Consolidated List of Exhibits

to

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

submitted to

the Board Accountability Mechanisms Committee

29 August 2022

LIST OF EXHIBITS

Exhibit No.	Description
Submitted with Afilias' Opening Submission (29 July 2022)	
Altanovo-1	Annex A to Afilias' Response to the *Amicus Curiae* Briefs (24 July 2020)
Altanovo-2	Final Decision (corrected version dated 15 July 2021) ("**Final Decision**")
Altanovo-3	Merits Hearing, Tr. Day 2 (4 Aug. 2020)
Altanovo-4	Merits Hearing, Tr. Day 3 (5 Aug. 2020)
Altanovo-5	Witness Statement of Paul Livesay in Support of ICANN's Rejoinder and AMICI's Briefs (1 June 2020)
Altanovo-6	ICANN, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012) ("**NDC Application**")
Altanovo-7	Merits Hearing, Tr. Day 5 (7 Aug. 2020)
Altanovo-8	Merits Hearing, Tr. Day 7 (11 Aug. 2020)
Altanovo-9	Report of George Sadowsky (20 Mar. 2019)
Altanovo-10	Expert Report of Jonathan Zittrain (26 Sept. 2018)
Altanovo-11	Afilias' Amended Request for Independent Review (21 Mar. 2019)
Altanovo-12	Letter to IRP Panel from S. Smith (Counsel for ICANN) (18 July 2020)
Altanovo-13	*Oxford English Dictionary* (2022): **material**
Altanovo-14	*Urica, Inc. v. Pharmaplast S.A.E.*, Case No. CV 11-02476 (RZx), 2013 WL 12123230 (C.D. Cal. May 6, 2013)
Altanovo-15	*Engalla v. Permanente Medical Grp., Inc.*, 15 Cal. 4th 951 (1997)
Altanovo-16	*Plan. Rsch. Corp. v. United States*, 971 F.2d 736 (Fed. Cir. 1992)
Altanovo-17	*Algese 2 s.c.a.r.l. v. United States*, 125 Fed. Cl. 431 (2016)
Submitted with Afilias' Reply Submission (29 August 2022)	
Altanovo-18	Afilias' Post-Hearing Brief (12 Oct. 2020) ("**Afilias' PHB**")
Altanovo-19	Merits Hr., Tr. Day 4 (6 Aug. 2020)
Altanovo-20	Witness Statement of Jose Ignacio Rasco III (1 June 2020) ("**J. Rasco III WS**")
Altanovo-21	9 Corbin on Contracts § 49.9 (2022)
Altanovo-22	9 Corbin on Contracts § 49.4 (2022)
Altanovo-23	*Mil-Tech Systems, Inc. v. United States*, 6 Ct. Cl. 26 (1984)
Altanovo-24	*In re Trompex Corp.*, 18 FCC Rcd. 3286, 2003 WL 751038 (2003)

Exhibit No.	Description
Altanovo-25	*Gregory v. Helvering*, 293 U.S. 465 (1935)
Altanovo-26	Cal. Civ. Code § 3528
Altanovo-27	*People v. Jackson*, 24 Cal. App. 2d 182 (1937)
Altanovo-28	*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332 (2015)
Altanovo-29	*Bolling v. Hawthorne Coal & Coke Co.*, 197 Va. 554 (Sup. Ct. 1955)
Altanovo-30	*McCown v. Spencer*, 8 Cal. App. 3d 216 (1970)
Altanovo-31	*Recorded Picture Co. v. Nelson Ent., Inc.*, 53 Cal. App. 4th 350 (1997)
Altanovo-32	*Bergin v. Van Der Steen*, 107 Cal. App. 2d 8 (1951)
Altanovo-33	Verisign's Request to Participate as *Amicus Curiae* (11 Dec. 2018)
Altanovo-34	Afilias' Response to Verisign, Inc.'s and Nu Dotco LLC's Request to Participate as *Amicus Curiae* (28 Jan. 2019)
Altanovo-35	Afilias' Response to the *Amici* Merits Briefs (24 July 2020)

EXHIBIT Altanovo-18

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED'S POST-HEARING BRIEF

---

12 October 2020

Arif Hyder Ali
Alexandre de Gramont
David Attanasio
Rose Marie Wong
Michael Losco
Tamar Sarjveladze
DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300

Ethan E. Litwin
CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
Tel. 212-350-2737

Counsel for Claimant

TABLE OF CONTENTS

Page

QUICK GUIDE TO PANEL'S QUESTIONS AND AFILIAS' RESPONSES

No.	Question	Response Location
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?	Afilias' Post-Hearing Brief, n. 202
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?	Afilias' Post-Hearing Brief, ¶¶ 216-222; *see also id.*, Section V(A)(1)
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)?	Afilias' Post-Hearing Brief, Section IV(B)(2)
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?	Afilias' Post-Hearing Brief, ¶¶ 224-230; *see generally id.*, Section V(A)(2)
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.	Afilias' Post-Hearing Brief, n. 35; *see generally id.*, ¶ 16
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.	Afilias' Post-Hearing Brief, ¶¶ 21-23

No.	Question	Response Location
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).	Afilias' Post-Hearing Brief, Section IV(B)
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.	Afilias' Post-Hearing Brief, ¶ 236; *see generally id.*, Section V(B)(1)
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.	Afilias' Post-Hearing Brief, Section III(F); Afilias' Submission on Costs, ¶¶ 19-21, 24-25, 29
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?	Afilias' Post-Hearing Brief, ¶ 160

I. INTRODUCTION

1. The two fundamental questions before the Panel are whether ICANN, in accordance with the terms of and policies underlying its Articles and Bylaws, was required to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules, and, if so, (ii) offer the .WEB gTLD registry to Afilias.[1] The hearing evidence should leave no doubt that the answer to both questions is plainly "yes" and that by failing to do so ICANN has not acted consistently with its Articles and Bylaws, including relevant principles of international law, specifically the obligation of good faith.

2. The hearing evidence confirms that NDC entered into an agreement with Verisign that resulted in NDC transferring its principal rights in and obligations under its .WEB application to Verisign; it lied to ICANN in order to keep that agreement secret and refused to disclose information that had materially rendered key parts of its application false or misleading; and it violated very strict requirements of the bidding rules to which it had specifically agreed. The hearing evidence also corroborated the documentary evidence showing that, in spite of NDC's violations of material requirements of the New gTLD Program Rules, ICANN ignored NDC's conduct and proceeded to contracting for a registry agreement with NDC—knowing that NDC was then required to seek the assignment of the registry agreement to Verisign. ICANN's actions (and its failures to act) were not guided by the clear instruction that it "[m]ake decisions by applying documented policies consistently, neutrally, [and] objectively,"[2] but rather by its unjustified position that Afilias' complaints about NDC were motivated by "sour grapes" for having "lost" the auction.[3] This attitude towards Afilias ultimately permeated every aspect of ICANN's consideration of Afilias' concerns and its eventual decision in the course of 2018 to approve a gTLD registry contract for NDC. Indeed, it is an attitude that ICANN has also displayed throughout these proceedings.[4] But as these proceedings have shown, far from "sour grapes," Afilias' concerns were unquestionably justified and its claims in this IRP substantiated and meritorious.

3. The hearing evidence confirmed that, dating back to at least August 2016, ICANN acted with manifest bias in favor of Verisign and NDC and against Afilias.[5] ICANN actively concealed and misrepresented the facts surrounding NDC's agreement with Verisign and its subsequent conduct at the ICANN auction for .WEB. Even as ICANN's officers promised Afilias that it would "consider" and pursue "informed resolution" of Afilias' concerns that NDC's application and bid violated the New gTLD Program Rules, ICANN failed to give any serious consideration to Afilias' concerns.[6]

4. The hearing evidence also showed that, as ICANN secretly proceeded to contract with NDC for .WEB, ICANN also concealed its actions from Afilias and the Internet community. Notwithstanding repeated inquiries from Afilias' outside counsel, as well as a formal request by Afilias under ICANN's Document Information Disclosure Program ("DIDP")—asking about the status of ICANN's promised investigation—ICANN refused to provide Afilias with any meaningful information. ICANN's only "disclosure" of the final disposition of Afilias' concerns came in an opaque and perfunctory email that did not even mention .WEB, but merely stated that "Case 00892769 has been closed."[7] Afilias' application status was contemporaneously changed to "will not proceed."[8] As a result of ICANN's actions and inactions, ICANN not only failed to "[m]ake decisions by applying documented policies consistently, neutrally, [and] objectively;" ICANN also failed to do so "fairly, without singling out any particular party for discriminatory treatment (*i.e.*, making an unjustified prejudicial distinction between or among different parties)[.]"[9] It also violated Section 2.3 of its Bylaws, which provides:

> ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.[10]

5. In this case, ICANN has applied its standards, policies, procedures, and practices inequitably and in a manner that has singled out parties for disparate treatment—*i.e.*, Afilias for less favorable treatment, and NDC and Verisign for more favorable treatment. Not only was there no

"substantial and reasonable cause" for ICANN to do so, the only identified reason for doing so, "the promotion of effective competition" requires ICANN to act consistently with its competition mandate to "promote" competition for Verisign. ICANN, however, has treated Afilias and Verisign disparately to the *detriment* of competition, instead of its promotion.

6. ICANN's actions and inactions have also violated its requirement of transparency:

> 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[.][11]

7. Although the transparency violation does not by itself require the Panel to reject and disqualify NDC's application and bid, ICANN's violations of its duty of transparency have been persistent, pervasive, and severe dating back to August 2016 and throughout the conduct of these IRP proceedings. As discussed below in Section III(E), ICANN's violations of its transparency obligation bear on its "defenses" in this case. Specifically, for example, ICANN cannot be allowed to invoke the California (or any form of the) business judgment rule as a defense in light of its utter lack of transparency in relation to the purported decision it took based on the exercise of that "business judgment." In any event, the evidence also shows that the ICANN Board never made such a "decision."[12]

8. Thus, the new evidence adduced at the hearing sweeps away any detritus left of ICANN's "defenses"—built on the inconsistent, shifting, unsupported, and bad-faith legal arguments and factual assertions offered up by ICANN over the course of this IRP.[13]

II. STATEMENT OF FACTS

A. The New gTLD Application Process

9. We have previously described the background to the New gTLD Program, including the detailed deliberative process through which the New gTLD Program Rules were developed and the policy objectives they were intended to achieve.[14] There is no dispute, as stated in ICANN's own documents, that the New gTLD Program Rules were intended to safeguard and advance the principles stated in

ICANN's Articles and Bylaws, including "the principles of ***fairness, transparency and non-discrimination***," as well as "the introduction of ***competition and consumer choice*** in the DNS."[15] For each phase of the application process, the New gTLD Program Rules provide detailed requirements—reflecting the "documented policies" by which ICANN was required to "[m]ake decisions" concerning the New gTLD Program—to protect and promote ICANN's guiding principles and community-developed policies.

10. Thus, as a threshold requirement to put all applicants on an equal footing from the outset of the Program, the New gTLD Program Rules required each applicant to submit its application by the close of the application period on 20 April 2012.[16] Absent "exceptional circumstances," any application received after the deadline was not to be considered.[17] Verisign did not submit an application for .WEB.

11. The New gTLD Program Rules contain numerous provisions reflecting the cardinal principle of transparency codified in the Articles and Bylaws, including the requirement that ICANN post the public portions of each application for public comment shortly after submission.[18] This requirement was intended to guarantee that everyone—including all of the other applicants—could know "which gTLD strings are being applied for and who is behind the application."[19] As ICANN witness Christine Willett (who served as the General Manager and then Vice President for the New gTLD Program) testified in response to questions from Chairman Bienvenu: "Once [the applications] were published, ***the world, the applicants[,] were able to see who had applied for the same string***."[20] The New gTLD Program Rules specifically required each applicant's statement of its "mission" and "purpose" to be published—so that all stakeholders could also learn why an applicant was seeking a particular string. The public could then comment on the identity of the applicants, on their stated "mission" and "purpose" for the particular gTLD at issue, and on any other aspect of the public portions of the application.[21] The public comment period allowed anyone in "the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications."[22]

12. Moreover, individual members of ICANN's Governmental Advisory Committee (the "GAC")—comprised of individual government and international organization representatives—could (and often did) submit comments on applications, including comments related to competition concerns.[23] As ICANN witness J. Beckwith Burr (an ICANN Board member) acknowledged at the hearing, "the community, including [individual members] of the GAC, would have … an opportunity to comment on each of [the] .WEB applications."[24] Ms. Burr also testified that the publication and public comment period was "certainly a point of ICANN's transparency commitment."[25] Ultimately, because of ICANN's failures, the Internet community, including governments, have been deprived of their right to comment on Verisign's attempted acquisition of .WEB. In this regard, the Panel will recall that in our prior submissions we discussed at length that, among the policy objectives underlying ICANN's creation and the introduction of the New gTLD Program, was the objective of countering NSI/Verisign's dominance of the DNS.[26]

13. Following the notice and comment period, ICANN was then required to perform "due diligence on the application comments ... and take the information provided in these comments into consideration" when performing the initial evaluation for an application.[27] Public comments could therefore affect an applicant's initial evaluation and further progress in the application process.

14. As discussed in more detail in Section III(A)(3) below, ICANN put in place specific procedures to permit applicants to change portions of their applications as a result of their changed circumstances, ensuring that the information provided in their applications remained true, accurate and complete. Applicants who sought to make changes to their applications were required to submit a "Change Request," which ICANN would then evaluate according to specific published criteria. If applicants were allowed to make material changes to their applications (*e.g.*, by transferring rights and obligations in the application to undisclosed non-applicants)—without providing notice of such changes—the entire publication and public comment process discussed above would have been rendered meaningless. This is, in fact, what transpired in light of NDC's failure to file a Change Request, or

otherwise advise ICANN of the "changed circumstances" underlying its application, which ICANN readily overlooked despite the fact that NDC intentionally withheld (*i.e.*, lied) critical information about its application from ICANN.[28]

15. All applicants for new gTLDs were subject to the same evaluation criteria. Applicants were required to pass evaluation in order to be designated a "Qualified Applicant" and thereby earn the right to negotiate and conclude a registry agreement with ICANN. In the event that two or more applicants seeking the same string became "Qualified Applicants," ICANN placed them into a "contention set."[29] ICANN encouraged contention set members to "self-resolve" contention amongst themselves.[30] However, as Ms. Willett testified, only entities that had "***submitted applicat[ions] and [who] are applying for a particular string and who have been identified in the public comment period***" could participate in the "self-resolution" of a contention set or otherwise elect to go on to an ICANN auction.[31] Qualified Applicants were prohibited from resolving contention sets in a manner that would cause "material changes in applications (for example, combinations of applicants to resolve contention)…."[32] Any such "material changes" required "re-evaluation" of the changed application,[33] which, ICANN warned, could delay resolution of the contention set to a later gTLD round.[34]

16. Qualified Applicants could (and many did) participate in "private auctions" to self-resolve contention sets, in which event the proceeds of the winning bid would be distributed among the losing bidders.[35] However, if the Qualified Applicants could not unanimously agree on a method for self-resolution (whether through a private auction or other permissible means), then the contention set was resolved through an ICANN-administered auction—in which case ICANN received all of the proceeds of the winning bid. According to Ms. Willett, the decision by a Qualified Applicant to participate in an ICANN auction "***is one of the applicant's rights***" under the application.[36] By virtue of the Domain Acquisition Agreement ("DAA"), NDC transferred this right to Verisign, thereby allowing it to participate secretly in the .WEB contention set.

17. As the Panel has learned, the New gTLD Program Rules also contain other requirements designed to protect the integrity of the New gTLD Program. Three of such requirements are at the core of the present dispute because of ICANN's failure to enforce them:

> (1) An "Applicant may not resell, assign, or transfer ***any*** of [its] rights or obligations in connection with the application."[37]
>
> (2) An "Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) ***are true and accurate and complete in all material respects***, and that ICANN may rely on those statements and representations ***fully*** in evaluating [the] application. … Applicant agrees to notify ICANN in writing of ***any change in circumstances*** that would render ***any information provided in the application false or misleading***."[38]
>
> (3) Under the Auction Rules, Qualified Applicants may submit bids only on their own behalf—not on behalf of any other entity. Under the AGB: "***Only*** bids that comply with ***all aspects of the auction rules will be considered valid***."[39] Invalid bids must be disqualified.

B. Verisign's Secret Pursuit of .WEB Using NDC's Application

18. In addition to their testimony confirming that they adhered to all of the DAA's material terms, there are certain portions of Mr. Livesay's and Mr. Rasco's testimony regarding Verisign's secret pursuit of .WEB using NDC's application that advance Afilias' case.

19. As Mr. Livesay testified, Verisign's decision to pursue .WEB more than two years after the new gTLD application deadline was made at the highest levels of the company. According to Mr. Livesay, Verisign's CEO, Mr. James Bidzos, and its General Counsel were personally involved in deciding that Verisign should pursue .WEB. They directed Mr. Livesay's activities on .WEB[40] Taken together with the record-breaking bids for .WEB, this should leave no doubt regarding the competitive significance of the .WEB gTLD.[41] But there are also other factors, as described below.

20. Mr. Livesay testified in his witness statement that Verisign had applied for several gTLDs related to .COM or Verisign's tradename in 2012.[42] However, Verisign chose to pursue one *and only one*

gTLD that did not fall into that category; it chose to pursue only one gTLD *after* the application deadline had expired; and it chose to pursue only one gTLD in secrecy—under the cover of an application timely submitted by another applicant.[43] Verisign's singular focus was on .WEB, as Mr. Livesay confirmed:[44]

> Q: … Is it fair to say that the ultimate objective that VeriSign sought to achieve by entering into the DAA with NDC was the acquisition of the rights to the .WEB registry?
>
> A: The goal was for us to become the operator of .WEB.[45]

21. While the DAA's terms on their face leave no room for doubt on this point,[46] both Messrs. Livesay and Rasco testified that the DAA was designed to ensure that ***no one*** would know that Verisign was pursuing the rights to .WEB through NDC's application, until ***after*** NDC had emerged as the winner of the contention set.[47] Mr. Livesay testified that he had studied the New gTLD Program Rules "very closely" because he Redacted - Third Party Designated Confidential Information

[48] Redacted - Third Party Designated Confidential Information

[49] He also testified that the DAA was designed to protect Verisign during the application process from the type of "alleged claims we are hearing now from Afilias."[50] The truth of the matter is that Mr. Livesay knew—having studied the New gTLD Program Rules "very closely"—that once NDC had entered into a registry agreement with ICANN and obtained approvals for its assignment to Verisign (as NDC was bound to do under the DAA), the termination provisions of the registry agreement would have made it very difficult (if not impossible) and costly for ICANN to unwind the assignment.[51]

22. Mr. Rasco similarly testified that he understood Redacted - Third Party Designated Confidential Information

.[52] Neither Mr. Livesay nor Mr. Rasco could provide any coherent explanation as to why—if the DAA did not violate

the New gTLD Program Rules as *Amici* contend—they considered it so important to conceal it from everyone, including ICANN, until after NDC had prevailed at the ICANN auction. The testimony and conduct of Messrs. Livesay and Rasco demonstrate that they harbored (at best) serious doubts as to whether they were acting in compliance with the New gTLD Program Rules; otherwise there was no reason to conceal the DAA's terms from ICANN's scrutiny and to keep Verisign's involvement in NDC's application hidden from the Internet community.[53]

23. The bottom line is that keeping the existence of the DAA and Verisign's involvement with NDC's application a secret allowed NDC and Verisign to cheat the system: keep things secret for as long as possible in order to avoid ICANN community scrutiny and criticism arising from Verisign pursuing .WEB to add the string to its TLD portfolio; torpedo any possibility of a private auction; win the ICANN auction at any cost using Verisign's vast resources; and then exploit ICANN's ministerial (*i.e.*, loose) TLD assignment criteria to secure approval of .WEB's assignment by NDC to Verisign.

24. The testimony of Messrs. Livesay and Rasco confirmed that the DAA was *not* a "financing arrangement" or a services agreement whereby Verisign was acting as a third-party provider to assist NDC with its application.[54] Redacted - Third Party Designated Confidential Information

The DAA also rendered NDC's application false and misleading in numerous respects. NDC was obligated under the New Program gTLD Rules to notify ICANN in writing to correct the false and misleading statements in its application. Yet while the DAA allowed NDC to communicate with ICANN on many issues, Redacted - Third Party Designated Confidential Information

Needless to say, obsessed with keeping its deal secret, Verisign did not give that consent.[55]

C. NDC's False and Misleading Statements to ICANN Prior to the Auction

25. Prior to the ICANN auction, certain members of the .WEB contention set had raised

questions about NDC's application with ICANN. Their concerns arose from NDC's decision not to participate in the private auction to which all of the other members had agreed. NDC was a small company, established specifically for the purposes of filing new gTLD applications. Mr. Rasco conceded that NDC did not have the funds to win a competitive bidding for .WEB.[56] It therefore surprised other contention set members when NDC did not meet the deadline to participate in the private auction. Subsequently, when one of the other .WEB applicants (Ruby Glen) inquired if NDC would agree to postpone the ICANN auction, so that the applicants could continue to discuss self-resolution, Mr. Rasco responded that the decision was ***not*** his to make. Referring to himself and the other two "Managers" of NDC, Mr. Rasco told Mr. Jonathon Nevett of Ruby Glen:

> The three of us are still technically the managers of the LLC, but the decision [on whether to participate in the ICANN auction] *goes beyond just us*. … Based on your request, I went back to check *with all the powers that be and there was no change in the response and [we] will not be seeking an extension*.[57]

Mr. Rasco was, in fact, telling Mr. Nevett the truth, albeit not the full truth. We now know that his reference to the "powers that be" was a reference to Verisign, who controlled this decision under the DAA. Based on Mr. Rasco's email, Mr. Nevett advised ICANN that NDC had likely undergone a "change of circumstances" that rendered NDC's application "false or misleading," but that NDC had failed to make a change request.[58] Accordingly, Mr. Nevett asked ICANN to investigate.[59]

26. What Ms. Willett and her colleagues proceeded to do can hardly be called an "investigation." On 27 June 2016, ICANN's Jared Erwin (who reported to Ms. Willett) wrote to Mr. Rasco stating that

> [ICANN] would like to confirm that there have not been changes to your application or the NU DOT CO LLC organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts). If there have been any such changes, please submit a new case via the Customer Portal … with the requested changes so that we may begin processing. If a change request is required, please note Rule 8 of the Auction Rules for Indirect

> Contention …: 'ICANN intends to initiate the Auction process once the composition of the contention set has stabilized. ICANN reserves the right not to send Intent to Auction notices and/or to postpone a scheduled Auction if a change request by one or more applicants in the Contention Set is pending, but believes that in most instances the Auction should be able to proceed without further delay.' Let me know if you have any questions. Thank you and best regards.[60]

27. Mr. Rasco responded: "I can confirm that there have been no changes to the NU DOTCO LLC organization that would need to be reported to ICANN."[61] NDC, of course, wanted its pay day, which would undoubtedly have been delayed, and quite likely jeopardized, if Mr. Rasco had answered candidly and comprehensively. Indeed, Redacted - Third Party Designated Confidential Information

if Mr. Rasco had been truthful in his responses to ICANN.[62] This, however, does not mitigate the consequences of Mr. Rasco's lack of candor.

28. Even though Mr. Rasco had only answered part of the question, Mr. Erwin readily accepted his response: "Thank you for confirming. No further action is required of you at this time."[63] As Ms. Willett testified, based on this exchange of emails, she then told Mr. Nevett that her "team had already investigated the alleged management changes" and that "based on the fact that ICANN found no evidence of such a management change, ICANN was continuing to proceed with the [ICANN] Auction as scheduled."[64]

29. Dissatisfied with Ms. Willett's assurances, Mr. Nevett asked the ICANN Ombudsman to investigate. On 7 July 2016, the Ombudsman emailed Mr. Rasco stating that if the directors or shareholders of NDC had changed, that could "change the auction by making knowledge of your applicant company different, and therefore it was unfair to the other applicants."[65] Mr. Rasco's response was categorical: "*There have been no changes to the Nu Dotco, LLC Application*."[66] There is simply no way to reconcile Mr. Rasco's representation to the Ombudsman with the terms of the DAA. Not only had there been fundamental and material changes to NDC's application; the application had effectively changed hands, from NDC to Verisign.

30. Ms. Willett then contacted Mr. Rasco the next day by phone. In her testimony she was unable to recall what they specifically discussed.[67] Mr. Rasco, however, emailed after the phone call, writing:

> My understanding from our discussion [on 8 July] is that ICANN is satisfied with the information I provided and has concluded there is no basis for any complaint, re-evaluation, or other process relating to our application, nor for any delay in the ICANN auction. Please let me know if that is not the case.[68]

31. The very next day, Ms. Willett contacted the Ombudsman to inform him that her "team" had "reached out to NU DOT CO LLC previously, and we received confirmation that NU DOT's application materials were still true and accurate."[69] This was not strictly true. All Mr. Rasco had said to Mr. Erwin is that there had been no organizational changes to NDC. Yet ICANN has no record of Mr. Rasco's confirmations, other than his statement to Mr. Erwin that there had been no organizational changes to NDC. There are only two possibilities: either Ms. Willett improperly intervened in the Ombudsman's investigation to drive it to a conclusion that ICANN desired (and thereby undermine that Accountability Mechanism) or Mr. Rasco compounded his failure to respond to Mr. Erwin's original inquiry by lying to Ms. Willett on their phone call. Either way, it is clear that Mr. Rasco prioritized NDC's contractual confidentiality obligations to Verisign over NDC's contractual obligations to ICANN as an applicant for .WEB.

32. Ms. Willett also informed the Ombudsman that Mr. Rasco was unequivocal in asserting that Rasco had confirmed to her that he himself had made the decision to proceed to the ICANN auction. Ms. Willett wrote the Ombudsman:

> [Mr. Rasco] was contacted by a competitor who took some of his words out of context and is using them as evidence regarding the alleged change in ownership. In communicating with that competitor, he used language to give the impression that the decision to not resolve contention privately was not entirely his. ***However, the decision was in fact his***.[70]

33. Of course, it is now clear based on the DAA's terms that the decision was ***absolutely in***

fact not his, but rather one that was exclusively Verisign's to make. In representing to Ms. Willett and the ICANN Ombudsman that "this decision was in fact his," Mr. Rasco was not—as required by the terms and conditions of the AGB—providing information that was "***true and accurate and complete in all material respects***."[71] It is also clear that Mr. Rasco had several opportunities to inform ICANN about the DAA, but intentionally chose not to do so. Mr. Rasco simply lied to ICANN rather than

Redacted - Third Party Designated Confidential Information

34. In light of Mr. Rasco's representations, on 13 July 2016, Ms. Willett wrote to the .WEB contention set members to advise them that the ICANN auction would not be postponed but would proceed as scheduled on 27 July 2016.[72]

35. ICANN's "investigation" into Mr. Nevett's concerns was certainly far from thorough. Ms. Willett, in fact, conceded at the hearing that "if Verisign or any other entity had been shared with me" as possibly being involved with NDC's application prior to the ICANN auction, that "would have given my team another direction to pursue and additional questions to ask …."[73] However, once the truth emerged after the ICANN auction, Ms. Willett and ICANN knew that Verisign was involved with NDC's application. At that point, a simple review of the DAA would have made it painfully obvious that NDC's application—and Mr. Rasco's representations to ICANN concerning NDC's application—were not "true and accurate and complete in all material respects." To the contrary, they were designed to conceal—and, in fact, succeeded in concealing—that Verisign was the real party in interest behind NDC's application. ICANN simply ignored that indisputable fact in purporting to consider the concerns that Afilias raised after the ICANN auction and in proceeding to contract with NDC (and hence with Verisign) for .WEB.

D. The ICANN Auction in July 2016

36. As Messrs. Rasco and Livesay acknowledged in their hearing testimony, NDC participated in the .WEB auction on 27 and 28 July 2016 precisely as required by the DAA.

Redacted - Third Party Designated Confidential Information

Redacted - Third Party Designated Confidential Information [74] To the outside world (including, presumably, ICANN), Mr. Rasco appeared to be bidding on behalf of NDC in order to win the ICANN auction and obtain the rights to .WEB for NDC. Under the DAA, however, and as confirmed at the hearing, Redacted - Third Party Designated Confidential Information

.[75] As Mr. Livesay acknowledged in his hearing testimony, Mr. Rasco was entirely unconcerned with how high the bidding went—or whether the bidding far surpassed Mr. Rasco's assessment of .WEB's value (assuming he ever made one)—because he was bidding with Verisign's money, on Verisign's behalf, to obtain the .WEB registry rights for Verisign.[76]

Redacted - Third Party Designated Confidential Information

Accordingly, NDC was not, as required by the Auction Rules, bidding on its "own behalf" as a Qualified Applicant.[77] NDC was bidding on behalf of an undisclosed non-applicant—Verisign.

37. As directed by Mr. Livesay, Mr. Rasco increased the bids in each round until only Afilias and Verisign (still under the cloak of NDC) remained as bidders—each at USD 135 million. When Mr. Livesay directed Mr. Rasco to increase the bid to USD 142 million, Afilias was unable to match it. Verisign's bid, entered by Mr. Rasco on Verisign's behalf and reflecting an amount that Verisign was willing to pay for .WEB Redacted - Third Party Designated Confidential Information therefore prevailed. According to ICANN's auction provider, this became the "Winning Bid" in the amount of the second highest bid—*i.e.*, USD 135 million. As Ms. Willett acknowledged at the hearing, the USD 135 million generated by the ICANN auction for .WEB exceeded the total amount of the successful bids ***in all of the fifteen prior ICANN auctions combined***.[78] All of these proceeds went to ICANN.[79]

E. The Immediate Aftermath of the .WEB Auction

38. Late in the day on 28 July 2016 following the conclusion of the ICANN auction, Verisign

made a public filing with the SEC, in which it vaguely disclosed in a footnote that it had "incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights."[80] The next day, Friday, 29 July 2016, rumors began to circulate in industry media that Verisign had used NDC to acquire .WEB.

39. On Sunday, 31 July 2016, perhaps in light of these rumors, Mr. Rasco emailed Ms. Willett, apparently disclosing for the first time that there was some sort of relationship between NDC's application and Verisign:

Redacted - Confidential Information

[81]

40. Just several weeks earlier, Ms. Willett had reported to the ICANN Ombudsman that based on her team's "investigation"—as well as her telephone conversation with Mr. Rasco—she had "received confirmation that NU DOT's application materials were still true and accurate."[82] Mr. Rasco had told Ms. Willett that the decision to forgo the private auction and proceed to the ICANN auction was made solely by NDC (specifically, by Mr. Rasco himself). Mr. Rasco had also written directly to the Ombudsman, asserting that "[t]here have been no changes to the Nu Dotco, LLC application."[83] At the very least, the revelation that Verisign was involved in NDC's .WEB application should have called into question the accuracy of Mr. Rasco's earlier representations and warranted some level of inquiry from Ms. Willett. Her reaction was quite the opposite.

41. Ms. Willett neither expressed any surprise nor asked Mr. Rasco for any explanation concerning Verisign's involvement in NDC's .WEB application, which had not yet been made public. Instead, she responded to Mr. Rasco:

Redacted - Third Party Designated Confidential Information

Redacted - Third Party Designated Confidential Information [84]

42. When asked at the hearing whether she was at all curious as to why Verisign would be issuing a press release about .WEB under these circumstances, Ms. Willett responded: "I don't recall, but likely, yes, [it] probably piqued my curiosity."[85] Yet Ms. Willett—who at this point was ICANN's Vice President charged with responsibility for administering the New gTLD Program—claimed she had no recollection of what, if anything, she did as a result. Ms. Willett's curiosity was apparently insufficiently "piqued" even to discuss Mr. Rasco's email with anyone else at ICANN:

> Q: … Did you forward Mr. Rasco's email to anyone at ICANN?
>
> A: Not that I recall.
>
> Q: Did you discuss it with anyone at ICANN?
>
> A: No, I'm sorry, I don't recall.
>
> Q: Do you know if someone from VeriSign contacted Mr. Atallah to discuss .WEB, as Mr. Rasco advised you shortly after this email?
>
> A: I don't know.[86]

43. Ms. Willett's attitude stands in sharp contrast to her reaction to Afilias' complaints, which would be forthcoming a few days after ICANN's press release. Ms. Willett testified at hearing that she did not consider Afilias' concerns to be "serious," but rather considered them to be "sour grapes":

> Q: Did you consider the concerns that Afilias had raised to be serious concerns?
>
> A: *I considered them to be sour grapes*.[87]

44. Indeed, Ms. Willett appears to have felt so strongly about Afilias' complaints that she expressed her views to others at ICANN:

> Q: And did you express that view to anyone else at ICANN?
>
> A: I may have.[88]

45. On August 1st, Verisign issued a press release in which it misleadingly stated that it had "provided funds for [NDC's] bid for the .web TLD" and that NDC would "seek to assign the Registry

Agreement to Verisign."[89]

46. From this moment on, ICANN has shrouded nearly all of its conduct concerning .WEB in secrecy and claims of privilege. ICANN has provided no information concerning Verisign's phone call with Mr. Atallah (*i.e.*, the call that Mr. Rasco had referred to in his 31 July email to Ms. Willett). Mr. Livesay testified that he was "informed that someone from Verisign called ICANN"—but he could not (or would not) provide any additional information.[90] Indeed, none of the witnesses presented by ICANN and the *Amici* claimed to have any specific knowledge of Verisign's contact with Mr. Atallah—or, for that matter, of any phone call between ICANN and Verisign other than through their respective outside counsel. We do know, however, that from this moment on, ICANN treated Verisign as though Verisign was the *de facto* applicant for .WEB, directly contacting Verisign about questions concerning NDC's application and working with Verisign on the delegation process for .WEB.

47. On 8 August 2016 Afilias' Vice President and General Counsel, M. Scott Hemphill, wrote to Mr. Atallah. Mr. Hemphill made it perfectly clear that Afilias had "not been able to review a copy of the agreement(s) between NDC and VeriSign," and that therefore Afilias could only speculate about the NDC/Verisign arrangement.[91] He requested that ICANN undertake an investigation of the matter. He also advised Mr. Atallah that "[i]n addition to this letter, we are filing a complaint with the ICANN Ombudsman" and "urge[d] ICANN to stay any further action in this matter with respect to NDC … until the Ombudsman has had an opportunity to investigate and report on this matter."[92]

48. Several weeks earlier, when Mr. Nevett had raised concerns to ICANN Staff and then to the Ombudsman about potential violations of the New gTLD Program Rules by NDC, ICANN Staff and the Ombudsman had contacted Mr. Rasco directly. That made sense, given that NDC's .WEB application specifically named Mr. Rasco as NDC's principal point of contact for the application.[93] Now, however—with Afilias raising the concern—and with someone from Verisign apparently having contacted Mr. Atallah—ICANN followed an entirely different "process." As far as we know, neither Ms. Willett nor the

Ombudsman contacted Mr. Rasco. Nor did anyone from within ICANN contact anyone at NDC to request a copy of the agreement(s) that NDC had entered into with Verisign.

49. Instead, ICANN arranged for its outside counsel, Mr. Eric Enson of Jones Day (ICANN's counsel in this IRP) to call *Verisign's* outside counsel, Mr. Ronald L. Johnston of Arnold & Porter (Verisign's counsel in this IRP).[94] According to Mr. Johnston's letter, Mr. Enson had made a "request for information regarding the agreement between NDC and Verisign relating to the .web gTLD."[95] The phrasing of Mr. Johnston's letter suggests that Mr. Enson requested more than just the DAA itself—and Mr. Johnston certainly provided far more than just the DAA. His eight-page single-spaced letter set forth detailed factual and legal arguments that purported to respond to Mr. Hemphill's 8 August 2016 letter and to explain why the DAA did not violate the New gTLD Program Rules. Mr. Johnston included not only the DAA, but numerous other "attachments," which (together with the DAA itself), was comprised of 65 pages.[96]

50. Ms. Willett testified at hearing that—remarkably—she had never seen the DAA or Mr. Johnston's letter.[97] Nor is there any evidence that the Ombudsman was ever provided with these materials.[98] And again, ICANN never disclosed the DAA (or Mr. Johnston's letter and other materials) to Afilias until December 2018, when the Emergency Arbitrator compelled ICANN to do so.[99] Even in this case, ICANN has designated the DAA as "Highly Confidential" under the Parties' Protective Order. Thus, only Afilias' outside counsel and Mr. Hemphill have been able to review it.[100] The ICANN community remains unaware of the agreement's details.

51. As explained in our prior submissions—and as the hearing evidence further demonstrates[101]—ICANN's review of the DAA should have led to the immediate rejection of NDC's application and the disqualification of its bids for being in violation of material provisions of the New gTLD Program Rules. The only investigation (if any) that ICANN might have reasonably undertaken was to ascertain whether NDC and Verisign in fact had acted according to the DAA's terms (which the hearing

in this IRP confirmed). ICANN, however, decided to take a different course.

F. ICANN's Commitment To Seek "Informed Resolution" of Afilias' Concerns

52. Having received no response to his 8 August 2016 letter, Mr. Hemphill again wrote to Mr. Atallah on 9 September 2016.[102] At this point, of course, Afilias did not know that outside counsel for Verisign and ICANN had been communicating about the DAA—in which Verisign's outside counsel had extensively commented on and attacked Mr. Hemphill's 8 August letter. Nor had ICANN provided Afilias with any information as to what (if anything) ICANN intended to do to address the concerns raised in Mr. Hemphill's 8 August letter, or whether ICANN intended to proceed to contract with NDC/Verisign for .WEB. Afilias knew only through ICANN's notice on its "Customer Portal" that ICANN had placed the .WEB contention set on hold on 19 August 2016 and therefore could not take any irreversible steps regarding the disposition of .WEB.

53. Mr. Hemphill's 9 September letter reflects the fact that Afilias had no idea about the specific terms of the agreement between Verisign and NDC.[103] Afilias was therefore left to speculate as to the type of arrangement into which Verisign and NDC had entered, as well as the specific rights and obligations that had been transferred. But, based on whatever information was available in the public domain, Afilias asked ICANN to investigate.[104] Accordingly, Mr. Hemphill reiterated the request made in his 8 August letter:

> We therefore request that ICANN provide us with an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until ICANN's Board has reviewed NDC's conduct and reached a considered decision on whether or not to disqualify NDC's bid and reject its application; the Ombudsman has completed his investigation and the Board has considered and reached a decision on his report; and, to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN's accountability mechanisms, Afilias has exhausted such mechanisms.[105]

Mr. Hemphill further requested "a response from ICANN by no later than 16 September 2016."[106]

54. And, indeed, on 16 September 2016, Afilias received a letter from Ms. Willett;[107] similar

versions of which were also sent to NDC, Verisign and Ruby Glen, but not—for reasons that ICANN has failed to explain— to the other .WEB contention set members. Mr. Hemphill's 9 September letter had requested "*a considered decision* on whether or not to disqualify NDC's bid," and Ms. Willett's letter seemed to promise exactly that. She wrote in the first paragraph:

> In various fora, Ruby Glen LLC (Ruby Glen) and Afilias Domains No. 3 Limited (Afilias) have raised questions regarding, among other things, whether NU DOT CO LLC (NDC) should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC's application for the .WEB gTLD should be rejected. *To help facilitate informed resolution of these questions, ICANN would find it helpful to have additional information*.[108]

As discussed below, Afilias would receive an even more direct assurance from Mr. Atallah about two weeks later that its concerns about NDC's application were being addressed.

55. Accompanying Ms. Willett's 16 September 2016 was a detailed questionnaire, which we now know was prepared entirely for pre-textual purposes (*i.e.*, a sham). As we have previously explained, ICANN prepared the questionnaire to create the impression that it was engaging in a fair and process—when in fact what it was doing was creating cover for itself and stacking the deck in favor of Verisign and NDC.[109] In this regard, the Panel need only consider that two of the questionnaire's recipients (Verisign and NDC) knew precisely why certain questions were being asked and therefore what to answer, and two of the recipients (Afilias and Ruby Glen[110]) could only speculate about what was being asked and why—because these two recipients had not reviewed the DAA and had no idea that ICANN had it in its possession. Indeed, as we have previously shown, ICANN compounded the information deficit issue by asking purposefully vague questions or questions that intentionally misrepresented the actual terms or effects of the DAA.[111]

56. Although ICANN sent out the questionnaire under Ms. Willett's name, she claims to have had very little involvement in its preparation, going so far as to testify that she has never seen the DAA or Mr. Johnston's 23 August 2016 letter to Mr. Enson—not even to this day.[112] Given her position at the

time, this is hard to believe. In any event, according to Ms. Willett, ICANN's legal department had final responsibility for the questionnaire.[113] Indeed, Ms. Willett asserted that "these questions as they stand were work product from counsel" and that she could therefore not discuss the "rationale" behind them.[114]

57. We will not repeat here the detailed explanation we have provided in our prior submissions showing that the questionnaire was intended to mislead anyone who had not read the DAA.[115] Ms. Willett—the only witness ICANN put forward who had any knowledge of the questionnaire—was obviously unable to rebut that point, given that she claims not to have read the DAA herself; did not write the questionnaire; and was prevented by ICANN's counsel from explaining the rationale behind the questions on the basis of asserted privilege. To provide but one example, Afilias' counsel asked Ms. Willett why the questionnaire asked Afilias to identify any evidence "regarding whether ownership or control of NDC changed after NDC applied for the .WEB gTLD," when ICANN (but not Afilias) knew there was no such evidence after receiving the DAA. Ms. Willett could not respond:

> Q: Now, at this point ICANN, VeriSign and NDC all knew that there had been no change of ownership or control of NDC the company, right?
>
> A: Yes, that was my understanding.
>
> Q: But Afilias, not having seen the DAA, had no idea what had happened, right?
>
> A: Again, I don't know what Afilias knew or didn't know.
>
> Q: So if you knew that -- if you knew that there had been no change of ownership or control of NDC the company, why were you asking Afilias to present evidence of that?
>
> MR. LeVEE: I do think that invades the privilege. I object on that basis.[116]

58. When pressed further, Ms. Willett testified that she had not drafted the question, and that, moreover, the "rationale" about the responses that ICANN was seeking "was something that I discussed with counsel" and therefore could not divulge.[117]

59. On 30 September 2016, Mr. Atallah finally responded to Mr. Hemphill's letters of 8 August

and 9 September. Mr. Atallah wrote, in relevant part:

> We note your comments regarding the Nu Dot Co LLC Application for .WEB and the ICANN Auction of 27 July 2016. We have posted your letters on the ICANN Correspondence page….
>
> …
>
> As an applicant in the contention set, the primary contact for Afilias' application will be notified of future changes to the contention set status or updates regarding the status or relevant Accountability Mechanisms. ***We will continue to take Afilias' comments***, and other inputs that we have sought, into consideration ***as we consider this matter***.[118]

60. In the meantime, Afilias—not knowing that the questionnaire was simply a ruse—answered the questions in good faith and returned the answers to ICANN on 7 October 2016.[119] Again, Afilias had no reason to know in 2016 that ICANN's commitment to "consider" and seek "informed resolution" of its concerns was untrue or made in anything other than good faith. It now appears, however, that ICANN never gave any consideration to Afilias' responses. Ms. Willett testified that that although she "believes" she read them, she did not undertake any analysis of the responses herself.[120] She simply passed them on to ICANN's lawyers and was "not exactly sure what counsel did with them."[121] In fact, no one but ICANN knows what counsel did with them. ICANN has presented no evidence explaining what it did with the questionnaire responses. We do know, however, that they were neither presented to nor considered by the ICANN Board.[122]

G. The 3 November 2016 Board Workshop

61. The load-bearing beam of ICANN's defense in this case (specified for the first time in ICANN's Rejoinder) is that, at an informal ICANN Board workshop in November 2016, certain members of the Board "decided to defer" consideration of Afilias' complaints until all accountability proceedings were over.[123] We address the record evidence regarding this alleged decision below, which shows that no decision of the sort represented to this Panel by ICANN's counsel was ever made at the workshop or, indeed, thereafter.[124] In short: there is no such evidence and there was no decision. ICANN's

witnesses—including, in particular, Board Member Christopher Disspain, rejected the assertion that the Board "decided to defer" (and indeed, Ms. Burr conceded that the Board was not permitted to take any decision under ICANN's constitutive documents) at the informal Board workshop.[125] Rather, ICANN counsel presented materials to the Board, which—according to Mr. Disspain—did *not* include the DAA, Mr. Johnston's 23 August 2016 letter to Mr. Enson, the questionnaire that had been sent under Ms. Willett's cover letter, or the answers that ICANN received in response to the questionnaire.[126] Mr. Disspain conceded at hearing that he "cannot say" that the Board "proactively decided, proactively agreed [or] proactively chose" to defer addressing Afilias' concerns.[127] Rather, Mr. Disspain and Ms. Burr each testified that ICANN simply adhered to its "longstanding" or "standard" practice that once an accountability mechanism has been initiated, "the process goes on hold, pending resolution."[128] As discussed below, ICANN has presented no evidence of any such practice and its witnesses were unable to describe any such practice with any coherence or consistency, let alone a single prior example of such practice being followed. Indeed, to the extent that ICANN employed any such unwritten "practice" to defer consideration of Afilias' issues when a contention set is on hold—especially after its officers committed in writing that they would "consider" and seek "informed resolution" of those concerns before proceeding to contract with NDC for .WEB—the employment of such a practice would in itself violate ICANN's Articles and Bylaws.[129]

62. In fact, Ms. Willett testified that ICANN would certainly continue to act behind the scenes even when a contention set had been placed on hold pending resolution of an accountability mechanism:

> Q: Now, if ICANN's practice was to defer decisions on contention sets while accountability mechanisms are pending, why did ICANN undertake this effort to facilitate informed resolution of the questions?
>
> A: Oh, ok. So there's the -- when we put an application on hold or a contention set on hold, it doesn't mean that all work ceases. In fact, what it means is that ***it prevents that applicant or that contention set -- we are committing that it won't move to the next phase of work***[.] … But, you know, in order to resolve

> a variety of maters and to get information to assist in the CEP, that's -- we were trying to gather information. So communications continued.[130]

63. Mr. Disspain acknowledged that ICANN disclosed nothing to Afilias concerning its discussions about .WEB at the 3 November workshop.[131] Accordingly, Afilias had no reason to believe that ICANN was *not* considering or seeking informed resolution of Afilias' concerns—or that ICANN would *not* reach such informed resolution before proceeding to contract with NDC for .WEB—as Mr. Atallah and Ms. Willett had expressly committed in writing that ICANN would do.

H. ICANN Moves To Contract with NDC for .WEB after the DOJ "Hiatus"

64. There is no dispute that in late 2016 or early 2017, the DOJ commenced its investigation into whether the Verisign/NDC arrangement violated U.S. antitrust laws and that the DOJ requested that ICANN take no action on .WEB during the pendency of the investigation.[132] A year later, in January 2018, DOJ closed the investigation.[133]

65. Unbeknownst to Afilias, Verisign and NDC were already in contact with ICANN about proceeding to contract with NDC, and then assigning the .WEB registry agreement to Verisign, in late 2017 and early 2018—before ICANN had resolved all accountability mechanisms related to .WEB.[134] In December 2017, Mr. Rasco organized a meeting with ICANN Staff regarding the .WEB gTLD.[135] And, on 17 January 2018, Ms. Jessica Hooper of Verisign asked for guidance from ICANN Staff on "the documents we would need to fill out to assist [NDC] with the assignment process for .web."[136] ICANN Staff, in response, were willing to engage with Verisign on the assignment of the .WEB gTLD even though Ruby Glen had not yet resolved its CEP with ICANN and neither ICANN Staff nor the ICANN Board had considered Afilias' concerns about NDC.[137] As Verisign's Mr. Bidzos disclosed on several analyst calls,[138] the company was "engaged in ICANN's process to move the delegation of .web forward."[139]

66. As soon as Ruby Glen's CEP was terminated, NDC pressed ICANN to begin the delegation process. On 15 February 2018, the day after Ruby Glen's deadline to file an IRP, Mr. Rasco

contacted ICANN Staff "regarding [NDC] signing the Registry Agreement for .web" and asked Staff to execute the Registry Agreement that week.[140] On 23 February 2018, NDC ***and Verisign*** contacted ICANN Staff to "request[] that ICANN send NDC an execution copy of the .web Registry Agreement … for NDC's signature."[141]

67. Meanwhile, Afilias was kept in the dark regarding ICANN's .WEB-related activities. On 23 February 2018, with no word on the "informed resolution" that ICANN had promised to reach on Afilias' concerns, Afilias' outside counsel wrote ***directly to the ICANN Board***. Afilias' counsel "request[ed] an update on the status of ICANN's investigation of the .WEB contention set …."[142] Afilias included a DIDP request with this letter, seeking *inter alia*, "[d]ocuments sufficient to show the current status of NDC's request to assign .WEB to Verisign."[143] ICANN denied the DIDP request almost in full on 24 March 2018, merely referring Afilias to several documents posted on its website that provide no new information.[144] Afilias sought reconsideration of the denial of its DIDP request on 23 April 2018,[145] and wrote additional letters to ICANN and ICANN's outside counsel on 16 April 2018 and 1 May 2018 asking for updates—as well as for a commitment from ICANN to provide Afilias with adequate notice to commence CEP or IRP in the event that ICANN decided to proceed to contract with NDC for .WEB.[146] ICANN rejected all of Afilias' requests and, on 5 June 2018, the ICANN Board denied Afilias' request for reconsideration of the denial of its DIDP requests.[147]

68. Immediately thereafter, ICANN Staff, led by Ms. Willett and other senior staff members, moved forward toward contracting with NDC for .WEB.[148] ICANN now claims that as a matter of "practice," ICANN removes contention sets from their "on-hold" status—and moves toward delegation—as soon as no accountability methods are pending.[149] ICANN also asserts that taking .WEB off-hold, and proceeding to contract with NDC for .WEB, did not mean that ICANN had taken any position on the merits of Afilias' complaints.[150] The record evidence in this case refutes ICANN's contentions.

69. Thus, Ms. Willett testified at hearing:

> [W]hile on hold, we wouldn't, for instance, send a Registry Agreement to NU DOT CO for execution. … *[W]e wouldn't delegate the top-level domain <u>until the issue of the matter was resolved</u>* and the hold was taken off.[151]

Ms. Willett plainly considered the matter to be "resolved" (*i.e.*, that ICANN had in fact taken a decision on whether NDC had violated the New gTLD Program Rules) when she and other ICANN Staff members moved forward to contract with NDC, even though, as she acknowledged, she had never even seen the DAA.[152]

70. In rejecting Afilias' requests in 2018 to receive advance notice if ICANN decided to proceed to contract with NDC for .WEB, ICANN's outside counsel (Mr. LeVee) assured Afilias' outside counsel (Mr. Ali) that "[w]hen the contention set is updated, your client – along with all other members of the contention set – will be notified promptly, as ICANN has always done when there is a status change with contention sets."[153] The email notification that ICANN subsequently sent Afilias on 6 June 2018 can only be described as vague, perfunctory and, as such, grossly deficient. *It did not even mention .WEB*:

> Dear John,
>
> Thank you for contacting the ICANN Team. Case 00892769 has been closed.
>
> <u>Case Information</u>
>
> Subject: Update Regarding Contention Set Status for Application ID 1-1013-6638
>
> Date Closed: 6/6/2018
>
> Please contact us if you have any additional questions.[154]

71. That same day, ICANN's Mr. Erwin informed his colleagues, including Ms. Willett that "By the end of the day, Grant [Nakata] will be conducting outreach to the prevailing applicants … to confirm/provide updated signatory contact information.[155]

72. A few days later, on 12 June 2018, Mr. Nakata sought approval for the issuance of a registry agreement to NDC:

Redacted - Confidential Information

156

73. He received the requested approvals on 12 and 13 June 2018. The registry agreement was sent to NDC, which Mr. Rasco promptly countersigned and sent back to ICANN the same day. On 14 June, Mr. Nakata then sought approval for ICANN's countersignature:

Redacted - Confidential Information

157

He received the requested approvals the same day.

74. On 14 June 2018, Afilias' counsel (Ali) contacted ICANN's counsel (LeVee) to inquire about the status of .WEB. Mr. LeVee's response indicated that Afilias had already been notified that the hold status on the contention set had been lifted. He attached to his message what he represented to be the communication that had been sent to Afilias. That communication contained the following language: "The WEB/WEBS contention set is no longer "'On-Hold'."[158] But the earlier communication sent to Afilias had not included this critical language,[159] raising serious questions as to why it did not. Afilias' commenced CEP on 18 June 2018, as a result of which the .WEB contention set was placed on-hold again and ICANN was required to void the registry agreement.[160]

75. Mr. Disspain testified that the ICANN Board was aware that ICANN Staff had sent NDC an approved registry agreement for counter-signature, but did nothing to stop Staff from doing so. He claimed that Afilias had made it "clear" that "in the event that [.WEB] did come off hold, they would file an IRP," as a result of which the Board had no obligation to consider whether NDC's application had violated

the New gTLD Program Rules when ICANN sent the .WEB registry agreement to NDC for signature.[161] However, when Chairman Bienvenu asked Mr. Disspain if ICANN would have proceeded to execute the .WEB agreement with NDC if Afilias had not commenced CEP, the best answer Mr. Disspain could provide was that he did not know.[162] When asked a similar question by Afilias' counsel, Ms. Willett similarly testified that she did not know what would have happened if Afilias had not commenced CEP.[163]

76. In fact, there is no evidence in this record to suggest that ICANN would have done anything but signed the .WEB registry agreement with NDC and then proceeded to approve its assignment to Verisign. Indeed, based on the record, the Panel could safely conclude that this is precisely what ICANN would have done.

I. ICANN Bends to Verisign's Pressure to Amend the Interim IRP Supplemental Rules

77. The facts relating to ICANN's amendment of the Interim IRP Supplemental Rules are important, as they reveal the degree to which ICANN was willing to go to make things easier for itself and Verisign to defend against any future efforts by Afilias to challenge ICANN's conduct.

78. As detailed in our prior submissions,[164] in connection with the transfer of the IANA functions from the U.S. government to ICANN, ICANN represented that it would strengthen its various accountability mechanisms, the IRP in particular. To that end, the IRP-IOT was formed in January 2016 and by November 2016 had developed a draft set of revised supplemental rules for public comment. Rule 7 of the Public Comment Draft provided for rights of intervention only for third parties that had claimant standing to pursue the same claims against ICANN.

79. Of the many public comments received, only three discussed Rule 7. These comments were discussed at length by the IRP-IOT.[165] These discussions make clear that the comments regarding Rule 7 all identified the same concern, namely that there were instances where issues decided by underlying panels could be now be appealed in an IRP under the new Bylaws, relegating the winner at the underlying proceeding to the sidelines while the loser litigated its appeal against ICANN, which had

been a bystander during that underlying arbitration. The commentators argued that all parties to the underlying proceeding should have a right to participate in the resulting IRP.

80. The IRP-IOT agreed and revised Rule 7 to address that narrow concern.[166] On 7 June 2018, the IRP-IOT determined that, other than Rule 4's timing rules, the balance of the draft interim rules were largely agreed and broke for the summer.[167] Afilias initiated its CEP regarding .WEB a week later on 18 June 2018, a fact that ICANN publicly disclosed days later.

81. When the IRP-IOT commenced work in October 2018, Mr. David McAuley, a Verisign employee who chaired the committee, announced that he wanted to substantially revise Rule 7 to provide mandatory participation rights to all parties that had significant interests that could be affected by the outcome of an IRP. During the 9 October 2018 IRP-IOT meeting,[168] Mr. McAuley stated that he "was concerned that the proposed rules were not sufficiently clear that parties with a significant interest relating to the subject of the IRP, that would be impaired by adjudication of that interest in their absence, be guaranteed a right to participate in the proceedings."[169]

82. On 11 October 2018, Mr. McAuley sent an email to the IRP-IOT members suggesting that Rule 7 be modified to permit parties with "a significant interest relating to the subject(s) of an [IRP]" to participate as claimants in that IRP.[170] Later in the day on 11 October, the IRP-IOT met to discuss Mr. McAuley's proposal.[171] At that meeting, Mr. McAuley stated: "where I'm coming from is a competitive situation, where . . . [entities] have contracts with ICANN or other[] [entities] have contracts that are affected by ICANN have to be able to protect their interest in competitive situations[.]"[172] In his hearing testimony, Mr. McAuley agreed that Verisign and NDC are competitors of Afilias, that NDC had a "contract with ICANN", namely its .WEB application, and Verisign had a contract that could be "affected by ICANN", namely the DAA.[173]

83. Ms. Samantha Eisner, an ICANN lawyer, disagreed with Mr. McAuley's proposal. In Ms. Eisner's view, Mr. McAuley's proposal would result in expanding claimant standing to include entities that

had no claims against ICANN.[174] She therefore proposed to work on language that would instead expand the concept of who could participate as *amicus curiae*.

84. Ms. Eisner testified that she was under considerable pressure in October 2018 to ensure that a set of interim rules were approved by the IRP-IOT in time for a Board vote on 25 October 2018.[175] She testified that the source of this pressure was coming from others in ICANN's legal department, who were aware that Afilias had initiated CEP in June 2018 and was prepared to file an IRP, having provided a draft IRP request to ICANN legal on 10 October 2018.[176] Indeed, Ms. Eisner stated during the 11 October IRP-IOT meeting that the need to finalize the rules immediately was acute, since ICANN was "on the precipice of" a new IRP.[177] This could only have been a reference to Afilias' forthcoming IRP, since the next IRP would not be filed until December 2019, more than a year later.[178]

85. On Friday, 12 October 2018, Ms. Eisner wrote to Mr. McAuley stating that she was finding it difficult to expand *amicus curiae* participation rights for several reasons.[179] *First*, Ms. Eisner was concerned that Mr. McAuley's proposal would take away from the Panel's discretion on a much broader basis than the rules provided for. *Second*, Ms. Eisner was concerned that Mr. McAuley's proposal would broaden *amicus curiae* rights beyond what the public comments had proposed and what the IRP-IOT had discussed over the several months following the receipt of those public comments. *Third*, Ms. Eisner was concerned that since Mr. McAuley's proposal went beyond what had been proposed by and in the wake of the public comments, the IRP-IOT would need to initiate a second public consultation on any such revisions. In sum, Ms. Eisner, still conscious of the need to finalize the rules before the 25 October Board meeting, suggested that the current rules were sufficiently broad and to defer this debate until after the interim set of rules had been approved.[180]

86. Mr. McAuley rejected Ms. Eisner's suggestion. Principally, his concern was that *amicus* participation was left to the IRP panel's discretion, whereas his goal was to secure mandatory rights of participation for entities with significant interests that related to the subject matter of the IRP.[181] The

evidence adduced during the hearing indicates that Mr. McAuley called Ms. Eisner on Monday, 15 October to discuss the concerns she had expressed in her Friday, 12 October email and to "negotiate the differences between us."[182]

87. While neither Mr. McAuley nor Ms. Eisner claimed to recall any details of that conversation, what is undisputed is that the very next day, on 17 October, Ms. Eisner sent an email to Mr. McAuley in which, in a complete reversal of the positions she had taken on 12 October, she expanded the categories of *amici* by proposing specifically that (1) members of the contention set could participate as *amici* in an IRP related to an application in that contention set, and (2) entities whose actions are "significantly referred to" in briefings before the IRP Panel could also participate as *amici*.[183] These categories were extremely narrowly drawn and did not replicate any rule of procedure known to Ms. Eisner.[184] Indeed, other than a claimed privileged conversation within ICANN legal,[185] Ms. Eisner apparently drafted this language wholesale over several hours solely on the basis of her 15 October call with Mr. McAuley.

88. Mr. McAuley, however, was not satisfied. He replied to Ms. Eisner's proposal on 17 October, changing Ms. Eisner's proposal—which allowed for amicus participation at the discretion of the IRP Panel—to a mandatory right of *amici* participation.[186] Tellingly, however, Mr. McAuley did not propose that all potential *amici* have a mandatory right to participate in an IRP—his edits only provided for a mandatory participation right for the two new categories of *amici* proposed by Ms. Eisner.[187] Mr. McAuley also proposed the concept that these *amici* be allowed broad participation rights in the IRP, a point that was also incorporated into the final version of the rule.

89. The interim rules, including Rule 7, were adopted under highly unusual circumstances. The IRP-IOT was never given an opportunity to discuss or comment on the significant changes to Rule 7 that were drafted by Ms. Eisner and Mr. McAuley. The revised Rule 7, along with the entire set of interim rules, was distributed to the IRP-IOT late in the day on Friday, 19 October 2018. When no comments

were received on Sunday, 22 October 2018, Mr. McAuley deemed the rules, including his revisions to Rule 7, approved by the IRP-IOT and transmitted them to the Board for vote the following day.

90. The Board adopted the interim rules on 25 October 2018, based on the text of a draft resolution that had been drafted by Ms. Eisner.[188] That draft resolution fundamentally misrepresented the process by which Rule 7 had been adopted. First, the resolution represented that "[t]he version considered by the Board today was the subject of intensive focus by the IOT in two meetings on 9 and 11 October 2018,"[189] despite the fact that those meetings were arguably conducted without a quorum present and which were largely comprised of ICANN lawyers. Second, the resolution stated that "[t]here were modifications to four sections identified through those meetings, and a set reflecting those changes was proposed to the IOT on 19 October 2018. With no further comment, on 22 October 2018 the IOT process on the Interim Supplementary Procedures concluded and it was sent to the Board for consideration."[190] This was also not true. As Mr. McAuley had written in his 19 October email to the IRP-IOT, the changes to Rule 7 were "not exactly as discussed" during the 11 October meeting.[191]

91. Moreover, the Board was not informed that the "modifications" to Rule 7 violated the drafting principles identified in both the resolution and the text of the rules themselves. Rule 7 did not "remain as close as possible to the current Supplementary Procedures" since no rights of intervention appeared in the prior rules, nor did Rule 7 "remain as close as possible to the [Public Comment Draft]."[192] As demonstrated at the hearing, the final version of Rule 7 bore no resemblance to the version that had been submitted for public comment. Moreover, even if those changes had been suggested by the public comments received, the IRP-IOT's drafting principles required any rules that underwent a "significant drafting" to be "properly deferred for broader consideration" in a subsequent public comment.[193] However, as Ms. Eisner stated in her 12 October 2018 email, the "modifications" that Mr. McAuley was proposing—even in the context of broadening the *amicus curiae* section of Rule 7—went far beyond what had been suggested in the three public comments that discussed Rule 7.[194] Accordingly, the version of Rule 7 that

was submitted for Board approval improperly and "materially expand[ed]" intervention rights in a way that the IRP-IOT had "not clearly agreed upon" and, moreover, "represent[ed] a significant change for what was posted for public comment."[195] For this reason, the drafting principles "require[d] further public consultation prior to changing the supplemental rules to reflect those expansions or changes."[196] Ms. Eisner told none of this to the Board, representing that the rules (and Rule 7 in particular) had been drafted in conformity with these principles. Fundamentally misled by ICANN legal, the Board approved the Interim Rules. Verisign and NDC are participating in this IRP only because of Rule 7 as finally approved.

III. ICANN HAS BREACHED ITS ARTICLES AND BYLAWS

92. In its prior submissions, Afilias has identified the relevant provisions of the Articles and Bylaws that ICANN violated and has stated the substantive content of those provisions.[197] ICANN has never contested Afilias' positions on the substantive content of its Articles and Bylaws (which are indeed incontestable)—instead raising the defenses that we have addressed elsewhere and address again in Section IV below.

93. There is no dispute that ICANN's documented policies comprise the New gTLD Program Rules, which in turn are intended to protect and promote the guiding principles of ICANN's Articles and Bylaws.[198] ICANN must therefore make decisions under the New gTLD Program Rules in accordance with Section 1.2(a)(v) (and other applicable provisions of ICANN's Articles and Bylaws). Where the New gTLD Program Rules afford ICANN any discretion in their enforcement (as identified below), the Articles and Bylaws define the parameters of such discretion—consistency, neutrality, objectivity, fairness, transparency, non-discrimination, competition promotion, and good faith.[199]

94. As discussed in greater detail at Section IV(D), ICANN's Board delegated primary responsibility for implementing the New gTLD Program Rules to Staff. Upon receipt of the DAA in August 2016, Staff should have immediately recognized that NDC's agreement with Verisign violated several key New gTLD Program Rules in significant and material respects that required rejection of NDC's application

and disqualification of its bids. But instead of enforcing the New gTLD Program Rules "consistently, neutrally, objectively, and fairly,"[200] ICANN undertook to overlook NDC's violations and protect Verisign's interests by conducting a biased investigation, taking decisions without considering all of the available evidence (or simply ignoring it), and, eventually in June 2018, deciding that Afilias' application "will not proceed" and approving the immediate execution of a registry agreement with NDC. Compounding these breaches, ICANN violated its obligation to act transparently in an obvious effort to keep Afilias in the dark about the facts Staff had discovered and the steps it was taking to deliver .WEB to Verisign/NDC, while at the same time changing the very procedural rules that purport to govern this IRP to ensure that NDC and Verisign could participate in the proceedings and ICANN could argue that Afilias' claims are time-barred. This pattern of disparate treatment has seriously prejudiced Afilias and has had severe cost consequences for the prosecution of Afilias' claims.

95. Afilias has previously identified the specific actions and inactions by ICANN that violated its Articles and Bylaws.[201] We will not repeat all of the points made in our prior submissions here, but rather will focus on the additional hearing evidence that provides even further support to Afilias' claims (while referring to our prior submissions as necessary). The hearing evidence leaves no doubt that Afilias has carried its burden of proving that ICANN violated its Articles and Bylaws as discussed in our prior submissions and stated below.[202]

A. ICANN Staff Failed to Make Decisions by Applying Documented Policies Consistently, Neutrally, Objectively, and Fairly

96. Under Section 1.2 (a)(v) of the Bylaws, it is a fundamental "Commitment" of ICANN to "*[m]ake decisions* by applying documented policies *consistently, neutrally, objectively, and fairly*[.]"[203] Again, ICANN's "Commitments … are intended to apply *in the broadest possible range of circumstances*" and to "reflect ICANN's *fundamental compact with the global Internet community* and are *intended to apply consistently and comprehensively to ICANN's activities*."[204]

97. The plain terms of the DAA leave no question that NDC violated the New gTLD Program Rules in numerous key respects, requiring ICANN to reject NDC's application and disqualify its bids.[205] Because ICANN failed to do so—and instead proceeded to contract with NDC for .WEB—ICANN violated Article 1.2(a)(v) of its Bylaws. Afilias' prior submissions and the hearing evidence demonstrate that by adhering to the provisions of the DAA, NDC violated the New gTLD Program Rules in the following material respects.

1. Staff Ignored NDC's Prohibited Resale, Transfer, or Assignment of Rights and Obligations in its .WEB Application

98. Section 10 of the "Terms and Conditions" of Module 6 of the AGB (which, according to ICANN, constitute a binding contract between the applicant and ICANN[206]) are categorical: "Applicant may *not* resell, assign, or transfer ***any of applicant's rights or obligations in connection with the application***."[207] The plain language of Section 10 leaves ICANN no discretion to overlook violations of this prohibition, which—as we have also explained in our prior submissions—is critical to safeguarding the fundamental principles of ICANN's Articles and Bylaws (including fairness, non-discrimination and transparency) that the New gTLD Program Rules are required to advance.[208] Allowing an Applicant to "resell, assign, or transfer" any of the rights it has acquired or obligations it has accepted—after, *inter alia*, submitting its application by the deadline, subjecting its application to the publication and public comment period, and passing the evaluation period—would fundamentally subvert those principles. That is all the more so where, as here, the resale, assignment, or transfer is to an undisclosed non-applicant.[209]

99. The DAA is far more than a mere "executory" contract that provides that the parties' obligations to each other are all contingent on NDC successfully resolving the contention set in its favor.[210] Rather, the plain language of the DAA creates numerous immediate rights and obligations, which effectively transferred control to Verisign over how NDC resolved the contention set.

100. As Afilias has previously demonstrated, the anti-transfer clause of Section 10 specifically

prohibits the transfer of "***any*** of applicant's rights or obligations in connection with the application."[211] Section 10 further draws a distinction between "rights in connection with a gTLD" (which the applicant "will acquire … only in the event that it enters into a registry agreement with ICANN") and "rights or obligations in connection with the application."[212] As Afilias has demonstrated, there is no question as a matter of law that individual rights and obligations in an application or contract are capable of being resold, transferred, and assigned—which is precisely what the DAA accomplished and precisely what Section 10 prohibits.[213]

101. For example, as Ms. Willett acknowledged at the hearing, ICANN makes a "significant distinction" "between rights and obligations in the gTLD on the one hand from rights and obligations in the application on the other hand[.]"[214] As Ms. Willett further acknowledged, the right to determine how a contention set is resolved is a "right" that applicants have in connection with their applications:

> Q: So just as an example, one of the applicant's rights is that if they make it through the evaluation process and go on to an ICANN auction, ***they have the right*** to submit bids on their behalf in advance of the application, right?
>
> A: So participating in an auction, the way I would express that is ***participating at auction is one of the applicant's rights or not participating in an ICANN auction of last resort***.[215]

The uncontroverted evidence demonstrates that NDC transferred this right—the right to decide whether or not to participate in an ICANN auction—to Verisign. The plain and unambiguous language of the DAA provides:

Redacted - Third Party Designated Confidential Information

Redacted - Confidential Information

216

102. NDC's transfer of this fundamental right to Verisign is sufficient, in and of itself, to violate Section 10, requiring Staff to have deemed NDC ineligible to execute a registry agreement for .WEB. This is hardly the only right or obligation NDC improperly transferred to Verisign in August 2015. As detailed in Afilias' prior submissions, those improperly transferred rights and obligations also included (1) the right of the applicant to decide whether to participate in a private resolution of the contention set (including through a private auction) or to proceed to an ICANN auction; (2) the right and the obligation of the applicant to make bids at an ICANN auction only on its own behalf; and (3) the obligation to provide ICANN with "true and accurate and complete" information—and to correct any information that becomes untrue or inaccurate or incomplete, or else risk losing all other rights in the application.[217] The DAA explicitly provided for Redacted - Third Party Designated Confidential Information

218

103. The testimony adduced during the hearing demonstrates that NDC and Verisign performed exactly as the plain language of the DAA provides. For example, Mr. Rasco conceded in his hearing testimony that "if, in fact, VeriSign wanted us to join the move towards private auction, then that guided us as to how that would happen."[219] Similarly, as Mr. Livesay testified, the DAA was intended to give Verisign complete control over whether .WEB was resolved through a private auction or an ICANN auction.[220]

104. Similarly, Messrs. Rasco and Livesay confirmed that Verisign exercised complete control over how NDC participated in the ICANN Redacted - Third Party Designated Confidential Information

[221] In particular,

Redacted - Third Party Designated Confidential Information

105. Redacted - Third Party Designated Confidential Information

106. The AGB's Terms and Conditions also require each applicant to "warrant" that "the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and

complete in all material respects."[228] There is no question that a warranty is a legal "obligation." The Terms and Conditions also obligate each applicant "to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading."[229]

107. Here, too, the DAA gave Verisign complete control over NDC's warranty that its statements and representations in its application were "true and accurate and complete in all material respects" and its obligation "to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading." Redacted - Third Party Designated Confidential Information

230

Again, the DAA's prohibition is unambiguous. And again, in their hearing testimony, both Messrs. Rasco and Livesay confirmed that Redacted - Third Party Designated Confidential Information

Redacted - Third Party Designated Confidential Information

232

Thus, the DAA's confidentiality provisions prevented NDC from promptly notifying ICANN when NDC's

execution of the DAA caused much of the information in its Application to be false and misleading.

108. In the final analysis, NDC's improper resale and transfer to Verisign of rights and obligations that NDC held in its application allowed Verisign to control how NDC acted to resolve the contention set.[233] The DAA essentially reduced NDC to acting as Verisign's secret bidding agent and fundamentally changed the essential purpose of NDC's .WEB application—which was now solely repurposed to acquire .WEB for non-applicant Verisign.

109. As we have explained in our prior submissions, the DAA subverted all of the basic principles that the New gTLD Program was required to advance—including fairness, transparency, non-discrimination and competition.[234] The only good faith interpretation of Section 10 of the AGB's Terms and Conditions—consistent with ICANN's Articles and Bylaws—is that it imposes an absolute bar against the resale, assignment or transfer to a third-party of any of the applicant's rights or obligations in connection with its application.[235] Upon receiving and reviewing the DAA, Staff had no discretion within the parameters of its Articles and Bylaws to do anything other than reject NDC's application and disqualify its bid. Staff failed to do this and instead proceeded to contract with NDC for .WEB—thus violating ICANN's Articles and Bylaws.

2. NDC Violated the New gTLD Program Rules' Bidding Rules and Requirements

110. As we have explained in our prior submissions, Staff should also have immediately recognized that the plain and unambiguous terms of the DAA violated certain aspects of the Auction Rules and were thus invalid, pursuant to the unambiguous rules set forth in the AGB.[236] Accordingly, Staff should have determined that NDC's first bid at the ICANN auction should be deemed to have been an "exit bid" and declared Afilias to have been the winner of the ICANN auction.

111. The New gTLD Program Rules' bidding rules and requirements—like the prohibition against the resale, assignment, or transfer of rights and obligations in the application—are designed to

prevent any entity other than a Qualified Applicant from participating in an ICANN auction. To protect and promote the principles of fairness, transparency, and non-discrimination, the bidding rules aim to prevent precisely what the DAA required: the ability of a non-applicant to use a Qualified Applicant to bid secretly on behalf of and for the benefit of the non-applicant.[237]

112. The New gTLD Program Rules' bidding rules and requirements are clear and categorical. The AGB provides that "[o]nly bids that comply with ***all aspects of the auction rules*** will be considered valid."[238] The DAA violates several "aspects of the Auction Rules," including:

- "Participation in an Auction is limited to Bidders."[239]
- The term "Bidders" is limited to (1) "Qualified Applicants" (*i.e.*, Applicants who have successfully gone through the application and evaluation process) and (2) the "Designated Bidders" of Qualified Applicants (*i.e.*, Bidders who are designated and disclosed by a Qualified Applicant to act as its agent to bid on its behalf).[240]
- "A bid represents a price, which *a **Bidder is willing to pay*** to resolve string contention within a Contention Set in favor if its Application."[241]
- "Before each Auction, each Bidder shall nominate up to two people … ***to bid on its behalf*** in the Auction."[242]

113. "If no valid bid is submitted within a given auction round for an application … the bid ***is taken to be an exit bid*** at the start-of-round price for the current auction round."[243] The bidding rules and requirements accordingly provide no discretion concerning the treatment of invalid bids: they must be disqualified. Upon receipt of the DAA, ICANN should have recognized that all of NDC's bids at the ICANN auction were invalid and therefore disqualified them.

114. Once again, the DAA's provisions are clear: Redacted - Third Party Designated Confidential Information

115. These clear violations of the Auction Rules should compel any objective person to conclude that NDC submitted invalid bids at the ICANN auction. There is simply no basis on which ICANN could have declined to disqualify NDC's bids given these plain violations of the New gTLD Program Rules. By failing to disqualify NDC's bids—and instead proceeding to contract with NDC for .WEB—ICANN violated its Articles and Bylaws.

3. Staff Failed to Reject NDC's Application Once It Became Clear that NDC Had Not "Promptly Notified ICANN" of Changed Circumstances that Rendered Information in its Application False or Misleading.

116. Once Staff received the DAA, Staff should have immediately recognized that Mr. Rasco had lied to Ms. Willett and the ICANN Ombudsman during their pre-auction investigations—and that he did so in order to conceal the terms of the DAA, which fundamentally changed NDC's application and the fact that Verisign was now controlling NDC's application for its own benefit. Mr. Rasco had told Mr. Nevett that the decision on whether to participate in a private auction rested with other "powers that be" and not with him.[247] This was a clear reference to Verisign, since the DAA provides that

Redacted - Third Party Designated Confidential Information

[248] In contrast, Mr. Rasco's statement to Ms. Willett that "this decision was in fact his" is,[249] notwithstanding Mr. Rasco's strained explanations at the hearing,[250] wholly incompatible with this plain language of the DAA.[251]

117. Moreover, upon receipt of the DAA and in light of the many obligations NDC assumed to

Verisign therein, Staff should have considered whether NDC should have submitted a change request once it had signed the DAA in 2015. As stated above (and explained in our prior submissions[252]), Section 1 of the AGB's Terms and Conditions provides:

> Applicant ***warrants*** that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) ***are true and accurate and complete in all material respects***, and that ICANN may rely on those statements and representations ***fully*** in evaluating this application.[253]

Section 1 of the Terms and Conditions states further:

> Applicant acknowledges that ***any material misstatement or misrepresentation (or omission of material information)*** may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. ***Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading***.[254]

118. Similarly, Section 1.2.7 ("Notices of Changes to Information") provides in relevant part:

> If at any time during the evaluation process information previously submitted by an applicant becomes ***untrue or inaccurate***, the applicant ***must promptly notify ICANN*** via submission of the appropriate forms.
>
> …
>
> Failure to notify ICANN of any change in circumstances that would render ***any information*** provided in the application ***false or misleading may result in denial of the application***.[255]

119. It is undisputed that, at a minimum, NDC's execution of the DAA in 2015 had caused a material change to its answer to Section 18 of the application. This fact was undisputed at the hearing. Mr. Johnston argued that this part of the application did not have to be updated because the answers to Section 18 are "not part of the evaluation criteria for an applicant."[256] Mr. Marenberg was more blunt: "There's a good reason why you don't have to update this section ***and it doesn't matter***. Because as I said, it is not used to determine the qualifications [to] operate the TLD, which is what ICANN is evaluating during this process."[257]

120. But NDC was required by the New gTLD Program Rules promptly to disclose whether *any* part of its application had become false or misleading and NDC's answers to Section 18's questions regarding the intended competitiveness of .WEB had become at the very least "misleading," since NDC had proffered that it intended .WEB to compete with Verisign's .COM,[258] something that was no longer true following the execution of the DAA.[259] The AGB does not exempt Section 18 from the obligations imposed on applicants to "promptly notify ICANN" of any changes needed to correct information in their applications that had become "untrue," "inaccurate," "false," or "misleading." Not only does ICANN admit that the information provided in Section 18 is "relevant to the Program as it allows the community to comment on the application (during the public comment period) based on the applicant's statement of the mission and purpose and how the gTLD is intended to be operated."[260] In fact, Ms. Burr testified that Section 18 was added to the application form at the request of the Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice specifically to address ICANN's competition promotion mandate.[261] Again, Section 18 was required so that the public (including governments, consumers, and other applicants) knew the identity of each applicant and the purpose for which each applicant was seeking a particular string.[262]

121. The relevance of the New gTLD Program Rules' Change Request Criteria lies in the guidance they contain as to the type of information ICANN expected applicants to disclose and why such disclosure was required in compliance with ICANN's transparency obligations. In the present context, they are critical to the Panel's assessment of NDC's obligation under the New gTLD Program Rules "to notify ICANN in writing of ***any change in circumstances*** that would render ***any information provided in the application false or misleading***."[263]

122. According to New gTLD Program Rules, the "criteria were carefully developed to enable applicants to make necessary changes to their applications ***while ensuring a fair and equitable process for all applicants***."[264] The criteria therefore recommend rejection of change requests that would "***affect***

other third parties materially," "*particularly other applicants*," or put the applicant filing the change request in a position of advantage or disadvantage compared to other applicants.[265] They state that if a change request would "*materially impact other third parties*, it will likely be found to cause issues of unfairness," therefore weighing in favor of denial.[266] The relevant focus of the criteria is to assess whether "the change [would] affect *string contention*."[267] As ICANN's explanatory notes state: "This criterion assesses how the change request will impact the status of the application and *its competing applications*, the string, [and] *the contention set*[.]"[268]

123. As Ms. Willett testified, had NDC notified ICANN of a "change in circumstances" prior to the ICANN auction, ICANN would have referred to its Change Request Criteria to "determine[] if and what reevaluation might have been necessary."[269] But neither Ms. Willett nor any other member of Staff considered whether, in light of the DAA, NDC should have submitted a Change Request and, if so, what ICANN should have done in response to NDC's failure to do so. By consulting the very factors that ICANN considers to be paramount in determining whether to grant a Change Request and submit the revised application for reevaluation, ICANN Staff could have determined whether NDC's purposeful concealment of the DAA until after the ICANN auction had ended required ICANN to reject NDC's application. Specifically, Staff should have considered whether the DAA (i) adversely affected other applications, (ii) was similar to other transactions that ICANN had approved, (iii) was fair to other applicants, and (iv) would impact the status of competing applications.[270] These criteria are, of course, entirely consistent with the principles of the Articles and Bylaws that the New gTLD Program was intended to safeguard and advance. But ICANN either failed to consider these criteria in considering whether NDC had violated its obligation promptly to notify ICANN of changes that rendered its application to be false and misleading in numerous material respects. Instead, Ms. Willett concluded that the concerns Afilias had raised about NDC's compliance with the New gTLD Program Rules were not "serious" but were merely "sour grapes" after not having prevailed in the ICANN auction.[271] Yet Ms. Willett never bothered to read the DAA—and indeed,

testified that the DAA was not her concern but rather a private matter between Verisign and NDC.[272]

124. To the extent that ICANN had any discretion in determining whether to reject NDC's application based on its failure promptly to correct its false and misleading statements, ICANN had to exercise that discretion consistent with Articles and Bylaws (including, without limitation, the principles of transparency and accountability), and the goals that the New gTLD Rights were meant to safeguard and promote.[273] NDC's purposeful concealment of the terms of the DAA frustrated and subverted the basic rules and principles underlying the entire New gTLD Program, including, for example:

- Only applicants who timely submitted gTLD applications could be considered as part of the program (so as to put all applicants on the same footing).
- The public was entitled to know ***the identity*** of each entity that was applying for a particular string, and the ***reasons*** that it was applying for that particular string.
- The public (including States and international organizations) was entitled to address any concerns (including competition concerns) raised by individual applications (including based on the identity of the applicants and the reasons for which they were applying for the gTLD at issue).
- The members of each contention set were entitled to know the identity of the other applicants with whom they were negotiating and against whom they were competing, to ensure fair and transparent resolutions of contention sets.
- ICANN auctions had to be conducted with transparency, fairness, and integrity; only Qualified Applicants (and their Designated Bidders, *i.e.*, agents disclosed to ICANN) could place bids on their own behalves (and not on behalf of an undisclosed non-applicant).

125. Under these circumstances, the New gTLD Program Rules—especially when applied consistently with ICANN's Articles and Bylaws—left ICANN no discretion but to reject NDC's application once it received the DAA. Instead, ICANN failed to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly[.]"[274] To the contrary, ICANN's decision-making with respect to NDC can only be described as arbitrary and capricious.[275]

B. ICANN's Violated its Articles and Bylaws Through its Disparate Treatment of Afilias and Verisign

126. As we have also explained in our prior submissions, ICANN's Articles and Bylaws prohibit

discriminatory and disparate treatment of similarly situated parties.[276] Thus, Article 1.2(a)(v)—discussed above—also requires ICANN to "[m]ake decisions by applying documented policies … ***without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)***[.]"[277] Similarly, under Article 2 of ICANN's Bylaws ("POWERS"), Section 2.3 ("NON-DISCRIMINATORY TREATMENT") provides:

> ICANN shall not apply its standards, policies, procedures, or practices ***inequitably*** or ***single out any particular party for disparate treatment*** unless justified by substantial and reasonable cause, such as the promotion of effective competition.[278]

127. There is no question that dating back to at least August 2016, ICANN's conduct with respect to .WEB has consistently treated Verisign with preferential treatment that it has denied to Afilias. The record evidence demonstrates ICANN's disparate treatment of these two competitors (with Verisign being the far larger company) without any justification.

128. *First*, the Panel will recall that Afilias is a Qualified Applicant for .WEB. Thus, Afilias paid its USD 185,000 application fee; submitted its application within the deadline; submitted the public portions of its application for publication and public comment; passed the evaluation process; participated in good faith in attempting to reach self-resolution of the .WEB contention set with other contention set members; and complied with all applicable rules in the ICANN application process and the ICANN auction.[279] And yet when Afilias raised its concerns with ICANN about NDC's .WEB application—through Mr. Hemphill's 8 August 2016 letter to Mr. Atallah[280]—ICANN failed to provide any response for well over a month. Moreover, Mr. Hemphill had to write to Mr. Atallah again, on 9 September 2016,[281] before he received any response from Staff, conspicuously at the deadline set by Mr. Hemphill. Mr. Atallah still did not respond to Mr. Hemphill's letters until 30 September 2016.[282]

129. By contrast, in the same time period, and in connection with the same issues, Verisign felt free to contact Mr. Atallah directly to discuss .WEB immediately following the .WEB auction—even

though it was a non-applicant.[283] ICANN then directed its outside counsel (Mr. Enson) to contact outside counsel for Verisign (Mr. Johnston). Yet ICANN has consistently maintained that communications concerning an application must be made with the contacts identified in that application.[284] Here, this request was made to Verisign, confirming that Staff now considered Verisign to be the appropriate contact for questions about NDC's application. Indeed, Staff chose to liaise directly with Verisign instead of NDC, despite the fact that Staff had been in regular communication with Mr. Rasco throughout the prior month.[285]

130. By letter dated 23 August 2016, Mr. Johnston provided not only the DAA (along with other "exhibits") to Mr. Enson, but also a detailed letter defending Verisign's conduct and attacking Mr. Hemphill's 8 August 2016 letter.[286] ICANN published Mr. Hemphill's 8 August and 9 September 2016 letters on its website. Merely because Verisign requested "confidential" treatment for the DAA and other materials submitted by Mr. Johnston, ICANN never disclosed them to Afilias until ordered to so by the Emergency Arbitrator in this IRP.

131. *Second*, Ms. Willett's testimony claims to have had minimal involvement in the preparation of the questionnaire that ICANN sent out under her cover letter on 16 September 2016. Rather, according to Ms. Willett's testimony, ICANN's counsel prepared most of it.[287] ICANN counsel obviously had the DAA in its possession and obviously based the questionnaire in significant part on Mr. Johnston's letter. Afilias, by contrast, had no knowledge of these documents and did not even know that ICANN had received the DAA. (Indeed, at that point, Afilias did not know whether Verisign and NDC had entered one or multiple agreements.) Thus, ICANN asked Afilias to comment on information that ICANN, Verisign, and NDC all had in their possession—when Afilias was unaware even of its existence. Moreover, as we have explained elsewhere, ICANN's counsel plainly drafted the questionnaire to support Verisign's positions (as stated in Mr. Johnston's 23 August letter) and to undermine Afilias' positions, which, as Mr. Hemphill expressly stated in his letters to Mr. Atallah, were based merely on Verisign's SEC

filing and press release.[288] For example, ICANN's questionnaire asked Afilias to identify the "evidence" that showed any change in ownership or control of NDC—when ICANN knew that there had been a change in ownership or control of NDC and Afilias did not.[289] By contrast, the questions provided no hint as to what the DAA actually required. (There are no questions, for example, about an arrangement under which an undisclosed non-applicant directs a Qualified Applicant to participate in an ICANN auction, exclusively at the direction of, and solely for the benefit of the non-applicant.) Thus, as early as September 2016, ICANN was already siding with Verisign against Afilias—while concealing the dispositive evidence on whether NDC's application and bids violated the New gTLD Program Rules and therefore required rejection and disqualification.

132. *Third*, despite ICANN's contention in this IRP that ICANN was precluded from acting on Afilias' complaints due to the pendency of Donuts' accountability mechanism concerning .WEB, the record in this IRP demonstrates that ICANN had been discussing the .WEB contract with NDC as early as December 2017.[290] Indeed, ICANN was discussing NDC's *assignment of the .WEB registry agreement to Verisign* as early as January 2018, even though the hold on the .WEB contention set was not formally lifted until 14 February 2018.[291] Moreover, even with the completion of Donuts' accountability mechanisms, ICANN did not honor the commitments made by Mr. Atallah and Ms. Willett to consider and undertake an "***informed resolution***" of Afilias' complaints concerning NDC's application and bids.[292] Instead, ICANN proceeded toward contracting with NDC (and thus Verisign) for .WEB.

133. *Fourth*, in early 2018, even as ICANN was discussing the delegation of .WEB to Verisign/NDC, ICANN was refusing to provide any information to Afilias, as Afilias repeatedly asked about the status of its complaints and how ICANN intended to proceed (including through ICANN's DIDP process).[293] Indeed, when Afilias asked for advance notice if ICANN planned to take the .WEB contention set off-hold—so that Afilias would have adequate time to commence its own accountability mechanism—ICANN claimed that "[p]roviding Afilias with a special notice that is not available to others similarly situated

would constitute preferential treatment and would contradict Article 2, Section 2.3 of the ICANN Bylaws."[294] Yet—at the same time—ICANN was in discussions with Verisign—a non-applicant—concerning the delegation of .WEB.

134. *Fifth*, as demonstrated elsewhere,[295] after Afilias had commenced the CEP process, and despite Mr. Disspain's and Ms. Willett's testimony that they understood that Afilias was going to file an IRP,[296] Staff coordinated with Verisign, acting outside of ICANN's normal procedures, to add eleventh-hour provisions to its Interim Supplementary Procedures for IRPs that were narrowly tailored to allow Verisign and NDC a right participate in this IRP as "*Amici*." The Board adopted those provisions, based on material misrepresentations by Staff regarding the principles by which these rules had been drafted.[297] The cost consequences of Staff's decision to work cooperatively with Verisign to ensure the latter's ability to participate as of right in this IRP have been severe.

135. *Sixth*, despite its claims of "neutrality," ICANN has repeatedly and zealously advocated for Verisign and NDC and against Afilias in this IRP.[298]

136. *Seventh*, despite significant disagreement within the IRP-IOT concerning the proposed time-bar provisions set forth in Rule 4, and despite the fact that Rule 4 was subject to an ongoing public comment in light of the significant criticism that the last draft of the rule had provoked from the public, Staff submitted Rule 4 for adoption by the Board and, further, made its application retroactive to a few weeks' prior to when Afilias had initiated its then-pending CEP. This unprecedented action, by which ICANN changed a rule, despite the outstanding public debate over its adoption (which, as of today, has yet to be resolved), and made it retroactive to a time specifically designed to encompass Afilias' CEP, underscores the depths to which ICANN was willing to subvert its processes, procedures, and policies to assist Verisign and NDC and make things difficult for Afilias.

137. In sum, dating back to at least August 2016, ICANN has taken extraordinary efforts—constituting multiple violations of the non-discrimination provisions of its Bylaws—to advance Verisign's

case at Afilias' expense and to Afilias' detriment. As discussed below in Section V, if this Panel were to accept ICANN's arguments concerning its limited jurisdiction (which arguments are completely erroneous), and refer these matters back to ICANN for ICANN's Board, there is no question on this record—none—as to what ICANN would do. ICANN would promptly enter into a registry agreement for .WEB to NDC and approve its assignment to Verisign. ICANN has said as much in its prior submissions in this IRP.[299]

138. Accordingly, the Panel should conclude that ICANN has violated the non-discrimination provisions of its Bylaws and direct ICANN to reject NDC's application and disqualify—as that is what the New gTLDs Rules and ICANN's Articles and Bylaws require.

C. Staff's June 2018 determination to take the .WEB contention set off of hold and conclude a registry agreement with NDC violated the Bylaws

139. Instead of either rejecting NDC's application, finding that NDC's bids at the ICANN auction were invalid, or otherwise declaring that as a result of its violations of the New gTLD Program Rules, NDC was ineligible to enter into a registry agreement for .WEB, Staff took a series of affirmative actions in June 2018 that were contrary to the New gTLD Program Rules and, accordingly, breached ICANN's obligation to enforce its policies, as implemented in the AGB, "consistently, objectively, neutrally and fairly[.]"

140. The uncontroverted evidence adduced during the hearing establishes that when the hold was lifted on the .WEB contention set on 6 June 2018, Staff determined that NDC had not violated the New gTLD Program Rules, that Afilias' complaints were mere "sour grapes,"[300] that Afilias' application "will not proceed"[301] and that NDC would thus be "in contracting."[302] Accordingly, Ms. Willett and other ICANN Staff approved the draft of the registry agreement for .WEB and authorized it to be sent to NDC on 12 June 2018.[303] Subsequently, ICANN Staff approved countersigning the .WEB registry agreement, which NDC had returned on 14 2018.[304] ICANN cannot disclaim Ms. Willett's negligent investigation, her

failure to look at (let alone consider) the evidence, and her decision to approve executing the .WEB registry agreement. ICANN's Board had delegated the authority to enforce the New gTLD Program Rules to ICANN Staff and Ms. Willett was the ICANN Staff member who was responsible for the administration of the New gTLD Program.

141. If Afilias had not initiated CEP on 18 June 2018, it is undisputable that Staff would have countersigned NDC's .WEB registry agreement.[305] Ms. Willett and her staff had approved the substance of the agreement and had authorized its execution. No approval from the ICANN Board was required, although Mr. Disspain admits that the Board was informed that execution of the agreement was imminent.[306] No one—not Ms. Willett, not ICANN legal, not the Board—did anything to stop the process, despite the fact that everyone, from Mr. Atallah and Ms. Willett at ICANN org, Mr. Jeffrey and Ms. Stathos at ICANN legal, and Mr. Disspain and Ms. Burr at the Board, knew that there were outstanding questions as to whether NDC had violated the New gTLD Program Rules.[307] Yet the Board, ICANN legal and Mr. Atallah were willing to let Ms. Willett and her team proceed to execute the registry agreement,[308] despite the fact that once that agreement came into force upon ICANN's countersignature—ICANN would have had very limited (if not non-existent) options to terminate the registry agreement if it later turned out that NDC had violated the New gTLD Program Rules.[309]

1. The Board Failed to Act, Knowing that Full Execution of the .WEB Registry Agreement Was Imminent

142. In June 2018, the Board had all the information it needed in order to act on Afilias' complaints. It had received copies of Mr. Hemphill's letters, which were copied to the Board Chair. As Mr. Disspain testified, the Board was told both (a) on 5 June 2018 that Staff intended to immediately take the .WEB contention set off hold,[310] and, (b) several days later that this had happened and that NDC had returned a signed registry agreement for ICANN to countersign.[311] The Board, however, took no action in light of this information, despite knowing how Staff's execution of the registry agreement would bind its

hands if it were later determined that NDC had violated the New gTLD Program Rules, and potentially expose ICANN to an expensive and lengthy litigation with Verisign and NDC. While Mr. Disspain testified that this was because the Board had been assured that Afilias would bring an IRP in time to prevent Staff from concluding the .WEB registry agreement with NDC, Mr. Disspain admitted that, in the event that Afilias had not initiated CEP on 18 June,[312] "it is impossible to suggest that the Board would have stepped in, but I don't know. I can't say whether they would or wouldn't."[313]

143. Despite knowing all of this, the Board failed to act. The Board's failure breached its obligation to ensure that its policies, as implemented by the AGB, were enforced consistently, neutrally, objectively and fairly.

D. ICANN Failed to Enable and Promote Competition in the DNS

144. As more specifically set forth in Afilias previous submissions,[314] ICANN's Articles and Bylaws are unambiguous that ICANN must act to enable and promote competition in the DNS. The Articles provide that ICANN shall carry out its activities "through open and transparent processes that enable competition and open entry in Internet-related markets."[315] Echoing the Articles, the Bylaw's Commitments provide that "ICANN must operate … through open and transparent processes that enable competition and open entry in Internet-related markets."[316] The Bylaw's Core Values include "[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process[.]"[317]

145. ICANN and the *Amici* have consistently misrepresented the substance of Afilias' arguments concerning ICANN's competition mandate. Afilias is not arguing in this IRP that Verisign's proposed acquisition of .WEB would violate U.S. antitrust law. While that very well might be the case, the question of whether Verisign will violate the antitrust laws is not a proper subject for an IRP. As Ms. Burr testified, the purpose of an IRP is to "mak[e] a determination about whether an [ICANN] action or inaction

violated the articles of incorporation and bylaws[.]"[318] Afilias' argument in this IRP is that to the extent ICANN has discretion regarding the enforcement of the New gTLD Program Rules, ICANN may not exercise its discretion in a manner that would be inconsistent with its competition mandate (or with its other Articles and Bylaws).

146. As Afilias has shown in its prior briefing,[319] the only decision ICANN could have taken regarding .WEB to promote competition in the DNS would have been to reject the NDC/Verisign application and delegate .WEB to Afilias. Even if there is uncertainty as to the success of .WEB, no other course of action would have promoted competition because .WEB could have no competitive benefit in the hands of Verisign. By contrast, in the hands of Afilias, .WEB would have the potential to challenge Verisign's market dominance, or at a very minimum, would leave the *status quo* unaffected. In light of these facts, Afilias' prior submissions have already demonstrated that ICANN's failure to reject NDC's application and delegate .WEB instead to Afilias was in violation of its competition mandate. That evidence will not be repeated.[320] However, the hearing provided further evidence in the following respects.

1. ICANN's Competition Mandate Applies in the Context of the New gTLD Program

147. ICANN has argued that the competition mandate from the Bylaws has no bearing on the decisions it must make in the course of evaluating New gTLD applications.[321] But the New gTLD Program was developed by ICANN for this exact purpose—to promote competition. The AGB provides that "New gTLDs are viewed by ICANN as important to fostering choice, innovation and competition in domain registration services[.]"[322] ICANN's Board wrote, in its resolution approving the AGB, that "[t]he launch of the new gTLD program is in fulfillment of a core part of ICANN's Bylaws: the ***introduction of competition and consumer choice in the DNS***."[323] ICANN's first Chair Esther Dyson summed up the ICANN's competition mandate in the context of her testimony before the U.S. Senate concerning the New gTLD

Program: "*our primary mission was to break the monopoly of Network Solutions* [now Verisign]…."[324]

148. Indeed, even Dr. Carlton, ICANN's economic expert both in this proceeding and in the development of the New gTLD Program itself, has explained that the New gTLD Program was the cornerstone and necessary part of ICANN's mission to break the .COM monopoly. Dr. Carlton has opined that, "ICANN's plan to introduce new gTLDs … *would be expected to mitigate market power associated with .com* and other major TLDs …."[325] Indeed, Dr. Carlton further opined that the introduction of a new gTLD would promote competition, *even if its introduction did not result in a price effect on .COM*, "by increasing the likelihood of the successful introduction of *new and innovative registration services* …."[326] Dr. Carlton further explained that, "any market power associated with *.com* will attract entrants with strategies built around bringing new registrants to the new gTLDs" and so "*[r]estricting the opportunity for entrants to compete for such profits necessarily has the effect of preserving profits associated with .com*.[327]

2. ICANN Cannot Satisfy its Competition Mandate by Relying on Regulators

149. ICANN argues in this IRP that ICANN has a practice of referring potential competition issues to relevant government regulators, notably the Antitrust Division of the U.S. Department of Justice ("DOJ").[328] However, ICANN's practice of referring competition issues to DOJ for determination was specifically rejected by DOJ as an ineffective method of ensuring compliance with ICANN's competition mandate. Moreover, not only is it likely that ICANN has *never* referred *any* competition issues to DOJ, the only evidence in the record is that where DOJ made specific recommendations to ICANN, ICANN ignored them.

150. The DOJ expressly rejected ICANN's argument that it may satisfy its competition mandate by referring competition concerns to government agencies. Ms. Burr admitted on cross-examination that the DOJ's Deborah Garza disagreed with ICANN's supposed practice of referring

competition issues to government authorities, recognizing that "[Garza] is certainly citing what she describes as a problem with ICANN's views, yes, that's what she's saying."[329] As the DOJ had opined, "*[t]he problem with ICANN's preferred approach is that the antitrust laws generally do not proscribe a registry operator's unilateral decisions made under processes established by ICANN* …."[330] DOJ concluded that ICANN's preferred approach of referring competition issues to government regulators for determination was "ineffective," because ICANN's "obligation to promote competition" is broader than U.S. antitrust law, particularly with respect to monopolization issues, *i.e.*, "a registry operator's unilateral decisions."[331]

151. Moreover, ICANN has failed to introduce any evidence that, despite this alleged long-standing practice, ICANN has ever proactively sought to refer a competition issue or concern for DOJ review. To the contrary, the evidence suggests that ICANN has never done so, despite the fact that it has oversight responsibility for an industry long dominated by a monopolist. Under cross-examination, Ms. Burr, despite testifying in her witness statement that "ICANN has historically referred competition concerns to DOJ,"[332] was unable to cite a single example of when ICANN had referred a competition concern to DOJ or even to confirm that ICANN had ever done so.[333] When further pressed, she was equally unable to identify the process by which ICANN would make such referrals, *e.g.*, by phone call, letter or formal request for a business review letter.[334] Her answer to all of these questions was simply "I don't know."

152. Finally, the evidence adduced at the hearing demonstrates that ICANN is more than willing to ignore the DOJ's opinion on competition issues where ICANN disagrees with them. In 2008, DOJ recommended that ICANN take several specific steps to revise its proposed New gTLD Program, including to "address any adverse consumer welfare effects" and to "limit the ability of the registry operator to exercise market power[.]"[335] DOJ's recommendations were forwarded to ICANN.[336] But rather than implement DOJ's recommendations regarding competition concerns that DOJ had identified in the New

gTLD Program, ICANN retained the services of several economists to develop reports that disputed DOJ's findings and recommendations.[337] Accordingly, ICANN's Board decided to adopt the reasoning of its economists and to reject the specific recommendations made by DOJ.[338]

3. ICANN Cannot Rely on DOJ's Decision to Close its .WEB Investigation

153. ICANN's view that it need not consider competition issues when exercising whatever discretion, if any, it enjoys in enforcing the New gTLD Program Rules is misplaced.[339] As explained more fully in Afilias' Response to the *Amici* Submissions,[340] the DOJ's decision to close its investigation without taking any action has little or no bearing on any competitive questions concerning Verisign's potential acquisition of .WEB. In a recent brief filed by the DOJ, the agency completely refuted ICANN's argument that the DOJ's decision to close its .WEB investigation is dispositive of any competition issues. Rejecting exactly that argument, the DOJ stated that "***no inference should be drawn from the Division's closure of its investigations***" because it "***decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive***."[341]

154. Indeed, not only has DOJ rejected ICANN's efforts to delegate responsibility for ensuring compliance with its competition mandate to government authorities, ICANN also cannot draw any inference from DOJ's closure of its .WEB investigation in particular. ICANN directly admitted at hearing that, "bottom line, we don't know anything" about why the DOJ closed its investigation.[342] Moreover, the DOJ's investigation concerned whether Verisign's potential acquisition of .WEB would ***substantially lessen*** competition in the DNS.[343] By contrast, ICANN is bound to take decisions that ***enable and promote competition***. The DOJ itself has taken the (obvious) view that ICANN's competition mandate is broader than US antitrust law.[344] ICANN's exercise of its discretion must be in keeping with its competition mandate and the objectives of the New gTLD Program—to break the .COM monopoly.

E. ICANN Failed to Operate Openly and Transparently to the Maximum Extent Possible

155. As we have repeatedly discussed,[345] ICANN's Articles and Bylaws require ICANN to operate openly and transparently to the maximum possible extent. Article III of ICANN's Articles provides that ICANN "shall operate … through open and transparent processes …."[346] ICANN's Commitments in Section 1.2(a) of the Bylaws reiterates that "ICANN must operate … through open and transparent processes …."[347] The Bylaws then underscore in Section 3.1 that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner …."[348]

156. ICANN did not "operate to the maximum extent feasible in an open and transparent manner"[349] in its treatment of the .WEB contention set and of Afilias' concerns. To the contrary, it acted throughout the events culminating in this IRP in such a way as to conceal its decision-making processes and its bias in favor of NDC/Verisign. ICANN violated its basic obligation of transparency through the following actions:

- ICANN kept the DAA concealed from Afilias even though it was directly relevant to—indeed, dispositive of—Afilias' concerns about NDC's application and even though ICANN received a copy of the DAA as early as 23 August 2016.[350] ICANN refused to even disclose the fact that ICANN had the DAA in its possession, let alone provide it to Afilias, until ordered to do so by the Emergency Panelist in this IRP on 12 December 2018—almost two and a half years later.[351]
- Despite Afilias' repeated requests, starting as early as February 2018, that ICANN disclose its relevant communications with NDC and Verisign regarding the .WEB gTLD, such as the *Amici*'s response to Ms. Willett's 16 September 2016 questionnaire,[352] ICANN produced these documents only on 17 and 24 April 2020, respectively.
- ICANN carried out the 3 November 2016 Board workshop in complete secrecy, even though it now asserts that the Board reached a supposedly crucial "decision" to defer consideration of Afilias' claims. ICANN did not specify the date of the alleged "decision" (assuming *arguendo* that a "decision" was in fact made) until its Rejoinder Memorial—even though the alleged "decision" now serves as the crux of its business judgment rule defense, until 1 June 2020.[353]
- ICANN refused to provide Afilias with any information regarding its investigation of NDC's conduct, despite repeated requests from Afilias for an update on the investigation following ICANN's promise to keep Afilias informed on the status of its

inquiries.[354] Afilias was left in the dark as to when ICANN's supposed investigation might conclude and whether it would in fact take Afilias' concerns into account.

- Despite ICANN's supposed commitment to transparency, ICANN refused to disclose to Afilias in response to its DIDP request any documents in its possession related to the .WEB gTLD that were not already publically available.[355] It was only in the present IRP that ICANN was finally forced to reveal information about how it had proceeded with the .WEB contention set.
- ICANN secretly and repeatedly communicated with Verisign and NDC regarding the process for delegating the .WEB gTLD to NDC. Even though ICANN claimed it was investigating Afilias' concerns, ICANN met with Mr. Rasco to discuss the delegation process in December 2017.[356] ICANN further helped Verisign's employees understand the assignment process for the .WEB gTLD in January 2018,[357] and allowed Verisign to participate in ICANN's discussions with NDC over the delegation of the .WEB gTLD.[358] None of these discussions were disclosed to Afilias and indeed ICANN still falsely maintains in this IRP that it takes no action on gTLDs that are the subject of ongoing or anticipated accountability mechanisms.[359]
- ICANN refused to produce all of the documents that Afilias requested concerning the enactment of Rule 7 of the Interim Supplementary Procedures[360] until after the hearing before the Procedures Officer—to which these documents were directly relevant.[361] It refused to produce these documents because they confirmed that ICANN had enacted Rule 7 at Verisign's behest specifically in view of the present IRP.[362]

F. Staff Improperly Coordinated with Verisign in Drafting Rule 7[363]

157. As the Procedures Officer observed in his Declaration, "one of the principal purposes of the IRP is to ensure that ICANN is accountable to the global Internet community and Claimants …."[364] For this reason, Mr. Donahey declared that the issues raised by Afilias' Rule 7 claim "are of such importance to the global Internet community and Claimants that they should not be decided by a 'Procedures Officer.'"[365] While this Panel observed in its Phase I decision on these issues that "modern international arbitral tribunals tend to 'accord greater weight to the contents of contemporary documents than to oral testimony given,'" the Panel was, at the time, "not prepared to make findings of fact that are inconsistent with declarations affirmed by witnesses whose evidence has not been subject to cross-examination."[366] The Panel has now heard from these witnesses (Ms. Eisner and Mr. McAuley). Rather than refute the contents of the contemporary documents, the best they could do was say they could not "recall" critical events and communications. The evidence therefore confirms that Staff impermissibly

coordinated with Verisign for the specific purpose of securing a non-discretionary right to participate in this IRP, thereby dramatically increasing Afilias' costs and demonstrating the course of conduct by which ICANN repeatedly breached the requirements of its Articles and Bylaws to benefit Verisign/NDC to the detriment of Afilias. Stated differently, and in response to the Panel's question, the relevance of Afilias' Rule 7 claim is that ICANN's breach of its Articles and Bylaws justifies an award of costs in Afilias' favor. This matter is taken up in further detail in Afilias' accompanying costs submission.

IV. ICANN'S NON-JURISDICTIONAL DEFENSES ARE MERITLESS

158. ICANN's defenses to the claims we discussed in the previous section are not supported by the evidentiary record or the Bylaws. To the extent not addressed elsewhere in this submission, in this Section we demonstrate that ICANN's remaining defenses are meritless. ***First***, ICANN asserts that the IRP Panel must defer to a decision ICANN's Board took at a workshop held in November 2016 in advance of the formal Board sessions specifically to the effect that no decision would be taken on the status of .WEB until all accountability mechanisms had been completed, even though there is no evidence that any such "decision" was taken (Section IV(A)). ***Second***, ICANN asserts that Afilias' claims are time-barred even though Afilias complied with the procedural rules in effect at the time it commenced dispute resolution with ICANN, ICANN continually represented to Afilias that it was considering its complaints, and ICANN's counsel agreed to toll the limitations period (Section IV(B)). ***Third***, ICANN improperly asserts that Afilias should have filed a Reconsideration Request to force ICANN to act on Afilias' complaints and cannot have expected ICANN to take any action based on letters Afilias had sent, notwithstanding the fact that there was no Board or Staff action to "reconsider" and the fact that the applicable rules regarding Reconsideration Requests would not have permitted Afilias to file one (Section IV(C)). And, ***fourth,*** the ICANN Board has waived its right to "individually consider" NDC's application following the conclusion of this IRP (Section IV(D)). In short, ICANN's defenses are wholly vacuous and serve only to demonstrate the overall flimsiness of ICANN's position in this IRP.

A. ICANN's Business Judgment Rule Defense

159. ICANN's business judgment rule defense centers on the alleged "decision" the Board took at the November 2016 Board workshop.[367] ICANN argues that the business judgment rule precludes the Panel from assessing the legitimacy or consequences of that alleged "decision." Notwithstanding its centrality to ICANN's case, this defense was not raised until late in the proceedings, prompting the Panel to request ICANN for an explanation as to why it only disclosed the alleged Board decision "for the first time in the Respondent's Rejoinder."[368] There is only one plausible answer: once Afilias had dismantled ICANN's first round defenses, ICANN needed to find an alternative set of circumstances to allow it to raise its oft-repeated IRP mantra that IRP panels are precluded from examining the Board's conduct pursuant to the California business judgment rule. In this regard, ICANN decided to concoct a narrative around the November Board workshop, but then proceeded to shroud almost every relevant document that could have shed light on what actually happened at the workshop under a cloud of privilege-based secrecy. However, ICANN's narrative was thoroughly dismantled by the hearing testimony of its own witnesses, none of whom were willing to support ICANN's categorical representation to this Panel that the Board took a policy-based decision at the workshop to defer consideration of Afilias' complaints until after all accountability proceedings have terminated.

160. We have addressed ICANN's arguments in our pre-hearing submissions and will not address them again in this submission,[369] except to the extent necessary to provide context for the new evidence that was adduced at the hearing. That evidence shows that there is no "policy" or "practice" of deferral, there were no deliberations regarding the .WEB matter, and no "decision" was taken of the nature that ICANN's counsel has represented to this Panel. The hearing evidence thus confirms that ICANN's position on the business judgment rule is both factually and legally baseless.

1. The Board did not "Decide to Defer" at the 3 November 2016 Workshop

161. As a threshold matter, the ICANN Board needs to have made a decision—which it

disclosed in accordance with the requirements of the Bylaws or justified in writing why it was not disclosed[370]—in order to rely upon the business judgment rule as a defense (in addition to satisfying the other criteria below). According to ICANN, the so-called "decision" upon which it rests its business judgment rule defense was allegedly taken at a Board workshop session. But, as demonstrated in our prior submissions,[371] the Board could not and did not "decide" anything during this workshop session.

162. According to California law, and as admitted by ICANN, the business judgment rule only protects the Board in "in making corporate ***decisions***."[372] The California Supreme Court confirmed in *Landen*—an authority cited by ICANN—that the business judgment rule applies only to "***qualifying decisions made*** by a corporation's board of directors."[373] It could hardly be otherwise, as absent a board decision there would be nothing to which an IRP panel could defer.

163. Absent written consent of all Board members, the Board is not authorized under the Bylaws to act outside of an annual, regular, or special meeting.[374] There was no such written consent here. As Ms. Burr testified under cross-examination, workshops are not regular, special, or annual meetings.[375] Instead, Ms. Burr testified that Board workshops are informal[376] "working sessions"[377] where the Board can discuss issues, but no minutes are taken[378] and no resolutions are passed.[379] In Ms. Burr's words, during Board workshops, members of the Board "prepar[e] to interact with the community" and "get[] caught up and briefed on other matters."[380] Indeed, Ms. Burr further conceded that Board workshop sessions do not satisfy the requirements in the Bylaws for Board action. As she testified, workshop sessions do not require a quorum of Board members, attendance is not taken,[381] and ***the Board does not vote because "[i]t can only adopt a resolution at a formal meeting."***[382] Hence, a Board workshop is simply not a forum where the ICANN Board can take any action at all, much less one that is protected by the business judgment rule in this IRP.[383]

164. Even assuming *arguendo* that a Board's affirmative "decision to defer a decision" could theoretically be protected by the business judgment rule given the claims and circumstances in this IRP,

the hearing testimony of ICANN's witnesses (Ms. Burr, Ms. Eisner, Mr. Disspain) confirmed that the Board, in fact, ***did not affirmatively "decide" anything regarding*** .WEB during the workshop. While none of the witnesses could recall the discussion of .WEB in any great detail[384]—which is not surprising because nothing happened—Ms. Burr forcefully disputed ICANN's characterization of the Board's discussion as a "decision to defer":

> [BURR]: Well, so it is complicated because ***we are referring to this as a decision, where what I observed was a confirmation to continue to follow the standard practice***, which was that the contention set was on hold, and I believe that Afilias was well-aware of the fact that the contention set was on hold.[385]

165. Ms. Burr's testimony was confirmed by Mr. Disspain, who testified that the Board did not take any affirmative action at that workshop that could be protected by the business judgment rule:

> [LITWIN.] [W]ould you agree with ICANN's counsel's statement that the Board took a, quote, "decision to defer," end quote, during the November 3rd workshop session?
>
> [DISSPAIN]. So what I said to you in response to that question is I think the Board made a choice to follow its longstanding practice of not doing anything when there is an outstanding accountability mechanism. ***I cannot say that the Board proactively decided, proactively agreed, proactively chose to as to put to do -- as to do it as you put it, which is not to pursue Afilias' complaints.***[386]

166. When pressed to clarify his answer, Mr. Disspain confirmed that far from "deciding" anything on 3 November 2016, Board members merely received a legal update from counsel:

> [LITWIN]. I will represent to you, Mr. Disspain, that ICANN has stated at oral argument in this IRP that the Board, quote, "decided to defer" --
>
> [DISSPAIN]. But it wasn't a vote or a straw poll.[387]
>
> …
>
> [LITWIN]. So when you say that the Board did not proactively decide, is it fair to say you received a brief from legal counsel, questions were asked of legal counsel, responses to those questions were given, and then you moved on to the next item on the agenda?

> [DISSPAIN]. Yeah, it wasn't before us for a decision -- for a formal decision unless we had chosen to move to a formal decision. What we chose to do was to follow our longstanding practice.[388]

167. ICANN counsel's insistence that the Board "decided to defer" consideration of Afilias' complaints was thus flatly rejected by its own witnesses. As such, counsel's obvious attempt to transform a legal update into a decision protected by the business judgment rule must deservedly fail. The business judgment rule operates only in the context of director action—it has no role if the Board has, as Mr. Disspain conceded, failed to take a consensus action. The evidence provided by ICANN's own witnesses shows that those Directors who attended the workshop listened to the legal update, perhaps asked some questions, and moved on to the next workshop item.

168. Moreover, not only was no "decision" taken during the 3 November 2016 workshop, no ICANN "policy" or "practice" informed the Board's conduct during that workshop. Mr. Disspain confirmed that ICANN's supposed "practice" of deferral is far from an ICANN policy:

> [LITWIN]. Mr. Disspain, you testified earlier today that ICANN and the ICANN Board has a policy of not considering the merits of complaints that are subject to outstanding accountability mechanisms; is that correct?
>
> [DISSPAIN]. No. I said that we had a longstanding practice. And I'm sorry to be picky, but the term "policy" in the context of ICANN has a different meaning. … I didn't say "policy." I said "practice" because that has a different meaning to me.[389]

169. While ICANN policies must be documented as per the Bylaws, Board practices are decidedly more nebulous. Mr. Disspain, for example, was unaware of whether, when, or how this alleged practice has been disclosed to the Internet community. He was unable to cite to any provision of ICANN's Bylaws, any document on ICANN's website, any Board minutes, or any source whatsoever. Indeed, Mr. Disspain was unable to cite any other example of "where the Board has not done anything because there have been accountability mechanisms running."[390]

170. Contrary to Mr. Disspain's testimony, the AGB—in its sole reference to accountability

mechanisms other than in the Litigation Waiver—states specifically that, despite the Board's delegation of primary responsibility to Staff for enforcement of the New gTLD Program Rules, the Board "might individually consider" issues related to an application "as a result of GAC Advice" or "the use of an ICANN accountability mechanism."[391] This rule therefore makes clear that the Board may exercise its discretion to consider an issue, but is not obligated to do so. Nothing in this rule prevents or even suggests that the Board (as a matter of "practice" or otherwise) will only consider issues related to an application until ***after*** all accountability mechanisms have been completed and an IRP panel has ruled on those issues. Nor would such a practice make sense. As Mr. Disspain acknowledged, the very purpose of a CEP (which ICANN now asserts will stop the Board from taking decisions on issues that are the subject of accountability mechanisms) is "to narrow claims in advance of filing an IRP" and to "discuss things and see if we can avoid an IRP."[392] The AGB specifically anticipates that there may be instances where the Board chooses to involve itself directly in the CEP or other accountability mechanism processes by considering issues that are in dispute between ICANN and the applicant. Although the AGB notes that this would be an "exceptional circumstance," the fact that the Board reserves the right to do so directly contradicts Mr. Disspain's testimony of a long-standing Board practice for which he could cite no other examples.[393]

2. ICANN may not Rely on the Business Judgment Rule to Justify Conduct Taken Contrary to ICANN's Articles and Bylaws

171. Afilias' claims also do not arise from the Board's exercise of fiduciary duties because they concern its *ultra vires* conduct. As Afilias set forth prior to the hearing, California case law clearly establishes that the business judgment rule does not extend to *ultra vires* actions, namely where, as here, ICANN acted contrary to its Articles and Bylaws.[394] Such actions are not entitled to deference and are, as the Bylaws provide, subject to *de novo* review by this Panel. ICANN did not respond to or deny the validity of this legal principle, either in hearing or before. This silence constitutes a concession of ICANN's

business judgment rule defense.

3. ICANN's Lack of Transparency Precludes it from Relying on the Business Judgment Rule

172. Even if the business judgment rule would otherwise apply to the ICANN Board's alleged November 2016 decision, which it does not, ICANN's lack of transparency regarding the 3 November 2016 workshop session precludes any application of the rule. ICANN was required by the Bylaws to publicize any action taken by the Board, or explain the absence of disclosure.[395] But there is nothing in any ICANN document or website posting even remotely suggesting that any decision was taken, nor what the content of that decision might have been.[396] At a very minimum, consistent with its obligations to act transparently to the maximum extent feasible, ICANN was required to inform the parties that would be affected by the decision that was allegedly taken.[397] To the contrary, ICANN has sought to cloak the circumstances and contents of that meeting, and indeed all of its actions related to .WEB, in a veil of privilege.[398]

173. This lack of transparency regarding the alleged decision precludes ICANN from invoking it (and hence the business judgment rule) as defense against Afilias. ICANN's utter lack of transparency about the circumstances of that meeting makes it effectively impossible to defer to the Board's supposed decision. ICANN has unfairly and unreasonably impeded Afilias from responding to the substance of the Board's decision simply by preventing Afilias from learning anything about what was decided, why, and on what basis. But, more importantly, it prevents the Panel from even considering whether it could afford deference to the Board's decision for the same reasons—the Panel cannot defer to a Board decision about which it knows almost nothing.

174. Indeed, the veil that ICANN has cast over the decision has precluded ICANN itself from demonstrating that another prerequisite of the business judgment rule was satisfied: the requirement that the Board's action was taken following reasonable inquiry. To the contrary, the evidence shows that the

Board never conducted a reasonable inquiry in regards to .WEB at any point. But, as ICANN has conceded, "[t]he business judgment rule does not shield actions taken without reasonable inquiry.'"[399] There is no evidence that the ICANN Board undertook any reasonable inquiry prior to making its supposed decision to defer consideration of .WEB.[400] The ICANN Board did not examine any of the critical documents during the November 2016 workshop session. Ms. Burr testified that, "I don't recall any documents being circulated."[401] In fact, Mr. Disspain confirmed that the Board did not consider the DAA, the 23 August 2016 letter to ICANN's counsel, or the responses to ICANN's 16 September 2016 questionnaire.[402] Mr. Disspain could not even recall whether the Board members present at the workshop asked any questions to ICANN counsel.[403] Thus, ICANN's own evidence shows that no inquiry was undertaken, and certainly not a reasonable one. ICANN's business judgment rule defense fails for this reason too.

4. The Business Judgment Rule Does Not Apply to ICANN Staff's Actions and Inactions

175. Finally, the business judgment rules does not apply to Afilias' claims in this IRP that are based on ICANN Staff's conduct. ICANN accepts that this is in fact the case. California law affirms that the business judgment rule only applies to actions by a corporation's board of directors and not to its staff.[404] Accordingly, and as stated by ICANN, "the Panel applies a *de novo* standard in making findings of fact and determining whether actions or inactions by ICANN's officers or staff violated the Bylaws or Articles."[405]

176. ICANN attempts to diminish the significance of the foregoing concession by trying to obfuscate the distinction between the Staff and the Board by referring to both generically as ICANN. However, ICANN's failure to distinguish the Staff and the Board in its pleadings does not alter the fact that ICANN Staff actions are subject to *de novo* review, all the more so in circumstances in which the Board, despite having had adequate opportunity to do so, exercised no oversight of Staff's conduct. ICANN Staff

decided to proceed with delegating the .WEB gTLD to NDC even though Afilias' complaints about NDC's conduct were not resolved. ICANN Staff failed to conduct a proper investigation in response to the claims against NDC. ICANN Staff failed to apply the New gTLD Program Rules and disqualify NDC. And, in doing so, ICANN Staff failed to comply with ICANN's Articles and Bylaws.[406]

B. ICANN's Statute of Limitations and Statute of Repose Defense[407]

177. Notwithstanding Afilias' repeated clear statements as to the nature of its claims and when they arose, ICANN continued to press its argument that Afilias' claims are time-barred at the hearing. ICANN's time bar cannot be accepted as being made in good faith.

178. ICANN's position is inherently inconsistent with its assertion that ICANN has not yet addressed the fundamental issues underlying Afilias' claims. In response to the Panel's question on this issue, Afilias maintains its position that claims "cannot be both" premature and overdue.[408] As we have set out in our prior submissions, ICANN's time bar defense is based entirely on its intentional distortion of Afilias' claims—as well as a distortion of the information that Afilias had in its possession at the time.[409] As we have repeatedly explained, Afilias' claims are based on conduct by ICANN's Staff and Board that culminated in irreversible violations of Afilias' rights only when ICANN Staff proceeded with the delegation of .WEB to NDC on 6 June 2018. This is when Afilias' claims crystallized and this is when Afilias concretely knew that it had claims that would withstand the type of procedural prematurity arguments that ICANN has made in other IRPs and has done so again in this IRP. ICANN's conduct had not yet conclusively violated the Articles and Bylaws until it proceeded with the delegation of .WEB to NDC. It was only then that ICANN's actions and inactions from 2016 onward became wrongful and had a material adverse effect on Afilias and only then that the SOL and the SOR could begin to run.

179. Consequently, as Afilias has demonstrated in its pleadings, its claims are not precluded by the 120 day Statute of Limitations ("SOL") or the twelve month Statute of Repose ("SOR") that ICANN enacted in Rule 4 of the Interim Supplementary Procedures on 25 October 2016.[410] Afilias' claims against

ICANN accrued no earlier than when ICANN proceeded with the delegation process for .WEB with NDC on 6 June 2018 and, even if the SOR and the SOL were applicable to Afilias' claims, they would have been tolled by the Cooperative Engagement Process ("CEP") that lasted from 18 June 2018[411] to 13 November 2018.[412] Afilias filed the present IRP on 14 November 2018—well within the time periods envisioned by both the SOL and the SOR.

1. Afilias' Claims Accrued in June 2018

180. ICANN has repeatedly and falsely asserted that the conduct underlying Afilias' claims was sufficiently complete and known to Afilias in 2016 and therefore the SOL and the SOR began to run at that time.[413] ICANN's position is based on a series of misrepresentations. ICANN misrepresents Afilias' claims as claims that "ICANN had an immediate, absolute and unqualified obligation to disqualify NDC" in 2016.[414] But this is not an accurate statement of Afilias' claim. Afilias claims that ICANN had an obligation to disqualify NDC prior to proceeding with delegation, which ICANN proceeded to do in June 2018—not that ICANN had to do so specifically in 2016.

181. As is evident from the record, Afilias had no way of knowing at any point in 2016 what the specific situation was regarding its complaints to ICANN about NDC's conduct. In fact, through its 16 September 2016 and 30 September 2016 letters, ICANN Staff represented to Afilias that it would, among other things, pursue "informed resolution of these questions"[415] and "consider this matter."[416] While ICANN has argued that its letters did not invite Afilias to delay filing the IRP and that Afilias should not have relied on its letters,[417] the two letters clearly represented to Afilias that ICANN would look into and address its concerns. In the face of such representations, it would have been manifestly unreasonable to file contentious (and costly) dispute resolution proceedings—which might have involved the integrity and substance of the very "informed resolution" that ICANN had represented it would undertake. Afilias' letter to ICANN of 23 February 2018 asking for an update on ICANN's investigation makes it clear that Afilias took no further action because it was waiting on the outcome of that process, and in fact expected that

the investigation would reach some resolution of the issue.[418] Hence, until June 2018, all Afilias knew was that ICANN was undertaking some sort of inquiry in to NDC's conduct and believed that it would be apprised of ICANN's views or findings at some point. This, of course, never happened.

182. ICANN misrepresents Afilias' claims as "the same claims that they knew about and asserted back in August and September of 2016."[419] ICANN asserts that Afilias first raised its claims in several letters—sent on 8 August 2016, 9 September 2016, and 7 October 2016—as the full extent of Afilias' claims in this IRP.[420] These letters, however, describe how *NDC* may have violated the New gTLD Program Rules. Afilias did not allege that *ICANN* had violated its Articles and Bylaws in regards to the .WEB gTLD. Afilias' claims in this IRP concerns ICANN's actions in response to NDC's conduct—not NDC's conduct. ICANN also ignores the basic grammatical distinction between past and future tenses in order to assert that Afilias alleged the same claims in 2016 as in this IRP. Afilias' letters all discuss ***future*** conduct by the ICANN Board and ICANN Staff.[421] Indeed, as far as Afilias knows, in August and September of 2016 ICANN had not yet undertaken any action or inaction that Afilias could challenge in an IRP. The only actions that concerned Afilias was ICANN moving forward to contracting with NDC and undertaking a reasonable investigation, but ICANN Staff put .WEB on hold and undertook to seek "informed resolution" of Afilias' concerns.[422]

183. As shown by its 23 February 2018 letter to ICANN, Afilias still did not claim that ICANN had violated its Articles and Bylaws as of *February 2018* because Afilias was not aware of what ICANN was doing with respect to the delegation of .WEB to NDC.[423] Put simply, ICANN's defense that Afilias' claims accrued in 2016, and therefore are barred by the SOL and the SOR contradicts the evidence presented in this IRP.

2. Rule 4 Does Not Apply to Afilias' Claims[424]

184. Because of the circumstances in which Rule 4 of the Interim Supplementary Procedures was adopted, the Statute of Limitations and Statute of Repose ("SOL/SOR") it establishes cannot be

applied to preclude Afilias' claims.

(i) The Facts Show that ICANN Enacted Rule 4 to Retroactively Time Bar Afilias' Claims

185. As Ms. Eisner admitted, the ICANN Board adopted Rule 4 on 25 October 2018, slightly more than two weeks before ICANN's counsel unilaterally terminated CEP and Afilias filed its IRP.[425] *Before that, Afilias' claims had never been subject to any SOL or SOR*. ICANN's witness, Ms. Eisner, who was involved in the development of Rule 4, in fact conceded that IRP claims from 1 October 2016 to 25 October 2018 were not subject to any SOL or SOR.[426] She also testified that, prior to 1 October 2016, an IRP had to be filed within 30 days following the posting of Board minutes from the meeting in which the Board took the challenged action.[427] However, Afilias' claims were never subject to this SOL/SOR because its claims do not arise out of Board action or inaction prior to 1 October 2016.

186. Understanding that its claims had never been subject to any SOL/SOR, Afilias initiated the CEP with ICANN concerning .WEB on 18 June 2018. The Panel will recall that the CEP is part of ICANN's accountability framework and is intended to allow ICANN and a prospective IRP claimant to resolve or narrow their disputes.[428] Four days after the CEP commenced, on 22 June 2018, ICANN launched a public comment concerning the addition of timing requirements to the rules governing IRPs. The public comment page for Rule 4 (updated as of September 2018) notes that a "significant number" of public comments received in 2016 did not support the "proposed limitations underpinning #4" and that the rule would not be adopted until after a second round of comments had been received and considered by the IRP-IOT. The result of the second public consultation regarding Rule 4 remains outstanding as of today.

187. On 10 October 2018, Afilias sent a draft of its Request for IRP to ICANN Legal. A day later, on 11 October 2018, Ms. Eisner told the IRP-IOT that ICANN was "on the precipice" of a new IRP filing and, as she conceded on cross-examination, she was therefore "under pressure to get the interim

rules adopted by the Board at the October 25 Board meeting[.]"[429] This imminent new IRP could only have been a reference to Afilias' draft IRP request (even if Ms. Eisner was not specifically aware of its existence at that time), since no other IRP would be filed for more than a year afterward. Only Afilias' IRP was "on the precipice" of being filed.[430] Despite the fact that the public comment period on proposed Rule 4 remained open, and the fact that ICANN legal was aware of the substance of Afilias' draft Request for IRP, ICANN legal proceeded to include the provisions of Rule 4 in the draft Interim Supplemental Rules that were presented to the Board for approval on 25 October 2018. ICANN's Board adopted Rule 4 on 25 October 2018, contrary to ICANN's representations that Rule 4 would not be adopted before the public comment period had concluded and the comments had been evaluated and discussed within the IOT.

188. Remarkably, ICANN further decided that the Interim Supplemental Procedures had to be backdated to 1 May 2018, that is, six weeks prior to Afilias' initiation of CEP. No carve out was included for pending CEPs or IRPs. The decision to make the Interim Supplemental Procedures retroactive can only have been made in an attempt to preclude Afilias from arguing that it had filed the CEP prior to the timing rules being adopted. There were no IRPs pending as of October 2018, so there was no other need to make the rules retroactive. Although there were several CEPs pending, Afilias' CEP was the first filed since November 2017 and thus the inexorable conclusion must be that the retroactive date was set purposely to predate Afilias' CEP.

189. The reason for ICANN's push to both adopt Rule 4 and make it retroactive by the end of October 2018 became immediately apparent. ICANN rejected Afilias' last outstanding Reconsideration Request regarding .WEB on 6 November 2018[431] and, a week later, terminated CEP on 13 November 2018, despite never engaging on the substance of Afilias' 10 October 2018 draft Request for IRP. Afilias filed its Request for IRP a day later on 14 November 2018 and ICANN now argues that it should be time-barred from doing so. ICANN's position is simply preposterous and should be characterized as such in the Panel's final award.

(ii) ICANN Cannot Rely on Rule 4 as a Matter of Fact and Law

190. ICANN's SOL and SOR defense also fails as a matter of law for two separate reasons, each of which is sufficient by itself to disqualify ICANN's defense.

191. *First*, Rule 4 of the Interim Supplementary Procedures cannot be interpreted as having retroactive effect, and certainly not where the claimant could not have known its claims were subject to an SOL or SOR. In fact, Rule 4's retroactive effect is contrary to ICANN's Commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly"[432] as well as the mandate that the "[t]he Rules of Procedure are intended to ensure fundamental fairness and due process."[433] It is also contrary to general principles of law that prohibit the retroactive application of rules resulting in the impairment or denial of a party's rights. In conformity with these principles, Rule 4 can only be interpreted to have prospective application only, with its time limits starting to run for past claims only on the date that the rule was actually adopted: 25 October 2018.[434]

192. *Second*, ICANN's enactment and invocation of Rule 4 is an inadmissible abuse of rights. As Prof. Jack Goldsmith (who was an expert in the *ICM Registry v. ICANN* IRP) explains, an abuse of rights occurs "where a legal right ... is exercised arbitrarily, maliciously or unreasonably, or fictitiously to evade a legal obligation."[435] An abuse of rights is contrary to the international principle of good faith as well as ICANN's Commitments in the Bylaws, which require ICANN to "[m]ake decisions ... consistently, neutrally, objectively, and fairly."[436] ICANN's defense is predicated on the assertion that Afilias should have complied with an SOL and SOR that it could not have known about during the relevant times, as the SOL and the SOR did not exist until after both time periods (according to ICANN) expired. ICANN's limitations defense is, for this reason alone, arbitrary, malicious, and unreasonable and therefore an inadmissible abuse of rights. ICANN's defense is also an inadmissible abuse of rights because, in all probability, ICANN used the CEP in which it was engaged with Afilias to delay Afilias' IRP until just after ICANN adopted Rule 4.[437]

C. ICANN's Reconsideration Request Defense

193. ICANN argues that if Afilias wanted the Board to act on its concerns, then Afilias should have submitted a reconsideration request. But, prior to June 2018, there was no action or inaction by the ICANN Board of Staff to be reconsidered. The Bylaws provide for the "review or reconsideration" of an action or inaction by the ICANN Board or Staff.[438] Neither the ICANN Board nor ICANN Staff took any relevant action prior to June 2018 that could have been the subject of a reconsideration request by Afilias (other than the denial of Afilias' DIDP request).

194. Specifically, on 8 August 2016, one week after Verisign had issued its press release disclosing the fact (but misrepresenting the terms) of its deal with NDC, Afilias could not seek reconsideration. As of that date, Afilias' application status remained "In Contention" so Afilias had not yet been "***materially affected***"[439] by an ICANN action or inaction concerning the week-old resolution of the .WEB contention set. Less than a fortnight later, ICANN placed the contention set on hold, ensuring that ICANN could not act in a way that would "***materially affect***" Afilias—such as changing Afilias' application status to "Will Not Proceed" and transitioning to delegation with NDC.[440] (And if ICANN had taken the contention set off hold, Afilias would have filed an accountability mechanism then—as Afilias did when ICANN finally changed the on-hold status of the contention set in June 2018.) ICANN subsequently represented through the issuance of its 16 September 2016 questionnaire and Mr. Atallah's 30 September 2016 letter that ICANN was actively investigating the concerns raised by Afilias.[441] Accordingly, on 8 August 2016, Afilias both wrote to Mr. Atallah in his role as the Staff executive in charge of the New gTLD Program and concurrently filed complaints with the Ombudsman.[442]

195. ICANN only proceeded to act in June 2018 when ICANN Staff changed Afilias' application status to "Will Not Proceed" and approved the execution of the .WEB Registry Agreement with NDC. At that point, Afilias was materially affected by an action of ICANN. ICANN has never identified the action or inaction by Staff that would have provided Afilias with the basis for seeking reconsideration

prior to that date. The determination by ICANN's auction provider that NDC was the Winning Bidder in July 2016 does not constitute Staff "action or inaction," since those claims would have had to have been made against the auction provider pursuant to the dispute resolution provisions of the Bidder Agreement. Even assuming *arguendo* that it did constitute Staff "action or inaction" for which Afilias could have requested reconsideration, Staff placed the contention set "on-hold" in August 2016. Staff then advised Afilias in September 2016 that it was "considering" and seeking "informed resolution" of the concerns that Afilias had raised. In short, there was no basis for Afilias to seek reconsideration at that point, since at that point Afilias had not been "materially affected" by any ICANN action or inaction—the contention set was on hold and Staff led Afilias to believe that it was actively investigating the matter. Nor was there any basis for Afilias to know how ICANN intended to proceed with the .WEB contention set (particularly given that ICANN had refused even to answer Afilias' DIDP requests seeking basic information on how ICANN intended to proceed) until June 2018—when ICANN took the contention set off hold and changed Afilias' application status to "will not proceed." ICANN's argument that Afilias should have filed a reconsideration request on these matters prior to June 2018 is entirely baseless.[443]

D. ICANN's Board Waived Any Right to Individually Consider These Issues

196. ICANN argues that because it has "ultimate responsibility" over the New gTLD Program, the Board has properly "reserved its right to 'individually consider' [NDC's] application" following the conclusion of this IRP.[444] ICANN's argument is based on a flawed reading of the Guidebook and the facts demonstrate that the Board has, in fact, waived its right to "individually consider" these issues, leaving them for this Panel to determine.

197. The relevant section of the AGB provides:

> ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. ***The Board reserves 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. ***Under exceptional circumstances, the Board may individually consider a gTLD application.*** For example, the

> Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.[445]

Contrary to ICANN's arguments, this provision does not grant the Board discretion as to ***when*** it may consider issues related to an application or ***how*** it may remedy violations of the New gTLD Program Rules; rather, this provision only grants the Board the discretion ***whether*** to consider such issues at all.

198. The uncontroverted evidence adduced at the hearing demonstrates that the Board did not exercise its "right to individually consider" NDC's application at a time where such review would have been meaningful. The Board took no "proactive" steps at the November Board workshop to "individually consider"[446] NDC's application. Similarly, the Board met during March 2018, when no ICANN Accountability Mechanisms were pending regarding .WEB, and similarly failed to exercise its "right to individually consider" NDC's application in light of Afilias' complaints. Tellingly, even after the BAMC was informed on 5 June 2018 that ICANN Staff intended to imminently take the .WEB contention set off hold and proceed to conclude a Registry Agreement with NDC, the Board did not exercise its "right to individually consider" NDC's application, despite the Board's knowledge that once the approved, it would be the very narrow termination provisions of the .WEB Registry Agreement—and not the New gTLD Program Rules—that would define the Board's remedial powers.

199. Under questioning from the Chairman, Mr. Disspain tried to explain why the Board had failed to act in June 2018 notwithstanding the imminent execution of the .WEB Registry Agreement:

> ARBITRATOR BIENVENU: By ICANN sending a draft Registry Agreement to NDC for execution, would you consider, Mr. Disspain, that ICANN was, in effect, expressing disagreement with those who claimed that NDC's bid was non-compliant and that the auction rules had been breached by NDC because of its agreement with Verisign?
>
> [DISSPAIN]: No, I don't think so. I think that ICANN was taking the next step in its process. ... To be clear, having been told in no uncertain terms by Afilias that they were intending to lodge an IRP, that is what we expected to happen, and that is exactly what did happen.[447]

200. Assuming, *arguendo*, the veracity of Mr. Disspain's testimony, the flaws in this logic are

obvious—it is the Board, not a third party such as Afilias, that has ultimate responsibility for ensuring that the New gTLD Program Rules are enforced. The Board was informed that Staff was going to conclude a Registry Agreement with NDC and did not take *any steps* to ensure that Staff's actions would not preclude the Board from having an opportunity to consider these issues at a later date.

201. Indeed, although Mr. Disspain testified that "Afilias would be aware that it had come off hold because all of the contention set members would be informed that it had come off hold[,]"[448] ICANN's notice was hardly designed to accomplish that goal. That notice, as set forth above, was a brief email, sent to one Afilias contact (without even copying Mr. Hemphill, as Mr. Atallah had promised to do, or Mr. Ali, who had also requested notice). The substance and limited distribution of ICANN's notice was seemingly antithetical to the Board's objectives, since ICANN apparently changed the draft notice[449] to remove the sentence "The .WEB/.WEBS contention set is no longer "On-Hold" from the final notice,[450] removing an indication that the notice actually concerned .WEB at all.

202. Finally, there is no evidence to suggest that the Board ever intended to consider whether NDC had violated the New gTLD Program Rules. Indeed, Mr. Disspain testified that, if Afilias had not filed for CEP on 18 June 2018, "it is impossible to suggest that the Board would have stepped in, but I don't know. I can't say whether they would or wouldn't."[451] Having failed to take up this issue in a timely manner—when the Board new what actions Staff intended to immediately take and the implications of those actions—it is now before this Panel to decide these issues.

V. THE PANEL'S JURISDICTION

203. The Panel's decision on the scope of its jurisdiction is critically important not only for this IRP, but also for future IRP panels that will be bound by the decision; subject, of course, to the extent of any amendments to the Bylaws or any particular bylaw.[452] This is the first IRP under both ICANN's revised Bylaws[453] and the Interim Supplementary Procedures.[454] It is also the first IRP to involve an accountability review of ICANN Staff's actions and inactions pursuant to the new Bylaws.[455] The Panel's decision on

the scope of its jurisdiction will thus ultimately determine the extent to which the accountability system that ICANN has put in place—and which it has represented to courts and the Internet community as providing "valuable redress" to parties that have been adversely affected by ICANN's conduct—will provide truly meaningful accountability for the actions and inactions of ICANN's Staff and Board. The systemic value stakes of this IRP could not be higher.

204. The Panel must reject ICANN's restrictive view of an IRP panel's jurisdiction, not only because of the policy objectives that the Internet community intended to achieve in adopting the enhanced IRP system that is reflected in the current Bylaws, but also because of the plain wording of the specific Bylaw provisions applicable to IRPs. The IRP is a "***final, binding arbitration process***" and the IRP Panel is "charged with hearing and ***resolving the Dispute***" (Section V(A)).[456] The Panel should define its jurisdiction in order to fulfill this charge and abide by both the ICANN Bylaws and the principles set forth in the Cross Community Working Group on Enhancing ICANN Accountability's (the "CCWG") Final Proposal on Work Stream 1 Recommendations (the "CCWG Report") of 23 February 2016 adopted by the ICANN Board.

205. This is particularly important in light of the Litigation Waiver that ICANN required all new gTLD applicants to accept. On the one hand, in U.S. court litigation, ICANN has argued that any claim associated with a new gTLD application cannot be pursued in court. On the other hand, ICANN has argued, as the Panel is aware, that an IRP panel's jurisdiction is restricted merely to declaring whether ICANN has acted consistently with its Articles and Bylaws, and that it is ultimately up to the Board to decide what to do with the Panel's declaration. The net effect of ICANN's position is an accountability gap (in international law terms, a denial of justice) that would leave claimants without a means of redress against ICANN's conduct. If ICANN accountability is to mean anything, this simply cannot be right. Not only does the Panel's jurisdiction encompass the claims that Afilias has presented, it also extends to granting the remedies that Afilias has requested (Section V(B)).

A. The IRP is Properly Understood to Provide Full Accountability for ICANN[457]

206. The ICANN Bylaws set out the scope of the IRP Panel's jurisdiction. The IRP is "a final, binding arbitration process."[458] As part of that process, this IRP Panel (1) is "charged with hearing ***and resolving*** the Dispute" between ICANN and the claimant;[459] (2) must "***make findings of fact*** to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws;"[460] and (3) ensure that "[a]ll Disputes shall ***be decided*** in compliance with the Articles of Incorporation and Bylaws."[461] And, further, the Bylaws grant the Panel "the authority to ... [d]eclare whether a Covered Action constituted an action or inaction that violated" ICANN's Articles or Bylaws.[462]

207. In the course of its pleadings,[463] Afilias has established that the jurisdiction of the Panel is broad and consistent with the IRP's status as "a final, binding arbitration process."[464] Since the IRP is a final, binding arbitration process, the inherent jurisdiction of an arbitral tribunal sets the baseline for the Panel's jurisdiction and any deviation must be fully justified by the text of the Bylaws. It is a well-established principle of international arbitration that a tribunal, or in this case a panel, has an obligation to exercise the full extent of its jurisdiction. This principle has been recognized by no less an authority than L. Yves Fortier in his decision as part of the *Vivendi v. Argentina* annulment proceeding.[465] A tribunal must consider and decide all matters falling within its jurisdiction, just as a tribunal may not consider or decide any matters falling outside its jurisdiction.

208. Indeed, ICANN's own argument in favor of the *Amici*'s participation in the present IRP assumed that the Panel enjoys expansive jurisdiction. There it argued that "many of Afilias' technical arguments regarding the Guidebook and Auction Rules have also been contested by Verisign and NDC," and therefore "[t]his dispute resolution process and the quality of the Panel's consideration of the issues that Afilias raises will benefit substantially from NDC's and Verisign's participation in this IRP."[466] If the jurisdiction of the Panel is as limited as ICANN and the *Amici* now argue, there would have been no reason for the *Amici* to participate in this IRP.

209. Nevertheless, ICANN and the *Amici* have now improperly sought to restrict the jurisdiction of the Panel to serve their own ends,[467] and indeed have accused Afilias of being a "clever pleader" for asking the Panel to exercise the full extent of its jurisdiction pursuant to the ICANN Bylaws.[468] ICANN's position that the jurisdiction of the Panel must be construed very narrowly is in effect a plea that ICANN should be accountable to no one but itself. This is a far cry from what the ICANN community expected when it developed enhanced accountability rules for ICANN to follow, and from the representations that ICANN has made to the United States' courts and government.

210. This Panel must not accept ICANN and the *Amici*'s invitation to exercise anything less than its full jurisdiction granted under the Bylaws.[469] The IRP was designed to provide full accountability for ICANN in the absence of *any other* external form of accountability. ICANN's attempt to deny Afilias accountability here is not only contrary to natural justice and basic procedural fairness[470] but also to the Bylaws' requirement that "ICANN ***shall be accountable*** to the community for operating in accordance with the Articles of Incorporation and these Bylaws."[471] In this regard, two key interpretative parameters underscore the fact that the Panel has ample authority to review and remedy ICANN's actions: the CCWG Report (Section V(A)(1)) and the litigation waiver that ICANN required all new gTLD applicants to accept as a condition for participating in the New gTLD Program (Section V(A)(2)).

1. The CCWG Provided for IRP Panels to Have Expansive Jurisdiction

211. As the Panel now knows, ICANN expanded the scope of the IRP, and the jurisdiction of the IRP Panel, as part of the IANA Transition: the U.S. Department of Commerce's transition of its control over the domain name systems' IANA functions to ICANN, which left ICANN without standing oversight from the U.S. government. As Ms. Burr confirmed, ICANN needed to be subject to enhanced accountability mechanisms "in the absence of the accountability backstop that the historical contractual relationship with the United States government provided."[472] The ICANN Board itself recognized that the IANA Transition required a strengthened accountability mechanism, in view of community "concerns on

the impact of the transition on [ICANN's] accountability, with the removal of the perceived backstop of [NTIA's] historical role."[473]

212. In light of these concerns, the CCWG was entrusted to develop "a set of proposed enhancements to ICANN's accountability to the global Internet community."[474] As the Board recognized, the CCWG Report was the outcome of a process involving "the 28 members of the CCWG-Accountability, representing six Chartering Organizations, and 175 participants" and "required over 220 meetings (face-to-face or telephonic), three public comment periods, and more than 13,900 email messages."[475] The Board provided a liaison to the CCWG and actively participated in its meetings, public comment processes on the CCWG Report, and its deliberations, and the CCWG was supported in the preparation of the CCWG Report by external legal counsel from two different law firms.[476] In sum, the preparation of the CCWG Report was no casual undertaking.

213. The CCWG Report concluded that an expansive IRP was the cornerstone of an enhanced accountability policy for ICANN. It provides that the "accountability enhancements will ensure ICANN remains accountable to the global Internet community" and that these enhancements included "[a]n enhanced Independent Review Process and redress process with a broader scope and ***the power to ensure ICANN stays within its Mission***."[477] Accordingly, the IRP will "ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws."[478] The accountability policy set forth in the CCWG Report therefore treats the IRP as an arbitration proceeding that culminates in a final and binding decision that "directed [the ICANN Board and staff] ***to take appropriate action to remedy [any] breach***."[479]

214. Question 2 from the Panel asks about the legal effect of the CCWG Report.[480] The CCWG Report provides binding interpretations for the provisions of ICANN's Bylaws that set forth the jurisdiction and powers of an IRP panel—none of which are inconsistent with the CCWG Report.[481] While ICANN quibbles with the relevance of the Report,[482] the Report is binding for the following reasons.

215. *First*, the CCWG Report was the product of a multistakeholder policy development process that the ICANN Board described as "a true demonstration of the strength and triumph of the multistakeholder model."[483] The results of this multistakeholder process are binding on ICANN pursuant to Section 1.2(a)(iv) of the Bylaws, which require ICANN to "[e]mploy open, transparent and bottom-up, multistakeholder policy development processes." As such, "in October 2014, the Board committed to a process through which it would consider the consensus-based recommendations of the CCWG-Accountability in Resolution 2014.10.16.16."[484] Pursuant to ICANN policy and the requirements of ICANN's bottom-up policy development process, if the Board had decided not to implement wholesale the CCWG's recommendations, it would have been required to revert to the CCWG to justify its decision. There is nothing in the record to suggest that any such steps were taken by the Board. To the contrary, all of the evidence reflects that the Board adopted and intended to implement ***in full*** the CCWG's recommendations.

216. *Second*, in recognition of the significance of its multistakeholder process, ICANN's Board formally accepted the CCWG Report in Resolution 2016.03.10.16.[485] Then the ICANN Board—in Resolution 2016.03.10.18—formally directed ICANN to "plan for the implementation of the Report so that [ICANN] is operationally ready to implement in the event [NTIA] approves of the [IANA] Stewardship Transition Proposal and the [IANA] Functions Contract expires."[486] The Board's acceptance and its direction were not subject to any qualification and did not take issue with any of the recommendations set forth in the CCWG Report.

217. The current accountability provisions of the Bylaws, first enacted in similar form on 1 October 2016, were then prepared based on the CCWG Report. The Board left no discretion for ICANN to implement anything less than the entirety of the CCWG Report's recommendations into the Bylaws. And this is precisely what ICANN set out to do. As Ms. Burr—who "worked on the writing of the Bylaws as the rapporteur"[487]—testified in response to Chairman Bienvenu's questions, the Bylaws were intended

to faithfully reflect the substance of the CCWG Report. As she explained the process:

> [BURR]: So the bylaws' effort took the recommendation -- and the process was over several days -- the entire recommendation, all 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 of those, ***to make sure that they faithfully represented the input of the CCWG***.[488]

218. ***Third***, ICANN's Board further authorized ICANN to provide the CCWG Report to the U.S. government as part of the IANA Transition Proposal in Resolution 2016.03.10.17.[489] As the Board noted, ICANN had previously agreed that the CCWG Report "would be transmitted to NTIA (US National Telecommunications and Information Agency) to support its evaluation of the ICG (IANA Stewardship Transition Coordination Group)'s proposal."[490] In accordance with that prior agreement, the Board resolved to transmit "the Report [to] the National Telecommunications & Information Administration of the United States Department of Commerce to accompany the [IANA] Stewardship Transition Proposal developed by the [IANA] Stewardship Transition Coordination Group."[491] ICANN thus represented to the U.S. government that it would implement the accountability policy as set forth in the report. ICANN must be bound by its representations to the U.S. government.

219. ***Fourth***, Article 27 ("TRANSITION ARTICLE") of the Bylaws specifically refers to the CCWG Report, stating that the CCWG Report provided not only for the "Work Stream 1" enhancements discussed above, but also for additional matters to "be reviewed and developed following the adoption date of these Bylaws ('Work Stream 2 Matters'), ***in each case, to the extent set forth in the CCWG-Accountability Final Report***."[492] The Bylaws' incorporation of the CCWG Report further demonstrates that the Report is authoritative as to how the Report's accountability enhancements are to be interpreted and applied.

220. The Panel would undermine the bedrock principle of bottom-up policy development that underpins ICANN's legitimacy if it were to disregard the principles and guidance provided in the CCWG Report. Rather, the Panel must give the CCWG Report full effect in interpreting the scope of its jurisdiction

in this IRP.

2. The Litigation Waiver Cannot Create an Accountability Gap for ICANN

221. The Litigation Waiver in Module 6 of the AGB, which ICANN required all New gTLD Program applicants to accept, is critical to understanding the scope of an IRP panel's jurisdiction and powers insofar as claims relating to a new gTLD application are concerned. The waiver purports to preclude New gTLD Program applicants from seeking any recourse before the courts for ICANN's wrongful conduct in relation to an application,[493] with the result that ***the IRP is the only external form of accountability that ICANN recognizes for New gTLD Program applicants***. Because ICANN's Bylaws obligate ICANN to be accountable for complying with its Articles and Bylaws,[494] the Bylaws do not permit any accountability gap. Therefore, the Panel must have full jurisdiction to review and decide any matters—whether procedural, substantive, or remedial—that cannot be submitted to the courts.

222. Question 4 from the Panel asks about the Litigation Waiver.[495] The significance of the litigation waiver for this Panel's jurisdiction was confirmed at the hearing. Both Ms. Burr (who was a member of the CCWG and is a member of the ICANN Board) and Mr. McAuley (who headed the IRP-IOT), acknowledged that the IRP provides an alternative to litigation before the courts when ICANN has violated its Bylaws:

> [LITWIN]. … Would it be a fair statement that applicants in the new gTLD Program are not left without any form of redress because of the litigation waiver because the litigation waiver provides that they may initiate an accountability mechanism, including the Independent Review Process?
>
> [BURR]. Right. And the result of the Independent Review Process is if the Independent Review Panel finds that the bylaws have been violated, the Board has to take appropriate action to fix that.[496]
>
> …
>
> [LITWIN]. Would you also agree that, you know, that the applicants have not been left without any form of redress because ICANN has provided for a robust form of review in which these challenges could be addressed, namely the IRP; is that a fair statement?

> [BURR]. Yes.[497]
>
> …
>
> [LITWIN]. … So the IRP is intended to operate as an alternative to civil court jurisdiction, right?
>
> [McAULEY]. When it says it is a mechanism for the resolution of disputes, I think it is getting at -- as an alternative to the legal action, yes. I think we are agreeing.[498]

223. Before U.S. federal courts, ICANN itself has expressed its the official position that the Litigation Waiver leaves no accountability gap and "is not exculpatory at all" because the IRP is available to applicants as an alternative.[499] Signed by ICANN's counsel in this IRP, Mr. LeVee and Mr. Enson, ICANN's Answering Brief in *Ruby Glen v. ICANN* before the U.S. Court of Appeals for the Ninth Circuit (the "Ninth Circuit") sets out ICANN's position concerning the scope of the IRP in the context of the New gTLD Program and the Litigation Waiver. ICANN represented to the Ninth Circuit that ICANN is not exempt from responsibility for its conduct in administering the New gTLD Program because the IRP provides applicants with "valuable redress;" applicants may request an IRP Panel to evaluate challenges to ICANN's actions under its Articles and Bylaws *in addition to* claims under the AGB.[500]

224. In this regard, ICANN directly represented to the Ninth Circuit that the Litigation Waiver would neither affect the rights of New gTLD Program applicants nor be "exculpatory at all," with the implication that the IRP could do anything that the courts could. Its key representations include the following:

> A key flaw in Ruby Glen's appeal is that ***the Covenant Not to Sue***, which Ruby Glen repeatedly describes as the 'exculpatory clause' ***is not exculpatory at all***. ... Instead, the Covenant Not to Sue is a promise by applicants to resolve disputes through ICANN's accountability mechanisms, including the Independent Review Process, rather than through lawsuits.[501]
>
> …
>
> ***While the Covenant Not to Sue prohibits lawsuits, it explicitly allows applicants to use ICANN's accountability mechanisms*** for any alleged

> violations by ICANN of its Articles, Bylaws, or the Guidebook in connection with the New gTLD Program.[502]

225. Directly relevant to the contested question of the Panel's remedial jurisdiction in this IRP, ICANN represented to the Ninth Circuit that an IRP panel could provide relief to a claimant, up to and including directing the ICANN Board to act, overturning an ICANN Board decision, and granting the rights to a gTLD:

> The Independent Review Process is mandatory, in that ICANN must participate, and the Independent Review Process calls for determinations that "are final and have precedential value," ***which the ICANN Board must act upon***.[503]
>
> …
>
> In fact, another Donuts subsidiary has ***utilized the Independent Review Process in the past to overturn an ICANN Board decision and obtain the rights to operate another new gTLD***, .CHARITY. Far from an exemption, the Covenant Not to Sue provides Ruby Glen ***with valuable redress***.[504]

226. Also of direct application to this IRP, ICANN represented to the Ninth Circuit that the IRP would not only be able to resolve challenges under ICANN's Articles and Bylaws but also independent claims regarding violations of the New gTLD Program Rules:

> The Independent Review Process gives Ruby Glen the ability, not available in court proceedings, to have independent third parties evaluate its challenges to ICANN's actions under ICANN's Articles and Bylaws, ***in addition to claims under the Guidebook***.[505]

227. Based on ICANN's representations, the Ninth Circuit accepted ICANN's position that the litigation waiver "is not exculpatory at all" and leaves no accountability gap. As the Ninth Circuit held, "Ruby Glen is not without recourse—it can challenge ICANN's actions through the Independent Review Process[.] … Thus, the covenant not to sue does not exempt ICANN from liability, ***but instead is akin to an alternative dispute resolution agreement*** falling outside the scope of section 1668."[506]

228. ICANN's position in *Ruby Glen* directly contradicts ICANN's position in this IRP. ICANN's counsel has asserted that the IRP Panel "cannot order mandatory or non-interim affirmative relief."[507]

ICANN has further asserted the Panel must be "explicitly concerned only with past actions or inactions" and therefore "has authority to issue a binding declaration only whether past actions or inactions violated ICANN's Articles or Bylaws. It does not have authority to 'declare' that ICANN must take some specific action in the future."[508] Yet, as discussed above, ICANN made explicit representations to the Ninth Circuit that the IRP can essentially replace litigation before a court with an alternative dispute resolution process that results in final determinations "which the ICANN Board must act upon."[509] ICANN told the Ninth Circuit that an IRP claimant can seek (and the IRP Panel can grant) relief "to overturn an ICANN Board decision," "obtain the rights to operate another new gTLD," and receive other "valuable redress."[510] Having successfully obtained the dismissal of a court action by representing to the court that an IRP Panel has the jurisdiction to provide such remedies, ICANN cannot now appear before this IRP Panel and assert that the Panel does *not* have such jurisdiction.

B. The Panel is Empowered to Grant Afilias' Requested Remedies

229. Afilias has submitted several requests for relief based on its claims, which the Panel should grant given the validity of those claims and ICANN's inability to present any sort of serious and sustainable defense to them.[511]

1. The Panel's Remedial Authority

230. As Afilias has set forth in its pre-hearing submissions,[512] the Panel is fully empowered under the Bylaws to resolve disputes by ordering remedies that ensure ICANN complies with its Articles and Bylaws. Specifically, pursuant to Section 4.3(a) of the ICANN Bylaws, the Purposes of the IRP are, *inter alia*, to "***[e]nsure*** that ICANN … otherwise ***complies*** with its Articles of Incorporation and Bylaws"[513] and to "[p]rovide a mechanism for the ***resolution*** of Disputes."[514] Furthermore, Section 4.3(x) of the ICANN Bylaws provides that the IRP is a "binding arbitration"[515] with the consequence that the Panel has broad inherent discretion to fashion relief.[516] Afilias has explained its position at length in its Response to the *Amici* Briefs;[517] neither ICANN nor the *Amici* have significantly engaged with those arguments.

231. The CCWG Report, discussed above, provides binding confirmation that the Bylaws grant the Panel full authority to order remedies for ICANN's violations.[518] According to the CCWG Report, "[t]he 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*."[519] And, further, the CCWG Report affirms that claimants have a right to "*seek redress*" against ICANN through an IRP.[520] Indeed, as ICANN argued before the Ninth Circuit, the IRP provides applicants "*with valuable redress*."[521] The CCWG Report, as ICANN acknowledged in its Ninth Circuit briefing, thus established the policy that IRP panels have the authority to require ICANN to remedy its violations of the Articles and Bylaws.[522]

232. The New gTLD Program Rules further confirm that the Bylaws provide the Panel with full remedial authority by virtue of the Litigation Waiver in Module 6 of the AGB. If the Bylaws did not provide the Panel with that authority, the Litigation Waiver would create a yawning accountability gap for ICANN and effectively prevent any neutral decision maker from effectively evaluating ICANN's conduct and granting redress in regards to the New gTLD Program. The key element of effective dispute resolution and accountability is the authority of a neutral decision maker to direct the parties as to how their dispute has been resolved by that decision maker. An IRP without mandatory remedies—contrary to the ICANN Bylaws—would not ensure that ICANN complies with its Articles and Bylaws,[523] would not secure the just resolution of disputes,[524] would not lead to resolutions consistent with international arbitration norms,[525] and would not provide a dispute resolution mechanism that is an alternative to legal action in the civil courts.[526] The IRP would also not hold ICANN accountable for complying with its Articles and Bylaws were the Panel deprived of remedial authority.[527]

233. Leaving aside (i) the Board's failure to act on Afilias' complaints (*i.e.*, its abdication of its responsibilities), (ii) the evident hostility that ICANN has displayed towards Afilias in these proceedings,

and (iii) its biased and capricious treatment of Afilias that led to these proceedings, the hearing made plain that, unless the Panel directs ICANN to remedy its violations, there is a serious risk that the present dispute will go unresolved. Mr. Disspain, a member of the ICANN Board, was unwilling to commit that the ICANN Board would comply with the Panel's decision absent a binding remedy. Instead, he announced that the ICANN Board would only "consider what this Panel has to say" and "take very seriously any recommendations made by this Panel."[528] Mr. Disspain's representations should give the Panel considerable pause, given ICANN's hostility towards Afilias throughout these proceedings, its prior treatment of Afilias' complaints and indeed the willingness of ICANN, at both the Staff and the Board levels, to proceed with the delegation of .WEB to NDC without ever giving Afilias' complaints a fair hearing. The only way to ensure that ICANN is held accountable and the dispute is resolved is to order binding remedies against ICANN.

234. Question 8 from the Panel relates to Section 4.3(o) of the Bylaws.[529] ICANN has repeatedly argued that, "as listed in 4.3(o) regarding the Panel's remedial authorities, that's exclusive."[530] We have previously shown, with reference to the text, context, and purpose of the Bylaws, that this is absolutely not the case and briefly recap our rebuttal points below:[531]

- ***First***, Section 4.3(o) is not a list of remedial authorities. It does not state that it is a list of *remedial* authorities nor does it include only remedial powers; for instance, the list in Section 4.3(o) of the Bylaws includes such items as the powers to summarily dismiss disputes, to request additional written submissions, and to consolidate disputes.[532]

- ***Second***, Section 4.3(o) does not state that it is setting out an *exclusive* list of remedial authorities. Section 4.3(o) states that "each IRP Panel shall have authority to" perform certain tasks, not that each IRP panel shall ***only*** have authority to perform those tasks. Had the drafters intended to limit an IRP panel's remedial authority to only those items listed in Section 4.3(o), they could easily have done so. But there is no such limitation.

- ***Third***, Section 4.3(o) is explicit that the listed authorities are "[s]ubject to the requirements of this Section 4.3." This provision grants the Panel any remedial authorities required by Section 4.3 of the Bylaws, including all the remedial authorities required by Section 4.3(a) and Section 4.3(x) of the Bylaws. Ultimately,

the clause must be read in light of the stated and enumerated purposes of the IRP.

235. Hence, despite ICANN's attempts to present a contrary opinion, this Panel has full remedial authority to grant Afilias' requested relief in order to ensure that ICANN complies with its Bylaws and resolve this dispute.

2. Afilias' Requested Remedies

236. Afilias respectfully requests that the Panel issue a decision that is legally binding on the parties and that fully resolves the dispute. In order to ensure this result,[533] Afilias requests that the Panel specify that, in accordance with ICANN's Bylaws, its decision on the submitted issues is an *arbitral award* that is a final and binding on the parties and that legally constitutes an arbitral award pursuant to the English Arbitration Act and for purposes of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Afilias also requests that the Panel specify that, pursuant to the English Arbitration Act, the IRP is legally an arbitration and the Panel is an arbitral tribunal legally empowered by the parties to adjudicate the dispute in a final and binding manner.

237. In light of the broad scope of its remedial authority, Afilias respectfully requests that the Panel issue the declaratory and injunctive relief set out below in Section V(B)(2)(i); make findings of fact in accordance with the principles set out in Section V(B)(2)(ii); determine the price to be paid by Afilias for .WEB as discussed in Section V(B)(2)(iii); award Afilias its costs as set out in our separate costs submission; and grant such other relief as the Panel considers appropriate. To ensure that the relief contained in the decision is legally binding on the parties,[534] Afilias requests that all categories of relief—including the findings of fact—be enumerated in the operative part of the award.

(i) Declaratory and Injunctive Relief

238. As an initial matter, ICANN agrees that "declarations finding that ICANN violated the Articles or Bylaws would be within the Panel's authority."[535] Thus the Panel can indisputably declare that ICANN has breached:

- Sections 1.2(a)(v), 1.2(c) of the Bylaws by failing to reject NDC's application, and/or disqualify its bids, and/or deem it ineligible to execute a registry agreement because NDC violated the following sections of the New gTLD Program Rules: Sections 1 and 10 of Module 6, Section 1.2.7 of Module 1, and Sections 4.3.1(5) and 4.3.1(7) of Module 4 of the AGB, as well as Rules 12, 13, 32 of the Auction Rules;

- Sections 1.2(a)(v) and 2.3 of the Bylaws by the arbitrary, capricious, disparate, and discriminatory manner in which it treated Afilias;

- Article III of ICANN's Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws by failing to act transparently to the maximum extent feasible;

- Article III of ICANN's Articles of Incorporation and Sections 1.2(a) and 1.2(b)(iv) of the Bylaws by failing to act in accordance with its competition mandate;

- Sections 1.2(a), 1.1(a)(i), 1.2(a)(iv), 3.1, 3.6(a)(i)-(ii), 4,3(n)(i), and 4.3(n)(ii) of the Bylaws by adopting Rule 7 of the Interim Supplemental Procedures for IRP;

- Article III of ICANN's Articles of Incorporation and Sections 1.2, 1.2(a), 1.2(c) of the Bylaws by failing to conduct itself in accordance with relevant principles of international law, specifically the obligation of good faith.

239. In light of the foregoing declarations, the Panel should also grant Afilias' requested injunctive remedies as well as its request for costs (as set forth in Afilias' separate submission on costs filed herewith). Such remedies are entirely within the Panel's jurisdiction and are necessary to "[e]nsure that ICANN … complies with its Articles of Incorporation and Bylaws" and to achieve a "binding, final resolution[]" of this dispute that is "consistent with international arbitration norms" and that is "enforceable in any court with proper jurisdiction."[536]

240. Specifically, as injunctive relief, in addition to granting such other relief as the Panel considers appropriate in the circumstances of this case, the Panel should order and recommend that ICANN:

- Reject NDC's application for the .WEB gTLD;

- Disqualify NDC's bids at the ICANN auction for the .WEB gTLD;

- Deem NDC ineligible to execute a registry agreement for the .WEB gTLD;

- Offer the registry rights to the .WEB gTLD to Afilias, as the next highest bidder in the

ICANN auction;

- Set the bid price to be paid by Afilias for the .WEB gTLD at USD 71.9 million;
- Pay Afilias' fees and costs as set out in Afilias' accompanying costs submission.

(ii) Findings of Fact

241. Afilias also requests that the Panel make such findings of fact as it considers appropriate based on Afilias' presentation of the facts in Section II, and in Afilias' prior submissions. To ensure that the findings of fact are legally binding on ICANN, we ask that the Panel include these in the operative part of its award.

242. In our pre-hearing submissions, we demonstrated that the Panel's mandate is to "conduct an objective, de novo examination of the Dispute."[537] Ms. Burr also confirmed during her cross-examination that the *de novo* standard of review requires the Panel to make its "own independent interpretation of the ICANN Articles of Incorporation and Bylaws."[538] The *de novo* standard of review further requires the IRP Panel to make its own factual findings. The Bylaws provide that, pursuant to the *de novo* standard of review, "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."[539] ICANN does not dispute this position, asserting that "[S]ection 4.3(i) [of the Bylaws] and Rule 11 [of the Interim Procedures] *establish a general de novo standard of review and require the Panel to make findings of fact* to determine whether any Covered Action violated the Articles or Bylaws."[540]

(iii) Price to be Paid for .WEB by Afilias

243. With respect to the price that Afilias should pay for the .WEB gTLD, we submit that this should be set at USD 71.9 million (with a set off for the costs awarded) in accordance with the New gTLD Program Rules. This is so for the reasons set out below.

244. ICANN Staff should have declared that NDC's bids during the ICANN auction are invalid because they violated the New gTLD Program Rules.[541] A determination that NDC submitted invalid bids

during the ICANN auction would change the result of the auction because, according to Rule 42 of the Auction Rules, an invalid bid placed during the first round of the auction is equal to an Exit Bid of USD 1.[542] NDC therefore would be deemed to have exited the ICANN auction after the first round, and NDC's subsequent bids should be treated as if they never occurred. Consequentially, Afilias should only be required to pay USD 71.9 million for the .WEB gTLD. Rule 47 of the Auction Rules states that the Winning Price of an Auction "shall not be less than the sum of the Bids for the non-winning set of Applications" and that the Winning Price cannot exceed the highest bid submitted at the auction.[543] Round 16 of the ICANN auction was the last round that involved applicants other than NDC and Afilias. The Start-of-Round bid for Round 16 (and thus the End-of-Round Price for Round 15) was USD 57.5 million, and the two other participants in Round 16 submitted bids for at minimum that amount.[544] The sum of these two bids (USD 115 million) exceeds USD 71.9 million. However, Afilias' Continuation Bid of USD 71.9 million is the highest bid submitted at the ICANN auction (based on the assumption that NDC exited the ICANN auction in Round 1). The price for the .WEB gTLD could therefore not be set at an amount in excess of USD 71.9 million.

245. Alternatively, Afilias should at maximum only be required to pay USD 135 million for the .WEB gTLD (with a set off for the costs that it is awarded). The ICANN Board or ICANN Staff should have determined that NDC is ineligible to enter into a Registry Agreement—either because NDC submitted invalid bids during the ICANN auction or because the DAA violates the New gTLD Program Rules. Both the Auction Rules and the AGB provide that Afilias should pay USD 135 million for the .WEB gTLD if NDC is deemed ineligible to sign a Registry Agreement. According to Rule 62 of the Auction Rules,

> If, at any time following the conclusion of an Auction, the Winner is determined by ICANN to be ineligible to sign a Registry Agreement for the Contention String that was the subject of the Auction, the remaining Bidders (with applications that have not been withdrawn from the New gTLD Program) will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective Exit Bid. In this way, the next Bidder would be declared the Winner subject to payment of its Exit Bid.[545]

The last bid that Afilias submitted during the ICANN auction was USD 135 million. Hence, subject to Rule 62 of the Auction Rules, NDC's ineligibility to sign the .WEB Registry Agreement means Afilias would only be required to pay USD 135 million for the .WEB gTLD—which was Afilias' Exit Bid.

246. The AGB further supports this conclusion. Section 4.3.2 of the AGB identifies two ways for a winning bidder of an ICANN-administered auction to be declared in default: (1) failure to pay the winning bid price within the applicable time period, and (2) failure to execute a Registry Agreement with ICANN within 90 days of the auction.[546] Since NDC cannot execute a Registry Agreement with ICANN, NDC will be "declared in default." Section 4.3.3 of the AGB ("Post-Default Procedures") sets forth the same consequences as Rule 62 of the Auction Rules: if the winning bidder is declared in default after an auction, that "the next bidder would be declared the winner subject to payment of its last bid price."[547] Pursuant to Section 4.3.3, the second place bidder is declared the winner subject to the "payment of its last bid price" and not the price of the next highest bid. Since Afilias' last bid price was USD 135 million, Afilias would be required to pay USD 135 million for the .WEB gTLD pursuant to both Rule 62 of the Auction Rules and Section 4.3.3 of the AGB.

VI. CONCLUSION

247. This Panel has an extraordinary opportunity to give effect to the ICANN community's imperative that ICANN to be subject to a robust accountability mechanism that results in meaningful outcomes reflecting ICANN's Articles and Bylaws. For too long now, ICANN Board and Staff have sought to chart their own course for the organization unmoored from the policy directives provided by the ICANN community through ICANN's bottom-up policymaking processes. And for too long now, the Board and Staff have felt that they have free reign to stonewall parties like Afilias that have been materially adversely affected by ICANN's impunity and capriciousness. ICANN is an organization with responsibility for the administration of a vital global resource. As we stated in our opening remarks at the hearing, "[w]ith great responsibility comes [the need for] enhanced accountability."[548] The Panel must hold ICANN accountable

for failing to faithfully adhere to its Articles and Bylaws by not rejecting NDC's application, disqualifying its bids, and deeming it ineligible to enter in to a registry agreement for .WEB.

Respectfully submitted,

Arif H. Ali
Alexandre de Gramont
David Attanasio
Michael Losco
Rose Marie Wong
Tamar Sarjveladze
DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300

Ethan E. Litwin
CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
Tel. 212-350-2737

Counsel for Claimant

END NOTES

[1] We appreciate that the Tribunal has before it a voluminous record, with multiple submissions from the Parties and Amici, as well as a lengthy hearing transcript. Accordingly, this Post-Hearing Brief focuses on the hearing evidence, while referring to (rather than repeating) our prior submissions, in order to put the hearing evidence in proper context. In particular, we explain how the hearing evidence confirms and further advances our prior factual and legal submissions, and undermines ICANN's "defenses." Our pre-hearing submissions are incorporated herein by reference.

[2] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("Bylaws"), [Ex. C-1], Sec. 1.2(a)(v).

[3] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 746:1-6 (Willett Cross-Examination).

[4] Letter from Jeffrey LeVee (Counsel for ICANN) to Arif Ali (Counsel for Afilias) (28 Apr. 2018), [Ex. C-80], p. 1; Email from ICANN to Arif Ali (Counsel for Afilias) (20 June 2018), [Ex. C-53]; ICANN's Opposition to Afilias' Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 7; ICANN's Reply to Afilias' Response to the Requests of VeriSign and NDC to Participate as *Amicus Curiae* (5 Feb. 2019), ¶ 1; ICANN's Supplemental Brief Regarding Phase I Issues (27 Sep. 2019), ¶ 3.

[5] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 746:1-6 (Willett Cross-Examination).

[6] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 688:18-20, 694:19 – 695:2 (Willett Cross-Examination).

[7] Email from ICANN Global Support to John Kane (Afilias) (7 June 2018), [Ex. C-62], p. 1.

[8] *See* New Generic Top-Level Domains – Update On Application Status And Contention Sets, [Ex. R-33]; *see* Merits Hearing, Tr. Day 5 (7 Aug. 2020), 946:11-14 (Disspain Cross-Examination) ("Q: And Afilias' status had changed at the same time from 'on hold' to 'will not proceed'; is that also correct? A: If you say so. I think that's a natural corollary from the move that you previously laid out, so yes. Q: So just -- it would be ICANN's general practice that if one member of a contention set's status had changed to 'in contracting,' the other members of the contention set would move to 'will not proceed,' correct? A. That sounds right.").

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

[10] Bylaws, [Ex. C-1], Sec. 2.3.

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

[12] In addition, to the extent that ICANN had any discretion in determining whether to reject NDC's application in light of its violations to notify ICANN of changes in circumstances that rendered the application false and misleading in material respects, ICANN was required to consider the extent to which NDC's violations subverted ICANN's commitment to conduct the New gTLD Program transparently and in accordance with the other principles of ICANN's Articles and Bylaws.

[13] *See* Afilias' Costs Submission (12 Oct. 2020), Sec. II.

[14] Afilias' Amended IRP Request, Sec. 2.1; Afilias' Reply Memorial, Sec. IV(A); Afilias' Response to the *Amici* Briefs, Sec. IV.

[15] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], pp. 7, 9 (emphasis added); Merits Hearing, Tr. Day 3 (5 Aug. 2020), 548:4-7 (Willett Cross-Examination) ("Q: But you understood that the new gTLD Program and the [ABG] were designed to promote the principles in the bylaws, correct? A: Correct."). *See also* Merits Hearing, Tr. Day 2 (4 Aug. 2020), 307:18-25 (Burr Cross-Examination) ("Q: Would you also agree that ICANN must implement the various procedures and rules and policies set forth in the guidebook consistently, neutrally, objectively and fairly? A: Yes, I believe ICANN is obligated to make decisions by applying documented policies consistently, neutrally, objectively and fairly in accordance with the bylaws).

[16] ICANN, gTLD Applicant Guidebook (4 June 2012) ("AGB"), [Ex. C-3], Module 1, Sec. 1.1.1 (at pp. 1-2, 1-3).

[17] AGB, [Ex. C-3], Module 1, Sec. 1.1.1 (at p. 1-3).

[18] AGB, [Ex. C-3], Module 1, Secs. 1.1.2.2 and 1.1.2.3 (at p. 1-5).

[19] ICANN, New Generic Top-Level Domains: Frequently Asked Questions, [Ex. C-181], Question 1.6 ("How and when can I see which gTLD strings are being applied for and who is behind the application?" "[A:] Approximately 2 weeks after the

application submission period closes, ICANN will post the public portions of all applications received, including applied-for strings, applicant names, application type, mission/purpose of proposed gTLD, and other public application data.").

[20] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 580:3-5 (Willett Cross-Examination) (emphasis added). *See id*., 580:24 – 581:2 ("[WILLETT:] … applicants could see all of the other applications, so it was very easy for them to see that there were seven applications for .WEB.").

[21] AGB, [Ex. C-3], Module 1, pp. 1-5 - 1-7; *id.*, pp. 1-38, 1-40.

[22] AGB, [Ex. C-3], Module 1, Sec. 1.1.2.3 (at p. 1-6).

[23] *See, e.g.*, GAC Early Warning – Submittal Blog-AU-47770 (.BLOG) (20 Nov. 2012), [Ex. C-183].

[24] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 313:24 – 314:7 (Burr Cross-Examination) ("Q: And the community, including the GAC, would have had an opportunity to comment on each of those .WEB applications during the evaluation period, correct? A: Yes. Individual members of the GAC -- so this is not GAC advice, this is an individual member of the GAC expressing a concern -- could have filed an early warning. And the GAC also had the ability to provide consensus advice."). *See id*., 384:2-13 ("Q: So during the evaluation process, Ms. Burr, members of the global Internet community would be able to see what the applicant believed the applied-for gTLD would contribute competitively to the DNS, right? A: Yes, if that provision was part of the public application. Q: And that's the entire point of ICANN's obligation to act transparently, right, to post this stuff for public view? A: It is certainly a point of ICANN's transparency commitment.").

[25] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 384:2-13 (Burr Cross-Examination).

[26] Afilias' Reply Memorial, Sec. IV; Afilias' Response to the *Amici* Briefs, Sec. VIII.

[27] AGB, [Ex. C-3], Module 1, Sec. 1.1.2.3 (at p. 1-6).

[28] Change Request Criteria, [Ex. C-56], pp. 1-2. The issue in this IRP is not whether NDC would hypothetically have passed a change request had it submitted one. Rather, the relevance of the change request criteria and guidelines lies in the guidance they contain as to the type of information ICANN expected applicants to disclose and why such disclosure was required in compliance with ICANN's transparency obligations. They should be considered in connection with assessing an applicant's duty to "to notify ICANN in writing of *any change in circumstances* that would render *any information provided in the application false or misleading*."). AGB, [Ex. C-3], Module 6 (at p. 6-2). As discussed in Section III(A)(3) below, ICANN disregarded NDC's failure to disclose information that rendered its application false and misleading.

[29] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 313:19-22 (Burr Cross-Examination) ("Q: Well, you couldn't get into a contention set unless you had been evaluated by ICANN and passed that evaluation, right? A: Right.").

[30] AGB, [Ex. C-3], Module 4, Sec. 4.1.3 (at p. 4-6).

[31] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 574:5 – 575:5 (Willett Cross-Examination) (emphasis added).

[32] AGB, [Ex. C-3], Module 4, Sec. 4.1.3 (at p. 4-6).

[33] AGB, [Ex. C-3], Module 4, Sec. 4.1.3 (at p. 4-6).

[34] AGB, [Ex. C-3], Module 4, Sec. 4.1.3 (at p. 4-6).

[35] Afilias' Reply Memorial, ¶ 48. In its Question No. 5, the Panel asks: "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." The use of private auctions to resolve gTLD contention sets does not violate antitrust or competition laws. Verisign's concern about the legality of private auctions is a complete fiction that is easily disassembled simply by looking at the DAA. The DAA, which was undoubtedly carefully vetted by Verisign's excellent legal department and outside counsel, provides that

Redacted - Third Party Designated Confidential Information

DAA, [Ex. C-69], Exhibit A, ¶ 1(i).

Redacted - Third Party Designated Confidential Information

If Verisign truly believed that private auctions were illegal, as Messrs. Livesay and Rasco suggest, then the DAA contained provisions that would have essentially allowed Verisign to compel NDC to participate in a criminal bid-rigging scheme and, if it lost, for the division of criminal profits among them. This is patently absurd. Further, ICANN has never raised any concerns regarding the use of private auctions for contention set resolution. Verisign's made-for-IRP concerns regarding the private auction mechanism for contention set resolution is perhaps best explained by the fact that the winning bid in a private auction is divided equally amongst the losing contention set members. It is hardly likely that Verisign would have wanted funds from its coffers to

be paid to its competitors; and quite likely that it saw considerable benefits to be gained from the auction proceedings going to ICANN.

[36] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 566:21-24 (Willett Cross-Examination) (emphasis added) ("So participating in an [ICANN] auction, the way I would express that is participating at [ICANN] auction ***is one of the applicant's rights*** or not participating in an ICANN auction of last resort.").

[37] AGB, [Ex. C-3], Module 6, ¶ 10 (at p. 6-6) (emphasis added).

[38] AGB, [Ex. C-3], Module 6, ¶ 1 (at p. 6-2) (emphasis added).

[39] AGB, [Ex. C-3], Module 4, Sec. 4.3.1 (at p. 4-22) (emphasis added).

[40] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1125:25 – 1126:2 (Livesay Cross-Examination) ("Q: Who gave you this assignment? A: My boss at the time, Tom Indelicarto, and Jim Bidzos, the CEO."). As Mr. Livesay testified, he had previously worked at Verisign during the period between 2009 and 2010. *Id*., 1123:1-5. He returned to Verisign in 2014. *Id*., 1122:22-25. In 2014, Messrs. Bidzos and Indelicarto gave him the assignment to pursue the acquisition of .WEB. *Id*., 1125:17 – 1126:7. Mr. Livesay testified that he reported to Messrs. Bidzos and Indelicarto on a regular basis—"probably weekly or biweekly"—as he pursued the project. *Id*., 1126:23 – 1127:4.

[41] Mr. Livesay testified that he had heard from his colleagues that "***.WEB looked like a great potential true generic***"—much like .COM—and that Verisign's acquisition of the rights to .WEB would therefore advance Verisign's business goals. Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1274:17 – 1275:9 (Livesay Cross-Examination) (emphasis added). Mr. Livesay's testimony confirms Afilias' position (as supported *inter alia* by its experts, Dr. Sadowsky and Prof. Zittrain) on the competitive significance of .WEB. In the words of Dr. Sadowksy, the .WEB gTLD is "the only new domain that is likely to compete strongly with .com." Sadowsky Report, ¶ 39; *see* Zittrain Report, p. 24 (".WEB IS THE BEST AND CLOSEST POTENTIAL COMPETITOR FOR VERISIGN"). *See also* Peter Lamantia, ".WEB Acquired for $135 Million. Too much? How does it compare?," *Authentic Web* (*undated*), [Ex. C-29], p. 2 (".WEB is what we call a 'super generic' and arguably the best new TLD alternative to .COM."); Kevin Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), [Ex. C-30], p. 2 (".web has been seen, over the years, as the string that is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide a real challenge to .com.").

[42] Merits Hearing, Tr. Day 7 (11 Aug. 2020), Livesay WS, ¶ 4 ("Verisign had participated in the New gTLD Program by filing applications for new TLDs that were variants of its company name (*i.e.*, '.Verisign') or internationalized versions of Verisign's existing TLDs, but Verisign had not sought to acquire the rights to new gTLD not already associated with Verisign.").

[43] DAA, [Ex. C-69], Sec. 4(c). By the time of the DAA, NDC's application had gone through the publication and public comment period, had passed the ICANN evaluation, and NDC was therefore a Qualified Applicant and a member of the .WEB contention set.

[44] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1136:1-10 (Livesay Cross-Examination) ("A: The goal was for us to become the operator of .WEB. Q: And VeriSign has not signed any other deals to acquire other gTLDs; is that right? A: Not that I am aware of. Not in the time that I was there.").

[45] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1136:1-6 (Livesay Cross-Examination).

[46] This provides a partial response to Panel Question 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." List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 2.

[47] In fact, although Messrs. Livesay and Rasco both testified that they anticipated that the existence (if not the terms) of the DAA would become public if NDC prevailed in the contention set, there is no basis to believe that would necessarily have happened.

[48] Livesay WS, ¶ 5; Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1138:13 – 1139:4 (Livesay Cross-Examination) ("Q: Is it fair to say, as you do in terms of the last sentence of Paragraph 5, that it was important to study these rules very carefully because VeriSign's transactions were often subject to industry scrutiny? A: I think that's fair to say, yeah."), 1166:7-18 ("Q: … And in response to the Chairman's question, you said that you had studied the rules to ensure that there were no changes that needed to be reported to ICANN. My question to you, sir, is the reason that you did that is because you

Redacted - Third Party Designated Confidential Information A: That's true."). Despite claiming that he had studied the New gTLD Program rules "very closely," Mr. Livesay stated that he was not aware of the Change Request criteria. Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1143:12 – 1144:2 (Livesay Cross-Examination) ("Q: … [W]ould you confirm that Section 1.2.7 provides that … where information in the application that had been previously submitted by the applicant becomes untrue or inaccurate, that applicant must promptly notify ICANN via submission of the appropriate forms? A: Correct. If something's untrue or inaccurate, the applicant needs to do that. Q: Now, those forms were analyzed pursuant to ICANN's change request criteria, correct? A: I don't know what form you're talking about. Q: You did not familiarize yourself with the ICANN application portal? A: We weren't making any changes to an application requiring submission of a form."); *see id.*, 1157:16 – 1159:4. This simply defies credulity.

[49] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1166:11-18 Redacted - Third Party Designated Confidential Information

[50] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1279:12 – 1280:5 (Livesay Cross-Examination).

[51] After all, an order that finds that ICANN should undo a signed contract with a third party would likely create significant legal complexities for ICANN given that ICANN cannot permissibly terminate a Registry Agreement for an applicant's prior New gTLD Program Rules violations. *See* Registry Agreement, [Ex. C-26], Sec. 4.3 (reflecting that there is no specific provision in ICANN's registry agreement allowing for termination based on the applicant's prior violation of the New gTLD Program Rules). *See also* Section III(C) below.

[52] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 816:22 – 819:6, 819:14-24 (Rasco Cross-Examination).

[53] As noted elsewhere, the only reason that anyone outside of ICANN knows the terms of the DAA today is because of this IRP—and even here, its disclosure has been limited to counsel.

[54] Merits Hearing, Tr. Day 3 (5 Aug. 2020), Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1215:13 – 1216:13 (Livesay Cross-Examination) ("Q: … In a financing arrangement, generally the entity that provides the financing defines the principal amount of that financing. A: … I did not say this is a financing. I said elements analogous to financing…. I did not mean to suggest it was a financing with a fixed principal or interest rate or this or that. … It is analogous to that from the sense of providing protections for the funds we were providing."); Merits Hearing, Tr. Day 5 (7 Aug. 2020), 823:13 – 824:4 (Rasco Cross-Examination) ("the DAA, in essence, was a funding arrangement, yes").

[55] Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (26 July 2016), [Ex. C-97].

[56] Afilias' Amended IRP Request, ¶ 28; Merits Hearing, Tr. Day 1 (3 Aug. 2020), 201:16-25 (Verisign Opening Presentation) Redacted - Third Party Designated Confidential Information As Mr. Rasco explained, the reason that NDC entered the DAA was that NDC recognized that it could not prevail in the .WEB contention set and therefore sought other ways to "monetize" its application. Merits Hearing, Tr. Day 5 (7 Aug. 2020), 802:8-21 (Rasco Cross-Examination) ("Q: When you applied for .WEB and the other strings in 2012, were you hoping to obtain the Registry Agreement and operate the registries for all of those gTLDs? A: When we submitted our applications, yes, we thought we had a legitimate chance of winning, probably not all of them, but we thought we could win. Q: And did you envision in 2012 that there would be private auctions and other settlement of contention sets to … 'monetize,' … the applications? A: Well, we speculated, but there was no way to be sure at that time.").

[57] Email communications between Jonathon Nevett (Donuts Inc.) and Jose Ignacio Rasco (NDC) (6 & 7 June 2016), [Ex. C-35], p. 1 (emphasis added).

[58] *See* Email Exchange between Jon Nevett and ICANN (23 June 2016), [Willett WS, Ex. A].

[59] Email Exchange between Jon Nevett and ICANN (23 June 2016), [Willett WS, Ex. A], [PDF] p. 2.

[60] Email Exchange between ICANN and Jose Ignacio Rasco (NDC) (27 June 2016), [Willett WS, Ex. B], [PDF] p. 2.

[61] Email Exchange between ICANN and Jose Ignacio Rasco (NDC) (27 June 2016), [Willett WS, Ex. B], [PDF] p. 2.

[62] *See* Section III(A)(i) below.

[63] Email Exchange between ICANN and Jose Ignacio Rasco (NDC) (27 June 2016), [Willett WS, Ex. B], [PDF] p. 2.

[64] Willett WS, ¶ 23; Merits Hearing, Tr. Day 4 (6 Aug. 2020), 621:8-14 (Willett Cross-Examination) ("Q: … And, again, just so I'm clear, when you told Mr. Nevett that the team had already investigated and found no evidence of a management change, you're referring to the exchange of emails that we just looked at between Mr. Erwin and Mr. Rasco; is that correct? A: That's correct.").

[65] Emails between C. LaHatte (ICANN) and J. Rasco (NDC) (6 & 7 July 2016), [Rasco Decl., Ex. N], [PDF] p. 2.

[66] ICANN, New Generic Top-Level Domains: Frequently Asked Questions, [Ex. C-181], [PDF] p. 1 (emphasis added).

[67] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 656:16-17 (Willett Cross-Examination). She testified at the hearing that she was joined by two colleagues for this call to Mr. Rasco, one of whom took notes. *Id.*, 625:21 – 626:22. These notes were not produced to Afilias, and they do not appear on ICANN's privilege log, even though they were apparently transmitted by Ms. Willett or her colleague to ICANN Legal after the call.

[68] Email communications between Christine Willett (ICANN) to Jose Ignacio Rasco (NDC) (8-9 July 2016), Willett WS, Ex. F], [PDF] p. 2. At the hearing, Ms. Willett testified that she did not recall "all of the specifics of that phone call with Mr. Rasco" (Merits Hearing, Tr. Day 4 (6 Aug. 2020), 656:16-17), but there is no evidence that Ms. Willett ever responded to Mr. Rasco's assertion or otherwise took issue with his "understanding" that, based on their discussion, ICANN considered the matter to be resolved.

[69] Email communications from C. LaHatte (ICANN Ombudsman) to C. Willett (ICANN) (9-10 July 2016), [Willett Decl. (17 Dec. 2018), Ex. D], [PDF] p. 3. In her email to the Ombudsman, Ms. Willett stated "Mr. Rasco indicated that he had provided you with similar information, but I wanted to share the details of our conversation in case they can provide you with a more complete picture." *Id.* Neither Ms. Willett nor ICANN have provided an explanation as to why Ms. Willett felt (unsolicited) that the Ombudsman, who was conducting an independent investigation at the request of a contention set member, needed to be provided "with a more complete picture," when she was already aware that Mr. Rasco had already provided the Ombudsman with "similar information."

[70] Email communications from C. LaHatte (ICANN Ombudsman) to C. Willett (ICANN) (9-10 July 2016), [Willett Decl. (17 Dec. 2018), Ex. D], [PDF] p. 3 (emphasis added).

[71] AGB, [Ex. C-3], Module 6, ¶ 1 (at p. 6-2) (emphasis added).

[72] Letter from Christine Willett (ICANN) to the .WEB/.WEBS Contention Set (13 July 2016), [Ex. VRSN-10], p. 3. It should be noted that on the preceding day, 12 July 2016, the Ombudsman had emailed Ms. Willett to state that he had not seen "any evidence which would satisfy me that there has been a material change to the application[,]" so that his "tentative recommendation is that there is nothing which would justify a postponement of the auction…." Email from C. LaHatte (ICANN) to C. Willett (ICANN) (12 July 2016), [Willett Decl. (17 Dec. 2018), Ex. G], [PDF] p. 2. Nonetheless, the Ombudsman asked whether there was "any particular reason why a postponement could not be made anyway," suggesting that it might be prudent to do so under the circumstances. *Id.* In her Witness Statement, Ms. Willett characterized the Ombudsman's "tentative conclusion" as a "determination" that there was no reason to postpone the ICANN auction, and on that basis Ms. Willett decided to move forward. Witness Statement of Christine A. Willett (31 May 2019), ¶ 29.

[73] Merits Hearing Tr. Day 4 (6 Aug. 2020), 616:9-17 (Willett Cross-Examination).

[74] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1235:4-6, 1238:19-25 (Livesay Cross-Examination); Merits Hearing, Tr. Day 5 (7 Aug. 2020), 828:14-19, 829:8-25 (Rasco Cross-Examination).

[75] DAA, [Ex. C-69], Exhibit A, Sec. 1; Merits Hearing, Tr. Day 5 (7 Aug. 2020), 830:18 – 831:18 (Rasco Cross-Examination) ("Q. And did Mr. Livesay tell you each bid to make? A: Well, the way the auction works is that I believe you have a continue price. So the auction provider generally provides a threshold for continuing the auction. You have to bid something above that amount in order to continue or that amount to continue, and I believe that's how it worked. And yeah, Mr. Livesay would confirm for me that we were okay to proceed to the next round. Q: To go to the next round you had to bid a certain amount, and Mr. Livesay would say whether it was okay for NDC to make that bid to go to the next round; is that correct? A: He was confirming, yes. Q: Well, was he confirming or instructing? A: Well, he was confirming the amount that we were going to go forward with. Q: And if he said you couldn't go forward to the next round, NDC wasn't permitted under the DAA to do so, right? A: Well, as our funding source, we were kind of limited as to what we were going to bid, just as I'm sure my competitors who were financed by outside sources were limited as to how much they were going to bid."); *id.*, 832:22 – 833:6 ("Q: All right. That wasn't my question. You followed all the instructions with respect to the bids for the domain that VeriSign provided you with, right? A. Yes, we bid each amount as we agreed upon.

Q: Well, as you agreed upon or as VeriSign instructed? A: Again, VeriSign was the one putting the money, and they were going to ultimately decide how much we were going to spend.").

[76] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1238:2 – 1239:8 (Livesay Cross-Examination) ("Q: Now, VeriSign would have instructed NDC to bid 71.9 million in that round, correct? A: That would make sense, yes. Q: Now, I would like you to assume a situation where Mr. Rasco believed that .WEB was not worth more than $65 million. So when you instructed Mr. Rasco to enter a bid of 71.9 million, he refused and said he only wanted to bid 65 million, okay, can we just assume that situation? A: I don't know. I have no way to assume what Mr. Rasco is thinking or why he would think like that. So you're creating a hypothetical, but go ahead. Q: I am asking you to assume that that factual situation took place. A: However improbable, but okay. Redacted - Third Party Designated Confidential Information

And Mr. Rasco, I think you said it is highly implausible, or words to that effect, because, in fact, as we established earlier, NDC would not incur any obligation to VeriSign to repay the $71.9 million if that was the eventual purchase price; is that right? A: That's correct, in that scenario, as we did at the 135, we would end up paying 71.9.").

[77] Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015) ("Auction Rules"), [Ex. C-4], pp. 16, 17. *See also* discussion at Section III(A)(2) below.

[78] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 669:8-11 (Willett Cross-Examination) ("Q: Do you recall that .WEB generated a bid that was more than the bids in all of the 15 prior [ICANN] auctions put together? A: That sounds about right."). *See also* Kieren McCarthy, "Someone (cough, cough VeriSign) just gave ICANN $135m for the rights to .web," *The Register* (28 July 2016), [Ex. C-43], p. 1 ("An unnamed organization just paid $135m for the rights to sell '.web' domain names. This is three times the previous record of $45m for .shop, and seven times the average auction price for top-level domains."); Peter Lamantia, ".WEB Acquired for $135 Million. Too much? How does it compare?," *Authentic Web* (*undated*), [Ex. C-29], p. 1. As Ms. Willett also testified, in addition to the auction proceeds that ICANN collected, ICANN received a fee of $185,000 for each application. Merits Hearing, Tr. Day 4 (6 Aug. 2020), 669:12-16 (Willett Cross-Examination). With 1,930 applications filed in the New gTLD Program, ICANN received approximately $360 million in application fees alone. Merits Hearing, Tr. Day 4 (6 Aug. 2020), *Id.*, 669:20 – 670:1.

[79] ICANN Board member and witness Christopher Disspain testified that ICANN collected approximately USD 240 million in revenue from the ICANN-administered auctions, including the USD 135 million from .WEB. Merits Hearing, Tr. Day 5 (7 Aug. 2020), 960:2-5 (Disspain Cross-Examination). Disspain further disclosed that ICANN moved some of the auction funds to its Reserve Fund, which ICANN has used to pay its operating expenses. *Id.*, 963:6 – 964:5.

[80] VeriSign, Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. C-45], note 11 (at p. 13).

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

[82] Email Exchange between Chris LaHatte (Ombudsman) and NDC (9-10 July 2016), [Willett WS, Ex. D], [PDF] p. 3.

[83] Emails between C. LaHatte (ICANN) and J. Rasco (NDC) (6 & 7 July 2016), [Rasco Decl., Ex. N], [PDF] p. 2.

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

[85] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 672:25 – 673:4 (Willett Cross-Examination).

[86] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 673:9-17 (Willett Cross-Examination).

[87] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 746:1-3 (Willett Cross-Examination) (emphasis added).

[88] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 746:4-6 (Willett Cross-Examination).

[89] Verisign Statement Regarding .Web Auction Results (1 Aug. 2016), [Ex. C-46].

[90] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1256:2-6 (Livesay Cross-Examination) ("I was informed that someone from VeriSign called ICANN. I don't know if it was Mr. Atallah or who it was…. I don't recall [who from VeriSign made the call to ICANN.")

[91] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (8 Aug. 2016), [Ex. C-49]. p. 1. Thus, for example, Mr. Hemphill stated that based on the public statements of Verisign, "it appears likely … that [NDC] and VeriSign entered into an agreement in the form of an option or similar arrangement with respect to the rights and obligations of NDC regarding its .WEB application." *Id*. The DAA is of course far more than an option agreement—having given Verisign complete control over virtually every aspect of NDC's application. *See* Section III(B).

[92] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], pp. 2-3.

[93] NDC .WEB Application, [Ex. C-24], p. 2.

[94] The explanation offered by Mr. Enson to the Panel for why he called Mr. Johnston—*i.e.*, that "ICANN and Verisign had been adverse to one another on a number of occasions," so that there was "nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this"—does not withstand even minimal scrutiny. It is (at best) an incomplete and entirely unsatisfactory response to the question of why ICANN was directing its outside counsel to call outside counsel for Verisign (a non-applicant for .WEB) to obtain the DAA and solicit Verisign's views and other information on the matter. *See* Afilias' Reply Memorial, ¶ 44 (quoting Hearing on Afilias' Application (11 May 2020), Tr. 209:9-15 (Enson).

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

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

[97] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 688:21 – 689:14 (Willett Cross-Examination) ("Q: Are you aware that at some point in August 2016, ICANN's outside counsel, Mr. Eric Enson at Jones Day, called [*sic*] VeriSign's outside counsel, Mr. Ronald Johnston at Arnold & Porter, about this matter? A: I have no knowledge about that. Q: … I am just going to show you the letter and ask you if you've ever seen it. … Have you seen this letter before? A: No, I have not.").

[98] As discussed below, the Ombudsman only notified Afilias that he was declining to investigate the matter via an email to Mr. Hemphill dated 19 September 2016. *See also* Email from Herb Waye (ICANN Ombudsman) to Scott Hemphill (Afilias) (19 Sep. 2016), [Ex. C-101], p. 1.

[99] Emergency Panelist's Decision on Afilias' Request for Production of Documents (12 Dec. 2018), ¶ 4.2.

[100] Emergency Panelist's Decision on Afilias' Request for Production of Documents (12 Dec. 2018), ¶ 1.14.

[101] Afilias' Reply Memorial, Sec. II(A); Afilias' Response to the *Amici* Briefs, Sec. IV; see Section III(A) below (discussion about the hearing evidence that shows the DAA violates the New gTLD Program Rules).

[102] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (9 Sep. 2016), [Ex. C-103].

[103] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (9 Sep. 2016), [Ex. C-103], p. 2.

[104] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (9 Sep. 2016), [Ex. C-103]. Based on Verisign's press release and 10Q filing with the SEC, Afilias had good reason to consider that "both companies entered into an arrangement well in advance of the Auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign." *Id.*, p. 2.

[105] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (9 Sep. 2016), [Ex. C-103], p. 4.

[106] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (9 Sep. 2016), [Ex. C-103], p. 4 (emphasis in original).

[107] Letter and attachment from Christine Willett (ICANN) to John Kane (Afilias) (16 Sep. 2016), [Ex. C-50]. In response to a question from Chairman Bienvenu, Ms. Willett testified that she thought it was a coincidence that her letter of 16 September had the same date by which Mr. Hemphill had requested a response to his 8 September letter, but she was plainly speculating on this point. *See* Merits Hearing, Tr. Day 4 (6 Aug. 2020), 751:1-2, 751:22 – 753:4 (Willett Cross-Examination) ("PRES. BIENVENU]: Can I ask you to turn to your letter of 16 September 2016? … 16 September 2016, that is the deadline that had been -- I will say 'set,' but maybe it would be more appropriate to say 'proposed' -- in Afilias' letter of 9 September. Was that coincidental? [WILLETT]: Yes, I believe it was.").

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

[109] *See, e.g.*, Afilias' Reply Memorial, ¶¶ 112-116.

[110] Afilias can only speculate that Ruby Glen was in the same position as it was when it responded to the questionnaire. We understand that Ruby Glen did not respond to the questionnaire on the basis that it was engaged in litigation with ICANN at the time.

[111] Afilias' Reply Memorial, Sec. II(B); Afilias' Response to the *Amici* Briefs, Sec. II.

[112] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 688:21 – 689:14 (Willett Cross-Examination) ("Q: Are you aware that at some point in August 2016, ICANN's outside counsel, Mr. Eric Enson at Jones Day, called [*sic*] VeriSign's outside counsel, Mr. Ronald Johnston at Arnold & Porter, about this matter? A: I have no knowledge about that. Q: … I am just going to show you the letter and ask you if you've ever seen it. … Have you seen this letter before? A: No, I have not.").

[113] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 698:17 – 699:1, 700:22 – 701:15, (Willett Cross-Examination). Ms. Willett testified that she recalled—but was uncertain—that only ICANN's in-house counsel were involved. *Id.*, 702:14-16. See also id., 702:4-10 ("[de GRAMONT:] The privilege log identifies both inside counsel and outside counsel corresponding with ICANN personnel at this time. So, again, the question is simply did you work with solely in-house counsel, or were outside counsel also interacting with you in the preparation of these questions?").

[114] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 706:4-7 (Willett Cross-Examination). ICANN's counsel also made privilege objections to Afilias' questions to Ms. Willett concerning the questionnaire. *See id.*, 701:17-18, 704:11-12. ICANN's Privilege Log contains multiple entries that appear to refer to the questionnaire. *See* Letter from Claimant to Panel (29 Apr. 2020), Attachment C.

[115] *See, e.g.*, Afilias' Reply Memorial, ¶¶ 112-116.

[116] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 703:24 – 704:12 (Willett Cross-Examination).

[117] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 704:21-22, 706:4-7 (Willett Cross-Examination).

[118] Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), [Ex. C-61] (emphasis added).

[119] Letter from John Kane (Afilias) to Christine Willett (ICANN) (7 Oct. 2016), [Ex. C-51].

[120] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 719:11-22 (Willett Cross-Examination).

[121] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 720:6-8 (Willett Cross-Examination).

[122] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 930:18-931:18 (Disspain Cross-Examination) (confirming that the questionnaire responses were not considered).

[123] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 160:1-7 (ICANN Opening Presentation) ("The purpose of the workshop was to focus on .WEB and top-level domains where there were issues. And the Board received advice from counsel, general counsel and the deputy general counsel in particular, and then as, Mr. Disspain explains, the Board decided that it would take no action."); ICANN's Rejoinder Memorial, ¶ 3. The Panel should note that the only accountability mechanism that was pending in November 2016 was a CEP settlement process between Ruby Glen and ICANN.

[124] *See* Section IV(A)(i) below.

[125] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 938:10 – 939:11 (Disspain Cross-Examination) ("Q: … [W]ould you agree with ICANN's counsel's statement that the Board took a, quote, 'decision to defer,' end quote, during the November 3rd workshop session? A: So what I said to you in response to that question is I think the Board made a choice to follow its longstanding practice of not doing anything when there is an outstanding accountability mechanism. I cannot say that the Board proactively decided, proactively agreed, proactively chose to as to put to do -- as to do it as you put it, which is to not pursue Afilias' complaints. We just decided that it was our standard practice not to do anything because there were outstanding accountability mechanisms. Q: So when you say that the Board did not proactively decide, is it fair to say you received a brief from legal counsel, questions were asked of legal counsel, responses to those questions were given, and then you moved on to the next item on the agenda? A: Yeah, it wasn't before us for a decision -- for a formal decision unless we had chosen to move to a formal decision. What we chose to do was to follow our longstanding practice.").

[126] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 930:20 – 931:18 (Disspain Cross-Examination) ("Q: … You note in your witness statement that you received briefing materials in advance of the November 3rd meeting, correct? A: Correct. Q: And did those briefing materials include a copy of the August 25th, 2015, VeriSign-NDC Domain Acquisition Agreement? A: Not to my recollection. Q: Did the briefing materials contain a copy of the August 23rd, 2016, letter from Mr. Ronald Johnston of Arnold & Porter on behalf of VeriSign to Mr. Eric Enson of Jones Day on behalf of ICANN? A: Again, not to my recollection. Q: You mentioned a few minutes earlier that ICANN had sent questionnaires out in response to Afilias's complaints. Were the responses to those questionnaires that were received from Afilias included in your briefing materials? A: Not to my recollection. Q: What about the answers that were received to the questionnaire from VeriSign or NDC, do you recall? A: I don't recall any responses or the questionnaire.").

[127] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 938:10 – 939:11 (Disspain Cross-Examination).

[128] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 938:10-25 (Disspain Cross-Examination).

[129] *See* Sections III(B) and IV(A) below.

[130] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 697:15 – 698:10 (Willett Cross-Examination) (emphasis added).

[131] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 976:1-8 (Disspain Cross-Examination) ("[PRES. BIENVENU:] Are you aware, as you sit here today, that the decision taken by the Board during that workshop was only communicated to Afilias in the course of the proceedings in this IRP, so just very recently? [DISSPAIN:] No. I am now aware of that. I wasn't aware of that at the time. I am aware of it because it's been mentioned.").

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

[133] ICANN's Response to Amended IRP Request, ¶ 50. Again, DOJ's closure of its investigation is irrelevant to whether ICANN complied with its competition mandated. *See* Section III(D)(iii) below.

[134] *See* Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018), [Ex. C-182]; Email Jessica Hooper (Verisign) to Karla Hakansson (ICANN) (17 Jan. 2018), [Ex. C-115].

[135] Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018), [Ex. C-182] (explaining that in February 2018 that NDC had "previous conversations" with ICANN Staff about the .WEB Registry Agreement in an email chain referencing a December 2017 meeting between NDC and ICANN).

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

[137] Email Jessica Hooper (Verisign) to Karla Hakansson (ICANN) (17 Jan. 2018), [Ex. C-115], p. 1 (stating that ICANN Staff were willing to "talk [Verisign] through the assignment process").

[138] Analyst calls, during which senior leadership of public companies brief independent financial analysts on the company's financial health and results, are heaving regulated by the U.S. Security and Exchange Commission and misstatements on such calls can expose companies to significant fines and civil damages.

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

[140] Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018), [Ex. C-182].

[141] Letter from Steven Marenberg (Counsel for NDC) to John Jeffrey & Akram Atallah (ICANN) (28 Feb. 2018), [Ex. C-165], p. 1.

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

[143] Letter from Arif Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78], p. 4.

[144] ICANN's Response to Afilias' DIDP, Request No. 20180223-1 (24 Mar. 2018), [Ex. R-30]; Letter from Arif Ali (Counsel for Afilias) to ICANN Board (23 Apr. 2018), [Ex. C-79], pp. 2-3.

[145] Afilias Domains No. 3 Limited Reconsideration Request (23 Apr. 2018), [Ex. R-31].

[146] Letter from Arif Ali (Counsel for Afilias) to ICANN Board (16 Apr. 2018), [Ex. C-113]; Letter from Arif Ali (Counsel for Afilias) to Jeffrey LeVee (Counsel for ICANN) (1 May 20018), [Ex. C-114].

[147] Determination of the Board Accountability Mechanisms Committee (BAMC), Reconsideration Request 18-7 (5 June 2018), [Ex. R-32].

[148] Email from Erika Randall (ICANN) to Russ Weinstein *et al.* (ICANN) (13 June 2018), [Ex. C-168] ("[NDC], the prevailing applicant … issue a Registry Agreement." "[NDC] has signed the … countersign.").

[149] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 722:8-13 ("[WILLETT:] But once it was on hold, to my recollection, we kept things on hold, and it was a matter of program operations, operational practice to keep them on hold until we became aware and informed that those accountability mechanisms were resolved.").

[150] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 980:8 – 981:8 ("[DISSPAIN:] We as a group meeting -- again, I'm sorry. I cannot remember. I am fairly sure it was the Board Accountability Mechanisms Committee meeting, but I imagine there would have been other Board members present as well. We were very clear that our understanding was that Afilias had said categorically that they would launch an IRP in the event that the contention set was taken off hold. [PRES. BIENVENU:]

By ICANN sending a draft Registry Agreement to NDC for execution, would you consider, Mr. Disspain, that ICANN was, in effect, expressing disagreement with those who claimed that NDC's bid was noncompliant and that the auction rules had been breached by NDC because of its agreement with VeriSign? [DISSPAIN:] No, I don't think so. I think that ICANN was taking the next step in its process. You know, there are two -- without wishing to place any weight on either side in this matter, there are two sides. There are the Afilias side, who are bringing this IRP; and then there are others on the other side who believe that they are entitled to the TLD. So both sides need to be treated fairly by ICANN. The best way for ICANN to do that is to follow its process."). *See also* Merits Hearing, Tr. Day 4 (6 Aug. 2020), 748:12 – 750:25 (Willett Cross-Examination).

151 Merits Hearing, Tr. Day 4 (6 Aug. 2020), 698:1-6 (Willett Cross-Examination) (emphasis added).

152 Merits Hearing, Tr. Day 4 (6 Aug. 2020), 746:13-17 (Willett Cross-Examination).

153 Letter from Jeffrey LeVee (Counsel for ICANN) to Arif Ali (Counsel for Afilias) (28 Apr. 2018), [Ex. C-80], p. 1.

154 Email from ICANN Global Support to John Kane (Afilias) (7 June 2018), [Ex. C-62], p. 1. Mr. Kane was in Australia at the time (which is why the date on the Afilias' copy is 7 June 2018, although ICANN apparently dispatched it on 6 June).

155 Email from Jared Erwin (ICANN) to Christopher Bare and Christine Willett (ICANN) (6 June 2018), [Ex. C-167].

156 Email from Erika Randall (ICANN) to Russ Weinstein *et al.* (ICANN) (13 June 2018), [Ex. C-168], p. 4 (emphasis added).

157 Email from Erika Randall (ICANN) to Russ Weinstein *et al.* (ICANN) (13 June 2018), [Ex. C-168], p. 2 (emphasis added).

158 Email from ICANN to Arif Ali (Counsel for Afilias) (20 June 2018), [Ex. C-53].

159 Email from ICANN Global Support to John Kane (Afilias) (7 June 2018), [Ex. C-62].

160 Letter from Arif Ali (Counsel for Afilias) to ICANN (18 June 2018), [Ex. C-52].

161 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 978:12 – 979:3 (Disspain Cross-Examination) (responding to a question by Mr. Bienvenu).

162 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 981:17-24 (Disspain Cross-Examination).

163 Merits Hearing, Tr. Day 4 (6 Aug. 2020), 741:16-20 (Willett Cross-Examination).

164 Afilias' Response (28 Jan. 2019), ¶¶ 15-18; Afilias Sur-Reply (12 Feb. 2019), ¶ 5.

165 Afilias' Response to VeriSign and NDC's Requests to Participate as *Amicus Curiae* in Independent Review Process (28 Jan. 2019), ¶¶ 28-49.

166 Email from D. McAuley (VeriSign) to Members of the IRP-IOT (23 Oct. 2017), [Ex. 247]; Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, [Ex. 1], pp. 8-9.

167 IRP-IOT Meeting #41 (7 June 2018), Transcript, [Ex. 255].

168 IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202]. It remains unclear whether this meeting was conducted despite the absence of a proper quorum. What is clear is that other than Verisign and ICANN representatives, only very few independent members of the IRP-IOT attended. Indeed, a quorum was only established by counting ICANN Legal and Jones Day lawyers who were participating in that meeting. *See* Afilias' Response to VeriSign and NDC's Requests to Participate as *Amicus Curiae* in Independent Review Process (28 Jan. 2019), ¶ 53.

169 McAuley Decl., ¶ 24.

170 IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205]; Email from David McAuley to Members of the IRP-IOT (11 Oct. 2011), [McAuley Decl., Ex. J], [PDF] p. 5. Mr. McAuley further testified that he did not consult any rules governing international arbitration, nor consult with the lawyers at the Sidley law firm who were advising the IRP-IOT, in drafting this proposal, which he took largely from the U.S. Federal Rules of Civil Procedure used in federal court litigation. Merits Hearing, Tr. Day 6 (10 Aug. 2020), 1055:12 – 1056:15 (McAuley Cross Examination).

171 IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205]. Again, a quorum at the 11 October meeting was achieved only by including members of ICANN's legal team. Other than VeriSign's McAuley, only two other participants independent of ICANN attended.

[172] Merits Hearing, Tr. Day 6 (10 Aug. 2020), 1067:4-9 (McAuley Cross-Examination) (reading IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205]).

[173] Merits Hearing, Tr. Day 6 (10 Aug. 2020), 1067:20 – 1068:24 (McAuley Cross-Examination).

[174] Email from Samantha Eisner (ICANN) to David McAuley (Verisign) (12 Oct. 2018).

[175] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 453:18-21 (Eisner Cross-Examination).

[176] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 450:5-25 (Eisner Cross-Examination) ("[Eisner.] And at this point, we were -- when you sit here in October, we were two years out from the passage of the new ICANN bylaws after the IANA transition. Even in May we were a year and a half out, and we were well-aware from the ICANN side that there would be great confusion if an IRP was filed under the supplementary procedures that did not align with the new bylaws. So this concern was part of the genesis of even introducing that idea of an interim supplementary procedure note in May. By this point, we had already -- we had been working with the IOT to get a set of interim procedures finalized and had it on our board agenda for that end of October meeting, and it was becoming very clear that if we weren't going to have a set coming out of the IOT, we then had an even longer delay. So we had been -- from my side with ICANN, I had been working with a sense of urgency about this since at least May of 2018.").

[177] IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 15.

[178] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 457:1-6 (Eisner Cross-Examination) ("[LITWIN.] And, in fact, the very next IRP to be filed after this one wouldn't be filed for more than another year, in December of 2019; isn't that right? [EISNER.] As far as I recall, yes, but people can file an IRP on any day.").

[179] Email from Samantha Eisner (ICANN) to David McAuley (Verisign) (12 Oct. 2018), p. 1; Merits Hearing, Tr. Day 3 (5 Aug. 2020), 458:5 – 461:7 (Eisner Cross-Examination).

[180] Email from Samantha Eisner (ICANN) to David McAuley (Verisign) (12 Oct. 2018); Merits Hearing, Tr. Day 3 (5 Aug. 2020), 463:15 – 464:2 (Eisner Cross-Examination).

[181] Merits Hearing, Tr. Day 6 (10 Aug. 2020), 1060:6-16, 1075:2-8 (McAuley Cross-Examination).

[182] Merits Hearing, Tr. Day 6 (10 Aug. 2020), 1080:8-19 (McAuley Cross-Examination).

[183] Email and attachments from D. McAuley to S. Eisner (17 Oct. 2018), [Ex. 3], pp. 1, 13.

[184] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 470:7-20 (Eisner Cross-Examination).

[185] Since ICANN legal was working as a member of the IRP-IOT, it is not clear how this conversation could be privileged. The Sidley firm was counsel to the IRP-IOT.

[186] Email and attachments from D. McAuley to S. Eisner (17 Oct. 2018), [Ex. 3], p. 3; Merits Hearing, Tr. Day 6 (10 Aug. 2020), 1081:2-1083:3 (McAuley Cross-Examination).

[187] Email and attachments from D. McAuley to S. Eisner (17 Oct. 2018), [Ex. 3], p. 3. Ms. Eisner subsequently accepted Mr. McAuley's edits and extended mandatory rights of participation to the other enumerated category of *amici* who had been ignored by Mr. McAuley. Ironically, this category of *amici*, the winning parties from underlying arbitrations, were the subject of the three public comments on Rule 7.

[188] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 481:13-14 (Eisner Cross-Examination) ("Q: Did you draft those resolution? A: I did.").

[189] ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], p. 63.

[190] ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], p. 63.

[191] Email from Bernard Turcotte (on behalf of David McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), [Ex. 262], p. 1.

[192] ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], p. 62.

[193] ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], p. 62; Merits Hearing, Tr. Day 3 (5 Aug. 2020), 524:11-25 (Eisner Redirect) ("[EISNER.] My understanding of when a change made to a version of the supplementary procedures that have previously been put out for public comment would have to go out again would be if it was -- if there was a change made that is not reflective of a trend that arrived from that first public comment or if it

was significant or an unexpected change -- significant and unexpected change from that version that was previously put out.").

194 Email from Samantha Eisner (ICANN) to David McAuley (Verisign) (12 Oct. 2018).

195 ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], p. 62.

196 ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], p. 62.

197 Afilias' Amended IRP Request, Secs. 4-6; Afilias' Reply Memorial, Sec. III.

198 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 307:18-25 (Burr Cross-Examination) ("Q: Would you also agree that ICANN must implement the various procedures and rules and policies set forth in the guidebook consistently, neutrally, objectively and fairly? A: Yes, I believe ICANN is obligated to make decisions by applying documented policies consistently, neutrally, objectively and fairly in accordance with the bylaws."); Merits Hearing, Tr. Day 3 (5 Aug. 2020), 548:4-7 (Willett Cross-Examination) ("Q: But you understood that the new gTLD Program and the guidebook were designed to promote the principles in the bylaws, correct? A: Correct."). The New gTLD Program Rules also include rules related to them, such as the Change Request Criteria. *See* Afilias' Amended IRP Request, p. i ("Glossary of Defined Terms").

199 Bylaws, [Ex. C-1], Sec. 1.2 ("In performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values[.]"); 1.2(a)(v) ("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)"); 1.2(c) ("[t]he Commitments and Core Values are intended to apply in the broadest possible range of circumstances. "); Articles, [Ex. C-2], Art. 2(III) (ICANN "shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes …."). *See also* Afilias' Response to the *Amici* Briefs, Sec. V.

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

201 Afilias' Amended IRP Request, Secs. 4-6; Afilias' Reply Memorial, Sec. III.

202 *See GCC v. ICANN*, Partial Final Declaration (19 Oct. 2016), [Ex. CA-17], ¶ 85 (applying "balance of probabilities" as the standard of proof). In response to Panel Question No. 1: Section 4.3(i)(ii) of the Bylaws 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." Accordingly, a determination in a prior IRP decision is precedential and binding when (i) it interprets a provision of ICANN's Articles of Incorporation or Bylaws and (ii) the provision has not materially changed since the prior IRP decision was rendered. This understanding of Section 4.3(i)(ii) reflects the purpose of the IRP of securing the "consistent, coherent, and just resolution of Disputes" (Bylaws, [Ex. C-1], Sec. 4.3(a)(vii)) and aligns with the Commitment in the Bylaws to "[m]ak[ing] decisions by applying documented policies consistently, neutrally, objectively, and fairly[.]" *Id.*, Sec. 1.2(a)(v).

203 Bylaws, [Ex. C-1], Sec. 1.2(a)(v) (emphasis added). As discussed in Section II(B) below, ICANN must also make decisions "without singling out any particular party for discriminatory treatment …." (*id.*), another provision of its Bylaws that ICANN has breached in this case. As explained in our prior submissions, given that ICANN's Articles and Bylaws require ICANN to act in accordance with relevant principles of international law—including the principle of good faith—the Panel must view all of the provisions of the Bylaws and all of ICANN's conduct at issue through that lens. *See* Afilias' Amended IRP Request, ¶ 10; Afilias' Reply Memorial, ¶ 123; Afilias' Response to the *Amici* Briefs, Sec. V.

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

205 As stated in Section II above, had there been any doubt, ICANN might have reasonably investigated whether NDC and Verisign in fact adhered to the DAA's terms. The hearing evidence left no question that NDC and Verisign strictly followed those terms.

206 *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), [Ex. C-187], p. 15 (ICANN argued before the Ninth Circuit that "in submitting its applications, Donuts agreed to be bound by the [AGB's] terms and conditions[.]").

207 AGB, [Ex. C-3], Module 6, Sec. 10 (at p. 6-6) (emphasis added). As we have also explained in our prior submissions, the use of the phrase "may not" in this context is equivalent to "shall not." *See* Afilias' Reply Memorial, n. 57.

208 *See* Afilias' Reply Memorial, ¶ 27.

[209] On questioning from Chairman Bienvenu, Mr. Livesay conceded that he understood Section 10 according to its plain meaning and that it prohibited reselling, assigning or transferring rights and obligations in connection with a gTLD application to non-applicants, *i.e*., "both inside and outside the contention set." Merits Hearing, Tr. Day 3 (5 Aug. 2020), 1169:2-19 (Livesay Cross-Examination).

[210] Verisign Br., ¶ 21; NDC Br., ¶ 28. In this respect, the DAA is contrasted with the draft Radix/Dot Tech Agreement that Mr. Livesay attached to his witness statement and averred had informed him as to "market practices." That agreement provides that the parties' obligations to each other are contingent on the occurrence of a future event, namely that Radix would pay a defined sum to acquire Dot Tech if Dot Tech prevailed at the .TECH auction. No other obligations were assumed by either party. *See* Dot Tech, Sale and Purchase Agreement (*undated*), [Livesay WS, Ex. C]. *See also* Afilias' Response to the *Amici* Briefs, Sec. IV(D)(3).

[211] AGB, [Ex. C-3], Module 6, Sec. 10 (at p. 6-6) (emphasis added). Afilias' Amended IRP Request, Sec. 2.3.3; Afilias' Reply Memorial, Sec. III(A)(1)(i); Afilias' Response to the *Amici* Briefs, Sec. IV (A)(1).

[212] AGB, [Ex. C-3], Module 6, Sec. 10 (at p. 6-6).

[213] Afilias' Response to the *Amici* Briefs, ¶¶ 75-77.

[214] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 566:10-15 (Willett Cross-Examination) ("Q: So ICANN distinguishes between rights and obligations in the gTLD on the one hand from rights and obligations in the application on the other hand; is that right? A: Yes, ICANN makes a significant distinction."). *See also id*., 569:6-10 ("Q: And the process for seeking … assignment of an executed registry agreement is different from the process for applying for a new gTLD, do you agree? A: Yes.").

[215] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 566:16-24 (Willett Cross-Examination) (emphasis added).

[216] DAA, [Ex. C-69], Exhibit A, Sec. 1.

[217] Afilias' Response to the *Amici* Briefs, Sec. V(A)(2). *See also* Afilias' Reply Memorial, Sec. III(A)(iii)(b).

[218] Redacted - Third Party Confidential Information

DAA, [Ex. C-69], Schedule 1, Secs. 1, 2; Merits Hearing, Tr. Day 3 (5 Aug. 2020), 823:13-25, 844:7-16 (Rasco Cross-Examination).

[219] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 869:21-24 (Rasco Cross-Examination). In attempting to justify his July 2016 representation to Ms. Willett that it was his own decision for NDC to proceed to the ICANN auction, Mr. Rasco testified that by entering the DAA in August 2016, he had effectively decided to proceed to the ICANN auction, since he knew that that is what Verisign preferred to do. *Id.*, 867:24 – 868:1 ("Q: And, again, the decision [to proceed to the ICANN auction] was actually your decision to enter the DAA; is that your testimony? A: Yes.").

[220] To Prof. Kessedjian's question why Verisign "was so adamant to actually have a public auction and not making it private," Mr. Livesay responded that "The DAA was written with a lot of concern in trying to make sure that we lock things down and didn't overexpose ourselves to risk." Merits Hearing, Tr. Day 3 (5 Aug. 2020), 1276:4 – 1277:17 (Livesay Cross-Examination).

[221] DAA, [Ex. C-69], Exhibit A, Sec. 1(h). In NDC's opening presentation, Mr. Marenberg asserted that—because Afilias does not allege any change in control over NDC as an entity—"control" is not an issue in the case. Merits Hearing, Tr. Day 1 (3 Aug. 2020), 228:4-10 (NDC Opening Presentation) ("[Control] is no longer [an issue] in the case, and one wonders why we are going to hear so much about it."). So that there is no confusion on this issue, Afilias alleges that NDC transferred "rights and obligations in connection with the [.WEB] application" to Verisign—***including rights of control***. *See, e.g.,* Afilias' Amended IRP Request, ¶¶ 40-43. It is well established that rights in an asset include rights of control over the asset. *See, e.g., Hearn Pacific Corp. v. Second Generation Roofing, Inc.*, 247 Cal. App. 4th 117, 134 (2016), [Ex. CA-125] (a party can transfer its interest in a lawsuit as well as the right to control a lawsuit); *Timed Out, LLC v. Youabian, Inc.*, 229 Cal. App. 4th 1001, 1004, 1011-12 (2014), [Ex. CA-126] (as a matter of law, an assignment may include the rights in controlling the display of models' images and likeness for the assignee's pecuniary gain). Here, the rights transferred by NDC to Verisign included, *inter alia*, rights of control in connection with the application: Verisign assumed virtually all rights of control over the application as well as the right to obtain the benefits conferred by the application if the application were successful. That is precisely what Article 10 of the Terms and Conditions prohibits.

[222] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 828:14 – 829:7, 830:1 – 831:18 (Rasco Cross-Examination); Merits Hearing, Tr. Day 3 (5 Aug. 2020), 1234:3 – 1235-10, 1238:2 – 1239:8 (Livesay Cross-Examination).

[223] DAA, [Ex. C-69], Exhibit A, Sec. 1(h); Merits Hearing, Tr. Day 3 (5 Aug. 2020), 1238:5-18 (Livesay Cross-Examination) ("Q: … So when you instructed Mr. Rasco to enter a bid of 71.9 million, he refused and said he only wanted to bid 65 million, okay, can we just assume that situation? … I am asking you to assume that that factual situation took place. A: However improbable, but okay.").

[224] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 1239:1-8 (Livesay Cross-Examination) ("Q: And Mr. [Livesay], I think you said it is highly implausible [for Mr. Rasco to refuse to bid 71.9 million and say that he only wanted to bid 65 million], or words to that effect, because, in fact, as we established earlier, NDC would not incur any obligation to VeriSign to repay the $71.9 million if that was the eventual purchase price; is that right? A: That's correct[.]").

[225] DAA, [Ex. C-69], Sec. 1 (at p. 1); *id.*, Exhibit A, Sec. 4(b).

[226] DAA, [Ex. C-69], Exhibit A, Sec. 4(d). Redacted - Third Party Designated Confidential Information

See id., Schedule 1, Sec. 3.

[227] DAA, [Ex. C-69], Sec. 15 (at p. 10*); id.*, Sec. 8 (p. 6).

[228] AGB, [Ex. C-3], Module 6, Sec. 1 (at p. 6-2).

[229] AGB, [Ex. C-3], Module 6, Sec. 1 (p. 6-2); *see also id.*, Module, Sec. 1.2.7 (at p. 1-30) ("Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.").

[230] *See* DAA, [Ex. C-69], Sec. 10(a), p. 7 (emphasis added).

[231] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 837:17 – 838:9 (Rasco Cross-Examination).

[232] Merits Hearing, Tr. Day 7 (11 Aug. 2020), 1243:24 – 1244:14 (Livesay Cross-Examination) (emphasis added).

[233] The DAA ensured that in any scenario, all of the potential benefits went to Verisign, rather than NDC. Once NDC had prevailed at the auction, NDC was required to seek to assign the .WEB Registry Agreement to Verisign. DAA, [Ex. C-69], Exhibit A, Sec. 3(h). Redacted - Third Party Designated Confidential Information

Id., Secs. 9, 10. Redacted - Third Party Designated Confidential Information

Id., Schedule 1, Sec. 3(b). *See also* Afilias' Response to the *Amici* Briefs, ¶¶ 93-95.

[234] *See, e.g.*, Afilias' Reply Memorial, ¶ 27.

[235] *See, e.g.*, Afilias' Reply Memorial, ¶ 32.

[236] Afilias' Reply Memorial, Sec. III; Afilias' Response to the *Amici* Briefs, Sec. IV.

[237] Afilias' Reply Memorial, ¶ 95-100.

[238] AGB, [Ex. C-3], Module 4, Sec. 4.3.1(5) (at p. 4-22) (emphasis added).

[239] Auction Rules, [Ex. C-4], Rule 12.

[240] Auction Rules, [Ex. C-4], pp. 16-17.

[241] Auction Rules, [Ex. C-4], Rule 32 (emphasis added). The Auction Rules clearly define "Bidder" as the Applicant or its Designated Bidder. *Id.*, p. 16. Thus, the Bidder at the ICANN auction could only have been NDC. Contrary to the suggestions of the *Amici*, NDC could not act as its own Designated Bidder, since that term is defined as a party designated by the Applicant to bid ***on its behalf*** in an auction. *Id.*, p. 17. For this reason, Verisign was neither a Bidder nor a Designated Bidder, since it was not an Applicant and was not submitting bids at the ICANN auction on NDC's behalf.

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

[243] AGB, [Ex. C-3], Module 4, Sec. 4.3.1 (7) (at p. 4-23) (emphasis added).

[244] DAA, [Ex. C-69], Exhibit A, Sec. 1 (at p. 16) (emphasis added).

[245] *See* n. 222 above.

[246] *See* n. 223 above.

[247] *See* Email communications between Jonathon Nevett (Donuts Inc.) and Jose Ignacio Rasco (NDC) (6 & 7 June 2016), [Ex. C-35]. The only "white lie" that Mr. Rasco told to Mr. Nevett was that it "pained" him to "stroke" a check to ICANN. Verisign—not NDC—was "stroking" the checks to ICANN. *Id*.

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

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

[250] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 833:21 – 834:7 (Rasco Cross-Examination) ("Q: So the decision as to whether to participate in a private auction or an ICANN auction was solely the decision of Verisign; is that correct? A: Well, not entirely. I believe – going into this DAA, I knew VeriSign's feelings on private auctions in general. So once I agreed to this deal, I pretty much talked about it with Nicolai and Juan and said, 'Listen, going into this, we are going to an ICANN auction because I don't foresee us going to a private auction, and we are going to have to just deal with that.'").

[251] NDC's argument that it did not have to disclose the DAA to ICANN because there were many possible scenarios where NDC would have ultimately retained its interest in .WEB (*see* NDC Br., ¶¶ 105-106), was comprehensively disproven at the hearing. While Mr. Rasco believed that if ICANN refused to assent to the proposed assignment to Verisign, NDC would be able to buy the rights back from Verisign, Mr. Livesay expressly contradicted this. Merits Hearing, Tr. Day 3 (5 Aug. 2020), 1221:6-10 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

[252] Afilias Amended Request for IRP, Sec. 2.2.2; Afilias' Reply Memorial, Sec. III(A)(2).

[253] AGB, [Ex. C-3], Module 6, Sec. 1 (at p. 6-2) (emphasis added).

[254] AGB, [Ex. C-3], Module 6, Sec. 1 (at p. 6-2) (emphasis added).

[255] AGB, [Ex. C-3], Module 1, Sec. 1.2.7 (emphasis added).

[256] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 213:13-14 (Verisign Opening Presentation).

[257] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 238:18-23 (NDC Opening Presentation) (emphasis added).

[258] Afilias' Response to the *Amici* Briefs, ¶¶ 101-104.

[259] The DAA gave Verisign complete control over how NDC participated in the ICANN auction—
Redacted - Third Party Designated Confidential Information
DAA, [Ex. C-69], Sec. 1 (at p. 16).

[260] Letter from ICANN to Panel (18 July 2020), pp. 3-4.

[261] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 379:17 – 381:25 (Burr Cross-Examination) (admitting that DOJ specifically requested that ICANN should consider competition criteria in its evaluation process).

[262] ICANN, New Generic Top-Level Domains: Frequently Asked Questions, [Ex. C-181].

[263] AGB, [Ex. C-3], Module 6, Sec. 1 (p. 6-2).

[264] Change Request Criteria, [Ex. C-56], p. 2 (emphasis added).

[265] Change Request Criteria, [Ex. C-56], pp. 1-3 (emphasis added).

[266] Change Request Criteria, [Ex. C-56], p. 2 (emphasis added).

[267] Change Request Criteria, [Ex. C-56], pp. 1-2 (emphasis added).

[268] Change Request Criteria, [Ex. C-56], pp. 1-2 (emphasis added).

[269] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 579:1-6 (Willett Cross-Examination) ("Q: The applicants would have to provide notice to you so you could evaluate them, right? A: Correct. We asked that they submit what we called an application change request in writing, and then the program team determined if and what reevaluation might have been necessary.").

[270] *See* Change Request Criteria, [Ex. C-56]

[271] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 746:1-3 (Willett Cross-Examination).

[272] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 706:18 – 707:3, 746:13-17 (Willett Cross-Examination).

[273] This provides a partial response to Panel Question 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." List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 2.

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

[275] Afilias' Response to the *Amici* Briefs, Sec. V(A).

[276] Afilias' Amended IRP Request, ¶ 75; Afilias' Reply Memorial, Sec. (III)(A); Afilias' Response to the *Amici* Briefs, Sec. V(B).

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

[278] Bylaws, [Ex. C-1], Sec. 2.3 (emphasis added). We discuss the meaning of the last phrase of Section 2.3—"such as the promotion of effective competition"—in our discussion of ICANN's violation of its competition mandate in Section III(D) below.

[279] As discussed in our prior submissions, the assertions by *Amici* that Verisign violated the "Blackout Period" of the Auctions Rules are baseless. ICANN has referred to them without advancing them in this IRP. *See* Afilias' Response to the *Amici* Briefs, Sec. VIII.

[280] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (8 Aug. 2016), [Ex. C-49].

.[281] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (9 Sep. 2016), [Ex. C-103].

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

[283] Emails from Jose Ignacio Rasco (NDC) to Christine Willett (ICANN) (*various dates*), [Ex. C-100]; Merits Hearing, Tr. Day 3 (5 Aug. 2020), 1255:25 – 1256:4 (Livesay Cross-Examination).

[284] To Mr. Ali's letters, Mr. LeVee responded that Afilias "along with all other members of the contention set – will be notified promptly …." *See* Letter from Jeffrey LeVee (Counsel for ICANN) to Arif Ali (Counsel for Afilias) (28 Apr. 2018), [Ex. C-80], p. 1. *See also* Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), [Ex. C-61] (Mr. Atallah noting that "the primary contact for Afilias's application will be notified of future changes to the contention set status or updates …").

[285] Mr. Enson acknowledged that he had contacted Mr. Johnston, Verisign's outside counsel. Hearing on Afilias' Application, Tr. (11 May 2020), . In response, Mr. Johnston submitted detailed legal argumentation, specifically responding to Mr. Hemphill's 8 August 2016 letter, the DAA, and various other documents. *See* Letter and attachments from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016), [Ex. R-18]. Previously, the ICANN Ombudsman, as well as Ms. Willett and her staff had communicated directly with Mr. Rasco. *See*, *e.g.*, Emails from Jared Erwin (ICANN) to Jose Ignacio Rasco (NDC) (27 June 2016), [Ex. C-96]; Emails from Jose Ignacio Rasco (NDC) to Christine Willett (ICANN) (*various dates*), [Ex. C-100]; Email from Chris LaHatte (Ombudsman) to NDC (6 July 2016), [Willett WS, Ex. C].

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

[287] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 698:11 – 699:1, 701:10-13 (Willett Cross-Examination). Ms. Willett acknowledged that she "drafted a handful, maybe six questions" of the questionnaire, and her questions "were less formal." *Id*. 702:21-25.

[288] Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (8 Aug. 2016), [Ex. C-49].

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

[290] *See* Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018), [Ex. C-182].

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

[292] *See* Letter and attachment from Christine Willett (ICANN) to John Kane (Afilias) (16 Sep. 2016), [Ex. C-50], p. 1; Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), [Ex. C-61], p. 1.

[293] *See* Letter from Arif Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78]; Letter from Arif Ali (Counsel for Afilias) to ICANN Board (23 Apr. 2018), [Ex. C-79]; Letter from Arif Ali (Counsel for Afilias) to ICANN Board (16 Apr. 2018), [Ex. C-113]; Letter from Arif Ali (Counsel for Afilias) to Jeffrey LeVee (Counsel for ICANN) (1 May 20018), [Ex. C-114].

[294] Letter from Jeffrey LeVee (Counsel for ICANN) to Arif Ali (Counsel for Afilias) (28 Apr. 2018), [Ex. C-80], p. 2.

[295] *See* Section II(I).

[296] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 772:2-7 (Willett Cross-Examination) ("Q: In June of 2018, when ICANN took the contention set off hold, did you know that Afilias had promised to file an accountability mechanism, namely invoking the CEP? A: I believe they sent a letter to that effect."); Merits Hearing, Tr. Day 5 (7 Aug. 2020), 948:16-20 (Disspain Cross-Examination) ("Afilias was going to launch an accountability mechanism.").

[297] *See* Afilias' Sur-Reply (12 Feb. 2019), (12 Feb. 2019), Sec. 2.3.

[298] *See* Afilias' Response to the *Amici* Briefs, ¶ 150.

[299] ICANN's Rejoinder Memorial, ¶ 3 ("The time has therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers."). *See also* Witness Statement of Christine A. Willett (31 May 2019), ¶ 38 ("ICANN's focus in evaluating a proposed gTLD transfer is whether the transferee organization has the requisite financial and technical ability to operate the gTLD.").

[300] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 746:1-3 (Willett Cross-Examination).

[301] New Generic Top-Level Domains – Update On Application Status And Contention Sets, [Ex. R-33].

[302] Email from Erika Randall (ICANN) to Russ Weinstein *et al.* (ICANN) (13 June 2018), [Ex. C-168], [PDF] p. 2.

[303] Email from Grant Nakata to Christine Willett *et al.* (14 June 2018), [Ex. C-170], [PDF] pp. 3-4

[304] Email from Grant Nakata to Christine Willett *et al.* (14 June 2018), [Ex. C-170], [PDF} pp. 1-2.

[305] Merits Hearing, Tr. Day 4 (6 Aug. 2020), 745:17-23 (Willett Cross-Examination).

[306] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 948:16-20 (Disspain Cross-Examination) ("Afilias was going to launch an accountability mechanism.").

[307] The President expressed concern about the tension between sending the Registry Agreement for signature and ICANN's argument that the Board never reached a decision on .WEB. *See* Merits Hearing, Tr. Day 4 (6 Aug. 2020), 748:13 – 749:9 (Willett Cross-Examination) ("PRE. BIENVENU: And to pick up on another question that was asked of you by counsel for Afilias, the fact that ICANN sent a draft Registry Agreement to VeriSign -- forgive me, to NDC for execution, that does not imply compliance of NDC's application with the guidebook?").

[308] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 977:24 – 949:17 (Disspain Cross-Examination) ("Prior to the lifting of the hold on the contention set, the matter was discussed in the Board Accountability Mechanisms Committee[.] .... In that discussion we were told that the next step in the process was for -- should all of the accountability mechanisms be dealt with, was for it to come off hold[.]").

[309] AGB, [Ex. C-3], Draft Registry Agreement, Art. 4.3 (at [PDF] p. 237).

[310] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 948:12-15 (Disspain Cross-Examination).

[311] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 982:5-9 (Disspain Cross-Examination). Mr. Disspain clarified in his testimony that although formally the Board's Accountability Mechanism Committee (BAMC) would have been informed, "it amount[ed] to the same thing, and … the Board would have known …." *Id*., 982:2-5.

[312] Mr. Disspain and Ms. Burr repeatedly testified that the Board's practice was not to interfere in pending accountability mechanisms. Merits Hearing, Tr. Day 2 (4 Aug. 2020), 296:4-9 (Burr Cross-Examination); Merits Hearing, Tr. Day 5 (7 Aug. 2020), 935:15-20 (Disspain Cross-Examination). Even crediting this testimony, no ICANN witness testified that the Board had a practice of not deciding issues that might be the subject of a future accountability mechanisms.

[313] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 983:24 – 984:2 (Disspain Cross-Examination). Disspain Testimony, 983:24-984:2.

[314] *See* Afilias' Amended IRP Request, Sec. 5; Afilias' Reply Memorial, Sec. IV; Afilias' Response to the *Amici* Briefs, Secs. V(E) and VIII.

[315] Articles, [Ex. C-2], Art. III.

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

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

[318] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 324:18-22 (Burr Cross-Examination).

[319] Afilias' Response to the *Amici* Briefs, ¶ 208.

[320] *See* Afilias' Amended IRP Request, Sec. 5; Afilias' Reply Memorial, Sec. IV; Afilias' Response to the *Amici* Briefs, Secs. V(E) and VIII.

[321] ICANN argues that "[t]here's nothing in the core values that says that ICANN is supposed to choose between registry operators to determine which registry operator may or may not create the most competition." Merits Hearing, Tr. Day 1 (3 Aug. 2020), 161:1-5 (ICANN Opening Presentation).

[322] AGB, [Ex. C-3], Module 2, p. A-1.

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

[324] Statement of Esther Dyson, S. Hrg. 112-394, ICANN's Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session (8 Dec. 2011), [Ex. C-58], p. 46.

[325] Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), [Ex. GS-33], ¶ 20.

[326] Dennis Carlton (Compass Lexecon), Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 8; *see also* Michael Katz et al., An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names: A Report Prepared for ICANN (June 2010), ¶ 28 (noting a "broad consensus among economists" that competition is preferable to regulation, specifically because competition is better at promoting innovation).

[327] Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), [Ex. GS-33], ¶ 22.

[328] ICANN's Rejoinder Memorial, p. 89; Merits Hearing, Tr. Day 1 (3 Aug. 2020), 162:17-21 (ICANN Opening Presentation).

[329] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 366:21 – 367:1 (Burr Cross-Examination) ("Q: … So in other words, the DOJ disagreed with ICANN's preferred approach to handling competition concerns, correct? A: Well, she is certainly citing what she describes as a problem with ICANN's views, yes, that's what she's saying.").

[330] Letter from Deborah A. Garza (US Department of Justice, Antitrust Division) to Meredith A. Baker (US Department of Commerce) (3 Dec. 2008), [Ex. C-125], n. 10.

[331] Letter from Deborah A. Garza (US Department of Justice, Antitrust Division) to Meredith A. Baker (US Department of Commerce) (3 Dec. 2008), [Ex. C-125], n. 10, p. 8.

[332] Burr WS, ¶ 23.

[333] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 358:14-17 (Burr Cross-Examination) ("Q: … When was the last time ICANN asked the DOJ to advise ICANN on a competition issue? A: I don't know the answer to that question."); *id.*, 359:3-4 ("Q: Has ICANN ever done that, do you know? A: I don't know the answer to that question.").

[334] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 359:5-12 (Burr Cross-Examination) ("Q: If ICANN was going to refer something to the Department of Justice, would it use the business review letter process? A: I have no idea how -- I don't know what ICANN would do. Q: So you don't know if they would send a letter, pick up the phone and call somebody? A: I don't know.").

[335] Letter from Deborah A. Garza (US Department of Justice, Antitrust Division) to Meredith A. Baker (US Department of Commerce) (3 Dec. 2008), [Ex. C-125], pp. 6-7.

[336] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 362:2-12 (Burr Cross-Examination).

[337] ICANN, *Rationale for Board Decision on Economic Studies Associated with the New gTLD Program*, March 21, 2011, *available at* https://www.icann.org/en/system/files/bm/rationale-economic-studies-21mar11-en.pdf, [Ex. JZ-46], p. 1.

[338] In its Rationales that Adopted these economic studies over the DOJ's recommendations, ICANN demonstrated that it was more than capable of deciding among competing opinions regarding competition issues. Specifically, the Board wrote: "ICANN's Board has concluded that there is no economic basis that would justify stopping the New gTLD Program from proceeding and no further economic analysis will prove to be any more informative in that regard than those that have already been conducted." ICANN, *Rationale for Board Decision on Economic Studies Associated with the New gTLD Program*, March 21, 2011, *available at* https://www.icann.org/en/system/files/bm/rationale-economic-studies-21mar11-en.pdf, [Ex. JZ-46], p. 1.

[339] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 112:8-9 (ICANN Opening Presentation) ("DOJ was investigating this precise matter"); *id.*, 164:10-19 (the DOJ's decision not to take action "basically resolves the matter from ICANN's perspective.").

[340] Afilias' Response to the *Amici* Briefs, Sec. VIII(C).

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

[342] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 112:14-15 (ICANN Opening Presentation).

[343] 15 U.S.C. § 18 (1996), [Ex. CA-111].

[344] Letter from Deborah A. Garza (US Department of Justice, Antitrust Division) to Meredith A. Baker (US Department of Commerce) (3 Dec. 2008), [Ex. C-125], p. 6 (n. 10).

[345] *See* Afilias' Amended IRP Request, , Sec. 2.2.1; Afilias' Reply Memorial, Sec. III(A)(iii)(b); Afilias' Response to the *Amici* Briefs, Sec. V(C).

[346] Articles, [Ex. C-2], Art. III.

[347] Bylaws, [Ex. C-1], Sec. 1.2(a); *id.*, Sec. 1.2(a)(iv) ("Employ open, transparent and bottom-up, multistakeholder policy development processes.").

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

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

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

[351] Emergency Panelist's Decision on Afilias' Request for Production of Documents (12 Dec. 2018).

[352] Letter from Arif Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78], p. 3. *See also* Letter from Arif Ali (Counsel for Afilias) to ICANN Board (23 Apr. 2018), [Ex. C-79]; Letter from Arif Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), [Ex. C-111].

[353] ICANN's Rejoinder Memorial, ¶ 91.

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

[355] ICANN's Response to Afilias' DIDP, Request No. 20180223-1 (24 Mar. 2018), [Ex. R-30]; ICANN's Response to Afilias' DIDP, Request No. 20181221-1 (20 Jan. 2019), [Ex. 307].

[356] Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018), [Ex. C-182].

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

[358] VeriSign, Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), [Ex. C-47]; Letter from Steven Marenberg (Counsel for NDC) to John Jeffrey & Akram Atallah (ICANN) (28 Feb. 2018), [Ex. C-165]; VeriSign, Inc. (VRSN) CEP Jim Bidzos on Q4 2018 Results - Earnings Call Transcript (7 Feb. 2019), [Ex. C-81].

[359] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 101:18-19 (ICANN Opening Presentation) ("ICANN does not take action on matters that are subject to accountability mechanisms.").

[360] Letter from Arif Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), [Ex. C-111]; Letter from Arif Ali (Counsel for Afilias) to ICANN (1 Apr. 2019), [Ex. C-112].

[361] *See*, *e.g.,* Email from Samantha Eisner (ICANN) to David McAuley (Verisign) (12 Oct. 2018). Although the Panel admitted this email to the record, the document has no corresponding exhibit number. *See* Phase I Decision (12 Feb. 2020), p. 16 (n. 5).

[362] *See* Letter from Afilias to the Panel (30 Sep. 2019), .

[363] In this section we address Panel Question 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." List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 3.

[364] Procedures Officer Declaration (28 Feb. 2019), , p. 38 (internal citations omitted).

[365] Procedures Officer Declaration (28 Feb. 2019), p. 38.

[366] Decision on Phase I (12 Feb. 2020), , ¶¶ 31, 181.

[367] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 111:5-9 (ICANN Opening) ("[LeVEE.] [T]he ICANN Board decided not to take any action on .WEB because of the pending Donuts CEP and the likelihood that additional accountability mechanisms would be invoked."); *id.*, 160:1-7 (ICANN Opening) ("[LeVEE.] The purpose of the workshop was to focus on .WEB and top-level domains where there were issues. And the Board received advice from counsel, general counsel and the deputy general counsel in particular, and then as, Mr. Disspain explains, the Board decided that it would take no action.").

[368] List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 3 ("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?").

[369] Afilias' Reply Memorial, ¶¶ 6, 14-18; Afilias' Response to the *Amici* Briefs, ¶¶ 165-78.

[370] Bylaws, [Ex. C-1], Sec. 3.5(c) (stating that "any actions taken by the Board shall be made publicly available in a preliminary report on the Website" and the non-disclosure of Board actions must be justified in writing and publicly disclosed); Merits Hearing, Tr. Day 2 (4 Aug. 2020), , 279:25-280:2 (Burr Cross-Examination) ("[LITWIN]. And the bylaws also require ICANN to post on its website notice of upcoming Board meetings? [BURR]. Correct, formal Board meetings.").

[371] Afilias' Response to the *Amici* Briefs (24 July 2020), ¶¶ 170-75.

[372] ICANN's Rejoinder Memorial, ¶ 59 ("Every United States jurisdiction, including California, recognizes the 'business judgment rule,' which provides a 'judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.'" (quoting with approval *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694 (1996), [Ex. RLA-15])) (emphasis added).

[373] *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249 (1999), [Ex. RLA-13], p. 10 ("Traditionally, our courts have applied the common law 'business judgment rule' to shield from scrutiny qualifying decisions made by a corporation's board of directors.") (emphasis added).

[374] Bylaws, [Ex. C-1], Secs. 7.13-7.15, 7.19; Merits Hearing, Tr. Day 2 (4 Aug. 2020), 274:10-15 (Burr Cross-Examination) ("[LITWIN]. But the Board can only act without a meeting if all the directors entitled to vote thereat shall individually or

collectively consent in writing to such action; is that right? [BURR]. Correct, at a formal meeting where there's going to be resolution and votes.").

375 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 282:15-20 (Burr Cross-Examination) ("[LITWIN.] So these workshops are not regular Board meetings; is that right? [BURR]. Correct. Q. And they are not special meetings, and they are certainly not an annual meeting, right? A. No.").

376 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 282:14-283:6 (Burr Cross-Examination) (testifying that a Board workshop session is not considered any one of the "formal" Board meetings).

377 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 283:1-2 (Burr Cross-Examination) ("[BURR.] The workshops are essentially working sessions for the Board.").

378 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 283:15-18 (Burr Cross-Examination) ("[LITWIN.] There aren't minutes taken at workshop sessions, are there? [BURR]. I don't believe so.").

379 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 283:3-4 (Burr Cross-Examination) ("[BURR.] [W]e are not passing resolutions and the like" at Board workshop sessions.).

380 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 283:22-25 (Burr Cross-Examination).

381 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 282:24-283:8 (Burr Cross-Examination) ("[LITWIN]. And these workshops don't require a quorum of Board members to be in attendance, do they? [BURR[. No.").

382 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 286:4-5 (Burr Cross-Examination) (emphasis added); *id.*, at 285:13-286:5 (Burr Cross-Examination).

383 Bylaws, [Ex. C-1], Sec. 7.19 ("Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action."). Ms. Burr admitted that the ICANN Board must make a formal action at an annual, regular, or special meeting and that the term "actions" in Section 3.5 of the ICANN Bylaws refers to formal actions made during those meetings. Merits Hearing, Tr. Day 2 (4 Aug. 2020), 282:14-20 (Burr Cross-Examination); *id*., 289:10-25 (Burr Cross-Examination) ("[BURR.] I am reading 'actions' throughout this section to refer to the formal decisions that the Board makes by resolution during Board meetings."). Accordingly, the "actions" described in Section 4.3 of the Bylaws ("Independent Review Process for Covered Actions") should only refer to formal actions of the Board—contrary to ICANN's position that the Board made a protected decision on 3 November 2016. Ms. Burr's response to this logical conclusion is the frankly ridiculous position that the term "action" is inconsistently defined in the ICANN Bylaws, which ignores all rules of contract drafting and interpretation. Merits Hearing, Tr. Day 2 (4 Aug. 2020), 291:20-295:7 (Burr Cross-Examination) ("[BURR.] So I do not believe that this is -- that it's limited to -- I mean, the words are in different -- the word 'action' has a different context here.").

384 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 410:17-23 (Eisner Cross-Examination) ("[LITWIN]. Do you recall anything about -- and without giving me any specifics, just a yes-or-no question, Ms. Eisner, do you recall any specifics about a Board workshop session in November of 2016 where Afilias' complaints about the resolution of the .WEB contention set were discussed? [EISNER]. I really don't recall specifics about it."); Merits Hearing, Tr. Day 2 (4 Aug. 2020), 388:6-12 (Burr Cross-Examination) ("[BURR.] And the Board did not change, did not deviate from the standard practice, which was once there is an accountability mechanism litigation, the process goes on hold, pending resolution."); Merits Hearing, Tr. Day 5 (7 Aug. 2020), 917:4-20 (Disspain Cross-Examination) ("[LITWIN]. And the complaints that Afilias had made to ICANN's ombudsman regarding .WEB? [DISSPAIN]. Well, I think we knew that a complaint had been made, but we didn't have any of the details. … Q. What about the letters that Afilias had written to Mr. Akram Atallah that had raised concerns regarding how the .WEB contention set had been resolved, were those discussed during those updates? A. I think we certainly knew about them because they were -- as Akram said, they were public.").

385 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 389:4-10 (Burr Cross-Examination) (emphasis added).

386 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 938:10-22 (Disspain Cross-Examination) (emphasis added).

387 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 935:21-24 (Disspain Cross-Examination).

388 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 939:1-11 (Disspain Cross-Examination).

389 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 956:11-957:5 (Disspain Cross-Examination).

[390] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 958:9-959:2 (Disspain Cross-Examination) ("[DISSPAIN]. But I can direct you to numerous occasions where -- there have been a number of occasions where the Board has not done anything because there have been accountability mechanisms running. It's just our practice. [LITWIN]. Were those examples -- well, strike that. Can you give me another example of when the Board has not intervened because of an outstanding accountability mechanism. A. Not off the top of my head, and I wouldn't do that without going away and doing some research, but I can assure you they exist.").

[391] AGB, [Ex. C-3], p. 5-4.

[392] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 944:14-20 (Disspain Cross-Examination) ("[LITWIN]. Now, the purpose of a CEP is to narrow claims in advance of filing an IRP; is that right? [DISSPAIN]. Yeah, but I think it is also -- yes, but in the main, it is also about getting the parties together to discuss things and see if we can avoid an IRP, if possible. But yes, you're right. The purpose is to do exactly what you just said.").

[393] Ms. Willett similarly testified that she never saw this "practice" in writing; nor could she describe this "practice" in consistent or coherent terms. Merits Hearing, Tr. Day 6 (10 Aug. 2020), 675:18-676:4 (Willett Cross-Examination) ("[DE GRAMONT.] [']In connection with the new gTLD Program, ICANN employs a practice, depending on the circumstances, of placing a contention set, as described below, or a gTLD application on hold if it is the subject of certain accountability mechanisms, including the initiation of a CEP,' unquote. Do you see that? [WILLETT]. Yes, I do. Q. Is that practice set forth in writing anywhere? A. I am not sure."). And, in fact, ICANN had "a few different practices over time." Merits Hearing, Tr. Day 6 (10 Aug. 2020), 678:17-21 (Willett Cross-Examination) ("[WILLETT.] And the actual filing over time about that, but the IRP, I believe, has another mechanism to – component to request relief, which could be putting the contention set on hold."). Ms. Willett further explained that ICANN Staff will "evaluate each accountability mechanism on a case-by-case basis." Merits Hearing, Tr. Day 6 (10 Aug. 2020), 678:8-9 (Willett Cross-Examination) "[WILLETT.] So as a general practice, we evaluate each accountability mechanism on a case-by-case basis.").

[394] Afilias Response to the *Amici* Briefs (24 July 2020), ¶ 175 (citing relevant California case law to argue that "California case law is clear that conduct contrary to governing documents [(i.e., corporate bylaws)] may fall outside the business judgment rule." (internal quotation omitted)).

[395] Bylaws, [Ex. C-1], Sec. 3.5(c) ("any actions taken by the Board shall be made publicly available in a preliminary report on the Website"); Merits Hearing, Tr. Day 2 (4 Aug. 2020), 280:9-281:3 (Burr Cross-Examination) ("[LITWIN]. And minutes from those Board meetings, correct? [BURR]. Correct. Q. Those have to be posted as well? A. From the formal Board meetings, yes. Q. And any resolution passed by the Board at a formal Board meeting also has to be produced -- published on the website, correct? A. Yes. A resolution passed at a Board meeting must be posted, yes. Q. And the bylaws require these documents to be publicly posted because ICANN is obligated to act transparently, correct? A. Uh-huh, yes. Q. And it's fair to say that because it's important for the public to know when the Board is meeting, what the Board will be considering, what the Board discussed, and what decisions the Board has taken, correct? A. Correct.").

[396] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 276:24-277:11 (Burr Cross-Examination) ("[LITWIN.] As a member of the Board, when you understand -- what do you understand the bylaw requirement that ICANN should operate in the maximum extent feasible to mean? [BURR]. I think there's a practical -- essentially ICANN should act openly. It should be informed, and it should act openly and transparently. Q. And that includes the disclosure of rationales for the Board's decisions, correct? A. That certainly includes an explanation of the rationale for formal decisions for all votes it takes.").

[397] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 275:18-25 (Burr Cross-Examination) ("[LITWIN]. Now, ICANN's bylaws don't just say you have to act transparently. They say you have to act transparently to the maximum extent feasible, correct? [BURR]. That's what the words say, yes. Q. You would agree that 'feasible' means, in general, possible, right? A. Yes.").

[398] *See, e.g.,* Letter from Respondent to Panel (26 June 2020), pp. 1-4.

[399] ICANN's Rejoinder Memorial, ¶ 61 (quoting with approval *Everest Inv'rs 8 v. McNeil Partners*, 114 Cal. App. 4th 411, 430 (2003)).

[400] *See* Afilias' Response to the *Amici* Briefs (24 July 2020), ¶¶ 176-78 (explaining that ICANN has failed to provide sufficient evidence to prove the reasonableness of the Board's alleged decision).

[401] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 269:20-21 (Burr Cross-Examination).

[402] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 930:18-931:18 (Disspain Cross-Examination) ("[LITWIN]. And did those briefing materials include a copy of the August 25th, 2015, VeriSign-NDC Domain Acquisition Agreement? [DISSPAIN]. Not to my recollection. Q. Did the briefing materials contain a copy of the August 23rd, 2016, letter from Mr. Ronald Johnston

of Arnold & Porter on behalf of VeriSign to Mr. Eric Enson of Jones Day on behalf of ICANN? A. Again, not to my recollection. Q. You mentioned a few minutes earlier that ICANN had sent questionnaires out in response to Afilias's complaints. Were the responses to those questionnaires that were received from Afilias included in your briefing materials? A. Not to my recollection. Q. What about the answers that were received to the questionnaire from VeriSign or NDC, do you recall? A. I don't recall any responses or the questionnaire."). Ms. Burr could not similarly recall whether the ICANN Board members even saw the DAA. Merits Hearing, Tr. Day 2 (4 Aug. 2020), 269:14-21 (Burr Cross-Examination) ("[LITWIN.] But I would like to ask if the Board members who attended that workshop session were shown a copy of the Domain Acquisition Agreement between VeriSign and NDC? [BURR]. I honestly have no idea. I do not believe that I have ever seen it, but I have no idea whether Board members saw it or not. I don't recall any documents being circulated.").

403 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 929:8-19; 930:3-931:19 (Disspain Cross-Examination) ("[LITWIN.] To the best of your recollection, sir, could you please identify everyone who asked a question of ICANN's legal counsel during the November 3rd discussion of .WEB? [DISSPAIN]. Well, no, for a couple of reasons, but mainly because I can remember the events and the discussion, but you're asking me to identify particular individuals who had asked particular questions, and I can't do that.").

404 *See, e.g., Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694 (1996), [Ex. RLA-15] (applying the business judgment rule to corporate directors); *Palm Springs Villas II Homeowners Assn., Inc. v. Parth*, 248 Cal.App.4th 268, 283 (Cal. Ct. App. 2016), [Ex. CA-106] ("The common law 'business judgment rule' refers to a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.... Under this rule, a director is not liable for a mistake in business judgment which is made in good faith and in what he or she believes to be the best interests of the corporation, where no conflict of interest exists." (internal quotation omitted)).

405 ICANN's Rejoinder Memorial, ¶ 62.

406 Even assuming *arguendo* that ICANN had a practice of not considering contention set issues while an accountability mechanism is pending, ICANN did not follow this practice in regards to Afilias' concerns about NDC. No accountability mechanisms were pending from 15 February to 22 April 2018 and as of 6 June 2018, yet the ICANN Board never considered Afilias' concerns and ICANN Staff moved forward with the delegation process for .WEB with NDC. *See* Section III(C).

407 In this section we address Panel Question 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." List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 2.

408 Afilias' Reply Memorial, ¶ 137.

409 Afilias' Reply Memorial, ¶¶ 137-146 (addressing ICANN's incorrect claim that "Afilias' claims are also time-barred because they should have been asserted sometime in 2016").

410 Interim Supplementary Procedures for IRP (25 Oct. 2018), [Ex. C-59], p. 5.

411 Letter from Arif Ali (Counsel for Afilias) to ICANN (18 June 2018), [Ex. C-52].

412 Email from ICANN Independent Review to Arif Ali and Rosey Wong (Counsel for Afilias) (13 Nov. 2018), [Ex. C-54].

413 ICANN's Rejoinder Memorial, ¶¶ 63-69.

414 Merits Hearing, Tr. Day 1 (3 Aug. 2020), 145:23-146:5 (ICANN Opening).

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

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

417 Merits Hearing, ICANN Opening Presentation (3 Aug. 2020), Slide 96.

418 Letter from Arif Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78], p. 1 ("As discussed below, we are writing to: (1) request an update on ICANN's investigation of the .WEB contention set ….").

419 Merits Hearing, Tr. Day 1 (3 Aug. 2020), 147:6-11 (ICANN Opening).

[420] Merits Hearing, ICANN Opening Presentation (3 Aug. 2020), Slides 41-49 (citing Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], Letter from John Kane (Afilias) to Christine Willett (ICANN) (7 Oct. 2016), [Ex. C-51], and Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (9 Sep. 2016), [Ex. C-103]).

[421] On 8 August 2016, Afilias wrote that: "We request that ICANN promptly undertake an investigation of the matters set forth in this letter and take appropriate action against NDC and its .WEB application for violations of the Guidebook as we have requested." Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], p. 2. On 9 September 2016, Afilias wrote that: "We take the opportunity of this letter to further explain the reasons why ICANN must disqualify NDC's application for .WEB and proceed to contract for .WEB with Alias, the next highest bidder in the Auction, in compliance with its obligations under ICANN's Articles of Incorporation and Bylaws (as well as principles of international law and California law), as set forth below." Letter from Scott Hemphill (Afilias) to Akram Atallah (ICANN) (9 Sep. 2016), [Ex. C-103], p. 1. On 7 October 2016, Afilias wrote that: "Accordingly, we urge ICANN to disqualify NDC's bid and prevent Verisign from obtaining control over the .WEB gTLD in order to ensure competition in the gTLD marketplace and prevent an unlawful act of monopolization based on anti-competitive behavior." Letter from John Kane (Afilias) to Christine Willett (ICANN) (7 Oct. 2016), [Ex. C-51], p. 1.

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

[423] *See* Letter from Arif Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78].

[424] In this sub-section we address Panel Question 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)?" List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 1.

[425] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 494:9-13 (Eisner Cross-Examination) ("[LITWIN]. As of that date, June 18, 2018, there was still no deadline to file an IRP because neither the bylaws nor the supplementary rules that were in effect had a timing provision in it; is that right? [EISNER]. Yes."); *id.*, 496:21-497:13 (Eisner Cross-Examination) ("[LITWIN]. And the Board voted on the interim rules, including the text of Rule 4, on October 25th, correct? [EISNER]. Yes.").

[426] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 492:3-11, 493:19-494:1 (Eisner Cross-Examination) ("[LITWIN.]. As of November 3rd, 2016, the then-current bylaws did not have a deadline in it for the filing of an IRP; is that right? [BURR]. That's correct. Q. And the supplementary rules for the IRP that were in effect on November 3rd, 2016, didn't have a deadline for filing either; is that correct? A. I believe that's correct.").

[427] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 492:3-11 (Eisner Cross-Examination) ("[LITWIN]. Before October 2016 the bylaws required a claimant to file within 30 days of the posting of the minutes of a Board meeting, correct? [EISNER]. Yes, I believe that's right.").

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

[429] Merits Hearing, Tr. Day 3 (5 Aug. 2020), 453:3-21 (Eisner Cross-Examination).

[430] IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 15.

[431] Afilias filed two Reconsideration Requests related to the .WEB gTLD. Reconsideration Request 18-7 was submitted on 23 April 2018, and sought reconsideration of ICANN's response to Afilias' 23 February 2018 DIDP Request. Afilias Domains No. 3 Limited Reconsideration Request (23 Apr. 2018), [Ex. R-31], p. 1. The BAMC summarily dismissed Reconsideration Request 18-7 on 5 June 2018. Determination of the Board Accountability Mechanisms Committee (BAMC), Reconsideration Request 18-7 (5 June 2018), [Ex. R-32], p. 10. Reconsideration Request 18-8 was submitted on 22 June 2018, and sought reconsideration of ICANN's response to Afilias' 23 April 2018 DIDP Request. Recommendation of the Board Accountability Mechanisms Committee (BAMC), Reconsideration Request 18-8 (28 Aug. 2018), [Ex. 209], pp. 1-2. The BAMC recommended that the ICANN Board deny Reconsideration 18-8 on 28 August 2018, and the ICANN Board accepted this recommendation on 6 November 2018. Recommendation of the Board Accountability Mechanisms Committee (BAMC), Reconsideration Request 18-8 (28 Aug. 2018), [Ex. 209], p. 24; Approved Board Resolutions, Special Meeting (6 Nov. 2018), [Ex. C-7], p. 2.

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

[433] Bylaws, [Ex. C-1], Sec. 4.3(n)(iv).

[434] ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314], p. 59.

[435] *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, Expert Report of Jack Goldsmith (22 Jan. 2009), [Ex. CA-60], ¶ 37 (internal quotations omitted).

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

[437] Whether ICANN did so intentionally so that it could rely on Rule 4 or whether it merely elected subsequently to rely on Rule 4, its behavior amounts to an abuse of rights and its SOL/SOR defense must be deemed inadmissible.

[438] Bylaws, [Ex. C-1], Sec. 4.2(a).

[439] Bylaws, [Ex. C-1], Sec. 4.2(a) ("ICANN shall have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff may request ('Requestor') the review or reconsideration of that action or inaction by the Board.") (emphasis added).

[440] New Generic Top-Level Domains – Update On Application Status And Contention Sets, [Ex. R-33], p. 2 ("The application is active but cannot complete certain Program processes such as Auction, Contracting, and Transition to Delegation until the On-Hold status is cleared.").

[441] Letter and attachment from Christine Willett (ICANN) to John Kane (Afilias) (16 Sep. 2016), [Ex. C-50], p. 1. (requesting information in order to "help facilitate informed resolution of these questions"); Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), [Ex. C-61], p. 1 ("We will continue to take Afilias' comments, and other inputs that we have sought, into consideration as we consider this matter.").

[442] The ICANN Ombudsman declined to investigate Afilias' concerns on 19 September 2016 because Ruby Glen had begun an accountability mechanism (the CEP) when and filed litigation against ICANN in regards to the .WEB matter; the "general rule in the practice of ombudsmanship is that the Officer will decline involvement if there is another formal accountability mechanism in progress or if there is litigation." Email from Herb Waye (ICANN Ombudsman) to Scott Hemphill (Afilias) (19 Sep. 2016), [Ex. C-101], p. 1. Nevertheless, Mr. Atallah later confirmed on 30 September 2016 that ICANN was considering Afilias' concerns about NDC. Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), [Ex. C-61], p. 1 ("We will continue to take Afilias's comments, and other inputs that we have sought, into consideration as we consider this matter.").

[443] ICANN does not and cannot assert that, in June 2018, Afilias was required to seek reconsideration of Staff's decision to take the contention set off-hold. At that point, under ICANN's Bylaws, Afilias was entitled to proceed directly to submit an IRP Request. But Afilias—still hopeful that ICANN might (as it had promised) consider its concerns—instead opted for CEP, which, as this Panel knows, was unsuccessful. (Indeed, ICANN Staff apparently knew that CEP was not going to be successful. Staff and Verisign used the time during which CEP was pending to redraft the Interim Rules to their advantage for use against Afilias once it commenced this IRO.)

[444] ICANN's Rejoinder Memorial, ¶ 87.

[445] AGB, [Ex. C-3], p. 5-4.

[446] AGB, [Ex. C-3], p. 5-4.

[447] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 980:17-981:12 (Disspain Cross-Examination).

[448] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 979:4-8 (Disspain Cross-Examination).

[449] *Compare* Email from ICANN to Arif Ali (Counsel for Afilias) (20 June 2018), [Ex. C-53], pp. 2, 5 *with* Email from ICANN Global Support to John Kane (Afilias) (7 June 2018), [Ex. C-62], p. 1.

[450] *See* Email from ICANN Global Support to John Kane (Afilias) (7 June 2018), [Ex. C-62].

[451] Merits Hearing, Tr. Day 5 (7 Aug. 2020), 983:17-984:2 (Disspain Cross-Examination).

[452] Bylaws, [Ex. C-1], Sec. 4.3(v).

[453] The revised ICANN Bylaws went into effect on 1 October 2016. Afilias' Reply Memorial, ¶ 8.

[454] The Interim Supplementary Procedures were approved by the ICANN Board on 25 October 2018. ICANN, Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Ex. 314] p. 59.

[455] *Compare* Bylaws, [Ex. C-1], Sec. 4.3(b)(ii) *with* ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), [Ex. C-23], Art. IV, Sec. 3(2); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23

Feb. 2016), [Ex. C-122], ¶¶ 4, 9 ("The role of the IRP will be to: . . .Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws ... .").

456 Bylaws, [Ex. C-1], Secs. 4.3(g), 4.3(x) (emphasis added).

457 We have previously addressed the scope of the Panel's jurisdiction in Afilias' Reply Memorial, ¶¶ 147-55) and Afilias' Response to the *Amici* Briefs, (¶¶ 214-36). We incorporate our earlier submissions herein by reference.

458 Bylaws, [Ex. C-1], Sec. 4.3(x).

459 Bylaws, [Ex. C-1], Sec. 4.3(g) (emphasis added).

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

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

462 Bylaws, [Ex. C-1], Sec. 4.3(o)(iii).

463 *See, e.g.*, Afilias' Response to the *Amici* Briefs, ¶¶ 214-236.

464 Bylaws, [Ex. C-1], Sec. 4.3(x).

465 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002), [Ex. CA-127], ¶¶ 112-15.

466 ICANN's Response to Amended IRP Request, ¶ 63.

467 As discussed further in Section V(A)(2) below, ICANN attempts to prevail in this IRP by convincing the Panel to avoid any substantive determination of Afilias' claims against ICANN and thereby leaving Afilias without a remedy for ICANN's wrongful conduct in connection to .WEB.

468 Merits Hearing, Tr. Day 1 (3 Aug. 2020), 174:6-12 (Verisign Opening).

469 Merits Hearing, Tr. Day 1 (3 Aug. 2020), 128:14-17 (ICANN Opening) ("[SMITH.] In fact, if you act outside of your jurisdiction, you will be acting in violation of international law and norms of international arbitration, which are also concepts that are baked into Section 4.3.").

470 ICANN's attempt is also contrary to its Bylaws. Bylaws, [Ex. C-1], Sec. 1.2(a)(v) ("Make decisions by applying documented policies consistently, neutrally, objectively, and fairly….").

471 Bylaws, [Ex. C-1], Sec. 4.1 (emphasis added); *see also id.*, Sec. 1.2(a)(vi) (ICANN commits to "[r]emain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness."); *id.*, Sec. 1.2(b)(v) (ICANN has the core value of "[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner….").

472 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 2; Merits Hearing, Tr. Day 2 (4 Aug. 2020), 302:16-20 (Burr Cross-Examination) ("[LITWIN.] So the CCWG was created to determine how ICANN's then accountability mechanisms could be strengthened to compensate for the absence of U.S. government oversight; is that right? [BURR.] Among other things, yes.").

473 ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), [Ex. C-184], p. 41.

474 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 1.

475 ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), [Ex. C-184], p. 45.

476 ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), [Ex. C-184], pp. 42-43.

477 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 3 (emphasis added).

478 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 174 (emphasis added).

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

[480] List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 2 ("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?").

[481] ICANN takes the position that Section 4.3(o) of the Bylaws is implicitly inconsistent with the CCWG Report's recommendation that the "*ICANN Board and staff shall be directed to take appropriate action to remedy the breach*." CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), **[**Ex. C-122**]**, ¶ 57 (emphasis added).

[482] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 121:12-13 (ICANN Opening) ("[SMITH.] But what controls are the resulting amended bylaws.").

[483] ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), **[**Ex. C-184**]**, pp. 43-44 ("[T]he [ICANN] Board accepts the Cross Community Working Group on Enhancing [ICANN] Accountability (CCWG-Accountability) Work Stream 1 Report ('Report').")

[484] ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), **[**Ex. C-184**]**, pp. 42-43.

[485] ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), **[**Ex. C-184**]**, pp. 43-44.

[486] ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), **[**Ex. C-184**]**, p. 44.

[487] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 318:24-319:10 (Burr Cross-Examination).

[488] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 390:7-14 (Burr Cross-Examination) (emphasis added).

[489] ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), **[**Ex. C-184**]**, p. 44.

[490] ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), **[**Ex. C-184**]**, pp. 41-42.

[491] ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), **[**Ex. C-184**]**, p. 44.

[492] Bylaws, **[**Ex. C-1**]**, Sec. 27.1(b) (emphasis added).

[493] AGB, **[**Ex. C-3**]**, p. 6-4.

[494] Bylaws, **[**Ex. C-1**]**, Sec. 4.1; *see also id.*, Sec. 1.2(a)(vi) (ICANN commits to "[r]emain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness."); *id.*, Sec. 1.2(b)(v) (ICANN has the core value of "[o]perating with efficiency and excellence, in a fiscally responsible and accountable manner….").

[495] List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 2 ("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?").

[496] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 328:1-11 (Burr Cross-Examination).

[497] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:7-13 (Burr Cross-Examination).

[498] Merits Hearing, Tr. Day 6 (10 Aug. 2020), 1048:23-1049:6 (McAuley Cross-Examination).

[499] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), **[**Ex. C-187**]**, [PDF] p. 12.

[500] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), **[**Ex. C-187**]**, [PDF] pp. 46-47.

[501] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), **[**Ex. C-187**]**, [PDF] pp. 12-13 (emphasis added).

[502] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), **[**Ex. C-187**]**, [PDF] p. 22 (emphasis added).

[503] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), [Ex. C-187], [PDF] p. 45 (emphasis added).

[504] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), [Ex. C-187], [PDF] pp. 46-47 (emphasis added).

[505] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), [Ex. C-187], [PDF] p. 46 (emphasis added).

[506] *Ruby Glen, LLC v. ICANN*, Case No. 16-56890 (9th Cir. 2018), Memorandum Order, [Ex. C-107], p. 2 (emphasis added).

[507] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 136:5-7 (ICANN Opening).

[508] ICANN's Rejoinder Memorial, ¶ 119.

[509] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), [Ex. C-187], [PDF] p. 45.

[510] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), [Ex. C-187], [PDF] pp. 46-47.

[511] Afilias' Amended IRP Request, ¶ 89.

[512] Afilias' Reply Memorial, ¶¶ 147-55; Afilias' Response to the *Amici* Briefs (24 July 2020), ¶¶ 214-36.

[513] Bylaws, [Ex. C-1], Secs. 4.3(a)(i) (emphasis added).

[514] Bylaws, [Ex. C-1], Secs. 4.3(a)(ix) (emphasis added).

[515] Bylaws, [Ex. C-1], Sec. 4.3(x).

[516] Afilias' Response to the *Amici* Briefs, ¶ 235 (citing Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], pp. 3069-3070; Arbitration Act 1996 (Eng.), [Ex. CA-124], c. 23, § 48). As Born explains, "courts have routinely upheld grants of injunctive relief, including specific performance"—regardless of whether the arbitral agreement or rules specifically provide for such relief—in recognition that the power to resolve a dispute confers broad flexibility in the method of its resolution. Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], pp. 3073-3076.

[517] Afilias' Response to the *Amici* Briefs, ¶¶ 214-236.

[518] At hearing, the *Amici* sought to distort the contents of the CCWG Report. Merits Hearing, Tr. Day 1 (3 Aug. 2020), 175:17-176:12 (Verisign Opening) ("[JOHNSTON.] In other words, this report does not recommend that you as a Panel decide the rights of third parties, but instead specifically anticipates that you will not make decisions that would affect the rights of third parties."). They misleadingly asserted that the CCWG Report stated "[s]uch a declaration represents a limitation to the type of decision by an IRP panel" and "[t]he purpose of such limitation is to mitigate the potential effect that one key decision of the panel might have on several third parties." Merits Hearing, Tr. Day 1 (3 Aug. 2020), 175:23-176:4 (Verisign Opening); Merits Hearing, VeriSign Opening Presentation (3 Aug. 2020), Slide 9. Neither statement in fact has any relationship to the issue of remedies, with the quoted text having been made specifically in relation to decisions on appeals from IRP decisions. CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶ 16.

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

[520] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 178; Afilias' Response to the *Amici* Briefs, ¶¶ 221-22.

[521] *Ruby Glen, LLC v. ICANN et al.*, Case No. 16-56890 (9th Cir.), Appellee's Answering Brief (30 Oct. 2017), [Ex. C-187], [PDF] p. 47 (emphasis added).

[522] Ms. Burr tried to evade this portion of the CCWG Report during her cross-examination, asserting that the applicable language's construction is passive and therefore ICANN itself must direct the remedy. Merits Hearing, Tr. Day 2 (4 Aug. 2020), 333:25-334:7 (Burr Cross-Examination) ("[BURR.] I can read that construction, which is passive and which was put up as we were working this out. I do not read it to say that the Panel is going to direct ICANN to take a specific action to remedy the breach."). Ms. Burr's interpretation ignores the plain language of the statement, however, which clearly asserts that "the ICANN Board and staff ***shall be directed*** to take appropriate action" if the Panel determines that the

ICANN Board or Staff violated the Articles or Bylaws. CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶ 57 (emphasis added).

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

524 Bylaws, [Ex. C-1], Sec. 4.3(a)(vii).

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

526 Bylaws, [Ex. C-1], Sec. 4.3(a)(ix).

527 Bylaws, [Ex. C-1], Secs. 4.1, 4.3(a)(iii).

528 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 988:10-19; 989:24-990:18; 991:4-16 (Disspain Cross-Examination). Similarly, in its ICANN's Response to the Amended Request, ICANN asserted that "ICANN's Board … will seriously consider and evaluate this Panel's findings to determine ***what action, if any, is appropriate****…*." ICANN's Response to Amended IRP Request, ¶ 10 (emphasis added).

529 List of Questions to be Addressed in Post-Hearing Briefs (23 Aug. 2020), p. 2 ("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.").

530 Merits Hearing, Tr. Day 1 (3 Aug. 2020), 137:3-11 (ICANN Opening); Merits Hearing, ICANN Opening Presentation (3 Aug. 2020), Slide 76.

531 Afilias' Response to the *Amici* Briefs, ¶¶ 223-236.

532 Bylaws, [Ex. C-1], Sec. 4.3(o).

533 ICANN's Bylaws are clear that, legally, the IRP is an arbitration; that the Panel is an arbitral tribunal; that the Panel's decision is an arbitral award; and that the decision is final and binding on the parties. However, because the Bylaws do not use standard terminology from international arbitration to name the IRP, the Panel, and the decision, this specification would serve to ensure that the legal status of the IRP, the Panel, and decision will not be subsequently contested.

534 However, Afilias does not suggest that the relief contained in the award would not be legally binding were it not to appear in the operative part of the award.

535 ICANN's Rejoinder Memorial, ¶ 117.

536 Bylaws, [Ex. C-1], Secs. 4.3(a)(i), 4.3(a)(viii).

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

538 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 178; CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶ 4; Merits Hearing, Tr. Day 2 (4 Aug. 2020), 319:14-25 (Burr Cross-Examination) ("[LITWIN.] And the CCWG intended that the IRP Panel is supposed to decide disputes based on its own independent interpretation of ICANN's articles and bylaws, correct? [BURR.] That is what this says. I have no idea if that particular sentence is in the bylaws itself, but it is definitely –- Q. I am not asking -- A. -- a de novo review.").

539 Bylaws, [Ex. C-1], Sec. 4.3(i)(i); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶ 34 ("The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.").

540 ICANN's Rejoinder Memorial, ¶ 55 (emphasis added); *see also* Merits Hearing, Tr. Day 2 (4 Aug. 2020), 321:18-20 (Burr Cross-Examination) (Ms. Burr admitted that the "Panel gets to decide what the facts are."); *id.*, 321:22-322:8 (Burr Cross-Examination) ("[BURR.] ICANN doesn't get to say, 'Here are the facts. You must accept them.'").

541 This Panel may also decide that ICANN Staff should have determined that NDC was ineligible to participate in the ICANN auction prior to the auction because it violated the New gTLD Program Rules. If NDC did not participate in the ICANN Auction, Afilias would be seemed to have won the ICANN auction at the end of Round 16 (the last round that involved applicants other than NDC and Afilias). *See* ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB/WEBS (*undated*), [Ex. R-10], pp. 1-2. Pursuant to Section 4.3.1 of the AGB, "[a]fter an auction round in which [there

is one remaining bidder at the end-of-pound price], the auction concludes and the auctioneer determines the clearing price. The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price." AGB, [Ex. C-3], p. 4-23. Only Afilias and NDC participated in Rounds 17-23 of the ICANN auction; accordingly, the ICANN auction should have ended after Round 16 since Afilias was the only applicant to submit a bid at the End-of-Round Price of USD 71.9 million other than NDC. Afilias should therefore be deemed the "successful application" because was the "last remaining application" and Afilias should be required to pay USD 71.9 million for the .WEB gTLD pursuant to Rule 47 of the Auction Rules. Auction Rules, [Ex. C-4], pp. 9-10.

542 Rule 42 of the Auction Rules states that: "If a Bidder who is eligible to bid for a Contention Set in a given Round does not submit a valid Bid during the Round …, then a Bid equal to the amount of the Bid of the previous Round (or $1 in the first Round) will be entered automatically on the Bidder's behalf." Auction Rules, [Ex. C-4], p. 8.

543 Auction Rules, [Ex. C-4], pp. 9-10.

544 ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB/WEBS (*undated*), [Ex. R-10], pp. 1-2.

545 Auction Rules, [Ex. C-4], p. 12.

546 According to Section 4.3.2, "Any winning bidder for whom the full amount of the final price is not received within 20 business days of the end of an auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that receipt of full payment is imminent.

Any winning bidder for whom the full amount of the final price is received within 20 business days of the end of an auction retains the obligation to execute the required registry agreement within 90 days of the end of auction. Such winning bidder who does not execute the agreement within 90 days of the end of the auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that execution of the registry agreement is imminent." AGB, [Ex. C-3], pp. 4-25 – 4-26.

547 AGB, [Ex. C-3], p. 4-26.

548 Merits Hearing, Tr. Day 1 (3 Aug. 2020), 84:15-17 (Afilias Opening).

EXHIBIT Altanovo-19

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

---o0o---

AFILIAS DOMAINS NO. 3 LTD., Claimant,	)	
vs.	)	ICDR Case No. 01-18-0004-2702
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	

VOLUME IV

ARBITRATION

AUGUST 6, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465535

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

---o0o---

AFILIAS DOMAINS NO. 3 LTD., Claimant,	)	
vs.	)	ICDR Case No. 01-18-0004-2702
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	

---o0o---

THURSDAY, AUGUST 6, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME IV
(Pages 589-785)

---o0o---

REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

A-P-P-E-A-R-A-N-C-E-S

---o0o---

FOR THE CLAIMANT AFILIAS DOMAINS NO. 3 LTD.:

DECHERT LLP
1900 K Street, NW
Washington, DC 20006-1110
BY: ARIF HYDER ALI, ESQ.
ALEXANDRE de GRAMONT, ESQ.
ROSEY WONG, ESQ.
DAVID ATTANASIO, ESQ.
MICHAEL LOSCO, ESQ.
TAMAR SARJVELADZE, ESQ.
(202) 261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
rosey.wong@dechert.com
david.attanasio@dechert.com
michael.losco@dechert.com

CONSTANTINE CANNON
335 Madison Avenue, 9th Floor
New York, New York 10017
BY: ETHAN E. LITWIN, ESQ.
(212) 350-2700
elitwin@constantinecannon.com

FOR THE RESPONDENT THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS:

JONES DAY
555 California Street, 26th Floor
San Francisco, California 94104
BY: STEVEN L. SMITH, ESQ.
DAVID L. WALLACH, ESQ.
PAUL C. HINES, ESQ.
(415) 626-3939
ssmith@jonesday.com
dwallach@jonesday.com
phines@jonesday.com

A-P-P-E-A-R-A-N-C-E-S
---o0o---

FOR THE RESPONDENT THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS:

JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, California 90071
BY: JEFFREY A. LeVEE, ESQ.
ERIC P. ENSON, ESQ.
KELLY M. OZUROVICH, ESQ.
(213) 489-3939
jlevee@jonesday.com
eenson@jonesday.com
kozurovich@jonesday.com

FOR NDC AMICI:

PAUL HASTINGS
1999 Avenue of the Stars
Los Angeles, California 90067
BY: STEVEN A. MARENBERG, ESQ.
JOSH GORDON, ESQ.
APRIL HUA, ESQ.
(310) 620-5700
stevenmarenberg@paulhastings.com
joshgordon@paulhastings.com
aprilhua@paulhastings.com

FOR VERISIGN AMICI:

ARNOLD & PORTER
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017
BY: RONALD L. JOHNSTON, ESQ.
RONALD BLACKBURN, ESQ.
OSCAR RAMALIO, ESQ.
MARIA CHEDID, ESQ.
JOHN MUSE-FISHER, ESQ.
HANNAH COLEMAN, ESQ.
(213) 243-4000
ronald.johnston@arnoldporter.com
ronald.blackburn@arnoldporter.com
oscar.ramalio@arnoldporter.com
maria.chedid@arnoldporter.com
john.musefisher@arnoldporter.com
hannah.coleman@arnoldporter.com

A-P-P-E-A-R-A-N-C-E-S
---o0o---

THE TRIBUNAL:

Pierre Bienvenu,
pierre.bienvenu@nortonrosefulbright.com
Richard Chernick,
richard@richardchernick.com
Catherine Kessedjian, ckarbitre@outlook.fr

INDEX OF EXAMINATION
---o0o---

CALIFORNIA, CALIFORNIA, AUGUST 6, 2020

---o0o---

ARBITRATOR BIENVENU: Welcome, everyone, to Day 4 of our hearing.

Before I ask our colleague JD to bring the witness back into the hearing room, I would like to convey to the parties the Panel's decision on the request by the claimant to add three documents to the record.

I begin by recalling that in Mr. De Gramont's email dated 21st July 2020, counsel for Afilias wrote, and I quote, "Both parties have agreed that only materials in the record may be used to examine witnesses," end of quote.

This followed up on a letter dated 20 July from Jones Day proposing 23rd July as a cut-off date to supplement the record for the purpose of the cross-examination of witnesses.

The document proposed to be added as Exhibit C-186 is a letter authored by Meredith Baker dating back to 2008, described as the cover letter through which the NTIA transmitted to ICANN the so-called Garza letter marked as Exhibit C-125.

The claimant avers in support of its request to add this document to the record, and I

quote, "The Baker letter provides crucial clarification regarding how the Garza letter came to the attention of ICANN," close quote.

The claimant spent considerable time cross-examining Ms. Burr about the Garza letter. The claimant, therefore, knew of the use it intended to make of the Garza letter. Had the claimant felt it relevant to rely on the Baker letter to provide context for the Garza letter, it ought to have added this document to the record before the agreed cut-off date of 23rd July.

The same reasoning applies in the opinion of the Panel to proposed Exhibit C-185, which consists of ICANN's answering brief in the Ruby Glen litigation before the U.S. Federal Courts, litigation to which reference is made in the parties' pleadings.

The Panel takes a different view in regard to proposed Exhibit C-184, which consists of Board resolution relating to the CCWG-Accountability Work Stream 1 report. These documents are directly responsive to questions from the Panel and, indeed, the Panel expected that ICANN would offer to provide its position on the issue so raised by the Panel by reference to documents even if those

documents were not already part of the record.

Accordingly, Afilias's request is granted in part. The addition of proposed Exhibits C-185 and C-186 is denied, but the addition of proposed Exhibit C-184 to the record is allowed.

So thank you, all.

MR. ALI: Mr. Chairman, if I may.

ARBITRATOR CHERNICK: Oh, come on.

MR. ALI: Sorry, was that -- I think somebody just said, "Oh, come on" to me. Should I proceed?

ARBITRATOR BIENVENU: I don't know who said that, but it wasn't a member of the Panel.

MR. ALI: Right. So, Mr. Bienvenu, just a couple of points. We wish to thank the Panel for accepting into the record the Board minutes relating to the CCWG-Accountability. And with respect to the two other documents which you have denied, we will note our objection to the ruling on the following. Just to make two points in connection with that.

Number one is I thought that the Panel was going to give us an opportunity to address ICANN's submission in writing yesterday. I believe that was something that had been indicated, which is why

we didn't simply go ahead and respond to what ICANN had submitted.

And secondly, I accept that there was a cut-off, but we are within the context of an international arbitration, and within international arbitration it is frequently the case that during the course of hearings, as when issues are raised by the questioning of witnesses by counsel and in particular by questioning of a -- of a member of the Tribunal or the Panel, that documents will be admitted.

Now, a balancing act can be achieved by instructing that a document not be put to a witness because the issue here is of fairness.

We are not -- it would be entirely appropriate for the Panel to say that such a document cannot be put to a witness.

But insofar as the Ninth Circuit brief is concerned, there is no surprise here to ICANN, I mean, Mr. LeVee and Mr. Enson, counsel to ICANN in the Ninth Circuit. They know exactly what they said.

These are representations to a United States Court that are inconsistent with representations that they are making before you, or

potentially not, but we are happy to let them put into the record anything else that they want to give that document context.

But a very important issue here -- and you could even admit this document as a legal authority -- is the fact that it is in your jurisdiction, and that jurisdiction is based on what it is -- what the scope of the litigation waiver is.

In fact, Mr. Chairman, you, yourself, raised a question with Ms. Burr, and I note in your rationales that you just gave us for denying the -- sorry, accepting the CCWG report was the fact that questions had been raised by the Panel.

You, yourself, raised the question regarding the issue of gap-filling role or the gap-filling effect of the litigation waiver and the IRP's jurisdiction, specifically you asked Ms. Burr.

So if a claimant -- if an IRP doesn't have jurisdiction to decide a claim, then you have to be able to bring it to court, right, because it is not arbitrable. If it is not arbitrable, you have to be able to bring it to court.

You also went on, and you asked Ms. Burr,

"Ms. Burr, was there, so far as you can recollect, a discussion of the effect of a gap between the litigation waiver, the scope of the accountability mechanisms, including any possible limitation on the remedies that an IRP Panel could award?"

So a careful balancing here. In the context of international arbitration, I would instruct you cannot put these documents to any witness because that would be unfair.

It is certainly a document that could be added to the record together with any documents from the litigation proceedings that we see fit so that we can refer to these documents in our discussions with you.

We can refer to these documents in post-hearing briefing and potentially then oral argument because it goes to the critical issue of your jurisdiction in what is ultimately a precedent-setting proceeding.

So with that, I will rest. Thank you.

ARBITRATOR CHERNICK: Mr. Chairman, I was the person who made the comment, "Oh, come on." I apologize to Mr. Ali, but my impression was that the matter had been submitted and fully argued and that we were going to proceed with the witness.

So my comment was simply directed to my expectation that we were done with this issue and that there would not be effectively a request to reconsider.

MR. ALI: I don't think I was making a request to reconsider. I was simply raising a point based on our understanding of what the Chairman had said yesterday. But I will say no more, as it seems to be irritating you.

ARBITRATOR CHERNICK: So be it.

ARBITRATOR BIENVENU: Mr. Ali, thank you for your comments. They are reflected in the transcript.

And I will now ask you if either party has any preliminary matter to raise before we bring the witness back for the continuation of her cross-examination?

MR. LeVEE: I do not, Mr. Chairman.

ARBITRATOR BIENVENU: Mr. Ali?

MR. ALI: Nothing other than to just confirm that everything that we just discussed has been on record.

Is that correct, Balinda?

THE REPORTER: Yes.

ARBITRATOR BIENVENU: Yes, of course.

MR. ALI: Yes. Thank you.

ARBITRATOR BIENVENU: Of course.

Very well. Can we then ask that Ms. Willett be brought back into the hearing room, please?

Good morning, Ms. Willett. This is Pierre Bienvenu, Chair of the Panel.

THE WITNESS: Good morning, Mr. Chairman.

ARBITRATOR BIENVENU: So, Ms. Willett, under the same solemn affirmation, we will continue your cross-examination.

Mr. De Gramont, your witness.

MR. De GRAMONT: Thank you, Mr. Chairman.

CROSS-EXAMINATION (Cont'd)

BY MR. De GRAMONT

Q. And good morning, Ms. Willett. Thank you again for being with us, particularly so early in the morning. I have a few follow-up questions from yesterday.

First of all, have you discussed your testimony from yesterday with anyone?

A. No.

Q. Okay. Yesterday you testified that you studied the guidebook upon assuming your position at ICANN; is that correct?

A. That's correct.

Q. And did anyone tell you that you should also study the bylaws and articles?

A. Not that I recall, no.

Q. Did anyone tell you that the guidebook had to be applied consistently with the articles and bylaws?

A. So in terms of any conversation with counsel?

Q. No, just anyone. Did anyone at ICANN say to you the articles and bylaws need to govern the application of the guidebook?

MR. LeVEE: At what time?

Q. BY MR. De GRAMONT: Why don't we start when you first arrived at ICANN.

MR. LeVEE: I am trying to interpose an objection. I am concerned that the witness has now identified that she may have had conversations with counsel. So if it's okay, I'd like to warn her not to disclose the contents of conversations with counsel. Beyond that, I have no further objection.

MR. De GRAMONT: Thank you, Mr. LeVee.

Q. So let me ask it this way, and this is just yes or no: Did anyone advise you when you started at ICANN that the articles and bylaws

inform the application of the guidebook?

A. Not that I recall.

Q. Did anyone tell you at any point during your time at ICANN that the articles and bylaws should inform the interpretation and application of the guidebook?

A. I don't recall anyone telling me that the bylaws would inform the application of the guidebook.

Q. Okay. Thank you. And if you don't remember something when I ask you, just -- it is perfectly fine to say you don't remember.

Okay. So let's pick up where we left off yesterday. And -- I'm sorry, one more question before we do that.

You said yesterday that there was no separation agreement providing for you to give testimony in this IRP.

Do I remember that correctly?

A. So the terms of that agreement are confidential. So -- but it did not -- I will go so far to say that it did not mention providing testimony, no.

Q. So there was a separation agreement, but it's confidential?

A. Correct.

Q. Okay. And do you have any other sort of consulting agreement with ICANN that covers your provision of testimony or assistance in this IRP?

A. No, nothing.

Q. Okay. So, again, going back to where we left off yesterday, and we were looking at Exhibit C-35, which is behind Tab 12 of your binder.

A. I am there.

Q. You are there?

A. Yes.

Q. And, again, this is the exchange of emails between Mr. Nevett and Mr. Rasco in early June 2016. And, again, just to put this in context, Mr. Nevett was an executive at Donuts, and Donuts owned Ruby Glen and Ruby Glen was a member of the .WEB contention set; is that correct?

A. That's correct.

Q. All right. So let me read Mr. Nevett's email again. June 6, 2016. "Hi, guys. Jose and I corresponded last week, but I wanted to take another run at the three of you. Not sure if you three are still the Board members of your applicant, but I wanted to reach out to discuss a couple of ideas. Until Monday, I believe that we

have a right to ask for a two-month delay of the ICANN auction with the agreement of all applicants. Would you be okay with an extension while we try to work this out cooperatively?" End of quote.

Again, do you recall seeing Mr. Nevett's email?

A. I may have seen it. I don't specifically recall seeing this email until we discussed it yesterday.

Q. Mr. Nevett is asking for a two-month delay of the ICANN auction to see if the members of the contention set could reach an agreement among themselves to resolve the contention set; is that your understanding?

A. Yes.

Q. And, again, the guidebook encourages members of the contention set to resolve contention among themselves, right?

A. Yes, it does.

Q. Okay. So there's nothing about Mr. Nevett's request in that respect?

A. Correct. As long as it is prior to the deadline of the request or prior to the blackout period, the contention set members aren't supposed to be discussing then, I would see nothing wrong

with that email.

Q. Okay. And you explain in your witness statement that under the auction rules, applicants can request a delay of the ICANN auction, but they are all supposed to do that within 45 days of the ICANN auction; do I have that right?

A. That's correct.

Q. So his reference to, quote, until Monday, is probably a reference to that cut-off; is that your understanding?

A. I would believe so.

Q. So on 7 June Mr. Rasco writes back to Mr. Nevett, and this is what he says, quote, "John, thanks for the message. Sorry for the delay. The three of us are still technically the managers of the LLC, but this decision goes beyond just us. Nicolai is at NSR full-time and no longer involved with our TLD applications. I'm still running our program, and Juan sits on the Board with me and several others. Based on your request, I went back to check with all of the powers that be and there was no change in the response, and we will not be seeking an extension. It pains me personally to stroke a check to ICANN like this, but that's what we're going to have to do, just like others did on

.APP and .SHOP," end of quote?

Just to put this in context at the outset, Nicolai is a reference to Mr. Bezsonoff; is that your understanding?

A. I forget the names of the three individuals on .WEB or NDC.

Q. Okay. You don't recall that it's -- you recall that Mr. Rasco was one of them?

A. Yes.

Q. And that -- do you recall that Mr. Calle was one of them?

A. I -- yeah, I recall that we looked at that yesterday.

Q. Yes. And Mr. Bezsonoff was the third, we looked at that yesterday?

A. I trust you, yeah.

Q. Okay. We can go back and take a look at the document, but I'll represent to you that that's what it says.

A. Very good.

Q. And do you know what NSR is a reference to? It says, "Nicolai is at NSR full time."

A. I do not.

Q. And do you understand Juan to be a reference to Juan Diego Calle?

A. I would believe so.

Q. Okay. Now, based on this email -- you saw this email at the time in June, July 2016, I think that's what you testified to yesterday?

A. At some point, it was four years ago, so June, July, August, I would have to refer to my testimony to determine the date when I --

Q. Sometime during that summer?

A. Yes.

Q. All right. And based on this email, Mr. Nevett raised a concern that there might have been a change of ownership or control over NDC.

Do you recall that?

A. Could you say that again?

Q. Yes. Based on the email, Mr. Nevett raised a concern that there might have been a change in ownership or control over NDC?

A. I don't see that in this email. Are you referring to a different email?

Q. No. I am asking if you recall that based on this email, after this email, Mr. Nevett raised that concern?

A. Yes. I recall Mr. Nevett raising that concern with me in June of 2016. I believe -- I came to understand it was based on this email

exchange.

Q. And reading Mr. Rasco's email, you can see why Mr. Nevett had that concern, would you agree?

MR. MARENBERG: Objection; calls for speculation, no foundation.

MR. De GRAMONT: I am asking for the witness' understanding, and I don't think it is appropriate for Amici to object in any extent.

ARBITRATOR BIENVENU: I will allow --

MR. MARENBERG: May I briefly respond? He's asking her to speculate on what Mr. Nevett was thinking and what Mr. Rasco was thinking.

MR. De GRAMONT: I am asking -- first of all, it is totally inappropriate for Amici to object. This is not an Amici witness, and I will ask the Chairman to instruct the Amici counsel not to interject objections to witnesses that are not being presented by the Amici. That's beyond the scope of what the Panel ordered and what we agreed to. So that's number one.

Number two, I am not asking the witness to speculate. I'd also ask for objections to be made in a form that doesn't suggest the answer to the witness.

Number three, I am simply asking for the

witness' understanding of the text of the document that we are showing to her.

ARBITRATOR BIENVENU: So as to Mr. De Gramont's first point, we recalled yesterday the parties' agreement on a one-counsel rule subject to the possibility for the counsel cross-examining a witness to consult with his team.

So the rule applies to all, and the witness is -- has been introduced by Mr. LeVee. If there are objections to be raised, he should raise them himself. And my ruling stands, I will allow the question.

Q. BY MR. De GRAMONT: So, Ms. Willett, just reading Mr. Rasco's email, you can understand why Mr. Nevett had raised a concern about the change of ownership or control in NDC, can't you?

A. Well, I really -- I don't know what Mr. Nevett was thinking, but this would not have raised concerns to me about the ownership interest. He says that the three of them are still technically the managers of the LLC. That was what was on their application. ICANN was concerned about what was technically the case.

Q. Well, he says the decision as to whether to participate in an ICANN auction or a private

auction, quote, "goes beyond just us," unquote. He says that there are now additional Board members beyond those identified in the application. He says that in order to be able to answer whether he can participate in a private auction or in an ICANN auction, he has to check with all of the powers that be.

In your view, that doesn't indicate that someone else is -- now has an ownership or control interest in NDC?

MR. LeVEE: Mr. Chairman, I do think that this is starting to be very argumentative. The witness has provided an answer.

MR. De GRAMONT: Again, I am asking for the witness' understanding of the document and how ICANN reacted to it at the time.

MR. LeVEE: She gave you an answer to the question, and then what you did was you read more of the paragraph and asked the same question.

MR. De GRAMONT: I am asking whether these particular issues raised a concern that there had been a change of ownership in the company. I am simply pointing her to particular statements to follow up on my earlier question.

ARBITRATOR BIENVENU: The question is

allowed.

THE WITNESS: So I can speak to my -- does this raise an issue for me. Since it says that Mr. Rasco was still managing, running the program, managing the application, the fact that he had to check with other individuals, that was sort of common practice amongst applicants.

They often had dozens of people on a Board of Directors, maybe a governing Board, an advisory Board. They had all sorts of other executives they would have to check with. So it wouldn't surprise me that an individual like Mr. Rasco would have to check with others.

Q. BY MR. De GRAMONT: So this communication did not raise any concerns for you that there was a change of ownership or control in NDC's ownership or, for that matter, in NDC's application?

A. So, again, I didn't get this email until some late date, but it did not drive me -- this email alone would not have -- I guess I am sort of talking about a hypothetical, but since I did receive it, it didn't drive action in it. I am just saying hypothetically it wouldn't have beyond, you know, the action my team did take in June of 2016.

Q. Okay. Well, let's move on to that.

In Paragraph 19 of your witness statement, again, that's behind Tab 1, the first sentence reads, quote, "ICANN was first notified that Ruby Glen had concerns that NDC had undergone a change of control or ownership on 23 June 2016 by way of an email from then Donuts Inc.'s cofounder and executive vice president of corporate affairs, John Nevett, sent to ICANN's customer portal."

And then you cite to Exhibit A of your witness statement. So let's take a look at that email, which is behind Tab 13 of your binder. It is Willett Witness Statement Exhibit A, Page 2.

A. Yes.

Q. And it's the longer email in the middle of the page, and it's very small. But Mr. Nevett writes, "It has come to our attention that one of the applicants for .WEB has failed to properly update its application. Upon information and belief, there have been changes to the Board of Directors and potential control of NU DOT CO LLC (NDC) that has materially changed its application. To our knowledge, however, NDC has not filed the required application change request," unquote.

He goes on to say, "We" -- this is the

second-to-last paragraph, quote, "We request that ICANN investigate the change in NDC's Board and potential control and that the ICANN auction scheduled for July 27th be immediately postponed. The auction should be scheduled after the final investigation is complete and NDC's requisite change request is resolved. We do not make this request lightly and haven't done so in well over 100 other scheduled ICANN auctions," unquote.

In light of the email from Mr. Rasco that we just looked at, this was a reasonable request, don't you agree?

A. Based on subsequent conversations I had with Mr. Nevett, I believe that this was a sincere concern of his. I would be presuming what was the basis of this email.

Q. And Mr. Nevett is correct when he writes that if the ownership or control of NDC had changed, NDC was required to report that and ICANN needed to evaluate that change, he's citing to Section 1.2.7 of the guidebook; is he correct in that assertion?

A. Section 1.2.7 of the guidebook does govern the changes that ICANN needs to be informed of, yes.

Q. Going back to your witness statement, Paragraph 20, Page 7. Tell me when you're there.

A. Yes.

Q. In reference to Exhibit A that we just looked at, you write in Paragraph 20, quote, "The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought VeriSign might be involved with NDC's application and, in fact, did not mention VeriSign at all."

Do you see that?

A. I do.

Q. My first question is: Do you have any reason to believe that Mr. Nevett knew that VeriSign might be involved in NDC's application?

A. I don't have any information on that.

Q. Are you suggesting that he was somehow at fault for somehow not mentioning VeriSign in that communication?

A. No, not at all.

Q. And you seem to draw a distinction between the concern that NDC may have undergone a change of ownership or control on the one hand and the possibility that VeriSign might be involved with NDC's application on the other.

Do I understand that correctly?

A. I'm sorry, I am not sure I understand the question. Could you repeat that?

Q. Sure. So you say, "The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought VeriSign might be involved with NDC's application," end of quote.

So is there a distinction between the concern that NDC may have gone -- undergone a change in ownership or control from a concern that VeriSign might be involved with NDC's application?

A. I wouldn't say that there was a concern or a distinction. It was more -- it would have been -- if VeriSign or any other entity had been shared with me, it would have given my team another direction to pursue and additional questions to ask about, but insomuch it was about control and ownership, we just followed up with NDC about those matters.

Q. But if VeriSign had been involved with NDC's application, that would suggest a resale or transfer or assignment of NDC's rights and obligations in the application.

Do you disagree?

A. Not necessarily.

Q. Okay. In paragraph -- let me back up.

So if -- you're saying that if Mr. Nevett had mentioned VeriSign, it would have given you another avenue to pursue and investigate?

A. We would have asked a question about that, yes.

Q. Okay. In Paragraph 21, you write, quote, "In view of Ruby Glen's concerns, ICANN immediately investigated. Upon receipt of Mr. Nevett's 23 June 2016 email, I instructed my staff to investigate the claims raised therein," unquote.

And you refer to an email dated 27 June 2016, which is Exhibit B. So let's take a look at that, and that's at Tab 14 of your binder. Tell me when you're there, Ms. Willett.

A. I am there.

Q. So the bottom -- the email at the bottom is from Mr. Jared Erwin to Mr. Rasco. Who is Mr. Erwin?

A. He was a member of the new gTLD Program team.

Q. Do you recall what his title was?

A. I don't. I know that he was involved in administering the auctions and contention set at

that time.

Q. How many investigations of this type had he done before, do you know?

A. I don't know.

Q. How big was your staff at this time, do you recall that?

A. June of 2016, approximately 35, perhaps 40.

Q. Okay. Were they all direct reports to you?

A. They were not.

Q. Was Mr. Erwin a direct report to you?

A. He was not.

Q. Do you recall to whom he directly reported?

A. As of that date, I was uncertain.

Q. So the first two sentences of Mr. Erwin's email to Mr. Rasco read, quote, "We would like to confirm that there have not been changes to your application or the NU DOT CO LLC organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts),"

period.

Do you recall that?

A. Yes.

Q. And did you see that email at the time that Mr. Erwin sent it out?

A. It was four years ago. I don't recall.

Q. Now, Mr. Rasco appears to respond very quickly, within about 48 minutes, but there are different time zones. Do you know if all these times are Pacific time?

A. I believe them to be Pacific time.

Q. In any event, Mr. Rasco responds, quote, "I can confirm that there have been no changes to the NU DOT CO LLC organization that would need to be reported to ICANN."

Do you see that?

A. Yes.

Q. So he answers Mr. Erwin's questions about whether any changes had been made to the NDC organization, but he doesn't answer whether there had been any changes to the application, correct?

A. Correct.

Q. And then Mr. Erwin responds very soon thereafter, quote, "Thank you for confirming. No further action is required of you at this time,"

unquote.

Just so I'm clear, when you write in your witness statement that you asked your staff to investigate the claims raised by Mr. Nevett, you're referring to this exchange of emails here on Willett Exhibit B; do I understand that correctly?

A. Yes, that was one of the steps. That was the investigation as of June.

Q. Okay. Let's go back to this witness statement. And at Paragraph 23 you state that on 29 June 2016, the next day, you met with Mr. Nevett -- sorry. It is two days later. You met with Mr. Nevett at the ICANN meeting in Helsinki.

Do you recall that meeting?

A. I do.

Q. And Mr. Nevett again asked that the auction be postponed based on his concerns about NDC's ownership or management.

Do you recall that?

A. I do recall that.

Q. Okay. And according to your witness statement -- I am looking at the middle sentence, four lines down. It says, quote, "During this meeting, I informed Mr. Nevett that my team had

already investigated the alleged management changes with NDC's representative and that NDC asserted that no such changes had occurred. I further informed Mr. Nevett that, based on the fact that ICANN had found no evidence of such a management change, ICANN was continuing to proceed with the auction as scheduled," unquote.

And, again, just so I'm clear, when you told Mr. Nevett that the team had already investigated and found no evidence of a management change, you're referring to the exchange of emails that we just looked at between Mr. Erwin and Mr. Rasco; is that correct?

A. That's correct.

Q. And you again say, "At no time did Mr. Nevett mention VeriSign."

Again, this is only a few days later, but at this point you had no reason to believe that Mr. Nevett should have been aware of VeriSign's involvement in the application; is that correct?

A. I don't know what Mr. Nevett was aware of.

Q. But you have no reason to believe he should have been aware of any involvement by VeriSign?

A. That he should have been, no.

Q. Okay. Now, you go on to say in Paragraph 24 that you told Mr. Nevett in Helsinki that if he was not satisfied with ICANN's course of action, he had the option to invoke one of ICANN's accountability mechanisms, and that's what Mr. Nevett proceeded to do.

Do you recall that?

A. Yes. He contacted the ombudsman.

Q. And the ombudsman at that time was Mr. Chris LaHatte. How do you pronounce that, LaHatte?

A. I believe he says LaHatte.

Q. LaHatte. And you go on to say in Paragraph 24, quote, "On 6 July 2016, the ombudsman sent an email to NDC on which I was blind-copied inquiring as to whether any changes in ownership/control had taken place and noting that he had," quote, "opened an ombudsman complaint file about this matter," unquote. And that's at Exhibit C of your witness statement.

So let's take a look at that. It is Tab 15 of your binder. Again, this is Willett Exhibit C, Page 2, an email from Chris LaHatte dated July 6, 2016. Quote, "Dear, Mr. Rasco. I have received a complaint from one of the applicants for .WEB as

follows: One or more applicants for .WEB made a complaint to the ombudsman about changes to the .WEB application by one of the applicants, being NU DOT CO LLC. There is evidence from them (which I have seen) which reveals that there have been changes to the composition of NU DOT CO LLC's Board that require it to go through an ICANN change process," unquote.

Was the evidence that Mr. LaHatte was referring to the exchange of emails between Mr. Rasco and Mr. Nevett that we looked at earlier?

A. Mr. LaHatte didn't tell me specifically what evidence he was basing that on.

Q. Were you aware of any evidence beyond that exchange of emails?

A. No, I was not.

Q. Okay. Even though Mr. LaHatte decided to open an ombudsman complaint, you decided that you would speak to Mr. Rasco yourself; is that correct?

A. So I had a variety of conversations of exchanges with Mr. LaHatte over the course of the program, and all of which I believe were with counsel and would have been privileged, but I could speak to generally the nature of why I would have sent an email -- contacted Mr. Rasco.

Q. In any event, two days after Mr. LaHatte's letter to Mr. Rasco, you did send an email to Mr. Rasco asking him to call you.

Do you remember that?

A. Yes. In essence, I was endeavoring to gather additional information to inform Mr. LaHatte's investigation that I could share with him.

Q. And did you tell Mr. LaHatte that you were reaching out to Mr. Rasco?

A. I may have. I don't recall specifically.

Q. Let's take a look at Tab 16, which is Exhibit F to your witness statement. Tell me when you're there.

A. Yes, I am.

Q. At the bottom we can see that you sent an email to Mr. Rasco on 8 July 2020 asking him to call you at his earliest convenience, right?

A. Yes.

Q. And you don't recall if you told the ombudsman that you were going to send Mr. Rasco this email?

A. I don't recall specifically telling him one way or another.

Q. Do you recall telling anyone else at ICANN

that you were going to send this email to Mr. Rasco?

A. In terms of conversations with counsel?

Q. For now let's leave it at yes or no. Did you tell anyone at ICANN that you were going to send this email to Mr. Rasco, that you recall?

A. Yeah, it's been four years. I don't recollect.

Q. Do you recall if anyone at ICANN asked you to send this email?

A. Not that I recall.

Q. In any event, Mr. Rasco called you later that day; is that correct?

A. That's correct.

Q. And do you remember how long the telephone -- he called you by telephone, I assume?

A. Yes.

Q. And do you remember how long the conversation lasted?

A. I don't.

Q. Was anyone on the call besides you and Mr. Rasco?

A. I believe I had one or two other staff members from our team with me.

Q. Do you recall who they were?

A. I believe that it was Christopher Bare, and I believe at the time it may have been Ms. Christina Flores.

Q. Was anyone from ICANN listening to the call?

A. Not that I recall, no.

Q. Okay. Did anyone take notes of the conversation?

A. Ms. Flores did.

Q. Do you recall if she took them by hand or were they typed?

A. Her practice was by hand. That's what I recall.

Q. And what did she do with the notes, do you recall?

A. I don't know.

Q. Do you know -- do you know if they still exist?

A. I don't.

Q. Do you know if they were sent to the legal department?

A. They may. I don't know.

Q. Okay. Your conversation with Mr. Rasco took place on 8 July.

Do you remember that that was a Friday?

A. I don't recall what day of the week it was, no.

Q. Well, the next day, Saturday, 9 July, you wrote to the ombudsman to report on your conversation with Mr. Rasco.

Do you remember that?

A. Yes.

Q. Okay. The email you sent to the ombudsman is Exhibit D to your witness statement. It is behind Tab 17 of your binder. So let's take a look at it.

Again, it is Willett Witness Statement Exhibit D, Saturday, July 9, 2016, and you copied Amy Stathos and Herb Waye.

Can you tell us who Ms. Stathos is or what her position was at the time?

A. She's deputy general counsel at ICANN.

Q. And when did Ms. Stathos get involved in this process?

A. So Ms. Stathos is -- I believe she was involved with the communications between the -- with the ombudsman from the beginning. That was the standard practice, but I suppose maybe that's privileged.

Q. I don't think it is.

A. Okay.

Q. Who was Herb Waye?

A. Mr. Waye was the -- don't know what his formal title was. He was the assistant ombudsman, secondary ombudsman.

Q. And when did he get involved?

A. I would have to review the emails, but I believe it would have been part of the email thread.

Q. Okay. So you write in the first paragraph to Mr. LaHatte, quote, "I hope that this email finds you well. I know that you have been in communication with NU DOT CO LLC to inquire about the recent complaint filed by Donuts regarding its ownership and potential impact on the .WEB/.WEBS auction," unquote.

Does this reflect your recollection as to whether you had communicated with Mr. LaHatte before contacting Mr. Rasco on Friday, July 8?

A. If I may review this.

Q. Yes.

A. Yes, I believe through this entire exhibit, it goes back July 6, yes, I had been in communication with Mr. LaHatte about this matter.

Q. Now, is it your understanding that the

ombudsman is supposed to be independent?

A. Yes.

Q. And so why are you gathering information under the ombudsman under the oversight of the deputy general counsel?

THE WITNESS: Should I be disclosing conversations and direction?

MR. LeVEE: I will caution you not to disclose communications with counsel, and I am going to object to the statement in the question that anything you were doing was under the direction of the deputy general counsel.

Q. BY MR. De GRAMONT: Had someone asked you to write this email to Mr. LaHatte?

A. Mr. LaHatte had -- in this matter, as in many other matters, had asked me to provide information -- the program team that I might have to help inform his investigation so he could pursue that independent investigation.

So he gathered information -- it is a common practice. My understanding is he gathered information from a variety of sources, including asking me to provide information on certain matters.

Q. Had you ever read the ombudsman charter

stated in ICANN's bylaws?

A. I don't specifically recall reading a charter.

Q. Well, maybe we can put it up on the screen. This is from the current bylaws, but it is identical -- virtually identical to the bylaws in place at the time. It is Exhibit C-1, Section 5.2.

MR. LeVEE: Is this in the binder?

MR. De GRAMONT: It is not in the binder.

Chuck, could you put that up and enlarge Section 5.2?

It says, "The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate, and where possible, resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board,

or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and 'shuttle diplomacy' to achieve those results," unquote.

Have you ever seen that before?

A. I may have. I don't specifically recall an occasion.

Q. And here Mr. Nevett was asking the ombudsman to look at a question which your staff had already investigated and where Mr. Nevett was unsatisfied with the results.

Do I understand that correctly?

A. Correct.

Q. Okay. So in the second sentence you write, quote, "As you know, my team had reached out to NU DOT CO LLC previously, and we received confirmation that NU DOT's application materials were still true and accurate."

Again, you're referring to that exchange of emails between Mr. Erwin and Mr. Rasco that we looked at earlier, right?

A. That's correct.

Q. You continue, quote, "In an effort to be extremely cautious, I reached out to Mr. Jose Ignacio Rasco (the application's primary contact

for NU DOT's .WEB application) again today to ensure our understanding of his previous response was accurate. During the call, he explained the following:"

And then he goes through five different points.

Do you see that?

A. Yeah, those were my points, yes.

Q. These were five points that Mr. Rasco had conveyed to you and were summarized and notes taken by your staff member?

A. Yes.

Q. Okay. And I think everyone can read the first four points on his or her own.

I want to focus on Point 5, quote, "He," meaning Mr. Rasco, "was contacted by a competitor who took some of his words out of context and is using them as evidence regarding the alleged change in ownership," period. "In communicating with that competitor, he used language to give the impression that the decision to not resolve contention privately was not entirely his. However, this decision was, in fact, his. He does not believe that it is appropriate that this email conversation is being used as evidence."

He goes on to say, quote, "Mr. Rasco indicated that he provided you with similar information, but I wanted to share the details of our conversation in case they can provide you with a more complete picture."

Do you recall that?

A. Yes.

Q. Now, did Mr. Rasco tell you during the conversation that the decision to enter the ICANN auction was, in fact, his decision; is that what he told you?

A. Yes.

Q. And by this time, you had seen Mr. Rasco's email to Mr. Nevett. Do I understand that correctly?

A. I may have. Again, I don't -- I don't recall when I specifically saw that email exchange.

Q. How could you possibly interview Mr. Rasco without having that email in front of you, Ms. Willett? Let's go back to Tab 12, which is Exhibit C-35.

And Mr. Rasco has told you that the decision to skip the private auction and go to the ICANN auction was, in fact, his. But here in Exhibit C-35, he is saying that the decision "goes

beyond just us."

Did you or anyone else at ICANN ask him what he meant when he said the decision to go to the ICANN auction, quote, "goes beyond just us," unquote?

A. Again, I don't recall having this email at that time. You asked me the question how could I have had the conversation with Mr. Rasco. But I was having a conversation with Mr. Rasco based on my conversation with Mr. Nevett in Helsinki and based on Mr. LaHatte's general practice and request that I provide him with information that I had. That was the basis of my, again, reaching out to Mr. Rasco.

Q. Ms. Willett, do you know if you or anyone else at ICANN ever asked Mr. Rasco what he said -- what he meant when he said the decision to go to the ICANN auction, quote, "goes beyond just us," unquote? Do you know if anyone ever asked that question?

A. Again, I don't believe -- I don't recall asking that question because I don't recall having this email. The nature of the conversation with Mr. Rasco, the way he described it, was like when someone asks me if I'm available to go out to

dinner and I don't really want to go to dinner, but I say, "Let me check with my husband. I need my" --

Q. Ms. Willett, you are straying far from my question, and I only have limited time.

MR. MARENBERG: Mr. Chairman, this is Steve Marenberg. I believe that the witness is entitled to finish her answer to the question.

MR. De GRAMONT: Mr. Chairman, we have had an instruction that the Amici counsel not intervene. The Amici counsel is only participating in this hearing at the discretion of the Tribunal. Are we going to have to ask for the Amici counsel to be removed or will Amici counsel be able to follow the Chairman's instructions?

ARBITRATOR BIENVENU: Mr. LeVee and Mr. Marenberg, could you, one after the other, respond to the objection that's just been made, starting with you, Mr. LeVee?

MR. LeVEE: I did understand that there's only one lawyer who is supposed to be raising objections in this context, and that lawyer would be me.

ARBITRATOR BIENVENU: Mr. Marenberg?

MR. MARENBERG: Mr. Chairman, I do believe

that we are different parties than Mr. LeVee represents. In other words, he and I represent different parties. So I don't believe that there are two lawyers for one party objecting here.

Now, this is a matter in which Mr. De Gramont is interrogating the witness about her conversation with my client, and she is giving an explanation of that conversation, and Mr. De Gramont interrupted her in the middle of that answer.

This answer bears on my client's rights, and I believe that I appropriately have the right to at least ask that her answer be heard in its entirety before she's cut off, as is proper in these types of proceedings.

Now, if you're going to tell me to be quiet and I cannot represent my client even though its interests are implicated in this question and this line of inquiry, I will be quiet and not raise any other objections, but that is why I interrupted and interjected myself here.

I don't believe that I am representing the same interest as Mr. LeVee and, therefore, we are not subject to the one-counsel rule.

ARBITRATOR BIENVENU: Mr. Marenberg, you

are aware of the status granted to the Amici in this proceeding under the Panel's decision in Phase I. The status is that of an amicus curiae whose contribution to the work of the Panel takes the form of written submissions.

So I would indeed ask you to refrain from making objections in the course of the cross-examination of witnesses presented by the respondent.

MR. MARENBERG: So noted, Mr. Chair, and I will not make any more objections.

ARBITRATOR BIENVENU: Thank you, Mr. Marenberg.

Q. BY MR. De GRAMONT: Now, Ms. Willett, since Mr. Marenberg did intervene, you were going to say that this was like being asked to a dinner party and you wanted to make an excuse not to go to have dinner with the person; is that what you were going to say?

A. Yes, sort of using my husband as an excuse as to being the decision maker about whether we go to a dinner party or not when ultimately it's my decision.

Q. And you know that's exactly the example that Mr. Marenberg gave during his opening argument

to the Panel, did you know that?

A. No. No, I'm sorry, I didn't.

Q. Okay. So going back to Exhibit C-35 -- so to your recollection, no one asked Mr. Rasco what he meant when he said that the decision to go to the ICANN auction, quote, "goes beyond just us," unquote?

A. I only know what I asked Mr. Rasco.

Q. Do you know if you or anyone else at ICANN asked him who the several new Board members were?

A. Again, I don't recall having this email in this time frame, so I don't believe that I would have asked him about that.

Q. Okay. Did you or anyone else at ICANN ask him whom he meant by, quote, "all the powers that be," unquote?

MR. LeVEE: Can I just object? I don't know how she has any way of knowing if anyone else at ICANN --

Q. BY MR. De GRAMONT: To your knowledge. To your knowledge, Ms. Willett.

A. Again, I can't speak to any other conversations. I believe that in terms of program interactions, it was my team and I that were the channel for communicating with applicants, but I

don't know what anyone else might have conveyed.

Q. Even after an applicant had raised a complaint to the ombudsman about your team's investigation of the matter, you believe it was your team's responsibility to continue communicating with applicants about such matters?

A. Well, insomuch as the ombudsman, I don't specifically recall in this situation, but my general recollection is that the ombudsman asked me to provide whatever information we had about the matters he was investigating pertaining to new gTLD applicant disputes.

So it was a matter of gathering that information, fact-finding where we could to support to provide that information in support of his investigation.

Q. Did you coordinate your phone call to Mr. Rasco with the ombudsman?

A. No.

Q. Let's go back to your witness statement. And at Paragraph 29 on Page 9 you write, quote -- tell me when you're there.

A. I am there. Thank you.

Q. So you write, again, Paragraph 29, quote, "On 12 July 2016, the ombudsman informed me that he

had determined that there was no reason to postpone the auction because he found no evidence of a change to the ownership or control of NU DOT CO," unquote.

Did you write this witness statement, by the way?

A. I worked with ICANN's legal counsel to draft this.

Q. Okay. And was "determined" your choice of words, do you recall?

MR. LeVEE: Object; invades the privilege.

Q. BY MR. De GRAMONT: Let me ask it this way: Do you recollect that the ombudsman informed you that he had determined that there was no reason to postpone the auction because he found no evidence of a change to the ownership or control?

A. May I look at his email?

Q. Yeah, let's take a look at it. That's a good idea.

Exhibit G is behind Tab 18 of your binder. Tell me when you're there. Are you there, Ms. Willett?

A. Yes. Thank you.

Q. So this is Mr. LaHatte's email to you, Ms. Stathos is in copy. It's dated July 12th,

2016. He writes, quote, "I have not seen any evidence which would satisfy me that there has been a material change to the application, so my tentative recommendation is that there is nothing which would justify a postponement of the auction based on unfairness to the other applicants," unquote.

So do you see a difference between the terms "determination" and the term "tentative recommendation"?

A. Certainly.

Q. He goes on to write, quote, "Is there any particular reason why a postponement could not be made anyway, or is the preparation for the auction too far advanced? I make that suggestion not because I agree with the complaint made by Donuts, but because it would prevent them from perhaps taking further accountability action based upon a refusal to postpone, as, of course, this company has demonstrated that they will be aggressive about use of such accountability functions."

Do you recall that?

A. Yes.

Q. Did you sense any discomfort on the part of Mr. LaHatte in having the public auction going

forward as scheduled based on this email?

A. I took this email to mean that he was trying to help ICANN avoid having to deal with further accountability mechanisms.

Q. And did you take this email to mean that he had made a determination that resulted in closing the ombudsman complaint on this matter?

A. I did. That's my recollection.

Q. Yeah, notwithstanding the words "tentative recommendation"?

A. Well, I took that as being sort of mitigated, suggesting that we delay the auction anyway, which would have just been completely inconsistent with program practices and all of the rules of the auction that had been in place for three years by that point.

Q. Did you speak to him in person or by telephone or were all your communications in writing?

A. Do you mean about this matter specifically?

Q. Yes, about this matter specifically.

A. So at this juncture, I believe -- because I was in LA, and I am not sure where he was, my recollection is that any communication at this

juncture, July 12, 2016, would have been via email, but given that we were at the public ICANN meeting in Helsinki in late June, I don't recall specifically meeting with him, but I expect I may have had a conversation with Mr. LaHatte in Helsinki about the .WEB matter in general.

Q. And that would have preceded this 12 July email; is that correct?

A. Correct.

Q. Okay. So you don't recall any conversation with Mr. LaHatte specifically about this July 12 email?

A. I do not.

Q. Do you know if anyone responded to his question, quote, "Is there any particular reason why a postponement could not be made anyway, or is the preparation for the auction too far advanced?"

A. I hope that respectfully I would have responded, but I don't recall.

Q. And you don't recall whether anyone else did either?

A. No, I don't know.

Q. In any event, the next day, 13 July, you wrote to the contention set to advise them that the ICANN auction would proceed as scheduled.

Do you recall that?

A. Is there another document I can look at?

Q. There is. It is not in your binder, but VeriSign Exhibit 10. It is also Exhibit P to the Rasco witness statement.

Chuck, could you put up VeriSign Exhibit 10. If you could go to the bottom, I think it is the second-to-last paragraph on Page 1 -- on the first page, sorry. If you could blow up the second-to-last paragraph.

Quote, "The date to submit the postponement form passed on 12 June 2016, and we did not receive consensus from the contention set. As such, no postponement was granted."

And then the next paragraph, "Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction."

You can see at the top -- I think you can see at the top it is dated July 13.

Do you recall writing that?

A. Let's see. I am just going to --

Q. Yeah, take your time. You can ask Chuck

to blow up any portions of the document that you need to read.

A. It would be helpful if nothing was blown up and I could just read through it.

Q. You can read that?

A. Yeah, thank you.

Could I ask to see the second page? Thank you.

I have forgotten the question, sorry.

Q. It was simply do you recall that on July 13th -- is that the date of the letter -- July 13th you wrote to the contention set to advise them that the ICANN auction would go forward as scheduled? That was simply my question.

A. Yes. Thank you.

Q. And that was the day after you had had that exchange with the ombudsman where he wrote about his tentative recommendation?

A. Correct.

Q. I take it you were under a lot of pressure to make sure that the ICANN auction for .WEB went forward on 27 July; is that true?

A. Oh, no, no, I wouldn't say we were under pressure to conduct auctions at all. In fact, ICANN would have preferred that we not have to

conduct any auctions of last resort.

Q. So you would have been -- ICANN would have been pleased to postpone the auction, the ICANN auction?

A. ICANN would have been pleased if the applicants had found some way to resolve the contention in the three-plus years until this point, or we would have hoped that the applicants could have agreed to submit a request for postponement with -- in a timely manner.

But at the writing of this letter, I -- this letter saying we were proceeding could have been a basis for any of the applicants to initiate an accountability mechanism, to initiate a reconsideration request saying that ICANN should postpone the auction, and that would have put the contention set on hold as of that date.

Q. So your testimony was once the ICANN auction was scheduled for July 27, you were not under any new pressure to make sure that it went forward on that date?

A. Correct. I wouldn't say there was pressure.

Q. Okay. Let's go back to your witness statement and take a look at Paragraph 14, and it

says, quote, "The auction rules governing indirect contention sets. Auction rules set forth a prescribed and limited period of time within which members of a contention set may request a postponement of an auction," quote -- and you're quoting from the rules -- "an applicant may request an advancement/postponement request via submission of the auction date advancement/postponement request form. The form must be submitted at least 45 days prior to the scheduled auction date, and ICANN must receive a request from each member of the contention set," close quote.

And that's from Rule 10 of the auction rules; is that correct?

A. I'd have to review the auction rules.

Q. Okay. Let's take a look at them. They are behind Tab 20, which is Exhibit C-4.

ARBITRATOR BIENVENU: While the document is being pulled up, Mr. De Gramont, at a convenient time in the flow of your cross-examination, we could take our first break.

MR. De GRAMONT: Mr. Chairman, may I suggest I finish my questioning on this document and then we can take our break then?

ARBITRATOR BIENVENU: Absolutely. If it

is convenient for you, we will take it then.

MR. De GRAMONT: Thank you, sir.

Q. Ms. Willett, we are at Tab 20 of your binder, C-4, is this the auction rules that were in effect in the summer of 2016?

A. I believe so.

Q. Now, if you turn to Page 4, bracketed Page 4, you'll see Rule 10 in about the upper half of the page.

And maybe we can highlight the language that starts, "The form must be submitted."

"The form must be submitted at least 45 days prior to the scheduled auction date and ICANN must receive a request from each member of the contention set," unquote.

So that's the language that you quoted in your witness statement, right?

A. Correct.

Q. But then the sentence that you didn't include in your witness statement says, quote, "Without limiting the foregoing, ICANN reserves the right at its sole discretion to postpone the auction for any contention set due to a future date regardless of whether each and every member of the contention set has submitted a postponement

request," unquote.

Do you see that?

A. I do.

Q. So ICANN had within its discretion the possibility of postponing the auction even though not each and every member had submitted a postponement request; is that correct?

A. That's correct.

Q. Was there any discussion of postponing the auction beyond the discussion by the ombudsman that we looked at in his email?

A. Again, I don't recollect a specific conversation, but there may have been.

Q. But you don't recall?

A. Correct.

MR. De GRAMONT: Okay. This would be a good time to take a break, Mr. Chairman.

MR. LeVEE: Mr. Chairman, very briefly, could I ask that the witness be excused but that the Panel and Mr. De Gramont remain for 30 seconds?

ARBITRATOR BIENVENU: Yes, of course. This is Mr. LeVee speaking?

MR. LeVEE: Yes.

ARBITRATOR BIENVENU: Yes, very well.

So, Ms. Willett, under the same

restrictions as yesterday, that is, not to discuss your testimony with anyone during the break. Thank you very much, indeed.

Yes, Mr. LeVee -- sorry -- let's wait to get confirmation from JD that the witness has been removed.

MR. ENGLISH: Yes, the witness has been removed.

ARBITRATOR BIENVENU: Thank you very much. Please proceed.

MR. LeVEE: Yes. Yesterday, Mr. Chairman, you said that we had a hard stop yesterday at a particular time, and I wanted to let the Panel know that the witness following Ms. Willett, Mr. Disspain, is in the United Kingdom. And so he said to me that he would not be terribly comfortable -- if the Panel chose to stay late, he would ask that he not be asked to testify.

He works during the day. So he will be testifying later today, presumably, and it would be until roughly 9:00 o'clock his time, and he would not be comfortable testifying beyond that.

I raise it not because the Panel made any decision whether it was going to extend this particular day, but just to advise everyone. I am

not trying to influence the extent of the Willett cross, not trying to have any other impact. I am just alerting the Panel that today we would make a request that we would not go late.

ARBITRATOR BIENVENU: Very well. It is a comment that is made at an opportune time because we had -- we had decided as a Panel that we would offer the parties today to sit longer hours precisely to -- well, to try to catch up on our schedule.

So you're saying that if Mr. Disspain is the witness being examined at this point, that would be a problem for him?

MR. LeVEE: Yes. He is under the original schedule. He was to be finished today, but it looks quite unlikely because we are running a little late. And I know that the estimate on Ms. Willett is four hours, but we have already gone two and a half and the binder is pretty thick. I have no idea if we are stopping at four hours or not.

Be that as it may, I have been looking at the schedule and thinking that we would be in the middle of Mr. Disspain's cross-examination if, in fact, that's how it occurs.

ARBITRATOR BIENVENU: All right. Well, thank you for advising us of this.

MR. MARENBERG: Mr. Chairman, this is Steve Marenberg. I would suggest that all counsel need to talk about scheduling. Because we had mentioned a while ago last week that Mr. Rasco is scheduled to testify on Friday, and he is not available the following week because he's on vacation.

I think before we dump this problem in the laps of the Panel, maybe counsel ought to talk about what we suggest the Panel does and we do that either on this break or the next break.

ARBITRATOR BIENVENU: Well, that would seem to me to be a sensible proposal. I know that counsel have important things to do during our short breaks, but perhaps they could find five minutes to, as you suggest, have a chat about scheduling and report back to the Panel.

MR. MARENBERG: Thank you, Mr. Chairman.

MR. De GRAMONT: I would suggest we do that at the next break, if that's -- oh, there isn't another break, is there?

MR. LeVEE: No, no, there's another break.

ARBITRATOR BIENVENU: There's another

break.

MR. De GRAMONT: Let's do that at the next break.

ARBITRATOR BIENVENU: For our guidance, Mr. De Gramont, and if you prefer to answer this after the break, that's fine, but do you have a sense of where you are in your game plan?

MR. De GRAMONT: Mr. Chairman, I would prefer to answer that after the break so I can confer with my colleagues.

ARBITRATOR BIENVENU: Perfect. So we will take our first 15-minute break. Thank you all.

MR. De GRAMONT: Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: So, Mr. De Gramont, you are ready to continue your cross-examination?

MR. De GRAMONT: I am, Mr. Chairman.

ARBITRATOR BIENVENU: Is the witness back with us?

MR. ENGLISH: Not yet. Should I call her now?

ARBITRATOR BIENVENU: Please call her, yes.

Mr. LeVee, you are there?

MR. LeVEE: I am here. I'm sorry if I'm

late. We didn't even get a signal to rejoin.

ARBITRATOR BIENVENU: Okay. Well, you're forgiven.

MR. LeVEE: Thank you.

MR. De GRAMONT: I forgive you too, Mr. LeVee.

MR. ENGLISH: The witness is in the room with us now.

ARBITRATOR BIENVENU: Ms. Willett, we will continue your cross-examination.

Mr. De Gramont.

MR. De GRAMONT: Thank you, Mr. Chairman.

And welcome back, Ms. Willett.

Q. I'd like to direct your attention back to Tab 16 in your binder, which is Exhibit F to your witness statement, and I believe we had looked at the bottom portion of this document before, which is the July 8, 2016, email where you asked Mr. Rasco to call you.

Now I'd like to take a look at the upper portion of that document, which is an email that Mr. Rasco wrote to you. I can't tell -- there doesn't seem to be a date. Am I missing it or do you know what the date of this email is?

A. I don't see a date either. I don't

recall. It references last Friday. So I suppose it was the week after -- 9, 10 -- week of the 11th.

Q. Okay. So in the first paragraph he writes, quote, "Thank you for taking the time to speak with me last Friday, July 8, concerning the complaint that another applicant for the .WEB TLD made to the ICANN ombudsman, Chris LaHatte, relating to an alleged change in the composition of NU DOT CO LLC's," quote, "Board," unquote. "I am writing to reiterate the information I provided you on our call so that the facts are clear," unquote.

The third paragraph, he writes, "My understanding from our discussion is that ICANN is satisfied with the information I provided and has concluded there's no basis for any complaint, reevaluation or other process relating to our application, nor for any delay in the ICANN auction. Please let me know if that is not the case," unquote.

Did you tell Mr. Rasco during your conversation on Friday, July 8th, that ICANN was satisfied with the information that he had provided?

A. I honestly don't recall all of the specifics of the conversation.

Q. Okay. In the next paragraph he goes on to cite Rule 10 of the auction rules, which we discussed, and in the next sentence he writes, quote, "As we discussed, I share your understanding that the complaint was raised in order to get more time to convince us to resolve the contention set via a private auction even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN's auction as scheduled," period, unquote.

Did you tell Mr. Rasco that you believed the complaint had been raised simply to convince NDC to resolve the contention set via a private auction rather than going to the ICANN auction?

A. Again, I don't recall all of the specifics of that phone conversation with Mr. Rasco.

Q. Do you recall if you told Mr. Rasco that you thought the complaint had no merit?

A. I don't recall saying that.

Q. Had you concluded at that point that the complaint had no merit?

A. Again, I am not certain of the date of this communication and I know, as we just looked at, I was still awaiting response from Mr. LaHatte.

My general recollection is that it was -- this understanding of mine that I seem to have shared with Mr. Rasco, this understanding that the other applicants wanted more time to resolve contention, I took that based on the conversation and communications from other applicants, including Mr. Nevett.

Q. Ms. Willett, we have limited time. So I am going to restate my question, which was: Do you recall telling Mr. Rasco during that conversation on Friday, July 8th, that your understanding was that the complaint was raised to get more time to convince NDC to resolve the contention set via private auction rather than ICANN auction?

A. Again, I don't recall the specifics of the conversation from over four years ago.

Q. Do you recall telling anyone else that you -- at that time, Friday, July 8th, that you believed that the complaint had been raised simply as a ploy to get NDC to proceed with the private auction rather than the ICANN auction?

A. I have that as a general recollection, but I don't recall a specific conversation from four years ago.

Q. Okay. You have a general recollection

that you told others at ICANN that you thought the complaint was simply a ploy to get others to -- rather, to get NDC to participate in the ICANN auction?

A. I apologize. I have a general recollection that it was my understanding that applicants were seeking a postponement to independently resolve and avoid an ICANN auction. That is my general recollection and understanding.

I don't recall having a specific conversation with anyone about that from four years ago.

Q. Do you have any reason to believe that you did not tell Mr. Rasco that you thought the complaint was raised in order to convince NDC to resolve the contention set via private auction rather than an ICANN auction?

A. No.

Q. Have you reviewed the Domain Acquisition Agreement, Ms. Willett, that was entered into between NDC and VeriSign?

A. I have not.

Q. You have never seen it?

A. I have seen -- in preparation for this I may have seen portions of it, but I have never

reviewed it.

ARBITRATOR BIENVENU: Mr. De Gramont, can you clarify whether you are asking the question by referring to the time period just prior to Ms. Willett's testimony or back when these events were occurring?

MR. De GRAMONT: That's helpful, Mr. Chairman. Thank you.

Q. Prior to your preparation for this testimony, had you seen the Domain Acquisition Agreement?

A. I had not.

Q. You never saw the Domain Acquisition Agreement in 2016?

A. That's correct.

Q. Okay.

Redacted - Third-Party Designated Confidential Information

MR. LeVEE: Let me remind you of the issues relating to privilege, Ms. Willett, and ask you not to disclose information that you acquired from counsel.

Q. BY MR. De GRAMONT: It is a yes-or-no question.

MR. LeVEE: No, I don't think that's an appropriate question, if anything that she knows comes from counsel.

MR. De GRAMONT: Well, let's do this.

Q. Let's take a look at the DAA, which is Tab 19, Exhibit C-69 in your binder.

A. I am there.

Q. And I would direct you, please, to Page 17, Paragraph (i), and I am just going to read some of the language to you, and you can tell me if it rings any bells.

Redacted - Third-Party Designated Confidential Information

Do you have any recollection about hearing about that provision in the DAA in 2016?

A. No.

Q. Looking at that provision, isn't it obvious that Mr. Rasco was telling Mr. Nevett the truth when he said that the decision went beyond simply us and that he had to check with the powers that be in order to answer the question?

MR. LeVEE: I object to the question. Ms. Willett is not a lawyer. The question asks an ultimate conclusion. And she's testified that she did not see the documents during 2016, so I don't see how her views today could possibly be relevant.

MR. De GRAMONT: I am not asking for a legal opinion. I am just simply asking whether, based on the plain language of this agreement, isn't it obvious that Mr. Rasco was telling Mr. Nevett the truth when he said that the decision whether to participate in a private auction or an ICANN auction went beyond the three individuals identified in the NDC application.

MR. LeVEE: It's the same question. "Isn't it obvious" asks her for a legal conclusion. You're asking her to --

ARBITRATOR BIENVENU: Mr. LeVee.

Mr. De Gramont, it is not for me to format a question, but I think the objection goes to the substance of your question.

So perhaps you can ask your question by making an assumption as to what this provision says and then ask the witness about her understanding.

MR. De GRAMONT: Thank you, Mr. Chairman. That's very helpful.

Q. Redacted - Third-Party Designated Confidential Information

If that's the case, then Mr. Nevett -- rather, Mr. Rasco was telling Mr. Nevett the truth when he said the decision went beyond just us?

A. Again, I am only looking at part of one paragraph of a very long agreement. As Mr. LeVee said, I am not a lawyer. I don't think I can even begin to guess what Mr. Rasco meant or intended or how this whole agreement informed what Mr. Rasco was saying.

Q. Okay. That's understood.

I am going to try to ask this question in a way that won't elicit a privilege objection from Mr. LeVee. I am going to tell you that this is a

yes-or-no question.

Redacted - Third-Party Designated Confidential Information

MR. LeVEE: That is an objectionable question. There's another way of asking it. But if what she knows comes from a lawyer, then you're asking to invade the privilege by the fact that a lawyer may have said something to her.

MR. De GRAMONT: For now I just want a yes-or-no question. If I ask a follow-up, I think Mr. LeVee can object then.

MR. LeVEE: No. Because you have asked, "Yes or no, did somebody tell you that the agreements mean something?" If someone told her that, that's a privileged communication.

MR. De GRAMONT: Not if it came from a nonlawyer.

MR. LeVEE: You didn't ask that question.

MR. De GRAMONT: I said "did anyone," "did anyone."

MR. LeVEE: Ask a nonlawyer question.

ARBITRATOR BIENVENU: Gentlemen, could I ask you both, rather than engage in a conversation,

to address the Panel?

MR. LeVEE: My apologies.

ARBITRATOR BIENVENU: Mr. De Gramont, perhaps you could ask the witness if aside from conversations that she may have had with counsel, rather than, you know, the rest of the question.

MR. De GRAMONT: Okay. Thank you, Mr. Chairman.

Q. Redacted - Third-Party Designated Confidential Information

A. No.

Q. Okay. Let's take a look at Paragraph 18 in your witness statement.

A. Yes.

Q. And you write, quote, "Even if NDC had submitted a change request indicating that it had undergone a change of control and/or ownership, NDC would not have been disqualified from the auction set to take place on 27 July 2016."

Do you recall that?

A. Yes.

Q. And we now know that VeriSign did not

acquire ownership control -- let me ask you this: 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.

Q. Okay. Your understanding is that VeriSign did not acquire ownership or control over NDC the entity, correct?

A. Correct.

Q. So Paragraph 18 in your statement, that even if NDC had submitted a change request indicating that it had undergone a change of control and/or ownership is simply a hypothetical, right?

A. Yes, that's a -- yes.

Q. Under your understanding of the change request process, could applicants submit a change request that they were reselling, assigning or transferring the rights and obligations in their application?

A. So they couldn't transfer their application to another entity, no. But applicants all the time had engaged third parties to act on their behalf.

Q. Right.

A. As part of the application processing.

Q. And have you formed a view -- well, you haven't formed a view of whether that's what happened here because you never reviewed the DAA; is that right?

A. That's correct.

Q. Okay. Let's move on to another subject.

So the ICANN auction went forward as scheduled on 27 July 2016; is that correct?

A. Yes.

Q. And did the auction continue into the next day, 28 July; do I understand that correctly?

A. That's my recollection, yes.

Q. And NDC was declared the winning bidder with a bid of 142 million.

Do you recall that?

A. I don't know what NDC's ultimate bid was. I understand what the second bid was.

Q. And that's because under the auction rules, the winning bidder paid the bid that the second highest bidder had made?

A. Correct.

Q. And Afilias submitted the second highest bid, which was 135 million, right?

A. That's come to be my understanding, yes.

Q. So NDC's bid was effectively 135 million; is that right?

A. Correct.

Q. Okay. On 28 July 2016 VeriSign published a 10-Q statement with the U.S. Securities and Exchange Commission, or the SEC, and in the footnote stated that, quote, "The company incurred a commitment to pay approximately $130 million for the future assignment of contractual rights, which are subject to third-party consent," unquote.

Do you recall that?

A. I recall seeing that at some point.

Q. And the media immediately picked up on that footnote and speculated that VeriSign was behind NDC's application for .WEB.

Do you recall that?

A. Not specifically.

Q. Look at what's behind Tab 21 of your binder. It is Exhibit C-98, and it is an email dated July 28, 2016, from Domain Name Wire to ombudsman@ICANN.org, "Subject: It looks like VeriSign bought .WEB domain for 135 million (SEC filing)."

Do you recall if you ever saw this particular report?

A. I don't ever recall seeing this.

Q. The fourth paragraph says, "VeriSign was rumored to be backing NU DOT CO's bid for the domain name."

Have you ever heard such rumors?

A. Prior to or during the auction, no.

Q. Prior to and during the auction you had never heard rumors that VeriSign was financially backing the NDC bid?

A. I had not, correct.

Q. Would you turn to Tab 22, which is Exhibit C-99, and this is an email from Google Alerts sent to you on Thursday, July 28, 2016. And if you turn to Page 2, you will see at the bottom of the page a title that reads, quote, "Someone (cough, cough VeriSign) just gave ICANN 135 million for the rights to .WEB."

It goes on to say, "Under the auction rules, all 135 million will now go into ICANN's coffers, to be added to the 105 million it has made from the auction of 15 other top-level domains."

Did you ever see that article?

A. Not that I recall.

Q. Is it correct that the 15 prior auctions had generated 105 million? And I should say -- let

me start over.

Is it your recollection that the 15 prior ICANN auctions had yielded $105 million in bids?

A. That sounds about right. I don't have a specific recollection without looking at the web page that reports that, but it sounds generally correct.

Q. Do you recall that .WEB generated a bid that was more than the bids in all of the 15 prior auctions put together?

A. That sounds about right.

Q. And these moneys that are generated in the ICANN auctions don't include the $185,000 application fees that each applicant paid; is that correct?

A. That's correct. The ICANN auction proceeds are kept in a separate fund, separate account, segregated from the new gTLD Program funds as well as segregated from ICANN's operating funds.

Q. How many applications did you say were filed during the new gTLD Program?

A. 1,930 applications.

Q. And we multiply that by 185 -- my math isn't good enough to do that, but it is a lot of money?

A. It is over $360 million.

Q. Do you recall -- let's do this. Let's take a look at Paragraph 33 of your witness statement.

A. Okay.

Q. It says, quote, "I am informed and believe that on 1 August 2016, VeriSign made a public announcement that it had entered into an agreement with NDC regarding .WEB," unquote.

Who informed you of that?

A. I don't specifically recall.

Q. Did you see the 1 August 2016 press release on the day that it was issued?

A. I believe I did review that.

Q. Now, Paragraph 34 you write, quote, "At no time before VeriSign's public announcement did any applicant ever raise a concern to me that VeriSign was involved with NDC's application, nor was I aware of VeriSign's involvement until it publicly announced its agreement with NDC," period, close quote.

When you are speaking of the public announcement, you mean the 1 August 2016 press release issued by VeriSign?

A. That's correct.

Q. Now, do you recall that Mr. Rasco sent an email to you the night before the 1 August 2016 press release Redacted - Third-Party Designated Confidential Information

A. Yes. I recall receiving an email from Mr. Rasco.

ARBITRATOR KESSEDJIAN: Mr. De Gramont, are you sure you are speaking of a press release of August 16? I think it was August 1st.

MR. De GRAMONT: I had meant to say 1 August 2016. I may have misspoken.

ARBITRATOR KESSEDJIAN: No, no, it may be my -- as you know, in France we speak of dates in a very different way. I may have been mistaken. Okay.

Q. BY MR. De GRAMONT: So let's take a look at that email, which is behind Tab 23. It is Exhibit C-100. And let's -- are you there, Ms. Willett?

A. I am. Thank you.

Q. And looking at the very bottom of the page, Mr. Rasco writes you on July 31st, 2016, Redacted - Third-Party Designated Confidential Information

Q. Were you at all curious why someone from VeriSign would be contacting Mr. Atallah -- I'm sorry. Let me break it down.

A. I don't recall, but likely, yes, probably piqued my curiosity.

Q. And similarly you were curious as to why someone from VeriSign would be contacting Mr. Atallah about the .WEB application?

A. Not that I recall.

Q. Okay. Did you forward Mr. Rasco's email to anyone at ICANN?

A. Not that I recall.

Q. Did you discuss it with anyone at ICANN?

A. No, I'm sorry, I don't recall.

Q. Redacted - Third-Party Designated Confidential Information

A. I don't know.

Q. Are you aware that NDC's lawyers stated in opening arguments that ICANN and specifically you, Ms. Willett, knew that VeriSign was financially backing NDC's bid prior to VeriSign's public announcement?

A. I am not aware of anything in the opening statements.

Q. I will read you what NDC's counsel said

and ask you to respond to it. Quote, "At this point, there was a lot of speculation in this close-knit community that VeriSign has been behind NDC's bids. This is an open secret out there, so this is not something that she's guessing about or that is it."

And by "she," NDC's lawyer is referring specifically to you.

Redacted - Third-Party Designated Confidential Information

ICANN has not received the DAA and doesn't get it until later in the month, but they do know that the financial impetus for our winning the bid is from VeriSign. That is something -- that is not something that's hidden from her at all."

So let me ask you again, did you know prior to 1 August 2016 that VeriSign was funding NDC's bid or was financially behind NDC's bid.

A. No, I don't recall ever having that information prior to 1 August.

Q. And as you sit here today, to your knowledge, did anyone else at ICANN know that VeriSign was funding NDC's bid prior to 1 August 2016?

A. No. I don't know what everyone at ICANN knew, but to my knowledge --

Q. To your knowledge --

A. To my knowledge, no.

Q. Okay. Let's go back to your witness statement, to Paragraph 9. And Paragraph 9 reads, quote, "Prior to the filing of an IRP, potential claimants are encouraged to enter into a Cooperative Engagement Process, CEP, with ICANN in order to allow the parties to discuss resolving or narrowing the issues to be brought in an IRP proceeding. In connection with the new gTLD Program, ICANN employs a practice, depending on the circumstances, of placing a contention set, as described below, or a gTLD application on hold if it is the subject of certain accountability mechanisms, including the initiation of a CEP," unquote.

Do you see that?

A. Yes, I do.

Q. Is that practice set forth in writing anywhere?

A. I am not sure.

Q. Do you recall ever seeing that practice set forth in writing?

A. I recall explaining it. It might have been written about in terms of the program. I might have spoken about it. Honestly, I don't recall the specifics.

Q. You say you recall explaining it -- explaining it to whom?

A. So as the head of the new gTLD Program, I spoke on behalf of the program and provided public updates on a regular basis through monthly webinars. In 2012, 2013, I typically gave one or more updates on the program at every public ICANN meeting.

So I spoke about how the program endeavored to respect the applicants, the community's opportunity to invoke those accountability mechanisms and to respect those by putting contention sets on hold -- or putting applications on hold or contention sets on hold to allow those accountability mechanisms to transpire,

to allow that dispute to be handled through one of those accountability mechanisms.

Q. And if the practice wasn't set forth in writing anywhere, what was the basis for your providing the information to certain applicants?

A. So when I took over the program, there were a number of all -- all of the applications, nearly all of the applications were still active and the program processing was still in its early days and there were many, many disputes about applications.

And although the applicant guidebook had described actually multiple objection mechanisms, types of objections, whereby community members or governments or interested parties could object to an application, the guidebook didn't specify an appeals process or any other mechanism by which applications could complain or dispute how ICANN was handling their applications.

So after internal discussions, it became clear that we needed to -- these are described -- these mechanisms are described in the bylaws, that we need to encourage applicants and the community to utilize those mechanisms. So it became a very familiar refrain of mine in public presentations to

guide those complaints using one of the accountability mechanisms, as there was no other mechanism described in the applicant guidebook.

Q. You say in your witness statement that the practice applies to certain accountability mechanisms. Which accountability mechanisms does the practice apply to?

A. So as a general practice, we evaluate each accountability mechanism on a case-by-case basis. But in general, when a reconsideration request was triggered about an application pertaining to an application or contention set, that application was put on hold.

Ombudsman inquiries, when the ombudsman informed us of such, that drove us to put something on hold. CEP being initiated put something on hold. And the actual filing of an IRP, we had a few different practices over time about that, but the IRP, I believe, has another mechanism to -- component to request relief, which could be putting the contention set on hold.

Q. You said that each accountability is evaluated on a case-by-case basis to determine whether to put it on hold. Are the criteria that ICANN uses for that determination set forth

anywhere in writing?

A. Not that I am aware of.

Q. And you said that you made presentations in which you referred to advising applicants that accountability mechanisms would sometimes lead to contention sets being put on hold. Are you aware if any of those presentations are exhibits in this IRP?

A. Oh, I am not -- I am not sure.

Q. Okay. Do you know whether those presentations are posted anywhere on the ICANN website?

A. I believe a number of my presentations are available by video recordings. I am not sure how far back that goes. But at one point, they were available on the ICANN website.

Q. Specifically the presentations where you said that accountability mechanisms would sometimes lead to contention sets being put on hold?

A. Yes. I believe -- as a general practice, ICANN records sessions from its public meetings and posts those recordings, but I don't know how long they retain them and where they might be available at this juncture.

Q. Are you familiar with the provision in the

bylaws that requires ICANN to, quote, "Make decisions by applying documented policies consistently, neutrally, objectively and fairly," unquote?

A. Sorry, can you repeat that?

Q. Yeah. Are you familiar with the provision in the bylaws that requires ICANN to, quote, "Make decisions by applying documented policies consistently, neutrally, objectively and fairly," unquote.

A. I think you may have showed that to me yesterday.

MR. LeVEE: Alex, since you're quoting, would you mind showing it to her?

MR. De GRAMONT: Sure, sure.

Q. This is Tab 39 in your bylaws. It's Exhibit C-1, and I am going to point you to a provision at bracketed Page 6. Now, these are not the bylaws that were in effect as of 2016, but the language that I am going to point you to is identical to the language that was in the bylaws that were in effect in 2016.

Let's actually start at Page 5 under Section 1.2, "Commitments and Core Values." It says, quote, "In performing its Mission, ICANN will

act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, each as described below," unquote.

And then if you turn the page, Subparagraph Roman Numeral v, and this is the language that's also in the bylaws that were in effect in 2016, "Make decisions by applying documented policies consistently, neutrally, objectively, and fairly."

Were you familiar with that principle contained in the bylaws?

A. I don't recall reading it from the bylaws.

Q. Were you familiar with the principle otherwise?

A. Yes, I -- yes.

Q. And are you familiar with the requirement of transparency in the bylaws?

A. Generally familiar, yes.

Q. So if you'll turn to Page 8, and this is language that was also in the bylaws in effect in 2018, it says, quote, "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," unquote.

Were you familiar with those provisions of the bylaws?

A. Generally familiar.

Q. And the purpose of those rules is to ensure that everyone knows what the rules and practices are so that everyone is treated as being on the same playing field, do you agree?

A. Well, I believe that both of those provisions are really -- you know, this is my interpretation of bylaws, and I am not a lawyer, but I believe that those are intended to describe ICANN's approach to policy implementation and applying Internet policy and in policy development, as, you know, Section 3.1(a), (b) and (c) are all talking about policy development work, but it was my general understanding that operationally we tried to be as transparent as possible.

Q. Let's assume for the sake of argument that there was this practice. If it was not stated anywhere in documentation, some applicants would know about it and others would not, right?

MR. LeVEE: Calls for speculation.

Q. BY MR. De GRAMONT: Isn't the idea that the policies and practices be documented to ensure that everyone knows what the policies and practices

are so that insiders won't have benefit that newcomers will not have; was that your understanding?

A. We endeavor to document a whole lot about our practices. The entire new gTLD website is largely our effort to be transparent and to share as much information publicly as possible.

Q. But as far as you know, the practice you describe in your witness statement of sometimes putting contention sets on hold depending on the circumstances wasn't documented anywhere for the public?

A. I am not certain.

Q. You don't recall any such documentation?

A. I don't.

Q. Okay. Are you aware that Donuts and Ruby Glen filed for CEP on 2 August 2016?

A. I am aware they filed and initiated CEP. The date sounds about right.

Q. Okay. And if you -- just to be sure, if you look at Tab 25 in your binder, this is a hyperlink in Mr. Atallah's 30 September 2016 letter to Mr. Hemphill, which is Exhibit C-61.

For the record, the parties agreed that we could use hyperlinked documents that we identified

to one another, and this is one of them.

Are you familiar with this Cooperative Engagement and Independent Review Processes Status Update?

A. Yes.

Q. You have seen these before?

A. Yes.

Q. You can see that Donuts and Ruby Glen filed for CEP regarding .WEB in 2 August 2016?

A. I can see that, yes.

Q. On August 5th you wrote to Mr. Rasco to say that NDC would receive an invitation to contract being later that day.

Do you recall that?

A. What date?

Q. 5 August.

A. Is there a --

Q. It is Tab 23, C-100. Tell me when you're there.

A. I am. Thank you.

Q. Okay. This is a continuation of the email string in which Mr. Rasco advised you about the press release that was coming from VeriSign, and in the middle of the page first Mr. Rasco writes to you on August 6th, and he writes, quote, "Hi,

Christine. I understand Power Auctions confirmed to ICANN that it received the full winning bid proceeds from us for the .WEB auction. With that step complete, I was hoping to find out when ICANN might provide us with the CIR," unquote.

Do you see that?

A. Yes.

Q. First of all, tell us what "CIR" means?

A. It stands for Contracting Information Request.

Q. So that's what you send out to start the process of delegating a string; do I understand that correctly?

A. Not quite. May I explain?

Q. Please.

A. So a Contracting Information Request is essentially a set of questions that the new gTLD Program team extends to an applicant who is -- once contention has been resolved -- who is moving forward and is proceeding into contracting. So once -- it is essentially sort of like an invitation to begin contracting discussions. It is one of the very first steps in a multiweek, multimonth process.

Q. Okay. So the next day, August 5th, we can

see from the email above, you write to Mr. Rasco, quote, "Hi, Jose. Yes, we have confirmed that the full auction payment was received by Power Auctions. Based on ICANN's standard registry contracting process, NU DOT CO should expect to receive an invitation to contracting (CIR) today. In addition to engaging with the new gTLD Program team via the GDD portal, feel free to contact me if you have any other questions," close quote.

Do you recall sending that email?

A. Well, reading it here, yes, I recall that.

Q. And do you recall if ICANN sent the invitation to contracting to NDC later that day?

A. I believe we did. Is there another document I might look at?

Q. I don't have another document.

A. Okay.

Q. I'm sorry.

Now, if -- sorry, if Donuts and Ruby Glen had filed for CEP on 2 August, why did that not put the contention set on hold?

A. So there were a lot of things happening in that week. So the CEPs are -- that notice goes to someone in ICANN's legal department, not my team. So it is a matter of when that -- the notice might

have come in for the CEP on the 2nd, and that reflects the date that's published on that previous document. But I didn't become aware of it until, I believe, later on August 5th, or shortly thereafter.

Q. Do you recall that on August 8, 2016, the general counsel of Afilias, Mr. Scott Hemphill, wrote to Mr. Atallah about the .WEB application and auction process?

A. I recall Mr. Hemphill wrote a couple of letters. Is it possible to look at the --

Q. Yes, absolutely. So that's Tab 26. It is Exhibit C-49.

Did you see that letter at the time it was sent by Mr. Hemphill to Mr. Atallah?

A. I expect I would have seen it shortly after Mr. Atallah received it.

Q. And did you read it?

A. I expect I did. I believe I did, yes.

Q. And do you remember that in the fourth paragraph, second sentence, Mr. Hemphill wrote, quote, "We have not been able to review a copy of the agreement(s) between NDC and VeriSign with respect to this arrangement, but it appears likely, given the public statements of VeriSign, that NDC

and VeriSign entered into an agreement in the form of an option or similar arrangement with respect to the rights and obligations of NDC regarding its .WEB application," unquote.

Do you remember that Mr. Hemphill made that statement?

A. I recall that, yes.

Q. And if you look at Page 2, the second paragraph from the bottom, quote, "We request that ICANN promptly undertake an investigation of the matters set forth in this letter and take appropriate action against NDC and its .WEB application for violations of the guidebook, as we had requested," unquote.

Do you remember that Afilias had asked for an investigation?

A. Yes, in this letter.

Q. And did ICANN undertake an investigation in response to this letter?

A. Not that I'm aware.

Q. Are you aware that at some point in August 2016, ICANN's outside counsel, Mr. Eric Enson at Jones Day, called VeriSign's outside counsel, Mr. Ronald Johnston at Arnold & Porter, about this matter?

MR. LeVEE: Please do not answer if the information you know is privileged. I will object that the question invades privilege.

THE WITNESS: I have no knowledge about that.

Q. BY MR. De GRAMONT: Okay. I am just going to show you the letter and ask you if you've ever seen it.

A. I apologize, I thought you said "called."

Q. Oh, I did. Okay. You're right.

Tell you what, let's take a look at the letter, Tab 27, Exhibit C-102.

Have you seen this letter before?

A. No, I have not.

Q. Okay. And in this letter Mr. Johnston forwarded the DAA and several other documents to ICANN's outside counsel. Were you aware that that had happened?

A. I'm sorry, who is Mr. Johnston? Oh, counsel for VeriSign.

Q. Yes.

A. Okay.

Q. Were you aware that VeriSign's outside counsel had written to ICANN's outside counsel forwarding the DAA and other materials attached

hereto?

MR. LeVEE: Can you ask her if she's aware from anyone other than a lawyer?

Q. BY MR. De GRAMONT: Are you aware from anyone other than a lawyer?

A. No.

Q. Okay. And you never saw these materials?

A. No.

Q. Okay. Let me ask you a question about the "Confidential Business Information. Do Not Disclose" heading. Have you seen that before on communications to ICANN?

A. On occasion parties would write to ICANN and ask their communications to ICANN to be held confidentially, meaning ICANN has a practice of publishing correspondence. So in order to indicate to ICANN that a party didn't want their correspondence published, they would indicate that it was confidential.

Q. And do you know if ICANN evaluates those requests, or does it simply keep it confidential if the sender has asked ICANN to do so?

A. Insofar as I administered and oversaw the handling of correspondence for several years during my tenure at ICANN, our practice was that we

respected those requests for confidentiality and we did not post those -- such correspondences, with one exception.

At some point if some other party asked for something to be published or it became desirable and relevant to something else, I recall, again, it's been years, so I don't recall a specific example, but as a general practice, I recall that ICANN might ask the sender if it would be possible to publish a letter, but we respected their requests for confidential correspondence.

Q. So you didn't ask anyone to undertake an analysis whether it was, in fact, sensitive business information or anything like that?

A. No. Any further discussions of that would have been with counsel.

Q. Are you aware that Mr. Atallah did not respond to Mr. Hemphill's 8 August 2016 letter? Let me withdraw the question.

Are you aware that he didn't respond to Mr. Hemphill's 8 August 2016 letter prior to late September?

MR. LeVEE: Alex, could you put that letter on the screen?

MR. De GRAMONT: Yeah, yeah, let's start

with this.

Q. Do you recall that Mr. Hemphill sent a second letter on 9 September 2016 to Mr. Atallah?

A. Yes, I do.

Q. Okay. And that's behind Tab 28, Exhibit C-103. Did you read this letter?

A. Yes, I believe I did.

Q. And did you discuss it with Mr. Atallah?

A. I may have. I don't recall a specific conversation.

Q. Do you recall discussing it with anyone outside of ICANN's legal department?

A. I don't recall a specific conversation.

Q. Do you recall that both this letter and Mr. Hemphill's 8 August 2016 letter were posted on the ICANN website?

A. I believe so, yes.

Q. And do you recall that Mr. Hemphill on Page 2 again said that Afilias hadn't seen the specific terms of the agreement because they had not been disclosed? Do you recall that?

ARBITRATOR BIENVENU: Do you want to draw the witness' attention?

MR. De GRAMONT: Yes, sure.

Q. First paragraph on the second page, first

full paragraph, he says, quote, "Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from VeriSign's own press release and its disclosure in its Form 10-Q filed with the U.S. Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign," unquote.

Do you remember that Mr. Hemphill said that?

A. This has refreshed my memory, yes.

Q. But not having the terms of the agreement, he was left to speculate as to which rights and obligations may have been transferred; is that a fair assessment, a fair interpretation?

A. I mean, I guess that's what the rest of the letter is about.

Q. And then do you recall that on Page 4, and this is the last paragraph before the conclusion, Mr. Hemphill requested that ICANN provide Afilias with an undertaking that it has not and will not enter into a Registry Agreement for .WEB with NDC until ICANN's Board has reviewed NDC's contact --

conduct and reached a considered decision on whether or not to disqualify NDC's bid and reject its application?

Did you recall that?

A. Yes.

Q. And do you recall that Afilias had submitted an ombudsman complaint?

A. I don't recall that. In September I don't recall.

Q. Do you recall if -- strike that.

Do you recall that Mr. Hemphill asked to receive a response from ICANN by no later than 16 September 2016?

A. Yeah, I see that.

Q. Okay. Do you recall that that request was made?

A. Yeah, I recall that was part of the letter, yes.

Q. And did ICANN undertake an investigation in response to Mr. Hemphill's 9 September 2016 letter?

A. Well, ICANN initiated -- sent a set of questions to four of the parties in mid -- in September or October, I forget the exact date, not just about what Afilias was claiming, but also

because there was a CEP. So there was a set of questions distributed to collect information.

Q. And if you turn to Tab 29 of your bundle, this is Exhibit C-50, it is your letter dated 16 September 2016 to Mr. John Kane at Afilias. You sent an identical letter to Ruby Glen, NDC and VeriSign, albeit obviously personally addressed.

Do you recall that?

A. That's correct, yes.

Q. You say, "Dear, Mr. John Kane. In various fora Ruby Glen LLC (Ruby Glen) and Afilias Domains No. 3 Limited (Afilias) have raised questions regarding, among other things, whether NU DOT CO LLC (NDC) should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC's application for the .WEB gTLD should be rejected. To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information."

Did you write this letter?

A. I worked with counsel to draft this letter.

Q. And to be clear, the only forum, quote/unquote, in which Afilias had raised the questions were in the two letters sent by

Mr. Hemphill; is that correct?

A. Well, I suppose there was also the ombudsman complaint.

Q. Oh, that's a good point. You're right. That's a good point. Right. Good point.

By the way, do you recall how the ombudsman complaint was resolved?

A. I'm sorry, I don't.

Q. Okay. You don't recall -- do you recall that the ombudsman declined to consider it because of the pending litigation and CEP that had been brought by NDC -- sorry, Ruby Glen?

A. That rings a bell, yes, thank you.

Q. What did you mean by the words, quote, "informed resolution," unquote?

A. So asking questions to gather information, to resolve the questions raised. So there was the Ruby Glen CEP. There was the Afilias request to the ombudsman. So we were endeavoring to gather information.

Q. Okay. This sounds like an investigation at the end of which ICANN would resolve the questions that had been raised, do you agree?

A. So I was not undertaking an investigation. ICANN counsel handled and administered the CEP

process. So the responses which I received to these letters I passed along to counsel.

Q. When you wrote to the recipients of this letter that ICANN was seeking to facilitate informed resolution of these questions, you were being truthful, right?

A. Of course.

Q. And there's nothing in the letter to indicate that ICANN was not going to seek, quote, "informed resolution," unquote, of these questions; is there?

A. No. I mean, ICANN resolves -- takes very seriously its bylaws responsibilities for all of its accountability mechanisms.

Q. Now, if ICANN's practice was to defer decisions on contention sets while accountability mechanisms are pending, why did ICANN undertake this effort to facilitate informed resolution of the questions?

A. Oh, okay. So there's the -- when we put an application on hold or a contention set on hold, it doesn't mean that all work ceases. In fact, what it means is that it prevents that applicant or that contention set -- we are committing that it won't move to the next phase of work, meaning we --

while on hold, we wouldn't, for instance, send a Registry Agreement to NU DOT CO for execution. We wouldn't -- it was on hold and the contract had been signed, we wouldn't delegate the top-level domain until the issue of the matter was resolved and the hold was taken off.

But, you know, in order to resolve a variety of matters and to get information to assist in the CEP, that's -- we were trying to gather information. So communications continued.

Q. Let's turn to the questions themselves. Who drafted the questions?

A. In terms of -- I am not sure I should be commenting or responding because of counsel.

Q. Let me ask it this way: Did you draft the questions?

A. I created an early draft of questions.

Q. And who assisted you in -- well, strike that.

Who else was involved in the drafting of the questions?

MR. LeVEE: Ms. Willett, you can say counsel if that's the answer, or if it is not counsel, whoever is the noncounsel.

THE WITNESS: I worked with counsel on

drafting the questions.

Q. BY MR. De GRAMONT: Did you work with anyone besides counsel in drafting the questions?

A. Not that I recall.

Q. Now, at this point in time, ICANN, VeriSign and NDC had the following materials in their hands: They had the DAA and the other materials forwarded by Mr. Johnston in his 23rd August letter to Mr. Enson, right?

A. I -- yes. That was the letter you just showed me.

Q. Yes.

A. From Mr. Johnston, and I didn't get a chance to read all of that, but did that include --

Q. It did forward the DAA, yeah.

A. Okay. Okay.

Q. And ICANN and VeriSign and NDC had the two letters that Mr. Hemphill had sent to Mr. Atallah since they were publicly posted, right?

A. Yes.

Q. And VeriSign and NDC knew the whole history underlying the DAA and how VeriSign and NDC interacted after the DAA was signed, right?

MR. LeVEE: I'm sorry, I didn't understand that question. Can you read it back?

MR. De GRAMONT: Yes.

THE WITNESS: I'm sorry.

MR. De GRAMONT: I'll just read it. I'll restate it.

Q. So VeriSign and NDC, of course, knew the whole history of the DAA and how they had acted under its terms, right?

A. Well, since it's an agreement between them, I would guess they are the only two who would see it.

Q. And all Afilias had was VeriSign's press release and footnotes in VeriSign's SEC filings, right?

A. I don't know what Afilias had.

Q. When you created the early draft of the questions, had you reviewed the -- you never reviewed the DAA; is that correct?

A. Correct.

Q. And you never reviewed Mr. Johnston's letter, correct?

A. Correct.

Q. And let me ask you this: Did you do the very first draft of the questions?

A. I created a draft of questions, yes.

Q. And what did you use to create the

questions?

A. The information that had been made available to me from the Donuts/Ruby Glen complaints prior to the auction. I may have looked at Mr. Hemphill's letters. I don't recall specifically. It was more my personal knowledge.

Q. And were -- do you recall how many drafts after your first draft were created?

A. I don't recall.

Q. Okay. And were you involved in any of the subsequent drafts, or did you turn the first draft over to counsel and they did the rest?

A. I worked with counsel on multiple drafts.

Q. And were you working both with in-house counsel and outside counsel?

MR. LeVEE: Mr. Chairman, I don't think that's an appropriate question. I object on the basis of privilege.

MR. De GRAMONT: I don't see why it matters which counsel she's interacting with. It is just a yes-or-no question or one or the other, and/or both question.

MR. LeVEE: I don't --

ARBITRATOR BIENVENU: Mr. LeVee.

MR. LeVEE: I don't see how identifying

who the lawyers are is appropriate under the privilege. She has stated that she worked with counsel, and -- well, yeah, that's my objection.

MR. De GRAMONT: The privilege log identifies both inside counsel and outside counsel corresponding with ICANN personnel at this time. So, again, the question is simply did you work with solely in-house counsel, or were outside counsel also interacting with you in the preparation of these questions?

MR. LeVEE: I'll let that -- I will withdraw my objections. Ms. Willett can answer if she recollects.

THE WITNESS: My recollection is I worked exclusively with inside counsel, but it's been a long time. That's my recollection.

Q. BY MR. De GRAMONT: And do you recall how the questions you drafted differed from those that went out finally?

A. I don't recall.

Q. Were they very different, only slightly different?

A. I believe I drafted a handful, maybe six questions, a handful of questions, and they were less formal.

Q. Let's look at a few of the questions.

MR. LeVEE: Mr. Chairman, this is a good time to break. I want to raise a matter that I doubt you want Ms. Willett on the screen for.

MR. De GRAMONT: May I just get through this document and then we can take a break?

MR. BIENVENU: Unless the matter relates to this document. Does it?

MR. LeVEE: No, it does not.

ARBITRATOR BIENVENU: Okay. So yes, proceed with your questions on this document, Mr. De Gramont, and then choose when would be a good time without breaking the flow of your cross for our second break.

MR. De GRAMONT: Thank you, Mr. Chairman.

Q. So if we look at the first question, the last sentence, it says, quote, "Please provide or describe any evidence of which you are aware regarding whether ownership or control of NDC changed after NDC applied for the .WEB gTLD," period, close quote.

Do you see that?

A. Yes.

Q. Now, at this point ICANN, VeriSign and NDC all knew that there had been no change of ownership

or control of NDC the company, right?

A. Yes, that was my understanding.

Q. But Afilias, not having seen the DAA, had no idea what had happened, right?

A. Again, I don't know what Afilias knew or didn't know.

Q. So if you knew that -- if you knew that there had been no change of ownership or control of NDC the company, why were you asking Afilias to present evidence of that?

MR. LeVEE: I do think that invades the privilege. I object on that basis.

ARBITRATOR BIENVENU: Mr. De Gramont, do you want to respond to the objection?

MR. De GRAMONT: I am not sure I understand it well enough to respond to it.

MR. LeVEE: I am happy to say I am trying to keep my objections short.

MR. De GRAMONT: Let me try to rephrase it.

Q. Did you draft this particular question?

A. I did not.

Q. Okay. Question 2 states -- well, in Question 2 ICANN asks for evidence that Mr. Rasco and Mr. Bezsonoff gave false testimony when they

said there was no change of ownership or control of NDC the entity, right?

A. I see that.

Q. And, again, at this point, NDC and VeriSign and ICANN all knew that there had been no change of ownership or control of NDC the company, right?

A. So you asked me that earlier. Let me clarify. I still had that informed perception. I can't speak to all of ICANN. My belief is that NDC -- and still is -- that there was no change of control of NDC based on what Mr. Rasco had told me in his responses because I had never seen the DAA. So that is what informed my perspective.

Q. The questions are filled with references to Mr. Hemphill's letters; is that right?

A. There are several, yes.

Q. Yeah. So, for example, Question 4 says, "In his 8 August 2016 letter Scott Hemphill stated," quote, "a change in control can be effected by contract as well as by changes in equity ownership. Do you think that an applicant's making a contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a 'change in control' of the

applicant," unquote.

How could Afilias possibly answer that question without having the DAA?

A. Again, these questions as they stand were work product from counsel, and the rationale about responses was something that I discussed with counsel.

Q. And while there are references to Mr. Hemphill's letter, there are, of course, no references to arguments attributed to Mr. Johnston's letter, right, because that was still confidential?

A. I hadn't seen it, and yes, it was confidential. I don't know the rationale as to why anything -- I just glanced at it here. I don't know what was or wasn't included based on that letter.

Q. Did you at any -- why didn't you ask to see a copy of the DAA in preparing these questions?

A. Honestly, I don't even -- I don't recall exactly when I became aware of a DAA or a side agreement between NU DOT CO and VeriSign. It is somewhere in August, September I generally became aware of that based on the information from counsel, but I hadn't read the agreement, and

personally, I viewed any agreement between those parties would have been confidential amongst themselves.

Q. You didn't think the agreement had any relevance to ICANN or ICANN's determination of whether the agreement violated the gTLD rules?

A. I don't -- I don't recall -- since I hadn't read the agreement, I don't think I had an opinion on its relevance.

Q. Well, isn't that a little bit circular, Ms. Willett? How could you possibly determine whether the agreement was relevant to whether NDC had violated its rules without reviewing the agreement?

A. So, okay, generally we talked about the auction rules, and my 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 action and to submit bids and to submit the funds and do the bidding during an ICANN auction.

Q. But, Ms. Willett, not having read the DAA, you have no idea whether the press release and NDC statements accurately reflected what the DAA required?

MR. LeVEE: Chairman, this is becoming very argumentative, and it is --

ARBITRATOR BIENVENU: Overruled. I'll allow the question.

THE WITNESS: 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.

So just having some sort of agreement, I didn't -- you know, again, I wasn't a lawyer, but they -- I was looking at the applicant's statements that the applicant had made, the information they had provided in the application and the subsequent

questions, and that's how I was reviewing and considering the matter.

Q. BY MR. De GRAMONT: But not knowing the DAA's terms, you had no way of knowing whether the DAA was comparable to the other arrangements that you just described; isn't that fair?

A. I had no way of knowing what was in the DAA or any of those other third-party agreements.

Q. You could have asked for the DAA, right?

A. Perhaps.

Q. Did you ever ask for the DAA?

A. I did not.

Q. And since you never reviewed the DAA, you don't know whether the questions and the questionnaire reflected any of the terms of the DAA; is that correct?

A. That's accurate.

Q. And who asked you to draft the questionnaire in the first place?

A. It was based on a discussion with counsel.

Q. It wasn't Mr. Atallah or any other nonlawyer at ICANN?

A. No.

Q. And was it your idea to send out the questionnaire?

A. Not that I recall.

MR. De GRAMONT: Okay. This would be a good time to break, Mr. Chairman.

ARBITRATOR BIENVENU: Very well, Mr. De Gramont. Thank you very much.

So could we ask our friends to remove the witness from the hearing room.

And then, Mr. LeVee, you wanted to raise a point of order?

MR. LeVEE: Yes, and I'll wait for Ms. Willett to be temporarily excused.

(Discussion off the record.)

MR. ENGLISH: She has left the room.

ARBITRATOR BIENVENU: Mr. LeVee.

MR. LeVEE: Thank you, Mr. Chairman. By my watch, Mr. De Gramont has now cross-examined Ms. Willett for over four hours. The Afilias estimate was four hours.

Again, I am not necessarily saying that people have to stick within the estimate, but I do believe Afilias has gone over with respect to all of the witnesses, and so we find ourselves faced with a situation where Mr. Ali is emailing me and my team -- it is very difficult for me to respond to email when I am trying to defend a witness --

asking about Mr. Disspain's availability next week when I told the Panel yesterday that he wasn't available next week.

Candidly I didn't ask him originally if he was available next week because the schedule made it clear ICANN's witnesses were going first and Mr. Disspain was going to be finished today.

At this point, it is not even clear we are going to get to Mr. Disspain today, so we will do it tomorrow, but that creates a problem for Mr. Rasco.

My concern is you had asked for a cross-examination estimate at the end -- at the beginning of the next session, and you were not provided that. I did not interrupt. But we still don't have an estimate, and we are now past the number of hours originally estimated for this witness.

I am not saying we have to establish, but I think you understand my point. We find ourselves in a difficult position, and it is utterly unfair that I am being asked about the availability of a witness next week when I said yesterday that he was not available.

MR. ALI: Mr. Chairman.

ARBITRATOR BIENVENU: Mr. Ali, just before you respond, if I may.

Mr. LeVee, we hear you, and we are conscious of the problem that you allude to, but have you had a chance, you and your colleagues, to speak with counsel for the claimant and counsel for the Amici to try to, as Mr. Marenberg helpfully suggested, to try to find a path forward, has that taken place or not?

MR. LeVEE: We have not spoken, but I have received email subsequent to the last time we had this conversation asking me if Mr. Disspain could go next week, and the answer was no. That seems to be their proposed resolution.

ARBITRATOR BIENVENU: My suggestion at this point in time, and I know that our breaks are short, but I think counsel should have a conversation and try to find a constructive solution to the problem that we are facing.

MR. LeVEE: May I -- sorry.

ARBITRATOR BIENVENU: Yes.

MR. LeVEE: It is not me. I thought you were done.

May I ask the members of the Panel if they were -- if they had flexibility to go a little

later tomorrow?

ARBITRATOR BIENVENU: I haven't discussed that with my colleagues, but we have discussed possible solutions to the problem that we face, and without in any way encouraging parties to revise their estimates, we are able to offer the parties an additional day on the 14th of August. We are not available on the 13th, but we can make ourselves available on the 14th.

ARBITRATOR KESSEDJIAN: In addition, Pierre, are we flexible for tomorrow night?

ARBITRATOR BIENVENU: I wasn't going to answer that question before I had consulted with my co-panelists.

ARBITRATOR KESSEDJIAN: Because I am.

ARBITRATOR CHERNICK: I would be available to start earlier but not to go later.

ARBITRATOR KESSEDJIAN: That's fine with me.

ARBITRATOR BIENVENU: I am available at both ends.

ARBITRATOR KESSEDJIAN: And by the way, I am available on Saturday. I don't know if anybody is working on Saturdays, but that could be also an option. Mr. Rasco is not available next week, so

perhaps he's available Saturday.

ARBITRATOR CHERNICK: I am not.

ARBITRATOR KESSEDJIAN: You are not.

ARBITRATOR BIENVENU: So I hope that the parties, with the additional availability of the Panel, can work this out, but I am very reluctant to direct these discussions before they have taken place.

The parties are fortunately represented by counsel who have experience, know each other and are solution-oriented. So I would just invite them to have a first crack at finding a path forward and to report back to the Panel.

MR. LeVEE: We will do that, Mr. Chairman. Is it possible for Mr. De Gramont to give us a time estimate of his remaining time?

ARBITRATOR BIENVENU: He will do that in the course of your discussions with him.

MR. LeVEE: Thank you.

ARBITRATOR BIENVENU: Thank you. So we break for 15 minutes, and maybe our friend JD can tell Ms. Willett that it will be 15 minutes more.

MR. De GRAMONT: Thank you, Mr. Chairman.

MR. ENGLISH: Will do.

(Whereupon a recess was taken.)

MR. LeVEE: Chairman, members of the Panel --

ARBITRATOR BIENVENU: Please, Mr. LeVee, a little bit louder.

MR. LeVEE: Sorry. The parties have spoken, and I think we have an agreement. We will accept the Panel's offer, generous offer to start one hour earlier tomorrow. So we will start 8:00 a.m. -- sorry, 7:00 a.m. Pacific, 10:00 o'clock Eastern and must be 4:00 o'clock or so in Paris.

And then Mr. Rasco will go first and Mr. Disspain will go second.

But the agreement of counsel is that Afilias will finish both witnesses tomorrow. So they will agree they are going to try to cut their examinations a little shorter and get an extra hour tomorrow. I know that we need to finish tomorrow at the normal time to accommodate the panelists.

Afilias has agreed that they will finish both examinations tomorrow, giving a reasonable amount of time for redirect examination of the witnesses.

MR. ALI: If I may just add on that particular point that I believe the agreement necessarily contemplates that Mr. Marenberg will

also observe the commitment I made that ICANN will have sufficient time for redirect of Mr. Disspain.

We can finish our crosses, but the agreement could get busted if Mr. Marenberg's redirect goes too long. So it necessarily means that we are all working towards the goal that we have -- that you just laid out, Jeff, correct?

MR. LeVEE: Yes. Our understanding is we are starting early because we understand that Mr. Chernick needs to leave at the normal 1:00 o'clock time, and that's good. He has a commitment.

So our agreement is that we are going to get those two witnesses done between -- I am going to do it on Pacific time, which will be 7:00 a.m. Pacific and 1:00 p.m. Pacific.

MR. ALI: My understanding is we would have an extra hour tomorrow, right?

ARBITRATOR CHERNICK: Yes.

MR. LeVEE: 7:00 a.m. start time.

ARBITRATOR BIENVENU: Okay. All right. We commend the parties for their cooperative approach to solving this problem. That probably will require Panel members to be restrained in their own questions, but so be it.

So then do we bring any other points that the parties wish to discuss? No, so we'll bring Ms. Willett back.

ARBITRATOR CHERNICK: Could I ask if we are to hold August 14th or not?

MR. LeVEE: I don't think that will be necessary at all.

ARBITRATOR CHERNICK: Okay.

MR. ALI: I think that's right.

ARBITRATOR BIENVENU: Okay. I will exercise my prerogative to say that we should all pencil it in in case. Because I think on Monday no one would have predicted where we find ourselves on Thursday afternoon. So let's pencil it in in case.

Okay. Let's bring Ms. Willett back in.

Mr. De Gramont, are you ready to continue your cross-examination? We cannot hear you, sir.

MR. De GRAMONT: I'm sorry, can you hear me now?

ARBITRATOR BIENVENU: We can.

MR. De GRAMONT: Thank you, Mr. Chairman.

Q. Welcome back, Ms. Willett. I have a couple more questions about the questionnaire. As you saw counsel changing your questions, were you curious about the basis on which they were changing

them?

MR. LeVEE: That invades the privilege clearly.

Q. BY MR. De GRAMONT: Let me ask it this way: Did you wonder why counsel was changing the questions in the manner that they changed them?

MR. LeVEE: I don't understand how that changes things. The witness sees something that counsel gives her, and then you're asking for her mental impressions following receipt of information from counsel.

MR. De GRAMONT: Yes. It is not her mental impressions that are privileged.

MR. LeVEE: That's exactly what it is. Were you surprised?

MR. De GRAMONT: Well, the communications are privileged and the work product is privileged, but Ms. Willett's frame of mind is not privileged.

MR. LeVEE: Mr. Chairman, I object to the question.

ARBITRATOR BIENVENU: Mr. De Gramont, can you comment on the relevance of that question?

MR. De GRAMONT: In the interest of moving forward, I will move forward and withdraw the question.

ARBITRATOR BIENVENU: Thank you.

Q. BY MR. De GRAMONT: Ms. Willett, what did you do with the -- well, let me ask you this: Did you receive responses from all of the recipients of the questionnaire?

A. I recall there was someone who did not respond.

Q. It was Ruby Glen that did not respond, right?

A. Donuts, that sounds right.

Q. So you received responses from Afilias and VeriSign and NDC; is that correct?

A. That's my recollection.

Q. And what did you do with them upon receiving them?

A. I passed those responses on to ICANN's legal team.

Q. Did you read the responses?

A. I believe I did.

Q. And did you undertake any analysis of the responses yourself?

A. I did not.

Q. Do you know if ICANN counsel did?

A. So any knowledge I have of what counsel did is based on communication I had with counsel.

Q. So let me just ask, do you know if they did any analysis, without telling me the substance of that?

Did I just check out --

(Discussion off the record.)

THE WITNESS: I said I provided the responses to counsel. I am not exactly sure what counsel did with them.

Q. BY MR. De GRAMONT: Were you aware -- are you aware that ICANN has asserted in these proceedings that its Board held a workshop in early November 2016 at which .WEB was discussed?

A. In preparation for this hearing, I had discussions with counsel.

Q. Were you aware in 2016 that there was a Board workshop at which .WEB was discussed?

A. I was not.

Q. Were you asked in 2016 to help prepare materials for the Board to consider the .WEB issue?

A. Not that I recall, no.

Q. To your knowledge, did ICANN ever reach a decision on what to do with the concerns that Afilias made regarding .WEB, either before or after November 2016?

A. Could you repeat the question? I want to

make sure I am answering correctly.

Q. Yeah. Do you know if ICANN ever reached a decision regarding the concerns that Afilias had made regarding .WEB?

A. Well, I mean, ICANN's a whole bunch of people, but I am not aware of a specific decision regarding Afilias' letters.

Q. Were you ever told that once the contention set comes off hold, you should proceed to delegate to NDC?

A. No.

Q. Were you ever told that the contention set should stay on hold until any pending and anticipated accountability mechanisms were completed?

A. That isn't something I would have been told. That would have been our practice. If there were any discussions, it would have been with counsel about that, but I can speak to our general practice within the GDD, Global Domains Division, and the new gTLD Program, our practice was to keep contention sets or applications on hold until accountability mechanisms had been resolved.

Q. But you testified that that practice was made on a case-by-case basis depending on the

particular circumstances. Do you know if, based on the particular circumstances here, ICANN decided to implement that practice?

A. So when I was discussing a case-by-case basis, it was about looking at that particular accountability mechanism, and it was about making the decision to put the application on hold.

But once it was on hold, to my recollection, we kept things on hold, and it was a matter of program operations, operational practice to keep them on hold until we became aware and informed that those accountability mechanisms were resolved.

Q. In late 2016 or early 2017 the U.S. Department of Justice commenced an antitrust investigation of the VeriSign-NDC arrangements.

Do you recall that?

A. I became aware of it, yes.

Q. And were you told that you should take no action regarding .WEB pending that investigation?

A. The conversations I recall were with counsel.

Q. Do you recall that there was a long hiatus until the DOJ investigation concluded in January 2018?

A. Well, the program wasn't on hiatus. My recollection -- if you mean the application and contention set remained on hold in that whole period, it did until 2018 June.

Q. Okay. Did you know that in January 2018 VeriSign contacted ICANN staff to inquire about the process for NDC to assign its .WEB Registry Agreement to VeriSign?

A. I was unaware of that prior to preparing for this hearing.

Q. Let me just quickly show you -- let's quickly take a look at what is behind Tab 31, Exhibit C-115. It is an exchange of emails between Jessica Hooper of VeriSign and ICANN staff members and then several internal emails.

If you look at Page 2, this is the email from Jessica Hooper at VeriSign. Do you know Ms. Hooper or do you know who she is?

A. I do not.

Q. And it is to Karla Hakansson at ICANN. Do you know Ms. Hakansson?

A. Yes, I do.

Q. Is she a member -- was she a member of your team?

A. She did not report up to me. She was part

of the Global Domains Division under another executive.

Q. And if you look at the second page, she writes, "I am beginning to take a high-level look at the documents we would need to fill out to assist NU DOT CO with the assignment process for .WEB when the time comes."

Then if you turn to Page 1, Ms. Hakansson says, "Great timing on Jessica's part! VeriSign's ears must have been burning," and there's a little smiley face emoji. You were not aware of these emails at the time?

A. No, I was not.

Q. You didn't hear anything about them?

A. Not that I recall.

Q. Were you aware that Mr. Rasco had had a phone call with Mr. Atallah and Mr. John Jeffrey in around this time frame?

A. Not that I recall.

Q. Can you turn to Tab 2 in your binder, which is Exhibit C-182? And you'll see on December 12th, 2017, there's a reference to Peg Rettino. Who was Ms. Rettino?

A. She's Mr. Jeffrey's executive assistant.

Q. And John Jeffrey is the general counsel of

ICANN; is that correct?

A. That's correct.

Q. And then there's an email from Mr. Rasco dated December 12, 2017, "Thank you. I look forward to speaking on Thursday."

Do you know anything about that telephone conference?

A. I don't.

Q. Then Mr. Rasco writes again on February 15th, 2018, quote, "Dear John and Akram, I hope this messages finds you well. In line with our previous conversation, I am contacting you regarding NU DOT CO signing the Registry Agreement for .WEB. Now that the DOJ CID has concluded and that there are no pending accountability mechanisms associated with our successful bid at the auction for this string in 2016, the next step in the process is for us to execute the Registry Agreement. Please let me know if you'll have sufficient time to get that to me this week. Thanks so much for all your help throughout this process, and I look forward to wrapping this up," unquote.

You were unaware of that communication in February 2018?

A. Yes, I was unaware of that.

Q. Did you have any communications with anyone from NDC after NDC submitted the questionnaire?

A. And by "questionnaire," you mean that September 2016 twenty questions?

Q. Yes, ma'am.

A. I don't recall any conversation.

Q. Okay.

A. Sorry.

Q. Did you know that the Ruby Glen CEP terminated on 30 January 2018?

A. That sounds about right. I would have been informed of that.

Q. And Ruby Glen had until 14 February 2018 to file an IRP but failed to do so.

Do you remember that?

A. I do recall that.

Q. Okay. And were you aware that Afilias had filed a DIDP request on 23 February 2018?

For the court reporter, it is D-I-D-P. It stands for Document Information Disclosure Policy.

A. Yes, I do recall that request.

Q. And did you see the DIDP request?

A. I don't believe I did.

Q. Okay. Were you involved in responding to the DIDP request in any way?

A. I don't recall. My only involvement would have been with counsel, but I don't recall supporting that request.

Q. Does a DIDP request put a contention set on hold under the practice you described?

A. Generally no. We considered a DIDP to be -- it was not one of those other three accountability mechanisms.

Q. And are you aware that ICANN denied most or all of the DIDP requests?

A. Of that specific DIDP request?

Q. Yes, yes.

A. I don't recall the specifics of that request or the response.

Q. Do you recall that Afilias submitted a request for reconsideration of the Board's denial of the DIDP request?

A. I do.

Q. And you're aware that in early June 2018 the Board denied the request for reconsideration?

A. Yes. I believe they dismissed that reconsideration request.

Q. And that apparently caused the contention

set to come off hold; is that correct?

A. Yes. That was -- on that basis, after the Board's consideration there, we did take the contention set off hold.

Q. When you say we took the contention set off hold, whom do you mean by "we," who is "we"?

A. The program team is responsible for managing, administering the applications and the contention sets.

Q. So someone notified you that the request for reconsideration was denied, and your team took the contention set off hold?

A. That's accurate.

Q. All right. So take a look at Tab 33, which is Exhibit C-166.

ARBITRATOR KESSEDJIAN: Mr. De Gramont, I am terribly sorry, but I don't see Pierre Bienvenu on the screen.

ARBITRATOR BIENVENU: I am still here, and you will see me in a second.

ARBITRATOR KESSEDJIAN: Okay. Good. Sorry.

MR. De GRAMONT: Thank you, Professor, for that. We don't want to lose the Chairman or any other members of the Panel. Thank you.

ARBITRATOR BIENVENU: I was there.

Q. BY MR. De GRAMONT: So, Ms. Willett, we are looking at Tab 33, Exhibit C-166. Do you have that?

A. Yes, I see that.

Q. And it is an email from Russ Weinstein dated June 6, 2018, to Lisa Carter, Linett Nardone and Karla Hakansson. What department were they in?

A. They reported to Russ Weinstein in the Global Domains Division. I believe it was contracted party -- they were on the engagement side of the division.

Q. When you say "the engagement side," that's the side of ICANN that engages with parties to enter into registry agreements?

A. Well, they engage with contracted parties for the most part. They did have some applicant engagement function, but they weren't involved in administering the new gTLD Program functions.

Q. Okay. Then you are copied, as are Amy Stathos, Christopher Bare and Cyrus Namazi. I think we have identified the others. Who is Cyrus Namazi?

A. In this period of 2018 he was a peer of mine. He was overseeing that portion of the gTLD

division.

Q. Okay. So Mr. Weinstein writes, "Lisa, Linett and Karla, wanted to give you an update re: .WEB/.WEBS. The question for reconsideration from Afilias has been denied and the contention set has been taken off hold."

It goes on to say, quote, "Please let me know if any questions come from your accounts regarding next steps. Those should continue to be managed by the program team," unquote.

And the program team is your team?

A. That's correct.

Q. Now, the email below is from you, and it refers to an updated scorecard for .WEBS.

Just very briefly, what is a scorecard?

A. In this context, I believe the scorecard was a summarized chart of the current state, some background information. We prepared those to inform executives about various matters.

Q. Did the scorecard contain information about the status of whether contention sets were on hold or not?

A. Yes. It would provide an update as to the current status of that application or contention set.

Q. So Mr. Atallah and these other executives would have seen that the .WEB contention set was taken off hold in the scorecard?

A. Well, Ms. Stathos is copied on here. My understanding is that that scorecard and the communications around it were privileged, but I don't know if that's been -- no longer the case.

MR. De GRAMONT: Mr. LeVee, are you raising an objection to my question?

MR. LeVEE: Now that I understand what your question is, I do raise a privilege objection because the scorecards are maintained by the legal department.

Q. BY MR. De GRAMONT: But your understanding is that the scorecard reflects the on-hold status of the contention sets and that it is sent to executives, including Mr. Atallah?

A. Yes. It is shared with executives to make sure that they are informed of the current state of certain matters.

Q. Would you turn to Tab 34, which is Exhibit C-167, and it's an email from Jared Erwin, and Mr. Erwin, again, is the gentleman who corresponded with Mr. Rasco in June of 2016; is that correct?

A. That's correct.

Q. So he's still part of your team in June 2018?

A. Yes.

Q. And he's writing to you and Mr. Bare and he copies Grant Nakata. Who is Mr. Nakata?

A. He was another member of the program team. Mr. Erwin and Mr. Nakata reported to Mr. Bare, who reported to me.

Q. Mr. Erwin writes, "Hi, Christine and Chris. We have made the contention set updates (on-hold arrow resolved) and notified the applicants. By the end of the day, Grant will be conducting outreach to the prevailing applicants (NU DO and Vistaprint) to confirm/provide updated signatory contact information," unquote.

Now, Vistaprint is the winner of the .WEBS contention set, right?

A. .WEB and .WEBS were put in one contention set, but Vistaprint was the prevailing party for the string .WEBS, W-E-B-S.

Q. So Mr. Erwin is informing you that the delegation process is -- of .WEB to NU DOT CO is proceeding?

A. So this -- no, this didn't pertain to delegation. This was essentially saying that --

indicating that since the -- informing us that since the status change had been made, which Mr. Erwin was responsible for, that Mr. Nakata would be proceeding to reengage with the applicants to restart the contracting process from where it left off when these applications were put on hold back in 2016.

Q. I see. So NDC had been sent the CIS, is that what it's called?

A. The Contracting Information Request, CIR.

Q. That's right. This was the next step for providing signatory contract information; is that right?

A. The next step -- since almost two years had gone by, my team was confirming signatory information at that time.

Q. And Mr. Erwin states that ICANN has notified the other applicants?

A. Notified, yes.

Q. Okay. And if we look at Tab 35, Exhibit C-62, it's from Global Support Center, dated June 7th, 2018. It is to Mr. Kane at Afilias. I believe he was in Australia at the time, which is why it is dated June 7. And it says, "Dear John, thank you for contacting the ICANN team. Case

00892769 has been closed," and then there's case information. And then it says, "Please contact us if you have any additional questions."

Do you see that?

A. I do.

Q. So this was the notification to Afilias that the contention set had been taken off hold, do I understand that correctly?

A. I am not sure exactly what this case is without looking at the whole case. I couldn't speak to this.

Q. Is this the form of notice that ICANN typically gives to members of the contention set when the contention set is closed?

A. It is not what I would expect to see, but I did not typically look at those communications going out from this portal system.

Q. Are you aware of any other notification that was sent to Afilias about the -- taking the contention set off hold?

A. I am not aware.

Q. Are you aware that Afilias' counsel had asked ICANN for advanced notice if the contention set was going to be taken off hold?

A. I recall that.

Q. And you recall that ICANN declined to give any advanced notice, right?

A. It was not our practice to have outside exceptional communications with applicants. We were treating Afilias like we would any other applicant in the contention set and informing them at the same time we informed everyone else.

Q. Well, that's interesting because in August 2016, after VeriSign had issued its press release, VeriSign's outside counsel got a call from ICANN's outside counsel asking them for information about .WEB.

Do you recall that?

A. I have no idea what counsel did, outside counsel.

Q. No one from Jones Day called Afilias' counsel when the contention set was taken off hold, right?

A. I have no idea.

Q. Let's take a look at Tab 36 of your binder, which is Exhibit C-169, and we are going to start at the end. And it is an email dated June 12th from Grant Nakata to you and various others, and it says, quote, "Hello, everyone. We have the following contracting request for your review and

approval. Attached please find the RA sending list."

I think "RA" stands for "Registry Agreement"?

A. It does.

Q. It goes on to say, quote, "If you recall, the .WEB/.WEBS contention set had resolved via indirect contention auction in July 2016. The contention set was later placed on hold due to a pending accountability mechanism. The accountability mechanisms closed and the contention set was reverted back to resolved. NU DOT CO LLC, the prevailing applicant for .WEB, has completed the CIR form, and we are now prepared to issue a Registry Agreement," unquote.

Do you see that?

A. I do.

Q. I take it that various approvals for that to happen were required?

A. That's correct.

Q. So we see an approval from Mr. Bare, from you, from Mr. Weinstein, and then at the top Mr. Nakata writes on June 14th, quote, "We have the following contracting request for your review and approval. Attached please find the RA execution

list. NU DOT CO has signed the Registry Agreement for .WEB, and we are now able to proceed to countersign."

So if I understand correctly, the Registry Agreement has been sent to NU DOT CO., they have returned it and Mr. Nakata says, quote, "We are now able to proceed to countersign," unquote.

Am I understanding that correctly?

A. So essentially it is two separate requests for approvals in this email chain.

Q. And so after the June 14th email there's a request for additional approvals to proceed to countersign?

A. So the first request for approval from Mr. Nakata, initiated on 12 June, was for approval to send the Registry Agreement. Then he evidently received that. And then the email from Mr. Nakata on 14 June indicates that NU DOT CO had signed the Registry Agreement. So he was then seeking a second approval from those individuals to -- prior to ICANN's execution, countersigning of the Registry Agreement.

Q. And so if we take a look at what's behind Tab 37, Exhibit C-170 and looking at the bottom of Page 2, we see the same -- I think this is the same

email that we just looked at from Mr. Nakata asking for approvals -- maybe that's -- yes, asking for approval to countersign, and above it we see various approvals.

And then on June 20th, 2018, Mr. Nakata writes to various recipients, "Hello," quote, "I want to provide an update on the .WEB Registry Agreement. Prior to the execution of the .WEB Registry Agreement, we received notice that a cooperative engagement process was initiated on .WEB. The .WEB/.WEBS contention set has been placed on hold. We will void the current Registry Agreement via DocuSign. If or when we are able to proceed, we will reinitiate this approval process," unquote.

Were you instructed that once there were no accountability mechanisms pending, you should go ahead to proceed to delegate or contract with NDC for .WEB?

A. Well, as I said before, I wasn't instructed. It would have been our common practice. And if I had -- if there were questions, it would have been a conversation with counsel.

Q. Was the ICANN Board informed that staff was moving forward with contracting with NDC for

.WEB?

A. So there were communications with the Board in which ICANN's legal team was copied.

THE WITNESS: Is that something I can disclose in regards to ICANN -- the Board's oversight of this process?

MR. LeVEE: Probably no, but I don't know what the document is that you're referring to.

I am trying not to object, but the question, Ms. Willett, is: Do you know of any communications that don't involve counsel?

MR. De GRAMONT: Let me just start with a yes-or-no question.

Q. Did anyone on your staff inform the Board that the contention set had been taken off hold and that you were proceeding to contract with NDC?

A. It wasn't a common practice for us to inform the Board of contention set status changes, no.

Q. But in this instance -- let me ask it this way: Are you aware of any nonlawyer at ICANN informing the ICANN Board in June 2018 that the contention set was being taken off hold and you were proceeding to contract with NDC for .WEB?

A. Communications between my team and the

Board typically copied one or more attorneys.

Q. Mr. LeVee will object if he thinks that's appropriate.

Right now I just want to know if any nonlawyer wrote to the Board to inform the Board that ICANN was proceeding to contract with NDC for .WEB?

A. Yes.

MR. LeVEE: Yes-or-no question. Okay. Thank you.

Q. BY MR. De GRAMONT: Do you know who sent that communication to the ICANN Board?

A. Without looking at an email, I can't be certain in this specific instance.

Q. Is there someone who it typically would have been?

A. It would have been someone on my team, either Mr. Nakata or there was also a David Saxa, who would have sent an email to the Board, and our legal team would have been copied on those communications.

Q. And do you recall if anyone on the Board responded to the nonlawyer who had made the communication advising the Board that you were proceeding to contract with NDC for .WEB?

A. To my knowledge, no Board member responded.

Q. So what had happened to the, quote, "informed resolution," unquote, that ICANN said it was seeking back in September 2016?

A. So I believe that was in relationship to those previous accountability mechanisms, the CEP, the ombudsman matter, and those had been resolved.

Q. So once Ruby Glen's CEP was resolved and once the ombudsman said he wasn't going to consider ICANN's -- sorry, Afilias' complaint, the questionnaires were -- or the informed resolution was rendered moot?

A. I don't know what the legal department was undertaking.

Q. If Afilias had not filed for CEP, ICANN would have proceeded to contract with NDC; is that your understanding?

A. I don't really know what would have happened.

Q. Is it ICANN's position that it only has to consider whether the gTLD rules have been violated if someone forces them to do so by filing an accountability mechanism?

MR. LeVEE: Can I get that question back?

MR. De GRAMONT: Yes, yes.

(Reporter read back as requested.)

MR. LeVEE: I object on the grounds of privilege. If you know on other grounds, then you should answer.

THE WITNESS: So I -- well, first I'd like to say I don't think -- because I am no longer an employee for ICANN, I don't think I can represent ICANN's position in this hearing.

I can only share with you my understanding as to how we operated, how we functioned and what we told applicants about this matter. So I would have to say at ICANN -- I fully expected from 2016 August, I expected Afilias to file a -- a reconsideration request at any day, and I fully expected that as soon as we changed the status of the contention set, taking the contention set off hold, that was staff action, and Afilias would have voiced their objection to that and made a formal -- the way to formally complain is not by writing a letter. It is by initiating a reconsideration request. That's what I had been telling applicants publicly. That was commonly understood since 2013.

Q. BY MR. De GRAMONT: Ms. Willett, Afilias had asked for an investigation. ICANN had

responded that it was going to seek informed resolution of the concerns that Afilias had raised. You don't think that ICANN was required to actually do what it had said it was going to do?

MR. LeVEE: I object the question's very argumentative. Put it in a brief.

Q. BY MR. De GRAMONT: Having sent a letter to Afilias stating that ICANN was going to seek informed resolution of ICANN's -- of Afilias' concerns, didn't you think it was incumbent on ICANN to actually provide an informed resolution of those concerns?

A. As we discussed before, I thought I told you the informed resolution pertained to the accountability mechanisms. It was not our practice to respond and initiate investigations and take action in the program based on letters.

We had hundreds, if not thousands of letters written to us asking ICANN to eliminate one applicant or give the TLD to another applicant in correspondence, and ICANN did not take questions in letters.

Q. Can I ask you to take a look at Tab 30 in your binder, which is Exhibit C-61? It is a letter dated 30 September 2016 from Mr. Atallah to

Mr. Hemphill, and at this point ICANN's ombudsman had dismissed Afilias' complaint.

Do you recall that?

A. I am not sure when I became aware of Afilias' ombudsman complaint.

Q. Okay. Just to save time, I will represent that the ombudsman had rejected the complaint by this time and the letter is on record.

Mr. Atallah acknowledges Mr. Hemphill's letters of 8/2016 and 9 September 2016. He says, quote, "We note your comments regarding the NU DOT CO LLC application for .WEB and the ICANN auction of 27 July 2016."

At the bottom, second-to-last paragraph, he writes, quote, "As an applicant in the contention set, the primary contact for Afilias' application will be notified of future changes to the contention set status or updates regarding the status of relevant accountability mechanisms. We will continue to take Afilias' comments and other inputs that we have sought into consideration as we consider this matter," unquote.

Do you see that?

A. I do.

Q. Had you seen this letter at the time?

A. I believe so.

Q. And at this point Afilias doesn't have any accountability mechanism pending, right?

A. That's my understanding.

Q. And Mr. Atallah is committing to continue to take Afilias' comments and other inputs that we have sought into consideration as we consider this matter, right?

A. I see that.

Q. In fact, if Afilias had not filed for CEP, ICANN would simply have proceeded to contract with NDC without ever considering the issues that Afilias had raised, right?

A. I can't speak to what Mr. Atallah would have done. He would have been the executive to sign the agreement on ICANN's behalf.

Q. In fact, the Registry Agreement was sent to NDC, NDC signed it, returned it to ICANN and ICANN personnel approved ICANN's signature and only stopped the process when Afilias filed its CEP; is that right?

A. Once they initiated, yes, that accountability mechanism.

Q. So the only way that ICANN will consider -- strike that.

Did you consider the concerns that Afilias had raised to be serious concerns?

A. I considered them to be sour grapes.

Q. And did you express that view to anyone else at ICANN?

A. I may have.

Q. You don't recall specifically?

A. I don't recall specifically.

Q. Did anyone at ICANN express that view to you, that Afilias' concerns were simply, quote, "sour grapes," unquote?

A. Not that I recall.

Q. And you reached that view that Afilias was simply acting out of, quote, "sour grapes," unquote, without ever having seen the DAA; is that right?

A. Correct.

MR. De GRAMONT: May I take a two-minute break, Mr. Chairman, to consult with my counsel, with my colleagues?

ARBITRATOR BIENVENU: Yes, you may, Mr. De Gramont.

(Whereupon a recess was taken.)

MR. De GRAMONT: Mr. Chairman, I have no further questions.

Ms. Willett, thank you very much for your time. It is nice to meet you.

ARBITRATOR BIENVENU: Thank you, Mr. De Gramont.

The Panel has a few questions for Ms. Willett, and we agreed that I would begin. If there are supplemental questions, my colleagues would follow me.

Ms. Willett, just to clarify an answer that you have just given to counsel for Afilias, he asked you, you said -- stated in an answer to one of his questions that you consider Afilias' concerns to be sour grapes.

Do you remember saying that?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Now, does that mean in your opinion, Ms. Willett -- and I am asking only for your opinion, not other people's opinion, not your counsel's opinion.

But in your opinion, does that answer mean in your opinion NDC's contract with VeriSign did not violate the guidebook and the auction rules?

THE WITNESS: I haven't evaluated that agreement, and I am not a lawyer or in a position to do a legal assessment of it, but 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. That's my --

ARBITRATOR BIENVENU: Sorry to cut you off, but if you haven't seen the agreement, you don't know if the agreement --

THE WITNESS: Correct. I haven't reviewed the agreement. I don't know what it says. I am simply saying the fact that an agreement exists to me is not disqualifying.

ARBITRATOR BIENVENU: Are you aware, Ms. Willett, as you sit here today, that the position taken by the Respondent in this IRP, and I am reading here from Paragraph 81 of ICANN's rejoinder, is, and I quote, "ICANN has taken no position on whether NDC violated the guidebook." Are you aware that that is the position taken by the respondent in this IRP?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And was that the position throughout the period from the moment concerns were first raised about NDC's bid -- NDC's application and the moment of your departure? At no point during that period did ICANN take a

position on whether NDC had violated the guidebook?

THE WITNESS: As far as I am aware, that's correct, yes.

ARBITRATOR BIENVENU: And to pick up on another question that was asked of you by counsel for Afilias, the fact that ICANN sent a draft Registry Agreement to VeriSign -- forgive me, to NDC for execution, that does not imply compliance of NDC's application with the guidebook?

THE WITNESS: Well, I suppose, in terms of the fact that -- sorry. I am trying to replay the question.

ARBITRATOR BIENVENU: Let me rephrase it if it is helpful to you.

If you and your team had taken the view that applicant -- let's move away from the facts in this case, but that an applicant had failed to respect the guidebook, but there had been no accountability mechanism to complain about that noncompliance, would you, by reason of the absence of an accountability mechanism, have sent a draft Registry Agreement for execution?

THE WITNESS: No, I don't believe we would have. If we determined that an applicant had violated the terms of the guidebook, I don't

believe that my team and I would have given our approvals to proceed with contracting.

ARBITRATOR BIENVENU: So why is it, then, that no one in your team raised a red flag before the Registry Agreement was sent to VeriSign to say, "Hey, we have not yet taken a position on whether NDC violated the guidebook, and we have to take a position on this before we send that Registry Agreement out for signature"?

THE WITNESS: So my team was operating within the rules of the applicant guidebook, and we were administering the processes and functions described in that applicant guidebook.

For us to have been reviewing something else, there was no mechanism beyond those evaluation criteria for the program team to determine that an applicant had violated the guidebook unless we were informed by an outcome of an accountability mechanism, an ombudsman determination, a reconsideration request that was taken up by the Board, and we were informed somehow by the Board to take something new into consideration. We were evaluating their application and the information that the applicant provided us according to those processes.

ARBITRATOR BIENVENU: Can I ask you to turn to your letter of 16 September 2016?

THE WITNESS: Yes, right there.

ARBITRATOR BIENVENU: And if we go to the next page, we see at the top of --

ARBITRATOR CHERNICK: What tab is that?

ARBITRATOR BIENVENU: It is Tab 30. Sorry, I had a separate copy apart from the witness binder, but it is Tab 30.

ARBITRATOR CHERNICK: Thank you.

ARBITRATOR BIENVENU: Sorry. I am mistaken. It is not Tab 30.

MR. De GRAMONT: I believe it is Tab 29, Mr. Chairman.

ARBITRATOR BIENVENU: 29. That's right, 29.

By the way, your letter is dated 16 September 2010.

Do you see that?

THE WITNESS: My copy says 16 September 2016.

ARBITRATOR BIENVENU: Sorry, 16 September 2016, yeah, forgive me.

16 September 2016, that is the deadline that had been -- I will say "set," but maybe it

would be more appropriate to say "proposed" -- in Afilias' letter of 9 September. Was that coincidental?

THE WITNESS: Yes, I believe it was.

ARBITRATOR BIENVENU: Now, turning to Page 2, we see the title of the questionnaire, "Topics on Which Ruby Glen, NU DOT CO, Afilias and VeriSign are Invited to Comment."

Do you see that?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Can you tell us why the questionnaire was addressed only to those four parties and not to all members of the contention set?

THE WITNESS: Any information I have on that would have been based on conversation with counsel.

ARBITRATOR BIENVENU: You were aware when you sent that questionnaire that, among its addressees, two of them were obviously aware of the DAA because they were signatories to it, and you knew that at least one of the four was not aware of the DAA, namely Afilias; is that correct?

THE WITNESS: So I'm sorry, I don't recall when I became aware of the DAA, if it was in -- if

it was prior to 16 September or not, and I don't know what other parties were aware of the DAA or had seen copies.

ARBITRATOR BIENVENU: Bear with me, Ms. Willett.

THE WITNESS: Of course.

ARBITRATOR BIENVENU: Just looking through my notes here.

You mentioned yesterday that you had not reviewed Mr. Rasco's statement; is that correct?

THE WITNESS: Which statement is that?

ARBITRATOR BIENVENU: Excuse me?

THE WITNESS: Oh, his witness statement?

ARBITRATOR BIENVENU: Yes.

THE WITNESS: No, I have not.

ARBITRATOR BIENVENU: You have not seen it?

THE WITNESS: Unless it's in this binder, I have not.

ARBITRATOR BIENVENU: Okay. There are statements in Mr. Rasco's statement about what ICANN knew or might have known, and I'd like to explore that with you, if I may.

THE WITNESS: Of course.

ARBITRATOR BIENVENU: If you go to

Paragraph 27, and can someone -- we are going to have someone display it for you.

THE WITNESS: Okay.

MR. De GRAMONT: Chuck, are you able to get Mr. Rasco's -- okay.

MR. BIENVENU: If we go to the bottom of Page 9 and top of Page 10. So I'll read it for you.

"It was not until April 2016, however, that ICANN" -- sorry, I can't read on my screen because we have the -- I'll follow here.

"It was not until April 2016, however, that ICANN sent notice to the contention set that ICANN would issue the .WEB gTLD and, therefore, that ICANN had scheduled a public auction for .WEB to take place on July 27, 2016. Until ICANN sent that formal notice, there was no guarantee that ICANN would hold an auction for .WEB. Rather, as had occurred with other domain strings (such as .CORP), ICANN had the right to decline to issue the .WEB gTLD and thus not hold an auction."

Could you help us situate those cases? In what circumstances might ICANN decide not to hold an auction?

THE WITNESS: So it is true that ICANN and

the Board had ultimate discretion as to whether to issue any TLD or not.

With .CORP, as I recall -- I am going to forget the term for this. There was a technical risk to the root, a root collision. There was a risk of essentially resolution of domain names to IP addresses and queries to the DNS being routed to the incorrect location, essentially, pertaining to the .CORP, C-O-R-P, top-level domain.

So I do believe that that was a Board decision which directed that we would not be delegating the top-level domain .CORP at all.

ARBITRATOR BIENVENU: Thank you.

Can you go to Paragraph 33, and I'll just let you read it, Ms. Willett. Let me know when you're done.

THE WITNESS: I am. Thank you.

ARBITRATOR BIENVENU: So there's reference in the second sentence to means of resolving contention sets, and I would like to focus on the third one mentioned by Mr. Rasco, which is, "buying various applicants out of their applications before any auction was held."

Do you know whether that has happened in practice?

THE WITNESS: I would have to think about a specific example, but I do recall more than a few applicants who the applying entity was acquired by a different organization.

ARBITRATOR BIENVENU: I don't believe that that's what he's referring to. He's not referring to an acquisition of the applicant. He is referring to an applicant being bought out of its application, at least that's how I read it.

THE WITNESS: I don't know what that would mean. Because it would be contrary and against the rules and the AGB to buy or sell an application, but the entity -- the applying entities changed hands on multiple occasions.

ARBITRATOR BIENVENU: Right. So you have anticipated my question.

If what he's referring to, and no doubt he can clarify when he appears before us, but if what he were referring to was the buyout of the application from the applicant, your view is that this would not be permissible under the guidebook; is that right?

THE WITNESS: To me it is -- what ICANN was looking at was that the applying entity continued to retain responsibility for the

application. So as long as that was still the case, I -- I am not a lawyer. 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.

But if that -- if that changed and then that applicant wasn't managing the application, that might be an issue. But we would have evaluated that on a case-by-case basis.

ARBITRATOR BIENVENU: Can you think of examples where that happened?

THE WITNESS: I'd have to do a little harder thinking about the specific strings, but I recall that we had at least one applying entity that ceased to exist, so some other, I don't know, parent corporation or sister corporation acquired the assets of that entity. I think there were -- over many years, you know, not just these four years in the program and beyond, it was a lot of time for all sorts of changes to corporate structures to occur.

As 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.

ARBITRATOR BIENVENU: Thank you. Could we go to Paragraph 37, and I'll let you read it, but my question will concern the penultimate sentence of the paragraph.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Based on your experience, Ms. Willett, were you aware of these practices?

THE WITNESS: I don't recall ever being informed explicitly by applicants of these practices, but I became aware through general discussions in the community that various practices of choosing which contention sets or which strings to pursue versus others did occur.

ARBITRATOR BIENVENU: Can you go to Paragraph 83 of the witness statement?

THE WITNESS: I'm sorry, before we go there, Mr. Chairman, I want to make sure I'm clear. If you're referring to the penultimate statement that ICANN did not object to them -- is that what you were asking me about specifically?

ARBITRATOR BIENVENU: I was mostly, whether it did or not is something -- is easily traceable, or more easily traceable. 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?

THE WITNESS: 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 we in 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 observing it, I think it is easy to form conclusions how certain applicants were treating certain applications and what was being resolved.

ARBITRATOR BIENVENU: Thank you.

I was going to ask you about the account in Paragraphs 83 to 86 of your conversation with Mr. Rasco, but I believe we have your evidence on this. So I don't need to go there.

My last question concerns the litigation waiver that is contained in Module 6. It is under Tab 8 of your binder.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And it is at Page 4. Do you have it in front of you?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: So I'll let you read the beginning of the paragraph. I don't want to burden the transcript, but when the text becomes capitalized, we read, quote, "Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application," and you can read what follows.

And then at the bottom of the paragraph, the last -- in the penultimate sentence we see, "Provided, that applicant may utilize any accountability mechanism set forth in ICANN's bylaws for purposes of challenging any final decision made by ICANN with respect to the application."

Do you have a view, Ms. Willett, as to what is meant by "final decision made by ICANN with respect to the application"?

THE WITNESS: I have a personal opinion.

ARBITRATOR BIENVENU: Excuse me?

THE WITNESS: I have a personal opinion as to that.

ARBITRATOR BIENVENU: Yes. Could you give us your understanding of what is meant by this language?

THE WITNESS: So the guidebook describes multiple evaluations that an evaluation goes -- that an application goes through, and if an applicant failed any of those evaluations, that would be a final decision made by ICANN.

So evaluation -- I guess in general, there are a number of actions that ICANN could take in the processing of an -- sorry -- in the processing of an application, which could be a final decision by ICANN, which would be an evaluation outcome, an objection determination to either perbado [phonetic] or fail an objection process, resolving contention, string similarity, all of those -- it wasn't just contracting. It wasn't just delegation which we deemed as a final decision.

This was the part of the guidebook that we were relying on when we looked and guided applicants to utilize those accountability mechanisms to channel action by ICANN.

We were talking about .CORP and not choosing to delegate .CORP. That would have been a final decision. This would have been a variety of

actions by ICANN in the processing of the program.

ARBITRATOR BIENVENU: Thank you very much.

So I don't know if my colleagues have questions, additional questions for Ms. Willett.

ARBITRATOR CHERNICK: I do not.

ARBITRATOR KESSEDJIAN: Well, I think I do, and I want to apologize to both Ms. Willett and Jeff LeVee because he's waiting for the redirect. I was looking at the schedule, and you have evaluated 40 minutes. So it is going to take us pretty long, but I will try to cut short -- I have four questions. We will see whether I go through four questions or whether I cut them.

Ms. Willett, I am speaking to you in your capacity as general manager of this new gTLD Program. So I want you to answer my questions to the best of your professional capacities at -- and not really trying to imagine what a lawyer would do, what another person would do. So I am really talking to you in the capacity you occupied for so many years, which I consider to be an essential capacity in the managing of the program.

On Monday -- of course you don't know about that, but I am going to tell you what happened on Monday. On Monday we had the opening

statements by the parties and the Amici.

NDC, who is an Amici -- Amicus in this IRP said, and I quote, "ICANN" -- and it's -- by the way, anyone who is concerned about where I quote, this is one of the slides of NDC's opening statement, and it is in the second version that we received. It is Slide 8. I don't know whether anybody would want to -- it is very short, so I don't think you need to see the document.

I quote, "ICANN" -- and it is a title of the slide. "ICANN Never Inquired about the Agreement," and I am adding for you, Ms. Willett, that the agreement that he is concerned about is the DAA. It is the agreement between NDC and VeriSign. "ICANN Never Inquired About the Agreement With VeriSign Prior to the .WEB Auction," unquote.

Now, when I read in my capacity as a Panel member this very sentence, what I read is the reverse position, which is basically what NDC's telling us, is that ICANN should have asked -- if they were interested, if ICANN was interested in the DAA, they should have asked, ICANN should have asked.

Now I am asking your opinion. Do you

think it was ICANN's duty to inquire about something that would have happened, could have happened? You said to us many times that you had no idea, but if that were true, if something like this was going on, do you think that was your duty as ICANN to ask for it?

MR. LeVEE: Professor Kessedjian, can I just clarify that you're asking about prior to the .WEB auction?

ARBITRATOR KESSEDJIAN: Yes, prior to the .WEB auction. Thank you, Mr. Levee.

THE WITNESS: So I don't believe we could have had a duty to inquire about an agreement we didn't know about. So I think we inquired the questions in June and July that my team and I posed to Mr. Rasco about who the directors or managers were of NDC, who the ownership interests were. We asked those same types of questions of many, many applicants. We sincerely did not -- I had no clue -- sorry, American --

ARBITRATOR KESSEDJIAN: That's okay. I understand.

THE WITNESS: I had no suspicion, no hint that there was this separate agreement. So I don't think we had a duty beyond all of the inquiries

that we did make.

ARBITRATOR KESSEDJIAN: Okay. Thank you.

Now, you said yesterday, and I quote from the transcript of your witness deposition yesterday, and that's for everybody in the room, it is Page 140, Lines 12 and 13 of the transcript. You said that the applicants are prohibited, and you were very strong on that statement, from signing, reassigning, transferring their application, and you made a difference between that prohibition, which seemed to be very strong in the way you expressed it, and the rights.

Now, when I read that -- and in your witness statement you said many, many times, and you were asked today about that, but I noted at least three paragraphs, if not more, 20, 23, 34, where you said, "At no time did NDC tell us that they were doing anything with VeriSign."

Now, for the sake of argument and for the sake of discussion, if you had known -- and it is just supposition, if you had known that there was something going on with VeriSign, that was my word, behind the scenes. Now, in your capacity as general manager, what would you have done?

You didn't know, so it is a completely

hypothetical question.

THE WITNESS: So hypothetically, if we had been made aware that NDC had an agreement with any other party, and as we now know about the auction and perhaps a hopeful assignment, we might have asked some questions about it, but not knowing about that, we didn't.

So hypothetically, it might have -- it might have driven us to ask some additional questions about the nature of that.

ARBITRATOR KESSEDJIAN: Thank you. Pierre, I had two other questions, but I think it is very late in the day, so thank you very much.

ARBITRATOR BIENVENU: Thank you.

Mr. LeVee, any redirect for Ms. Willett?

MR. LeVEE: I do have some.

Are you good to keep going?

(Discussion off the record.)

REDIRECT EXAMINATION

BY MR. LeVEE

Q. Ms. Willett.

A. Mr. LeVee.

Q. Would you turn to Exhibit C-61, but in your binder it is Tab 30.

I am going to ask Ms. Ozurovich to

highlight the second paragraph.

You see where it says -- this is the letter that you said you recognize sent by Mr. Atallah and Mr. Hemphill in September 2016, correct?

A. Correct.

Q. Okay. And do you see where it says in the second paragraph, "You were notified via the Customer Portal we placed the .WEB/.WEBS contention set on hold. This was to reflect a pending accountability mechanism initiated by another member of the contention set." And then there's a citation to the cooperative engagement.

Do you know what that was referring to, the other member of the contention set?

A. Yes. I believe that was Donuts/Ruby Glen's CEP from 2016.

Q. And does this letter anywhere say that ICANN was putting the contention set on hold because of the letters that Afilias had sent?

A. No, it does not.

Q. Okay. Now, would you --

Ms. Ozurovich, would you pull up Exhibit C-51.

I am going to -- you don't have this,

Ms. Willett. It is not in your binder.

Do you see that this is a letter from Afilias to you dated October 7, 2016?

A. I do.

Q. And I am going to ask Ms. Ozurovich -- so this is a letter from Afilias to you, and it says, "We appreciate the opportunity to provide comments on behalf of Afilias to the question posed by ICANN in its September 16 letter." I am going to skip because we're short on time.

Last sentence. "We are concerned" -- go up one sentence. It says, "Mr. Atallah states that while the .WEB contention set was placed on hold by ICANN on August 19," that's the letter we looked at, "such action was taken because of the initiation of an ICANN accountability mechanism by another applicant."

Do you see that?

A. These are long sentences. Yes.

Q. The last sentence says, "We are concerned that this statement appears to imply that ICANN is not placing the contention set on hold in order to address the issues raised by Afilias."

Do you see that?

A. I do.

Q. Did ICANN place the contention set on hold because of the letter sent by Afilias?

A. We did not.

Q. So the concern expressed by Afilias was accurate, that ICANN was not placing the contention set on hold because of the letters that it had sent?

A. Correct.

Q. Now, you said before that you expected Afilias to file a reconsideration request.

Tell the Panel, what does it mean to file a reconsideration request and what could they have reconsidered back in 2016?

A. So a reconsideration request is one of those accountability mechanisms defined in ICANN bylaws, both prior to 2016 and the most current ones, and a reconsideration request asks the Board to examine any action or inaction taken by staff, Board, et cetera.

Q. And who decides a reconsideration request?

A. The Board does, or one of the -- either the Board governance committee or the Board itself depending on practice.

Q. So could Afilias have initiated a reconsideration request after the .WEB auction when

it started complaining that it thought NDC and VeriSign had done something wrong?

A. Absolutely, yes. That's what we expected.

Q. And by doing that, would the Board have acted on the reconsideration request? That's a bad question.

Would it have been the Board that had acted on the -- would have acted on the reconsideration request that Afilias would have filed?

A. Yes, it would have been the Board.

Q. Okay. And so had that happened, the Board would have taken up at that time whatever Afilias' reconsideration requests addressed?

A. Correct.

Q. Okay.

ARBITRATOR BIENVENU: Mr. LeVee, I am sorry, this is the Chair here. If you'll permit, can I ask the witness what decision would the reconsideration request have targeted?

MR. LeVEE: That's a good question. That was my next one.

THE WITNESS: So hypothetically --

ARBITRATOR BIENVENU: Then maybe you should wait for the question from Mr. LeVee.

MR. LeVEE: No, no, no, Mr. Chairman, you asked a question. I couldn't help myself. I'm getting tired. I'm sorry.

ARBITRATOR BIENVENU: Please proceed.

THE WITNESS: So Afilias made a number of assertions in those two letters of August and September 2016. I would have expected they would have raised those same issues as part of the reconsideration request and hypothetically would have asked the Board to disqualify NDC or invalidate the auction or any of the actions Afilias was asking in letters. It would have been a formal request through that proper channel to the Board to drive them to look at it.

Q. BY MR. LeVEE: Was a reconsideration request available to be filed with respect to the action of ICANN staff as opposed to the ICANN Board at that time?

A. Yes, it was.

Q. So in 2016, Afilias could have filed a reconsideration request with respect to an action of both the Board and the staff, whether it was action or inaction; is that correct?

A. That's correct.

Q. I am going to jump ahead to 2018 just to

connect the points.

In June of 2018, when ICANN took the contention set off hold, did you know that Afilias had promised to file an accountability mechanism, namely invoking the CEP?

A. I believe they sent a letter to that effect.

Q. Yes. So when they did initiate a CEP, that put the contention set back on hold before ICANN could sign, if it was going to sign, a Registry Agreement?

A. That's correct.

Q. Okay. You were asked a question this morning about -- well, I have the copy of the daily transcript. This is something that we receive.

And for the members of the Panel, I am going to read from the transcript today at 8:00 a.m. -- 8:43, that would be Pacific time. There's an answer I don't understand.

The question is: "But 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." And then you were asked, "Do you disagree?"

And you said, "Not necessarily."

I did not understand what you meant by "Not necessarily," because I was concerned that you actually might not have heard the whole question.

A. Yeah. I think it was a long question, and I might have misunderstood. So could you reread?

Q. Let me read the question.

A. Perfect.

Q. "But 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."

Let me ask you to comment on that without asking you to either agree or disagree.

A. So, again, if VeriSign had been involved with NDC's application, I don't know what that meant. VeriSign -- VeriSign was acting as the back end. They had been designated as the back-end registry operator for several dozen applicants to operate TLDs.

So that could have been an involvement, and that wouldn't have indicated a resell of the application. They could have been acting as a consultant to the applicant.

Again, if I may, 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.

Q. Thank you.

ARBITRATOR KESSEDJIAN: Mr. Levee, can I interject a follow-up question on this one?

MR. LeVEE: Please do.

ARBITRATOR KESSEDJIAN: Thank you.

Ms. Willett, would you say that because you were asked "involved," if VeriSign had been involved and then you explained to us that there are many kinds of different involvements, are you saying to us that basically each case is to be looked at, evaluated?

I am not sure I know exactly the word because I have not worked in this kind of position, but would that be a case-by-case depending on what are the facts, who is doing what and so on?

THE WITNESS: Thank you, Professor. ICANN, through information provided by applicants, both in their applications, subsequent conversation and dialogue, we became aware of a variety of

plans, future plans for their operation, what they wanted to do with the TLD. If it wasn't pertaining to selling the application and taking it from, you know, application -- Applying Entity A to Applying Entity B, ICANN was simply -- we were trying to administer the evaluations described in the guidebook.

We couldn't and didn't undertake to evaluate all of those other 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.

So to your question, Professor, I suppose it would have required an evaluation of that, but 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.

ARBITRATOR KESSEDJIAN: You have been

repeating many times that you had so many applications and, therefore, couldn't spend a lot of time on each of them or whatever, you had a lot of each of them, and it was a fairly difficult job.

Now, isn't there some kind of contradiction with the fact that you have been in contact very regularly -- and I could quote you the number of emails and telephone conversations and whatever with the representatives of NDC.

So, you know, if, indeed, you had so much work with all those applications, how come this particular application was concerning you particularly?

In your witness statement at some stage you say that there was an email to Mr. Rasco, and then a few hours later he's calling you. So he had apparently direct communication with you.

THE WITNESS: So I --

ARBITRATOR KESSEDJIAN: These are questions in my mind. So if you could clarify that, that would be helpful.

THE WITNESS: I would be happy to. You're right, there were many applications, and I didn't regularly email -- have email contact or phone contact with the primary contacts, with the

applicants on a regular basis.

However, there were more than a handful of several dozen applications that became highly contentious, not just string contention, but I'm thinking of the string for .AMAZON, the string for .AFRICA, the string for .GAY. I could go on, several dozen. Those issues, because we were getting the string for dot -- it doesn't matter.

There were several of those situations where there were many communications, there were many accountability mechanisms triggered, and those parties, it wasn't always satisfactory to them or suitable simply to engage on somewhat sensitive and very charged topics simply through emails from low-level staff via that applicant portal.

It wasn't very friendly, if you will. So on these handful of occasions, I would become involved, my staff would bring it to my attention or parties would contact me directly. So it was those few dozen applications, contention sets that I had direct conversation with applicants about.

ARBITRATOR KESSEDJIAN: And yet in the case for which we are sitting here, that did not trigger your curiosity about trying to find out what was going on, really?

THE WITNESS: Well, it wasn't really a matter of my curiosity. 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. So that's why we ask the same questions.

ARBITRATOR KESSEDJIAN: But you just said it was not true for those two handful -- so there was a differentiation?

THE WITNESS: So I was speaking of the distinction in terms of the level of concern and disagreement. The .AMAZON TLD had numerous accountability mechanisms and perhaps even hundreds of letters written about it.

So depending on sort of the nature, certain issues get escalated to me. But that didn't mean that we were treating the applications and we were applying different standards to different applicants, you know, based on whether I knew them or -- no one got -- there was no favoritism, whether I knew someone or didn't know someone.

I believe when I first emailed Mr. Rasco in June 2016, July 2016, I said, "Do you even remember me?" Because I don't know that he and I

have ever met face to face, and I don't think I recall talking to him prior -- except maybe on one occasion prior to June 2016.

So it was more about --

ARBITRATOR KESSEDJIAN: I got the message. I think we probably need to defer to Mr. LeVee. I am sorry, Mr. LeVee, took more time than I thought. Thank you.

MR. LeVEE: You are entitled to ask whatever you want, you know that. Let me follow up on those questions.

Q. When there was a top-level domain application or there was kinds of disputes such as .AMAZON, was .WEB one where there was a lot of activity over the course of a few years?

A. Yes. A couple of accountability mechanisms. Not as much as some, but it wasn't a straightforward contention set.

Q. Was there a point on these -- I don't know the right word, I don't want to put words in your mouth, but a point where strings that had a lot of attention where the law department would inevitably become involved?

A. Absolutely.

Q. And would that affect the amount of

attention that you personally would give once the law department became involved?

A. Yes.

Q. Let me ask you -- I just have two other things.

You were asked about the ombudsman and what kind of investigation an ombudsman can do.

I am going to ask to have the bylaws put up. I think it is Exhibit C-1, and in particular, let's start with Page 41. Actually go to the previous page, Kelly.

Just to orient you, as you see, Article 5 is the ombudsman article, yes?

A. Yes.

Q. Okay. So, Kelly, if you would turn to Page 42, I am going to ask you to look at Section 5.3, which is entitled "Operations." It says, "The Ombudsman shall" -- and look at (d). We'll blow that up.

It says, "The ombudsman shall have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible

(subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN)."

You see that?

A. I do.

Q. You understand that was part of the bylaws?

A. Yes.

Q. Did you understand that the ombudsman would ask ICANN's staff to assist him from time to time in gathering information relating to his investigations?

A. Yes. Based on his having done so with me in regards to matters pertaining to the new gTLD Program.

Q. Okay. Change of subject.

You were asked about some emails that you could not recall, in particular, some media reports.

Do you remember that?

A. Yes.

Q. Can you give some estimate of how many emails you received in a given day and the priority that you put on media reports?

A. So in 2016, I was probably down to receiving 200 to 300 emails per day, and media reports were definitely not my priority. I might look at them when my calendar permitted, but I will say I typically had in 2016 many hours of meetings scheduled on my calendar.

I looked at those news feeds maybe once or twice a week.

MR. LeVEE: Mr. Chairman, if I could have one minute, and I'll just check with my colleagues.

ARBITRATOR BIENVENU: Yes, Mr. LeVee, please do.

MR. LeVEE: I am just going to put this on mute.

(Whereupon a recess was taken.)

MR. LeVEE: Ms. Willett, I would like to thank you. You sat much longer than I told you you would, and for that I apologize.

I very much appreciate that the Panel stayed extra late this evening, in particular the Panel in France, and I have no additional questions. Thank you.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: Thank you very much, Mr. LeVee.

Ms. Willett, I am sure that counsel for the claimant join Mr. LeVee in thanking you for your availability and for your evidence, and certainly the members of the Panel appreciated the time that you devoted to assisting us in our task, and we are very grateful.

I must instruct you that the sequestration of fact witness order requires me to instruct you not to communicate with other witnesses whose testimony has not yet been heard in the case. So if you could avoid doing that, please.

So thanks again. It's been a long day for all of us, but I am sure particularly for you, and we are grateful for your availability.

THE WITNESS: I hope it's been helpful. Thank you.

MR. De GRAMONT: Thank you again.

ARBITRATOR BIENVENU: So I don't think I am going to ask if there are any other matters. It's very late for at least one of us, but I do thank everybody for remaining available until such a late hour, particularly our court reporter. Thank you very much.

So we resume tomorrow morning at 7:00 a.m. Pacific, and until then, keep well. See you

tomorrow.

MR. De GRAMONT: Thank you, Mr. Chairman.

MR. LeVEE: Thank you very much.

MR. De GRAMONT: Thank you, everyone.

ARBITRATOR KESSEDJIAN: Good-bye.

(Whereupon the proceedings were concluded at 2:22 p.m.)

---o0o---

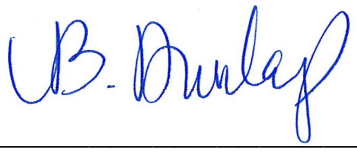
REPORTER'S CERTIFICATE

---o0o---

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 17th day of August, 2020.



BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

F

G

M

N

O

P

Q

R

EXHIBIT Altanovo-20

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

WITNESS STATEMENT OF JOSE IGNACIO RASCO III

1 June 2020

HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY

Steven A. Marenberg
Josh B. Gordon
April Hua
PAUL HASTINGS LLP
1999 Avenue of the Stars, 27th Floor
Los Angeles, California, 90067

Counsel to *Amicus Curiae*
Nu Dotco, LLC

I, Jose Ignacio Rasco III, declare as follows:

1. My full name is Jose Ignacio Rasco III, and I reside in Miami, Florida. I am currently the Chief Financial Officer and a Manager of Nu Dotco, LLC ("NDC"), a company founded to submit applications and acquire rights for new generic top level domains ("gTLD") as part of the Internet Corporation for Assigned Names and Number's ("ICANN") New gTLD Program.

I. Biography

2. In 2001, I graduated from the University of Pennsylvania's Wharton School with a Bachelor of Science Degree in Economics with concentrations in Accounting and Real Estate. In 2003, I earned a Master's Degree in Taxation from Florida International University.

3. In 2005, I saw an opportunity to enter the domain name industry after I began working with Juan Diego Calle, an entrepreneur working within the internet space. In 2007, the Colombian government announced the release of the .CO geographic top level domain ("TLD") for public auction. In 2009, I, Mr. Calle, Nicolai Bezsonoff, and a few others co-founded .CO Internet S.A.S. ("dotCO") to acquire, develop, and operate the .CO TLD. I served as dotCO's Chief Financial Officer, while Mr. Calle and Mr. Bezsonoff served as dotCO's Chief Executive Officer and Chief Operating Officer, respectively. We operated dotCO as a joint venture with Neustar, Inc. ("Neustar"), an American technology company that served as our technical partner. In 2009, dotCO successfully bid for the .CO TLD, which we then operated with considerable success. Under our leadership, for example, we increased registrations and revenue to the point where .CO operated on par with top-echelon domains. Following that success, we sold dotCO to Neustar in 2014.

4. In 2012, while still at dotCO, Mr. Calle, Mr. Bezsonoff, and I began to strategize the future of our domain industry business. During this time, we closely followed ICANN's

announcement of its New gTLD Program, under which ICANN promised to introduce numerous new gTLDs to the domain name system. As a complement to our existing dotCO business, we decided to participate in the New gTLD Program by applying to be operators of certain new gTLDs. We focused on those potential gTLDs that could occupy a corporate space similar to .CO and had the greatest potential for commercial success.

II. NDC's Management and Ownership

5. The business organization we used to pursue our interest in participating in ICANN's New gTLD Program was NDC, a name ("Nu Dotco") that is a takeoff on our then-existing business "dotCO." On March 19, 2012, Mr. Calle, Mr. Bezsonoff, and I founded NDC, a company organized under the laws of Delaware with its principal place of business in Florida. Maintaining the same positions and roles we served at dotCO, I served as NDC's Chief Financial Officer, Mr. Calle served as NDC's Chief Executive Officer, and Mr. Bezsonoff served as NDC's Chief Operating Officer.

6. At its formation, NDC was owned by two entities as follows: Domain Marketing Holdings, LLC ("DMH") owned 85% of NDC; Nuco LP, LLC ("Nuco") owned the other 15%. That ownership structure remained the same until December 2017, at which time Nuco distributed its 15% ownership interest in NDC to Nuco's members. As a result of that distribution, as of December 2017, DMH continued to hold 85% of NDC and the three other entities that had comprised Nuco collectively held the remaining 15% (with each necessarily owning less than 15%).

7. Accordingly, other than DMH and Nuco, no other entity or person has ever owned at least 15% of NDC. Similarly, there have been no changes or amendments to NDC's management since 2012. Mr. Calle, Mr. Bezsonoff, and I remain the sole officers of NDC and continue to perform the duties associated with those positions.

8. Formed for the specific purpose of submitting applications to ICANN to acquire gTLDs, NDC ultimately applied for thirteen (13) gTLDs through ICANN's New gTLD Program, including .WEB.[1]

III. NDC's Application for .WEB

9. On June 13, 2012, NDC submitted an application to ICANN to acquire the right to operate the .WEB gTLD (the "Application"). Exhibit A attached hereto is a true and correct copy of the Application, together with the exhibits to that Application.[2] NDC timely paid the required $185,000 application fee.

10. NDC's Application satisfied all of ICANN's requirements. For example:

- **Corporate Information**

11. Mr. Bezsonoff and I completed NDC's .WEB Application. In that regard, as specified by Sections 1 and 8 of the ICANN gTLD application form, we identified NDC as the applicant and as a Delaware limited liability company. Ex. A.1, §8(b). As specified by Sections 6 and 7 of the form, we listed me as NDC's "Primary Contact" and listed Mr. Bezsonoff as NDC's "Secondary Contact." *Id*. at §§6-7. And as specified by Sections 11(a) & (b), we listed three people as NDC's directors and officers: me as CFO, Mr. Calle as CEO, and Mr. Bezsonoff as COO. *Id.* at §§11(a), (b). This information was accurate at the time NDC's Application was prepared and submitted and this information remains accurate today.

12. To comply with the requirements of Section 11(c) of the gTLD application form, we identified "all shareholders holding at least 15% of shares" in NDC. As was accurate at the time, we listed Domain Marketing Holdings, LLC and Nuco LP, LLC as entities that held at least

[1] NDC applied for the following 13 gTLDs: .INC, .LLC, .GROUP, .LTD, .DESIGN, .MOVIE, .BOOK, .WEB, .CORP, .GMBH, .APP, .LAW, and .TECH.

[2] Exhibit A.1 contains publicly available portions of the Application. Exhibit A.2 contains non-public, confidential portions of the Application. Exhibits Aa-Ap contain exhibits submitted with the Application.

a 15% ownership interest in the LLC. *Id.* at §11(c). As stated above, these two entities are the only entities or persons that have ever held at least 15% of NDC.

- **Mission/Purpose of Proposed .gTLD**

13. Consistent with other gTLD applications NDC had submitted, in Section 18(a) of the Application we stated that the "mission/purpose" of .WEB was "to provide the internet community at-large with an alternative 'home domain' for their online presence. We envision that through strategic marketing campaigns designed to brand the domain, it will become a premium online namespace for a variety of businesses and websites. This general domain will provide new registrants with better, more relevant alternatives to the limited options remaining for current commercial TLD names." *Id.* at §18(a).

14. Sections 18(b) and 18(c) of the ICANN gTLD application ask applicants, respectively, to describe how the "proposed gTLD will benefit registrants, Internet users, and others" and to describe "operating rules … to eliminate or minimize social costs." *Id.* at §§18(b), (c). In answering these questions, NDC provided its general vision of new gTLDs in the marketplace and its general strategy at the time as to how .WEB might be successfully and productively introduced and used to benefit consumers. *Id.* Although NDC used its experience with .CO as an *example* of how .WEB might accomplish these goals, we understood, and we stated in our answers, that specific plans would depend on market conditions and thus were not fully described in the Application. Nonetheless, we repeatedly stated NDC's intent to follow ICANN's policies, rules, and recommendations in connection with .WEB.

15. With slight modifications to reflect the specific gTLD at issue, NDC's statements in Section 18 of its .WEB Application were largely identical to corresponding statements in all of NDC's other ICANN gTLD applications. We understood Section 18 to request general

descriptions of marketing and other business intent, not binding commitments of future actions. In fact, as described in more detail below, I understand that ICANN does not use Section 18 to evaluate gTLD applications and does not take any interest in any distinctions that might arise between statements made in Section 18 of a gTLD application and how a domain is ultimately operated. To the best of my knowledge, other applicants—including Claimant Afilias Domains No. 3 Ltd. ("Afilias")—similarly responded to Section 18 (and other sections) of the ICANN gTLD application form with near-identical statements in each of their applications, irrespective of how they operated domains they ultimately acquired or whether they subsequently transferred the domains to another entity. And, also to the best of my knowledge, ICANN has never policed any distinctions between Section 18 statements and such subsequent actions.

16. Nonetheless, I understand that Afilias has alleged that NDC's answers to the application form's "mission/purpose" inquiries in Section 18 were made false or misleading, thereby requiring an update to NDC's Application, by NDC's entry into the Domain Acquisition Agreement ("DAA") with Verisign over three years later. *See* Part VI, *infra*. That is incorrect. First, NDC's subjective views as to the "mission/purpose" of gTLDs, including .WEB, and how .WEB might benefit consumers and others have not changed, irrespective of who operates .WEB. Second, NDC's Section 18 responses expressly stated that NDC's marketing and other business plans were not final and were subject to market conditions. In all of my experience with ICANN applications, I have never updated, nor known any applicant to update, an application to reflect new and different marketing and business plans for a gTLD.

17. Third, given that NDC's marketing and business plans were subject to change, as a baseline position NDC stated that it planned to follow ICANN's policies, rules, and recommendations in connection with .WEB. Nothing in the DAA required an update to that

statement, including because I understood that Verisign, a longstanding registry owner and operator with whom ICANN was very familiar, would also follow those policies, rules, and recommendations. As a baseline, therefore, I did not believe anything about our Section 18 responses had materially changed on account of the DAA and I did not believe any amendment to NDC's Application was required or warranted. Among other things, in

Redacted - Third Party Designated Confidential Information

18. Moreover, as stated above, it has always been my understanding that the Section 18 "mission/purpose" inquiry is intended to provide ICANN with certain New gTLD Program statistics and is not part of the evaluation criteria. Rather, when evaluating whether an applicant is qualified to participate in a new gTLD contention set, ICANN has always been most concerned with whether that applicant has the financial ability and technical infrastructure to successfully operate the gTLD registry. For example, the ICANN Guidebook states that responses to Section 18 are "not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored."[3]

19. 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:

> The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space. For the application to be considered complete, answers to this section must be fulsome and

[3] Afilias C-3 (*gTLD Applicant Guidebook*, Attachment to Module 2, A-11, A-12, *available at* https://newgtlds.icann.org/en/applicants/agb).

> sufficiently quantitative and detailed to inform future study on plans vs. results. The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. *Id*.

20. As a result, while helpful for ICANN to assess the New gTLD Program in general, Section 18 responses are not a material part of evaluating a particular application and, moreover, are not subject to subsequent enforcement by ICANN in the event those responses differ from how or by whom a domain is ultimately operated. Accordingly, for this additional reason, I again did not believe that NDC was obligated to update any such response in its .WEB Application.

- **Technical Capabilities**

21. In Sections 23-44, NDC provided a robust description of its technical ability to operate the .WEB gTLD. For example, NDC explained that it had partnered with Neustar, an experienced domain registry company with proven and scalable infrastructure. Ex. A.2, §§23-27. NDC further provided detailed information regarding the specific services Neustar would provide, including the necessary security, abuse prevention, and rights protection services. *E.g., id*. at §§28-44.

- **Financial Information**

22. Redacted - Third Party Designated Confidential Information

This financial information is considered confidential by ICANN, and is not disclosed by ICANN in its public posting of new gTLD applications. Therefore, only ICANN would have had access to this information about NDC's financial ability to operate the .WEB gTLD. Other members of the Contention Set, including those who might bid at auction for .WEB, would not have had access to such financial information.

23. Notably, the ICANN application form did not call for, and therefore NDC did not provide, any information regarding NDC's financial capability to acquire the .WEB gTLD in an auction or sources of financing for that auction. In more than a dozen ICANN applications I have overseen for NDC, ICANN has never requested and NDC has never provided such information.

24. As NDC's primary contact for the Application, I received confirmation from ICANN that our .WEB Application had been accepted—meaning that the Application had satisfied all applicable ICANN criteria and evaluations—in June 2013.

25. Pursuant to the ICANN Guidebook, if more than one applicant applies for a gTLD, then the approved applicants are grouped together into a "Contention Set," with the competing applications resolved either through (i) a private auction or other negotiated settlement conducted by agreement of the applicants or, if all members of the Contention Set do not agree to a private auction, (ii) a public auction conducted under the auspices of ICANN.

26. In addition to NDC, there were six other approved applicants for the .WEB gTLD: Web.com Group, Inc., Charleston Road Registry Inc. (Google), Schlund Technologies GmbH, Dot Web Inc. (Radix), Ruby Glen LLC ("Donuts"), and Afilias. In February 2014, ICANN officially formed a Contention Set for .WEB comprising these seven applicants, including NDC.

27. It was not until April 2016, however, that ICANN sent notice to the Contention Set that ICANN would issue the .WEB gTLD and, therefore, that ICANN had scheduled a public

auction for .WEB to take place on July 27, 2016. Until ICANN sent that formal notice, there was no guarantee that ICANN would hold an auction for .WEB. Rather, as had occurred with other domain strings (such as .CORP), ICANN had the right to decline to issue the .WEB gTLD and thus not to hold an auction.

28. As a result, between June 2013, when ICANN approved NDC's application, and April 2016, when ICANN scheduled the public auction, there was no clarity as to how NDC's application for .WEB might ultimately be resolved.

IV. Changes to the gTLD Marketplace and the Emergence of New Participants

29. Following NDC's successful acquisition and operation of the .CO domain in 2010 and ICANN's introduction of the New gTLD Program in or around 2012, NDC decided to focus its gTLD acquisition strategy on similar company-type domains. For example, because "CO" is short for "Company," NDC applied for domain strings such as .INC, .LLC, .CORP, .LTD, and others in this corporate short identifier space. NDC also applied for domain strings related to high traffic Internet searches, including .MOVIE, .BOOK, and, of course, .WEB. In total, NDC submitted 13 ICANN applications for these and similar domains.

30. Between 2012 and 2015 several other companies emerged as repeat participants in the ICANN New gTLD Program. Prominent among these was Donuts. On information and belief, Donuts raised funds through private equity transactions to finance ICANN applications and auction bids. With that money, it is my understanding that Donuts applied for and bid on at least 300 gTLD domain strings, far more than NDC or, I believe, most other companies.

31. Donuts also emerged as a driving force behind the private auctions permitted by ICANN. As briefly described above, ICANN does not specify how applicants might privately resolve the Contention Set, and applicants may mutually agree to resolve the Contention Set through a private auction or other means. In fact, ICANN encourages applicants to resolve

Contention Sets on their own terms—viewing a public auction as a last resort—and historically has neither participated in nor policed those private resolutions.

32. To the contrary, once ICANN has determined that a gTLD application satisfies the requirements of the Guidebook and placed the various applicants into a Contention Set, to the best of my knowledge, ICANN has effectively fulfilled any gatekeeping function that it might undertake: ICANN has determined that the applicant is qualified and capable of operating the gTLD if that applicant emerges from the Contention Set and secures the rights to operate the domain. Beyond that, to the best of my knowledge, ICANN takes no position ***on which*** applicant in a Contention Set subsequently becomes eligible to sign a registry agreement with ICANN for the domain in question ***or how*** they do so. In fact, the Auction Rules expressly state that applicants within a Contention Set may discuss and negotiate, among other things, "settlement agreements or post-Auction ownership transfer arrangements" for the domain in question so long as the Contention Set is not within a designated Blackout Period shortly before a public auction.[4]

33. Accordingly, over the years, applicants have considered and employed numerous means to resolve Contention Sets. For example, when NDC first considered participating in the New gTLD Program, we researched the program rules and considered various means of resolving Contention Sets, including trading domains with other applicants who might have a greater interest in a particular domain string than NDC, cross-selling percentage interests in different domains, and buying various applicants out of their applications before any auction was held. Although NDC has never used these means in practice, I have never considered, and am not aware of anyone who does consider, such means of resolving Contention Sets to be prohibited by the ICANN rules.

[4] Afilias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a)-(b), *available at* https://newgtlds.icann.org/en/applicants/auctions).

34. Following the disclosure by ICANN of the various entities that had submitted gTLD applications, NDC and those entities engaged in numerous discussions regarding how we might resolve Contention Sets without proceeding to a public ICANN auction. Most of the ideas discussed were variations on private auctions, and private auctions have since become the most prominent means to resolve Contention Sets. Although the terms of those auctions may vary depending on the agreement reached by members of the Contention Set, a common form of private auction—which Donuts was heavily involved in creating—is resolved in favor of the highest-bidding applicant. Unlike a public auction under the auspices of ICANN, however, the money offered by the *highest* bidder is often divided equally among the *losing* bidders, not paid to ICANN. As a result, each member of the Contention Set stands to benefit from a private auction as long as the "losers' share" exceeds expenses, including the ICANN $185,000 application fee.

35. As another example, in July 2016, Oliver Mauss, the CEO of 1&1 Internet, which owns the Schlund entity that had applied for .WEB and was in the .WEB Contention Set, emailed Mr. Calle with a proposal for an "alternative private auction." Exhibit C attached hereto is a true and correct copy of that email, which Mr. Calle forwarded to me on July 5, 2016. In his email, Mr. Mauss described the "basic principles" of his proposal: "It divides the participants into groups of strong and weak;" "the weak players are meant to lose and are compensated for this with a pre-defined sum;" "the strong players bid for the asset;" and "the highest bid wins, but the winner pays a lower price than the 2nd highest bid." *Id*. According to Mr. Mauss, this proposal had several advantages over a typical private auction (which he called an "Applicant Auction") and an ICANN public auction. *Id*. For example, "the winning party pays less for the asset in comparison to both" an ICANN public auction or an "Applicant Auction;" "the losing strong players receive a higher return than in the Applicant Auction;" and "the losing weak players receive a lower return than in

the Applicant Auction." *Id*. Essentially, Mr. Mauss concluded, the "benefit for the strong bidders comes from a lower share of proceeds for the weak bidders than in the Applicant Auction." *Id.* We did not agree to participate in Mr. Mauss's proposal, but it was yet another example of means through which participants in the New gTLD Program attempted to resolve Contention Sets without proceeding to a public ICANN auction.

36. Following ICANN's publication of the Guidebook in 2012, Donuts made significant efforts to coordinate private auctions between gTLD applicants. For example, Donuts hired a mathematician to develop models for operating such auctions, developed tutorials, and hosted meetings and mock auctions so participants could experience and evaluate how private auctions might work. I participated in at least one such meeting, which was held during an ICANN conference (but was not on the official conference schedule) and which I understood had been arranged by Donuts. At that meeting, a mathematician and a private auction company provided information to gTLD applicants about how a private auction might work.

37. Other companies, including Afilias, similarly prioritized private auctions, 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. Based on my active participation in the domain industry for over 12 years and numerous conversations with other participants, it is my understanding that such practices were commonly known in the industry. I believe that 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.

38. By 2015, Donuts had become a well-financed, major force in the New gTLD Program. In addition, large companies such as Amazon and Google also began to participate in the Program, including by participating in private and public auctions.

39. As private auctions proliferated and the value of gTLD domain strings increased, including as a result of the influx of money from participants such as Donuts, Amazon, and Google, the market expectations for the .WEB domain and other new gTLDs increased.

40. Given these changes in the marketplace, Redacted - Third Party Designated Confidentia Information

V. The Domain Acquisition Agreement and Confirmation of Understandings

A. The Domain Acquisition Agreement

41. In or around May 2015, I received a phone call from Verisign expressing interest in working with NDC to acquire the rights to .WEB. As noted above, by that date ICANN had formed the Contention Set for .WEB (meaning no new applicants could join) and

Redacted - Third Party Designated Confidential Information

In addition, as also noted above, by that date ICANN had yet to schedule a public auction for .WEB, and thus the domain was still on hold, so there was no clarity as to a resolution by either a public *or* a private auction. Consequently, because

Redacted - Third Party Designated Confidential Information

42. As stated above, based on my experience and discussions with others in the industry, it was common industry knowledge by 2015-2016 that gTLD applicants used various means to resolve Contention Sets and monetize their applications. In addition to private auctions, it was common knowledge that interested parties had monetized successful gTLD applications by assigning interests in domain strings after securing the rights from ICANN. And it was commonly understood that ICANN approved of these assignments. In fact, when NDC first developed its strategy in connection with the New gTLD Program, we considered the possibilities presented by these secondary market opportunities to acquire others' rights in domains, and we came to understand that other gTLD applicants had utilized such opportunities and entered into registry agreements with ICANN based on those opportunities.

43. For example, in or around 2013-2014 I knew that Donuts and Rightside Media had entered into an arrangement whereby certain gTLD applications were potentially financed by the other party in exchange for an interest in the domains in question if and when the domains were acquired. To the best of my knowledge, more than twenty (20) domains have been assigned under this arrangement without any update to ICANN applications disclosing the underlying arrangement. Later on, I knew that the .BLOG gTLD had been acquired by WordPress, or an affiliated entity, after another entity, Primer Nevel S.A, prevailed at auction and executed a registry agreement with ICANN.

44. In addition, I have reason to believe that Radix Registry ("Radix") acquired the rights to the .TECH gTLD through an agreement with Dot Tech, LLC. Dot Tech, LLC was in the .TECH Contention Set with NDC. At no time in the auction process for .TECH did NDC think or know that Radix was participating in any way in the auction and Dot Tech LLC did not update its ICANN application prior to the auction to reveal any agreement with Radix. Dot Tech, LLC won

the .TECH auction on or around September 17, 2014. Thereafter, on October 23, 2014, Dot Tech, LLC updated its application to, among other things, add Radix personnel (including Brijesh Joshi, a Radix Director) as officers and as the new Primary and Secondary Contacts and to reflect that a Radix entity was the only party holding 15% or more of the shares of Dot Tech, LLC. Attached hereto as Exhibits D and E, respectively, are Dot Tech, LLC's original June 2012 application and the revised application dated October 23, 2014. On November 7, 2014, less than two months after Dot Tech, LLC won the auction, ***Radix*** issued a press release stating that "***Radix*** made the winning bid of $6.7 million for rights to .TECH, competing with Google, Donuts, and other industry players." (Emphasis added.) Indeed, based on the unsigned .TECH Registry Agreement available on ICANN's website, that agreement was set to be signed for Dot Tech LLC by Brijesh Joshi, the Radix Director whose name appeared on the Dot Tech LLC application for the first time after the auction was held, not anyone from Dot Tech LLC who had participated in the .TECH Contention Set. Attached hereto as Exhibits F and G, respectively, are true and correct copies of Radix's press release and the publicly available, unsigned, .TECH Registry Agreement.

45. It was in this context—our knowledge of these transactions, and our interest in maximizing NDC's return from our .WEB Application—that we began to consider any type of contact with Verisign about .WEB. In the spring and summer of 2015 NDC engaged in discussions with Verisign about the .WEB domain. Those discussions culminated in the August 25, 2015 "Domain Acquisition Agreement" between NDC and Verisign. Ex. B.

46. In the DAA, Redacted - Third Party Designated Confidential Information

Redacted - Third Party Designated Confidential Information

47. Redacted - Third Party Designated Confidential Information

48. Redacted - Third Party Designated Confidential Information

49. Redacted - Third Party Designated Confidential Information

50. Redacted - Third Party Designated Confidential Information

51. Redacted - Third Party Designated Confidential Information

52. Redacted - Third Party Designated Confidential Information

53. Redacted - Third Party Designated Confidential Information

Not only in the past did any transfer depend on ICANN determining to delegate a .WEB TLD (as noted above), and not only must ICANN consent to an assignment of a .WEB registry agreement to Verisign, but the DAA further provides that Redacted - Third Party Designated Confidential Information

B. The Confirmation Of Understandings

54. In July 2016, Verisign requested that NDC confirm the parties' understanding regarding NDC's .WEB Application in light of allegations by Donuts that NDC had transferred control of NDC to a third party or assigned the .WEB Application to a third party. *See* Part VII.C,

infra. Because those allegations were unequivocally false, and because Redacted - Third Party Designated Confidential Information, NDC readily agreed to Verisign's request, and the parties subsequently executed a letter agreement dated July 26, 2016 (the "Confirmation of Understandings"). Exhibit H attached hereto is a true and correct copy of the Confirmation of Understandings. Redacted - Third Party Designated Confidential Information

55. I understand that Afilias has alleged that the Confirmation of Understandings contained "false 'talking points'" provided to me by Verisign that I "duly signed" because I was "instructed" to do so by Verisign. Reply Memorial ¶79. That is false. I did not view the Confirmation of Understandings as "talking points," let alone as something to be used in coordinating any response to ICANN, but instead as an accurate statement of NDC's rights and obligations that protected NDC. As a result, I signed the Confirmation of Understandings of my own accord, for NDC and not for Verisign, because it was a true and accurate description of certain facts and understandings between NDC and Verisign, each of which is consistent with NDC's intent in executing the DAA. In addition, Redacted - Third Party Designated Confidential Information

.

56. For example, in the Confirmation of Understandings, Redacted - Third Party Designated Confidential nformation

57. Fully agreeing that the Confirmation of Understandings set forth NDC's rights as the applicant for .WEB and its rights and obligations under the DAA, each of which I understood to be consistent with and in compliance with ICANN rules and procedures, I signed the Confirmation of Understandings as of July 26, 2016. Importantly, the Confirmation of Understandings in no way contradicted what I told ICANN in June and July 2016—that NDC had not experienced any changes in its organizational management or control. *See* Part VII.C, *infra*.

As explained in detail below, my statements to ICANN were truthful, and I never deceived or misled ICANN or anyone else regarding NDC's .WEB Application.

VI. Neither the DAA Nor the Confirmation of Understandings Warranted an Update to NDC's .WEB Application

58. As discussed in Part III, *supra*, I did not believe that the DAA warranted or required any update to NDC's .WEB Application. The same is therefore true of the Confirmation of Understandings. For example, I address in Part III, *supra*, why I disagree with Afilias' assertions that the DAA rendered NDC's "mission/purpose" responses false or misleading. Simply put, nothing in the DAA changed NDC's view of the "mission/purpose" of .WEB or changed how NDC might operate .WEB or NDC's technical or financial capability to operate .WEB. Because nothing in those responses became false or misleading, I did not believe any update to the Application was necessary.

59. Indeed, Afilias assumes that, as of August 2015, there was no scenario in which NDC itself might operate .WEB. That is incorrect, including because Redacted - Th rd Party Des gnated Conf dent a Informat on and, as of August 2015, ICANN had yet to even conclude whether or how the .WEB Contention Set would be resolved. There was no guarantee, therefore, that the DAA would be in effect when the Contention Set was resolved.

Redacted - Third Party Designated Confidential Information

These facts informed my belief that NDC was under no obligation to update its .WEB application upon execution of the DAA.

60. I understand that Afilias has emphasized two provisions of the DAA in support of its argument that the DAA required an update to NDC's .WEB Application. First, Afilias repeatedly quotes the following: Redacted - Third Party Designated Confidential Information

61. Redacted - Third Party Designated Confidential Information

In fact, in the context of private auctions, there is no disclosure of interested parties or planned transfers of acquired domains, and I am not aware of any applicant, including Afilias, questioning or challenging the results of a private auction on any basis, let alone on the basis that the winner of the auction subsequently transferred its rights in the domain to another, previously unknown party. Redacted - Third Party Designated Confidential Information

62. Second, Afilias also relies on language

Redacted - Third Party Designated Confidential Information

VII. Pre-Auction Communications with the .WEB Contention Set and ICANN

A. NDC Did Not Agree to a Private Auction for .WEB

63. As noted above, in April 2016, eight months after NDC and Verisign executed the DAA, ICANN informed the .WEB Contention Set that it had scheduled a public auction for July 27, 2016. Thereafter, members of that Contention Set began to discuss the private and public auction options for .WEB.

64. For example, between April and June 2016, I and Mr. Calle (the CEO of NDC) had various phone, email, and text conversations with other members of the Contention Set regarding both .WEB and other outstanding TLDs for which we had pending applications. In the course of those conversations, other members of the Contention Set, including Donuts and Afilias, attempted to persuade NDC to participate in a private auction for .WEB.

65. Because there is no obligation under the ICANN Guidebook or otherwise to participate in a private auction, NDC declined to do so in connection with .WEB. Not only did

Mr. Calle and I repeatedly decline requests from Donuts, Afilias, and others, but we also never signed any agreement committing NDC to a private auction for .WEB. To be plain, NDC was not required to participate in a private auction for .WEB and never agreed to do so.

66. Nor would NDC Redacted - Third Party Designated Confidential Information

B. Other Contention Set Members Sought to Pressure NDC to Agree to a Private Auction

67. At the time, I understood that other members of the .WEB Contention Set were unhappy that NDC would not agree to a private auction. Recall that a private auction requires the consent of all members of the Contention Set. And recall that, in a private auction, the winner secures the rights to the gTLD at issue and the winning bid is shared among the losing parties. In contrast, in a public auction, the winning bid is retained by ICANN (for investment in the Internet infrastructure) and the losing bidders recover nothing.[5] Accordingly, other members of the Contention Set stood to lose the opportunity to "earn" significant amounts of money as the losers in a private auction were .WEB to proceed to a public auction.

[5] Applicants can recover portions of their application fee depending on if and when they exit the auction process, but recover nothing if they complete the auction but do not prevail.

68. One such party was Donuts. On June 6, 2016, I received an email from Jon Nevett, a co-founder of Donuts, regarding .WEB. Exhibit I attached hereto is a true and correct copy of an email string containing Mr. Nevett's June 6 email and our subsequent communications. In his June 6 email, Mr. Nevett said that he was unsure if I, Mr. Calle, and Mr. Bezsonoff were "still the Board members of your applicant" and asked us to agree to a two-month delay of the public auction for .WEB while the Contention Set tried "to work this out cooperatively." *Id*. Based on prior communications with Mr. Nevett, I understood him to be asking to discuss further NDC's participation in a private auction. On June 7, I replied to Mr. Nevett's email and informed him that NDC would not agree to a private auction (maintaining its intention to proceed to a public auction administered by ICANN) and would not agree to a postponement of the public auction. *Id*. In particular, I told Mr. Nevett that, based on his request, "I went back to check with all the powers that be and there was no change in the response and [NDC] will not be seeking an extension." *Id*.

69. In addition, in response to Mr. Nevett's inquiry about whom at NDC he should contact regarding .WEB, I stated that "Nicolai [Bezsonoff] is at [Neustar] full time and no longer involved with our TLD applications. I'm still running our program and Juan [Calle] sits on the board with me and several others." *Id*. Mr. Nevett responded with "Thanks Jose," and asked a follow-up question about unrelated domains. He did not ask for any other information or for any clarification about what I had written. *Id*.

70. I am aware that my reply to Mr. Nevett is being mischaracterized and used as the basis to withhold the award of .WEB to NDC following our successful auction bid in July 2016. My email to Mr. Nevett was an informal email between colleagues who, though also competitors, had a cordial, and even friendly relationship. In that context, I sought to politely respond to Mr.

Nevett's inquiry and deflect further questions. I never intended to suggest any of the changes to the ownership or control of NDC that have been alleged. Nor did I have any obligation or intention to provide detailed, formal information about our company or its management to Donuts.

71. To the contrary, as I have previously attested, I intended the following by the statements in my June 7 email:

Redacted - Third Party Designated Confidential Information

72. Again, I did not intend my June 7 email to a competitor to convey formal information about NDC's corporate organization, let alone to communicate some change to NDC's management that warranted an update to our .WEB Application, as there had been no such change since NDC submitted its .WEB Application. Rather, the language I used was intended to politely dissuade Mr. Nevett from continuing to pursue the issue of a private auction but, at the same time, not to create any ill will between us. I viewed the email as a polite "stiff-arm" response to a competitor to whom neither I nor NDC had any duty to provide either information or explanations for our decisions.

73. On the same day that Jon Nevett of Donuts emailed me, June 7, 2016, Steve Heflin of Afilias contacted Mr. Calle by text message to similarly ask if NDC would reconsider its decision to forego a private auction for .WEB. Exhibit J attached hereto is a true and correct copy of those text messages, which Mr. Calle forwarded to me on June 7, 2016. In those messages, Afilias offered to "guarantee [NDC] score[s] at least 16 mil if you go into the private auction and

lose." Mr. Calle declined Afilias' offer. *Id*. Afilias then offered to increase the guaranteed payment to "$17.02" million. Mr. Calle again declined. *Id*.

74. John Kane of Afilias also texted me to make the same request. I again declined. Exhibit K attached hereto is a true and correct copy of my text messages with Mr. Kane.

C. ICANN Investigated and Dismissed Complaints by the Other Contention Set Members

75. Unable to persuade NDC to participate in a private auction for .WEB, and, in my opinion, motivated entirely by a desire to delay the upcoming *public* auction so as to preserve the possibility that they might profit from the losers' share in a *private* auction, on June 23, 2016, Donuts and Ruby Glen (which is owned and operated by Donuts) complained to ICANN that NDC had changed its ownership and/or management structure but had not reported the change to ICANN as allegedly required. Donuts and Ruby Glen requested that ICANN investigate those allegations and requested that the public auction for .WEB be delayed during that investigation. Exhibit L attached hereto is a true and correct copy of Donuts' and Ruby Glen's June 23, 2016 complaint to ICANN (the "Donuts Complaint").

76. Signed by Jon Nevett of Donuts—with whom I had emailed between June 6-8, 2016—the Donuts Complaint was entirely premised on the misconception that my statements to Mr. Nevett on June 7 revealed a change in "ownership or control" of NDC that NDC had not communicated to ICANN through an update to NDC's .WEB Application. *See id*.

77. On June 27, 2016, I received an email message from a member of ICANN's New gTLD Operations department stating that ICANN "would like to confirm that there have not been changes to [NDC's] application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors

[and/or] application contacts)." Exhibit M attached hereto is a true and correct copy of ICANN's June 27, 2016 email and subsequent communications on that day between me and ICANN. ICANN's email requested that, if "there have been any such changes," NDC submit the changes to ICANN via ICANN's customer portal. *Id*.

78. I responded to ICANN's email on the same day, confirming that "there have been no changes to the [NDC] organization that would need to be reported to ICANN." *Id*. ICANN responded that same day, informing me that no further action was required at the time. *Id*. I believed—and still believe—that my answer to ICANN's inquiry was accurate and fully responsive. It most certainly was not an "outright lie" as Afilias accuses it to be. *Cf*. Reply Memorial, ¶73. To the contrary, as shown on Exhibit M, ICANN's June 27 emails to me did not reference any complaint received by ICANN from any other party or any specific information that ICANN or any other party believed might be incorrect. Rather, given the type of potential changes highlighted in ICANN's email—"changes that occur as part of regular business operations ***(e.g., changes to officers and directors [and/or] application contacts)***" (my emphasis)—I understood ICANN to be making a routine inquiry of the Contention Set members given that many years had passed since the .WEB applications had been submitted and that the public auction date had been set and was rapidly approaching. That is, in the context of this very specific inquiry, I understood ICANN to be asking whether the identifying information set forth in NDC's application, (*e.g*., management, ownership, and contacts) had changed, not whether ***any aspect of NDC's business had changed***. As such, it never occurred to me that ICANN's routine inquiry might require disclosure of NDC's financing arrangement with Verisign in general or the DAA in particular, especially given the well-known industry practice of transferring domains, with ICANN's consent, after the auction process concluded.

79. The next I heard from anyone at ICANN about any potential concerns regarding NDC's .WEB Application was July 6-7, 2016, when I received emails from ICANN ombudsman Chris LaHatte informing me that "one or more" of the other applicants for .WEB had complained that NDC's .WEB Application had not been properly updated due to changes in NDC's board. Exhibit N attached hereto is a true and correct copy of Mr. LaHatte's emails to me and my response.

80. In particular, Mr. LaHatte referenced an email "which suggests that one of [NDC's] directors is no longer taking an active part in the application, and that there are other directors now involved." *Id*. And he informed me that the "complainant also suggested that NDC's shareholders have changed since the original application." *Id*. In the communications with ICANN that followed, I endeavored to be as thorough and responsive as possible, and I provided accurate and what I thought were clear answers to the questions I was asked. For example:

81. I responded to Mr. LaHatte on July 8, 2016, telling him that there had "been no changes to the [NDC] application. Neither the governance, management nor the ownership in [NDC] has changed." *Id*. I further explained that, in an LLC like NDC, "there are no directors, it is a manager managed company, as designated by the Members of the LLC within the Operating Agreement of the Limited Liability Company." *Id*. And in the case of NDC, I explained that there "has never been an amendment to that operating agreement. There are no new 'directors,' nor have any left the company." *Id*. Finally, I explained that, "while the managers are ultimately responsible for the LCC, as a manager, I take my duties very seriously and for major decisions, I confer with the Members (i.e. shareholders), which again for clarification, have never changed." *Id*.

82. My July 8 email was accurate at the time and remains accurate today. Mr. LaHatte asked if other NDC directors were involved with the .WEB application and if any shareholders had changed. I truthfully answered that neither was true. Moreover, in stating that I confer with other Members regarding "major decisions," I only meant to clarify our general practice at NDC and not to represent anything specifically about .WEB. *Cf*. Reply Memorial, ¶81.

83. Also on July 8, 2016, I received an email from Christine Willet, whom I understand to be a Vice President, gTLD Operations, Global Domains Division, at ICANN. Ms. Willett asked me to call her regarding NDC's .WEB Application and I did so the same day.

84. During that July 8, 2016 telephone conversation with Ms. Willett, I reiterated what I had explained to Mr. LaHatte, which was that neither the ownership nor the control of NDC had changed Redacted - Third Party Designated Confidential Information

85. During that same telephone conversation, I also explained that Redacted - Third Party Designated Confidential Information

86. Realizing that Donuts had misconstrued my June 7 response to Mr. Nevett and that my email was now the basis for the complaint to ICANN, I further explained to Ms. Willett that Redacted - Third Party Designated Confidential Information

87. I understand that Afilias now contends that my statements to the other applicants were intentionally misleading. However, I was under no obligation to be completely forthcoming about our internal operations or plans with parties who were competing for the same gTLD. Nor did I expect the same candor from the other applicants. My statements to Donuts were an attempt at politely deflecting a competitor. Nothing in ICANN's rules prohibits doing so. To be clear, nothing I said to Donuts or to ICANN was a "blatant falsehood" or any attempt to "affirmatively conceal" anything from anyone. *Cf*. Reply Memorial, ¶78. Afilias' assertions to the contrary are simply not true.

88. In fact, on July 11, 2016, I wrote to Ms. Willett to make sure the statements I made in our conversation on July 8 were clear. Exhibit O attached hereto is a true and correct copy of my July 11, 2016 email to Ms. Willett. In addition to reiterating what I had told her about the lack of any changes to the ownership or control of NDC, I also reiterated that I shared her understanding that other applicants had raised the complaint "in order to get more time to convince us to resolve the contention set via a private auction, even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN's auction as scheduled." *Id.* In addition, I noted that under ICANN's rules every member of the Contention Set was required to join in a request for the postponement of a public auction, but as of July 11, 2016, the deadline to make such a unanimous request for .WEB had passed. *Id*.

89. On July 13, 2016, Ms. Willet informed the Contention Set that, among other things, ICANN had investigated the complaints of "potential changes of control" of NDC and, "to date we have found no basis to initiate the application change request process or postpone the auction." Exhibit P attached hereto is a true and correct copy of Ms. Willett's letter dated July 13, 2016.

90. Although my June 7, 2016 email to Mr. Nevett was taken entirely out of context, my responses to ICANN's inquiries were unequivocal and accurate. In particular, as described above, I repeatedly told Ms. Willett and Mr. LaHatte in July 2016 that there had been no change to NDC's management, control, or ownership since the filing of NDC's .WEB Application, including because the LLC Operating Agreement had not been amended. *See, e.g.,* ¶¶ 81, 84, *supra*. Those statements were unequivocally true.

91. Moreover, the only changes to NDC's ownership structure (pursuant to which Nuco distributed its shares in NDC to its shareholders) that have ever been made did not occur until December 2017, more than five years *after* NDC submitted its .WEB Application in 2012 and more than one year *after* both my communications with ICANN and the .WEB Auction in 2016. And in any event, that change to NDC's ownership structure did not result in any new person or entity having more than a 15% interest in NDC, the threshold required to be disclosed in the ICANN application form. *See*, ¶12, *supra*. As such, even today, nearly eight years after NDC submitted its .WEB Application, the information therein remains accurate.

D. Afilias Attempted to Arrange a Private Auction for .WEB During the ICANN Blackout Period

92. As noted above, ICANN informed the parties in April 2016 that a public auction for .WEB had been scheduled for July 27, 2016.

93. Under the ICANN Auction Rules and Bidder Agreement, upon the commencement of a "Blackout Period," "all applicants for Contention Strings within the Contention Set are

prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements with respect to any Contention Strings in the auction."[6] Violations of the Blackout Period can result in disqualification from the Contention Set.

94. The Blackout Period for .WEB commenced on July 20, 2016, when the deposit deadline for the .WEB auction expired. In particular, on July 20, 2016, I received an email from Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the .WEB auction) advising me—as every other member of the Contention Set was also advised—that "the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period." Exhibit Q attached hereto is a true and correct copy of the July 20, 2016 email from Mr. Ausubel.

95. On July 22, 2016, two days after Mr. Ausubel notified the Contention Set that the Blackout Period had begun, I received a text message from John Kane of Afilias asking: "If ICANN delays the auction next week would you again consider a private auction? Y-N." Exhibit R attached hereto is a true and correct copy of that July 22, 2016 text message.

96. I did not respond to Afilias' text message, as it was sent within the Blackout Period in violation of the Auction Rules and Bidder Agreement. Specifically, I understood that 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.

[6] Afilias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a), *available at* https://newgtlds.icann.org/en/applicants/auctions).

97. I also understood Afilias' text message to refer back to a proposal made by Afilias to Mr. Calle in June 2016 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. Because we were in the Blackout Period and the public auction was scheduled for five days later, July 27, I ignored Afilias' improper contact.

VIII. The .WEB Public Auction

98. The public auction for .WEB took place on July 27, 2016, continuing into the morning of July 28, 2016. I participated in that auction from Verisign's offices in Reston, Virginia.

Redacted - Third Party Designated Confidential Information

99. Redacted - Third Party Designated Confidential Information

100. Similarly, I believed that it was reasonable for

Redacted - Third Party Designated Confidential Information

Given the significant interest in the .WEB domain, there were numerous rounds of bidding across the two auction days. In an ICANN 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.

101. The .WEB auction concluded on July 28

Redacted - Third Party Designated Confidential Information

Apart from that statement, I have never possessed any information regarding the terms of Afilias' financing, which I believe remains confidential.

102. Financing arrangements secured by the .WEB Contention Set were not disclosed by NDC or other bidders, as any such arrangements are commonly confidential. Nor is there any ICANN or other requirement that the Contention Set disclose available financing to ICANN or other members of the Contention Set. To the contrary, doing so would provide an unfair advantage to bidders that, upon such disclosure, would know the limits of their competitors' funds and thus know what amount of money would secure the winning bid. Such disclosure would thus be counterintuitive to a competitive auction, and I am not aware of any auction, ICANN or otherwise, that proceeds in such a manner. As a result, I did not know (and could not have known) that Afilias

Redacted - Third Party Designated Confidential Information Nor would it have been appropriate for others to know the amount NDC could or might bid.

103. Having secured the winning bid, NDC

Redacted - Third Party Designated Confidential Information I understand that ICANN has retained the entire notwithstanding that it has not yet agreed to execute a Registry Agreement with NDC for the .WEB gTLD.

IX. Post-Auction Communications with ICANN Regarding .WEB

104. On September 16, 2016, I received an email from Ms. Willett at ICANN stating that Ruby Glen and Afilias had continued to complain that NDC should not have participated in the .WEB public auction and that NDC's Application should be rejected. That letter was a surprise to me, as prior to receiving it I had not heard from or communicated with Ms. Willett or anyone else at ICANN about .WEB since confirming our payment for .WEB in August 2016.

105. In her letter, Ms. Willett requested that NDC provide responses to 20 questions posed by ICANN so that ICANN could evaluate those complaints. Ms. Willett's email also invited Ruby Glen, Afilias, and Verisign to respond to the same questions, and I understand that each of those entities received the same request from ICANN. Exhibit S attached hereto is a true and correct copy of Ms. Willett's September 16, 2016 email.

106. NDC provided responses to ICANN's 20 questions on October 10, 2016. Exhibit T attached hereto is a true and correct copy of the October 10, 2016 email I sent to ICANN attaching those responses and the responses themselves.

107. Since submitting those responses in October 2016, NDC has periodically made inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB. ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the pendency of accountability mechanisms or similar processes.

108. I understand Afilias has suggested that NDC somehow colluded with Verisign and ICANN regarding ICANN's investigation of Afilias' complaints. That is false. NDC does not have any ability to direct or control ICANN's investigation and has not remotely attempted to do so. NDC was not consulted by ICANN about its investigation and has no more insight into ICANN's investigation than any other party.

109. What is true, however, is that it is now June 2020, nearly four years after the public auction for .WEB. NDC has been seriously injured by the delays caused by the various—and in my opinion entirely unfounded—complaints and objections by Donuts and the pursuit of this proceeding by Afilias. Among other things, Redacted - Third Party Designated Confidential Information

110. Redacted - Third Party Designated Confidential Information by members of the .WEB Contention Set, including Afilias, following their unsuccessful attempts to either (i) coerce NDC to participate in a private auction for .WEB—thus ensuring a profit even if they lost that auction—or, (ii) when those efforts failed, to obtain the rights to .WEB themselves. Having accomplished neither, it is my belief that Afilias' continued complaints are no more than a transparent attempt to profit at NDC's and Verisign's expense. I respectfully submit that, as set forth in this statement, there is no factual basis for those complaints.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 30th day of May, 2020 at Miami, Florida.

José Ignacio Rasco III

EXHIBIT Altanovo-21

§ 49.9. Contractual Prohibition of Assignments—Antiassignment Clauses

The question of the extent to which the parties to a contract can agree effectively to limit or prohibit the assignability of otherwise assignable rights or the delegation of delegable duties created by their contract has resulted in confusion over the years. Some older cases found attempts to prohibit the assignment of money claims[1] or contract rights for the purchase of land[2] to constitute an unlawful restraint on alienation on the theory that such rights were sufficiently similar to the ownership of tangible chattels. While limitations on the alienability of goods and chattels are certainly not to be favored, policies against restraints of alienation of property have very limited application to contract rights.[3] Some other older cases, therefore, categorically declared that prohibitions on assignments or delegations were effective and made any attempt to assign the right or delegate the duty ineffective:

> Without discussion, it is settled law that parties to a contract can agree that the contract in all of its terms shall be nonassignable both at law and in equity, and the Commonwealth in the pending case could refuse to recognize any assignment not within the strict provisions of it.[4]

Neither of these polar positions reflects modern contract law. While the law currently looks with high favor on the free assignability of rights and frowns on restrictions that would limit or preclude assignability, with certain exceptions, parties may agree to prohibit assignments. Anti-assignment clauses, however, will be narrowly construed. As we have seen earlier, a general statement in a contract that "Assignment of the contract is prohibited" will be construed to prohibit only the delegation of duties and not the assignment of rights. Though the parties may not have been conscious of the distinction between the assignment of a right and the delegation of performance of a duty, it may be clear that the limitation of power referred to one of these and not to the other. Thus, if a building contract provides that the builder shall not assign the contract, it is also certain that the parties intend that he shall not delegate supervision of the work wholly to another. In the absence of very specific words to the contrary, they do not intend that the builder shall not assign his right to installments of the price as they fall due.[5] Both the UCC and the Restatement (Second) of Contracts construe such a statement as barring only the delegation of duties and not the assignment of rights.[6] The underlying rationale is "that obligor, the party obligated to perform, would not suffer any harm by a mere assignment of payments under the contract."[7]

Earlier, we recognized that contractual duties requiring artistic talent, skill, unique abilities or personal relationships that are nondelegable become delegable if the parties otherwise agree.[8] Conversely, where the performance of the duty is clearly delegable, the parties may nonetheless agree that the obligee is still entitled to receive performance exclusively from the original promisor. Thus, the performance of ordinary mechanical repairs or other ordinary duties that would normally be delegable become nondelegable if the parties clearly understood that only the original promisor was authorized to perform such duties.[9]

Antiassignment provisions play an important role in insurance contracts since the risk characteristics of the applicant for insurance determine whether the insurer will provide any coverage as well as the rate of any coverage the insurer decides to provide. Under either a life insurance or casualty policy, however, once a loss has occurred the assignment of a policy is regarded as a transfer of a chose in action, notwithstanding an antiassignment clause. The situation is more complicated where a successor corporate entity seeks indemnity under a commercial general liability policy that would include an environmental loss that could be of indeterminate length and indeterminate magnitude. Even here, however, it has been held that the chose in action as to the duty to indemnify is not affected by an antiassigment provision where the covered loss has already occurred.[10]

In determining the parties' intentions concerning anti-assignment clauses and clauses prohibiting delegation, courts have relied heavily on the interpretation and construction of the contract language. In particular, courts have distinguished

promises creating a *duty* not to assign from agreements surrendering the *power* to assign. In a well-known case making this distinction, a contract between a general contractor (defendant) and a painting subcontractor contained a clause that stated,

> The assignment by the second party [painter] of this contract or any interest therein, or of any money due or to become due by reason of the terms hereof without the written consent of the first party shall be void.[11]

Without written consent from the defendant, the painter assigned his rights but did not attempt to delegate his duties. The defendant based its rejection of the assignee's claim to be paid on the prohibitory clause. The court distinguished promises creating a duty not to assign rights under a contract from the surrender of the power to assign and focused on the interpretation of the parties' contract language to determine which of these operative effects they intended. An assignment that breaches a duty not to assign will subject the assignor to liability for the breach, but the assignment will be effective. To preclude the power to assign, thereby rendering the assignment ineffective, requires "the plainest words" since such a consequence cannot be deduced from uncertain language.[12] The court concluded,

> [W]hile the courts have striven to uphold freedom of assignability, they have not failed to recognize the concept of freedom of contract. In large measure they agree that, where appropriate language is used, assignments of money due under contracts may be prohibited. When "clear language" is used, and the "plainest words … have been chosen," parties may limit the freedom of alienation of rights and prohibit the assignment. … We have now before us a clause embodying clear, definite and appropriate language, which may be construed in no other way but that any attempted assignment of either the contract or any rights created thereunder shall be "void" as against the obligor. One would have to do violence to the language here employed that it is merely an agreement by the subcontractor not to assign. We are therefore compelled to conclude that this prohibitory clause is a valid and restrictive restriction of the right to assign.[13]

A more recent holding describes what it characterizes as the "modern approach":

> The contract may contain a promise by one or both parties to refrain from assigning … . The promise creates a duty in the promisor not to assign. It does not deprive the assignor of the power to assign and its breach, therefore, would simply subject the promisor to an action in damages while the assignment would be effective.[14]

Many other courts have adopted this analysis. Where a clause stated that the agreement "shall not be assigned without the prior written consent" of the other party to the contract, the court approved the analysis under the Restatement (Second) of Contracts, which provides a right to damages for breach of the clause prohibiting assignment but does not render the assignment ineffective.[15] Other courts, however, reject what they characterize as a "magic words" approach:

> Illinois' approach implements the modern view, expressed in the Restatement (Second) of Contracts, § 322(2) (1981) that an antiassignment provision in a contract is unenforceable against the assignee "unless a different intention in manifested." Magic words are not required: "Where there is a promise not to assign but no provision that an assignment is ineffective, the question whether breach of the promise discharges the obligor's duty depends on all the circumstances." Id. at comment c.[16]

In a recent case on the "magic words" side of the ledger,[17] the anti-assignment provision read, "[N]o payment under this annuity contract may be … assigned … in any manner by the [plaintiff]."[18] The majority of the court held that the absence of contractual language expressly limiting the power to assign or expressly invalidating the assignment itself creates only a duty in the assignor not to assign and does not make the assignment ineffective. A dissenting opinion, joined by another member of the court, however, found the language in the clause to be "sufficiently clear and unambiguous to be enforced."[19] While agreeing with the basic distinction between a duty not to assign and the surrender of the power to assign, the dissent found the majority's holding to be "formulaic" rather than focused upon the intention of the parties. Instead of adopting "precise linguistic requirements" that would be necessary to effect a surrender of the power to assign, the dissent argued that the intention of the parties should control and pointed to several cases included under the "majority" view where the anti-assignment provision did not include terms such as "void" or "invalid" in

support of the view that such terms are unnecessary. In several of the clauses cited by the dissent, however, the clauses did include a restriction on the "power" to assign which is even more precise than "void" or "invalid" and reflected the majority's distinction with which the dissent expressly agreed.[20]

The case law reflects an accommodation of the tension between a strong policy of free assignability and the classic desire to fulfill the intention of the parties by a traditional common law approach of insisting upon clear manifestations of intention in the form of contract language if the favored policy of avoiding restrictions on assignments is to be overcome. The UCC, however, deems the assignment of certain rights to be assignable regardless of the clearest antiassignment provision. It is important to understand the purpose of the Code perspective.

(A) The following cases cite this section or a predecessor section:

(1) Sunoco, Inc. v. MX Wholesale Fuel Corp., 2008 U.S. Dist. LEXIS 46822 (D.N.J. June 17, 2008). Coastal and Monmouth entered into a series of franchise agreements. In 2001, Monmouth assigned to MX all of Monmouth's rights under the franchise agreements, and Coastal signed the Monmouth-MX assignment. Thereafter, Coastal was permitted by the franchise agreements to assign its own rights and interests. Coastal assigned them to Sunoco. The court cited Corbin for the proposition that, generally, contract rights may be assigned if there is no prohibition on assignment. Monmouth admitted that the Monmouth-MX assignment stated that Monmouth "acknowledges and agrees that this assignment does not release [Monmouth] from any liability or obligation that is or may be owed to Coastal … under the agreement … ." Accordingly, when Coastal assigned its rights to Sunoco after the Monmouth-MX assignment, Monmouth was held to be liable to Sunoco pursuant to Coastal's assignment to Sunoco.

(2) J.G. Wentworth LLC v. Christian, 2008 Ohio App. LEXIS 2581 (June 17, 2008). Otis Christian was injured at work and entered into a structured settlement agreement with his employer through Symetra Life Insurance Company that issued an annuity for payments through 2013. The settlement agreement contained a clause stating that no amount payable under it shall be subject to assignment. An endorsement stated that Symetra shall not be bound by an absolute assignment of the contract. Otis named his four daughters as beneficiaries of the settlement agreement. He later executed agreements to sell five of his annuity payments to Wentworth. When Otis died, Symetra began paying the daughter beneficiaries. Wentworth filed a complaint for a declaratory judgment against them. The court granted summary judgment for Wentworth and the daughters appealed.

The new Ohio Structured Settlement Protection Act was inapplicable since it did not become effective until after Otis had made the assignments to Wentworth. These statutes, which have been widely enacted in recent years, are discussed in § 47.9. Wentworth claimed that the beneficiaries were not parties to the settlement agreement and could not, therefore, raise the prohibition of assignment clause. The court rejected this argument since the daughters were intended third party beneficiaries who were entitled to this right under the contract. Wentworth claimed that antiassignment language in a clause that did not state that the attempted assignment would be "void" did not prevent the assignment, but merely allows the non-assigning party to sue for damages. The court recognized that various states have distinguished mere promises to assign from the surrender of the power to assign, as noted in the main volume. Ohio, however, has not adopted that view. The annuity contract also stated that it was to be construed in accordance with the law of the state where the owner resides at the time of application. The owner was Symetra with a state of Washington address. Washington law does not require the antiassignment clause to state that an assignment will void the contract. The court found that the antiassignment language was the equivalent of language stating that no assignment shall be recognized. The antiassignment clause, therefore, was sufficiently clear in this case to prevent Wentworth from replacing the decedent as the annuitant. This left Wentworth with the rights of a creditor of the annuitant's estate, which did not give Wentworth superior rights of the named beneficiaries. The court reversed the judgment below and granted summary judgment in favor of the appellants.

(3) Gallagher v. Southern Source Packaging, LLC, 2008 U.S. Dist. LEXIS 20816 (E.D.N.C. March 14, 2008). NPSG and Southern Source entered into a contract ("the sales agreement") wherein Southern Source

agreed to purchase nearly all of NPSG's assets. The sales agreement contained an anti-assignment clause. In December 2004, NPSG and its secured creditors created a trust for the benefit of NPSG's secured creditors. NPSG assigned its right to receive a $1.5 million deferred payment from Southern Source to the trust. Southern Source refused to pay the $1.5 million, and Gallagher, as head of the trust, filed for breach of contract. Southern Source argued that it need not pay Gallagher because the assignment to him was null and void under the anti-assignment clause.

Reviewing Restatement (Second) of Contracts § 322, the court noted that the two purposes of anti-assignment clauses are (1) to insure that the counterparty receives personal performance from the would-be assignor where material, and (2) to protect the counterparty from the danger of double liability to both the would-be assignor and would-be assignee. Citing Corbin, the court further explained that "anti-assignment clauses must be clear and plain and should be strictly construed contra proferentem." In the present case, the court reasoned that the policy rationale underlying anti-assignment clauses was not implicated. NPSG's personal performance was immaterial, and the recipient of the $1.5 million was fungible. Further, there was no risk of double liability because NPSG had stated that payment was due only to Gallagher. Thus, the court denied Southern Source's motion for summary judgment.

(4) Khan v. Douglas Machine & Tool Co., 661 F. Supp. 2d 437, (S.D.N.Y. 2009). To finance the acquisition of the defendant, Khan loaned $833,333 to the acquiring corporation. The transaction, however, required additional financing that the National City Bank (NCB) agreed to provide. NCB, however, also required a subordination agreement whereby Khan and others agreed that their debts were junior to NCB's debt. NCB later assigned its interest to LaSalle Business Credit. Khan claimed that the subordination agreement precluded the assignment under a provision stating, "This Agreement binds Junior Creditor and each of Junior Creditor's heirs, executors, administrators, successors in interest and assigns, and benefits NCB and each of its successors in interest." Khan claimed that since the agreement only referred to NCB's "successors in interest" and not to "assignees," it could not be enforced by an "assignee" of NCB. Khan further claimed that "successor in interest" is limited to an entity that acquires substantially all of its predecessor's assets or stock and continues to operate its predecessor's business. LaSalle did not acquire any of the assets or stock or continue to operate the business. The court was not persuaded that "successors in interest" should be so narrowly construed, but even if the phrase was so interpreted, the court held that it would still not support the plaintiff's contention that the subordination agreement could not be assigned in light of the strong policy in favor of the free assignment of contract rights (citing Restatement (Second) of Contracts § 317(2)). The court emphasized the requirement of clear language prohibiting assignment, and the absence of the term "assignees" in the phrase benefiting NCB was hardly such a clear statement. After reviewing several cases finding no prohibition of assignment because the language was not clear and explicit, the court held that the subordination agreement, under its own terms, was assignable.

(5) Western Surety Company v. APAC-Southeast, Inc., 2010 Ga. App. LEXIS 31 (Jan.14, 2010). APAC assigned its subcontract with Bruce Albea Contracting (Albea) to C.W. Matthews Contracting Company (Matthews) before the completion of a road project for the Georgia Department of Transportation. The subcontract specified that it could not be assigned. Albea paid Matthews for its work, because Albea claimed it could not find another subcontractor, and it agreed to pay Matthews when Matthews demanded higher rates, but Albea insisted this was a "new agreement." Subsequently, APAC sued Albea and its sureties to recover for work performed prior to the assignment. The trial court granted APAC summary judgment. On appeal, defendants argued that the trial court erred when it granted APAC summary judgment because APAC's breach, by reason of assignment, negated its claim against both Albea and its sureties. Citing Corbin, the court explained that "when a contract contains express words forbidding one party to assign the contract, usually more is intended than that he shall not repudiate his duty by assigning it to another and escaping; it indicates that his duty is one that he cannot perform vicariously by delegating the performance to another. Such a provision makes the party's reciprocal right to compensation dependent and conditional on his own personal performance of the agreed exchange." Therefore, the court concluded that APAC's assignment of the subcontract amounted to a breach sufficient to abrogate any claim under the subcontract.

(6) Easton Business Opportunities, Inc. v. Town Executive Suites—Eastern Marketplace, LLC, 230 P.3d 827, 2010 Nev. LEXIS 14 (Nev. 2010). A brokerage agreement was entered into between Town Executive Suites as seller and Century 21 and Michael Brelsford as broker. The agreement included an "extender" clause that provided that a 10% commission would be due if, within 180 calendar days of final termination of the agreement, the property was sold to anyone with whom the broker had negotiated or to whom the property was shown prior to final termination. In January 2004, after the exclusive listing agreement expired but within the 180 day extender clause period, Town Executive Suites sold its business to a buyer to whom Century 21, through agent Keith Easton, had shown it during the exclusive listing period. During the extender clause period, Easton obtained his own broker's license and left Century 21 to open Easton Business Opportunities. Easton testified he bought out his listings from Century 21 when he left. No formal written assignment was produced but in an affidavit, Brelsford confirmed that Easton purchased the rights to all of his listings in December 2003. The District Court found that Century 21's assignment of its commission rights to Easton was invalid and came too late for Easton to qualify as the real party in interest under the agreement.

Upon review, the instant court explained that under ordinary rules of contract law, a contractual right is assignable unless assignment materially changes the terms of the contract or the contract expressly precludes assignment. Citing Corbin, the court explained that because the law looks with favor on the assignability of rights and frowns on restrictions that would limit or preclude assignability, anti-assignment clauses are narrowly construed. The court further explained that Century 21's assignment of commission rights to Easton did not materially change the terms of the broker agreement as to Town Executive Suites. Further, the brokerage agreement did not contain an anti-assignment clause. For these reasons, the court disagreed with the District Court's reading of the brokerage agreement and concluded that the brokerage agreement permitted Century 21 to assign its commission rights to Easton.

(7) Condo v. Conners, 266 P.3d 1110 (Colo. 2011). An anti-assignment clause stated that a party "shall not sell, assign, pledge or otherwise transfer any portion of its interest" in a particular fund without the approval of other members of the fund. The assignment was made without such approval. The trial court granted summary judgment in holding that the assignment was ineffective. The court of appeals affirmed. On the instant appeal, the court reviewed the "classical" versus "modern" approaches to anti-assignment clauses.

The court of appeals applied the "classical" approach under which an assignment made in violation of an anti-assignment clause is void *ab initio* because the assignor was powerless to assign the right. Under the "modern" approach as evidenced by the opinion in *Rumbin v. Utica Mutual Ins. Co.* (see text at note 14, *supra*), a mere promise not to assign creates only a duty in the promisor (assignor) not to assign. It does not surrender the power to assign. The assignment is effective, but the promisor may be sued for breaching his contractual duty not to assign. Thus, under the "modern" approach, to prohibit the assignment, the clause must restrict the power to assign, which may be evidenced by language stating that any such assignment shall be deemed "void" or "invalid." The court hastened to add that not all jurisdictions require "magic words" to preclude the "power" to assign. The Restatement (Second) of Contracts does not adopt the formulaic "magic words" requirement; it recognizes only a duty not to assign unless "a different intention is manifested" (§ 322(2)(a), cmt. c).

Though agreeing with the holding in the court of appeals that the power to assign had been surrendered under the anti-assignment clause, the instant court was careful to note that its holding should not be read as a blanket rejection of the "modern" approach in favor of the "classical" approach applied by the court of appeals. Rather, noting that the Restatement's limitation that the application of the modern approach is necessarily dependent on the circumstances, the court "narrowly" held that the strict "magic words" approach was inapplicable to the present case. The "circumstances" in this case included an important statutory mandate (C.R.S. 7-80-108) of giving "maximum effect" to the operating agreement, which contained the anti-assignment clause that the court read as prohibiting the power to assign.

(8) CPR Restoration and Cleaning Services, L.L.C. v. Franklin Mutual Insurance Company, 2012 N.J. Super. Unpub. LEXIS 1454 (2012). In 2007, Witherspoon obtained a homeowner's insurance policy from

Franklin Mutual. The policy covered, among other things, loss resulting from fire. The policy stated: "No assignment of this policy or an interest here is binding on us without our written consent." Following a fire at his residence in 2008, Witherspoon retained CPR to perform emergency clean-up and mitigation services. He assigned to CPR all of his rights and benefits under the insurance policy to the extent necessary to pay CPR all of the sums due for work performed by CPR. None of the assignments were signed by a representative from Franklin Mutual. CPR submitted four invoices totaling in excess of $32,000, and these were forwarded to Franklin Mutual. Franklin Mutual failed to pay the sums owed. CPR brought suit against Franklin Mutual, but summary judgment was entered in favor of Franklin Mutual on the basis that the alleged assignment was invalid.

On appeal, the court reversed. The court cited Corbin for the proposition that "[o]nce a loss has occurred, assignment of the right to collect proceeds under a casualty or liability policy 'does not alter, in any meaningful way, the obligations the insurer accepted under the policy.' " In fact, the assignment only changes the identity of the entity enforcing the obligation to insure the same risk. Thus, the assignment at issue did not materially change Franklin Mutual's duty. Here, since the insurance policy did not provide that any assignments were void, the anti-assignment clause contained in the agreement was simply a covenant not to assign. The breach of such a covenant renders the assigning party liable for damages. A contractual provision limiting or prohibiting assignments operates only to limit a party's *right* to assign the contract, but not their *power* to do so, unless the parties manifest an intent to the contrary with specificity. To reveal the intention necessary to preclude a power to assign, or to cause an assignment to be void, the anti-assignment clause must state that non-conforming assignments shall be "void" or "invalid." In the alternative, "that the assignee shall acquire no rights or the non-assigning party shall not recognize any such assignment." Where such language is not included in the contract, any provision limiting or prohibiting assignments is interpreted merely as a covenant not to assign, the breach of which may render the assigning party liable in damages, but the assignment remains valid. In this case, Witherspoon's assignments to CPR were valid and enforceable. The insurance policy contained no specific prohibition on the power to make an assignment, and did not specify that an assignment was "void," "invalid," or that "the assignee shall acquire no rights or the non-assigning party shall not recognize any such assignment."

(9) Harding v. Viking Int'l Res. Co., 2013-Ohio-5236 Lessors, the Hardings, owned tracts of real property subject to oil and gas leases. Carlton Oil, lessee, purported to assign all of its interests in the leases to Appellant, Viking International. The leases contained an anti-assignment clause that provided: "The rights and responsibilities of the Lessee may not be assigned without the mutual agreement of the parties in writing." The lessors sued, seeking a declaration that the purported assignment was invalid, forfeited, and void. The trial court determined that the assignments were made without the written consent of the lessors, which was expressly required in the leases. As such, the trial court partially granted lessors' motion for summary judgment and held that the assignments were void. The court cited a prior edition of this treatise for the proposition that rules of interpretation governing anti-assignment provisions do not override the express intention of parties to limit both the delegation of duties and the assignment of rights.

(B) The following cases are noteworthy:

(1) Sourcecorp, Inc. v. Villandry Holdings, LLC, 2007 U.S. Dist. LEXIS 78069 (E.D. Pa. 2007). Servecore executed a note in favor of FYI (now Sourcecorp) in exchange for all shares of a Sourcecorp subsidiary (PMI). Servecore executed an assignment of its rights and delegation of its duties to Villandry notwithstanding an anti-assignment provision in the contract between Servecore and Sourcecorp stating, "No party hereto may assign this agreement without the prior written consent of the other party hereto. This agreement shall be binding and inure to the benefit of the parties hereto and their respective successors and permitted assigns." When Sourcecorp sought to enforce the note, Villandry claimed that the anti-assignment from Servecore was invalid because it was not made in conformity with the anti-assignment provision. Quoting § 322(C) of the Restatement (Second) of Contracts, the court held that the contractual limitation on assignment was made for the benefit of the non-assigning party, Sourcecorp. Thus, only Sourcecorp and not Villandry had standing to object to the absence of a writing reflecting Sourcecorp's approval of the assignment. The court noted "overwhelming jurisprudence" supporting this holding as well as the case law such as Bel-Ray Co. v. Chemrite Ltd., 191 F.3d

435, 441 (3d Cir. 1999) adopting Restatement (Second) § 322(b), under which a term prohibiting the assignment of rights under a contract (absent a different intention) gives the obligor a cause of action for breach of the contract but does not render the assignment ineffective.

(2) Ranstad Professionals US LP v. Wilson, 2008 Mass. Super. LEXIS 405 (Mass. Super. Ct. 2008). Wilson was employed in 1994 by New Boston Select Group under a contract containing a non-competition agreement obligating him for 18 months after his employment ended. The agreement also stated that it would inure to the benefit of and be binding on the parties' successors and assigns, "*provided however*, that the employee's obligations under this agreement may not be assigned." Wilson succeeded in a series of promotions until 2008 when the company was to be sold to the plaintiff, at which point Wilson took a position with a direct competitor. The plaintiff sought to enforce the non-competition agreement. The court held that the quoted statement in Wilson's employment contract (stating that Wilson's obligations under the contract could not be assigned) by its own terms made the non-competition agreement unenforceable by any assignee against Wilson for any obligation, including the non-competition obligation under the contract.

(3) Traicoff v. Digital Media, Inc., 439 F. Supp. 2d 872 (S.D. Ind. 2006). At the center of the plaintiff's arguments is the effect of the anti-assignment clause, included in the March 2002 contract, which stated:

"This contract is not assignable by [Digital Media] and shall be binding upon the heirs, legal representatives, successors and assigns of the parties hereto."

The plaintiff argued that the anti-assignment clause absolutely prevented Digital Media from sublicensing its rights.

"[P]arties may include an anti-assignment provision in the contract, prohibiting (1) the assignment of rights, (2) the assignment of duties, or (3) both. But, careful detail must be given to the language of such provision." The anti-assignment provision merely prohibits the assignment of "the contract," but failed to detail whether the prohibition applies to the assignment of rights, duties, or both.

The Restatement (Second) of Contracts §322(1) states that "[u]nless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" bars only the delegation to an assignee of the performance by the assignor of a duty or condition." This rule is followed by Indiana's version of the UCC, Ind. Code § 26-1-2-210(4) ("Unless the circumstances indicate the contrary, a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.")

The contract's anti-assignment provision failed to preclude the assignment of rights. Consequently, the contract did not prevent Digital Media from assigning a portion of its rights.

(4) IXE Banco, S. A. v. MBNA American Bank, N. A., 2009 U.S. Dist. LEXIS 89979 (S.D.N.Y. Sept. 29, 2009). MBNA and IXE Banco agreed to a joint venture that would issue credit cards and consumer loans in Mexico. IXE claimed that MBNA had intentionally hindered and prevented IXE's performance by failing timely tender of certain documents which hindered IXE from obtaining Mexican government approvals thereby breaching the implied covenant of good faith and fair dealing. MNBA argued the IXE would have to show bad faith by MNBA to assert the prevention or hindrance doctrine. The court, however, found that any such bad faith requirement in applying the doctrine was contrary to established law. IXE only had to establish that MNBA deliberately or arbitrarily frustrated IXE's efforts to obtain government approvals. MNBA also asserted that IXE would have to show that "but for" MNBA's behavior, IXE would have performed in a timely fashion. Though recognizing this as a "closer question," the court applied the concept in Restatement (Second) of Contracts § 245 that had been cited with approval by the New York Court of Appeals: "Where a party's breach by non-performance *contributes materially* to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." The court explained that if the plaintiff established that the defendant's behavior materially contributed to the plaintiff's non-performance, the burden would then shift to the defendant to show that the condition would

not have occurred regardless of the lack of cooperation. Having clarified the legal analysis, the court concluded that material issues of fact precluded granting summary judgment in favor of either party.

(5) Florida v. AU Optronics Corp., 2011 U.S. Dist. LEXIS 105152 (N.D. Fla. 2011). The Florida Department of Management Services, Procurement Division (DMA), requires vendors contracting through DMA with political subdivisions, universities or community colleges to assign any claims they have accrued relating to any violation of state or federal antitrust laws to the State of Florida. Twelve retailers assigned such claims to Florida, which Florida brought against the alleged violators. The defendants claimed that the assigned rights were under contracts that contained non-assignment clauses. The broadest of the anti-assignment clauses, however, precluded assignment of "any right, interest, privilege or obligation of this agreement." The court agreed with Florida in holding that such a clause only prohibits assignment of rights and duties created by the agreement, itself. Litigation over antitrust claims cannot be seen as "an interest in" or a "right" or "duty" contemplated by the contract. The court held that the anti-assignment clauses could not be the basis for dismissing any of the State's assigned claims.

(6) R. E. Monks Constr. Co., LLC v. Telluride Reg. Airport Auth., 2012 U.S. Dist. LEXIS 61157 (D. Colo. 2012). The plaintiff, general contractor, brought this action for additional costs its subcontractor expended notwithstanding assurances by the defendant that such conditions would not be encountered. The plaintiff entered into a "liquidation agreement" with the subcontractor under which the subcontractor released all claims against the general contractor for the wet conditions in exchange for the general contractor's promise to pursue these claims against the owner and remit ("pass through") any such recovery to the subcontractor. The court noted that general contractors have long been permitted to pursue such subcontractor claims against the government where a no-privity rule would bar subcontractors from bringing such actions directly. As long as the general contractor remains liable to the subcontractor, albeit only for amounts recovered from the owner, courts have upheld such arrangements. The defendant argued that the liquidation agreement violated a prohibition of assignment in the contract between the owner and general contractor. The court disagreed, noting that the general contractor's right to performance from the defendant was not extinguished in the liquidation agreement which clearly stated that it did not constitute a release of the claim against the defendant. If the liquidation agreement had been an assignment of rights, the defendant would have to pay any amounts recovered directly to the subcontractor with whom it had no contractual relationship. Since, however, the liquidation agreement specifically described the pass-through agreement of the parties, it did not involve any impermissible assignment of rights.

(7) GOE Lima, LLC v. Ohio Farmers Ins. Co., 2012 Bankr. LEXIS 1172 (N.D. Ohio 2012). The defendant claimed that the following language in a performance bond precluded the assignment of the owner's rights under it: "No right of action shall accrue on this Bond to any person or entity other than the Owner, its executors, heirs, administrators or successors." The court recognized that performance bonds typically disclaim the rights of assignees of the named obligee to enforce the bonds without the consent of the obligor because the named obligee's identity, financial solvency, project management capability, and capacity to perform the obligee's contractual obligations can be material to the contractor's decision to enter into the bonded contract and to the surety's decision to provide a performance bond (quoting 4A Bruner & O'Connor, Construction Law). These concerns, however, do not apply where, as in this case, the construction contract has been terminated and the obligee has taken the steps required for a duty to arise in the surety under the terms of the bond. The owner did not assign any rights it had under the construction contract. That contract had been terminated. The owner assigned a right to damages resulting from the contractor's breach of the construction contract. As noted in *Restatement (Second) of Contracts* § 322(2)(a), a contract term prohibiting assignment of rights under a contract does not forbid an assignment of a right to damages for the whole contract, unless a different intention is manifested. The court found no violation of the anti-assignment provision.

(8) Omicron Safety & Risk Techs., Inc. v. UChicago Argonne LLC, 2015 U.S. Dist. LEXIS 27478 (N.D. Ill. 2015 U.S. Dist. LEXIS 27478). In August 2011, UChicago Argonne awarded Omicron a $2.16 million services contract for Omicron to ascertain whether hazardous and radiological materials were present at UChicago Argonne's facility. Omicron encountered "unforeseen field conditions" that UChicago Argonne had not disclosed when soliciting bids. The contract provided: "Neither this contract nor any interest therein nor claim thereunder

shall be assigned or transferred by [Omicron] except as expressly authorized in writing by [UChicago Argonne]." Omicron sold all of its assets to NSA after obtaining UChicago Argonne's consent pursuant to the requirements of the parties' contract in a novation agreement. NSA proceeded to perform obligations under the contract and, subsequently, NSA assigned its rights to sue under the fully performed contract back to Omicron without UChicago Argonne's consent. Omicron then sued UChicago Argonne to recover almost $1.2 million in cost overruns. UChicago Argonne did not consent in writing to NSA's assignment of its rights under the contract back to Omicron. UChicago Argonne moved to dismiss Omicron's complaint, alleging its claims were barred by the anti-assignment provision of the parties' contract. Omicron argued that pursuant to the rule expressed in § 322(2) of the Restatement (Second) of Contracts, an anti-assignment provision does not prohibit the assignment of a contractual right to sue for money damages: "A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, (a) does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation[.]" The court agreed with Omicron and held that the Restatement's rule, which the court noted was the modern view, was dispositive of the issue. The court explained: "The logic behind this rule is that it should make no difference to UChicago Argonne whether NSA or an assignee sues to recover money allegedly owed under a fully performed contract." While a contract can validly forbid the assignment of rights and duties under it, it cannot validly forbid the assignment of rights to damages following breach.

(9) Southeastern Chester County Refuse Auth. v. Bfi Waste Servs. of Pa., 2017 Del. Super. LEXIS 312 (2017). In 2011, Signature owed SECCRA "tipping fees" for using its landfill. In June 2011, BFI entered into a Purchase Agreement with Signature and its sole member, Lockhart. The parties closed on the Purchase Agreement on July 29, 2011. Important to this dispute was that the Purchase Agreement contained an anti-assignment provision stating: "This Agreement may not be assigned (except by operation of Law) or otherwise transferred without the express written consent of Seller and Buyer (which may be granted or withheld in the sole and absolute discretion of Seller and Buyer); *provided*, *however*, that Buyer may assign this Agreement to an Affiliate of Buyer or any successor of Buyer to the Business without the consent of Seller or Member." Further, in the Purchase Agreement, BFI did not assume Signature's obligation to SECCRA. After the closing on the Purchase Agreement, SECCRA sued Signature and Lockhart. To protect BFI from liability in connection with the SECCRA claims, BFI, Signature, Mr. Lockhart modified the Purchase Agreement in November 2011 to set aside $50,000 as Retained Funds from the monies due "as security for any Losses that Buyer may incur in connection with the SECCRA Claim" until resolution of the SECCRA/Signature-Lockhart dispute. After resolution of the claims, the modification agreement provided: "Buyer shall transfer to Seller … any portion of the Retained Funds not expended in connection with any Losses incurred by Buyer." Further: "Buyer shall be permitted to retain the Retained Funds as security for any Losses that Buyer may incur in connection with the SECCRA Claim or otherwise." (Thus, BFI was entitled to deduct from the Retained Funds the losses incurred as a result of the SECCRA Claim or otherwise.) Subsequently, in the SECCRA/Signature-Lockhart litigation (which was not part of the instant litigation), the court entered judgment against Mr. Lockhart for $337, 963.70 and in favor of Signature. SECCRA began garnishment proceedings against BFI and pursued discovery, causing BFI to incur $6,637.50 in legal expenses. Subsequently, Signature and Lockhart assigned their interests in the Retained Funds to SECCRA—including all of their "right, title, and interest in and to the balance of the 'Holdback Funds' and to any and all claims and causes of action related thereto that they may have against BFI arising under and out of" both the Purchase Agreement and modification agreement. For its part, SECCRA agreed to release Signature and Lockhart from all claims related to tipping fees, provided SECCRA obtained the full $50,000 of the Retained Funds from BFI. SECCRA sent BFI a copy of the assignment and also proposed to relieve BFI from any liability for Signature's unpaid tipping fees in exchange for the full $50, 000 in Retained Funds. BFI rejected the settlement agreement and refused to turn over the Retained Funds because the settlement agreement did not permit BFI to offset its losses by $6,637.50 (the expenses it incurred in the garnishment proceeding). SECCRA filed this action to retain the $50,000, and parties filed cross-motions for summary judgment. BFI argued, among other things, that the Purchase Agreement's anti-assignment provision made the Signature/Lockhart-SECCRA assignment void. The court rejected this argument, based on the language of the anti-assignment provision:

While Delaware courts recognize the validity of clauses limiting a party's ability to subsequently assign its rights, courts generally construe such provisions narrowly because of the importance of free assignability. Accordingly, the modern approach to assignment clauses is to distinguish between the *power* to assign and the *right* to assign.

When a provision restricts a party's power to assign, it renders any assignment void. However, in order for a court to find that a contract's clause prohibits the power to assign, there must be express language that any subsequent assignment will be void or invalid. Without such express language, the contract merely restricts the right to assign. When a contract limits a party's *right* to assign instead of the *power* to do so, the assignment is valid and enforceable but generates a breach of contract action that the non-assigning party may bring against the party assigning its interest.

Distinguishing between restricting the right and power to assign rights under a contract finds support in a majority of jurisdictions and is the approach taken in the Restatement (Second) of Contracts. The majority of jurisdictions use this approach which balances the desire for free assignability while still protecting the obligor by recognizing a cause of action for a breach of contract.

The court held that the instant anti-assignment language did not manifest an intent to prohibit the *power* to assign, only the *right* to assign. Further evidence for this conclusion was that the provision allowed assignments without consent in certain circumstances. The court held: "While Signature's and Mr. Lockhart's subsequent assignment to SECCRA constituted a breach of contract, the assignment is not void. It remains an enforceable assignment." The court rejected BFI's other arguments, but held that, per the language of the modification agreement quoted above, BFI was entitled to offset its losses incurred in connection with the SECCRA claim or otherwise, not exceeding $50,000.

Footnotes — § 49.9:

[1] See State St. Furniture Co. V. Armour & Co., 345 Ill. 160, 177 N.E. 702 (1931); Portuguese-American Bank v. Welles, 242 U.S. 7 (1916) (Holmes, J.).

[2] See Goddard, "Non-Assignment Provisions in Land Contracts," 31 Mich. L. Rev. 1 (1932).

[3] Restatement (Second) of Contracts § 322, cmt. a.

[4] Federal Nat'l Bank v. Commonwealth, 282 Mass. 442, 450, 185 N.E. 9, 12 (1933). See also Concrete Form Co. v. W. T. Grange Const. Co., 320 Pa. 205 181 A. 589 (1935).

[5] See Hipwell v. National Surety Co., 130 Iowa 656, 105 N.W. 318 (1905): "[T]here is an obvious distinction between the assignment of the money or earnings … and of the obligation to do the work."

[6] UCC § 2-210(3); Restatement (Second) of Contracts § 322(2), citing this treatise.

[7] Wonsey v. Life Insurance Co. of N. Amer., 32 F. Supp. 2d 939, 943 (E.D. Mich. 1998), where the court reviews cases such as Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., 452 F.2d 1346 (D.C. Cir. 1971), which stated the view subsequently recognized in the Restatement (Second) of Contracts § 322. See also Aldana v. Colonial Palms Plaza Ltd., 591 So. 2d 953, 955 (Fla. Dist. Ct. App. 1991); Cedar Point Apts., Ltd. v. Cedar Point Inv. Corp., 693 F. 2d 748, 753 (8th Cir. 1982), *cert. den,* 461 U.S. 914 (1983) (citing this treatise).

[8] See the discussions at §§ 49.4 and 49.6.

[9] See Snellman v. A. B. Dick Co., 1987 U. S. Dist. LEXIS 2306 at *26 (N.D. Ill. 1987), relying on the Restatement (Second) of Contracts § 318(2) that begins with the phrase, "Unless otherwise agreed…" See also comment c to this section. Similarly, UCC § 2-210(1) states, "A party may perform his duty through a delegate *unless otherwise agreed* or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract." (Emphasis supplied).

[10] Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 112 Ohio St. 3d 482, 861 N.E.2d 121 (2006).

Star Windshield Repair, Inc. v. Western National Ins. Co., 2009 Minn. LEXIS 359. When policyholders's windshields incurred damage, it was a common practice for the windshields to be repaired by auto glass vendors who billed the insurance companies directly

on the basis of the insured policyholders's assignments of the insurance proceeds. The policies contained anti-assignment clauses and, in each case, the insurance company paid the auto glass vendors less than the amount billed. Each of the vendors petitioned for arbitration. In three of the cases, the arbitrator made an award in the vendors' favor. The district court affirmed one of these awards but vacated the other two awards. The court of appeals agreed with the district court's vacating the two awards on the footing that the anti-assignment clauses in the policies prohibited not only the assignment of the policies, but the post-loss assignment of proceeds.

On the instant appeal, the Supreme Court of Minnesota recognized the general validity and enforceability of anti-assignment clauses in other types of contracts, but it also recognized the particular attention the Minnesota legislature devoted to the relationship between insurers and glass vendors under a statutory framework that allows the insured to choose an auto glass vendor based on a competitive price within industry standards. The court expressly limited the issues before it to whether anti-assignment clauses in auto insurance policies can be read to bar post-loss assignments for proceeds for auto glass repair claims or the right of auto glass vendors to arbitrate disputes with insurers concerning those claims. In light of the statutory framework concerning not only auto insurance policies but the special legislative treatment concerning repairs of safety glass on automobiles, the court concluded that the legislature intended that auto glass vendors were entitled to arbitrate their claims against insurers since anti-assignment clauses in auto insurance policies do not preclude a policyholder's assignment of post-loss proceeds to an auto glass vendor. While the question before the court did not require it to address the broader question of whether anti-assignment clauses in insurance polices are, as a general rule, enforceable, the court noted that its decision concerning the auto-glass vendors "fits squarely within the majority rule which limits the validity of anti-assignment clauses to pre-loss assignments in insurance contracts."

[11] Allhusen v. Caristo Const. Corp., 303 N.Y. 446, 449, 103 N.E. 2d 891 (1952).

[12] 303 N.Y. at 451, 103 N.E.2d at 892.

[13] Id. at 452 and 893.

[14] Rumbin v. Utica Mutual Ins. Co., 254 Conn. 259, 271-272, 757 A.2d 526, 533 (2000), quoting J. Murray, Jr., Murray on Contracts, § 138 at 807.

Oliver/Hatcher Construction & Devel. Inc. v. Shain Park Associates, 2008 Mich. App. LEXIS 1084 (May 22, 2008). The American Institute of Architects (AIA) form was used to evidence a construction project. Section 13.2.1. of that form states:

> Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain responsible for all obligations under the contract.
>
> Except as provided in Subparagraph 13.2.2, neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain responsible for all obligations under the contract.

The owners assigned their rights to the defendant, which notified the contractor of what the defendant called latent defects in the construction project. In apparent anticipation of the defendant's filing an action, the plaintiff contractors sought a declaratory judgment in which it asserted that the assignments to the defendant were void because the plaintiffs never consented to them as required under Section 13.2.1. The trial court held that the assignments failed. On appeal, the court recognized that the quoted AIA language constitutes a mere promise not to assign for which a promisor can be held liable in damages; it does not affect the power to assign. The assignment was therefore valid. The court held that the trial court erred in ruling that the assignments were void because they were not made with the plaintiffs' consent.

No More Waiting LLC v. Hack, 2010 Conn. Super. LEXIS 1035. Hack attempted to assign future payments under an annuity contract pursuant to a structured settlement. The court followed the analysis in *Rumbin*, cited in the main volume, in recognizing the distinction between a mere promise to assign creating a duty not to assign but having no effect on the assignment, and the parties agreement to eliminate the power to assign. The anti-assignment clause stated that Hack "shall not have the power to sell or mortgage or encumber said periodic payments, or any part thereof, nor anticipate the same, or any part thereof, by power of otherwise." The court noted that, by expressly restricting the defendant's power to assign, the attempted assignment was "legally invalid" under the modern approach adopted by Connecticut precedent and followed by the court.

In Tunison v. Hollow Oak Props., LLC, 2010 Conn. Super. LEXIS 2655 (2010). Superior Walls made certain express warranties to G & S properties for materials used in the construction of a house. G & S sold the house to the plaintiffs, who claimed a right to enforce the warranties either as third party beneficiaries or assignees. The contract between G & S and Superior Walls expressly limited the rights to the buyer, G & S, which precluded any third party beneficiary rights in the plaintiffs. The contract also contained a provision stating, "This Agreement may not be assigned by the buyer without the express written consent of SWHV." No such consent was obtained. Nonetheless, relying upon *Rumbin v. Utica Ins. Co.*, the court held the assignment of such warranty rights to the plaintiffs was effective since the quoted clause merely created a covenant not to assign which could give rise to a claim for damages in Superior Walls against G & S., but does not preclude the power to assign. Only precluding the power to assign makes any attempted assignment void.

[15] Pravin Banker Associates Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 856 (2d Cir. 1997) ("to reveal the intent necessary to preclude the power to assign, or cause an assignment violative of a contractual provision to be wholly void, [a] clause must contain

express provisions that any assignment shall be void or invalid if not made in a certain specified way"). Reuben H. Donnelly Corp. v. McKinnon, 688 S.W.2d 612 615 (Tex. App. 1985), adopting the Restatement (Second) of Contracts § 322(2)(b) stating this construction "unless a different intention is manifested." Earlier cases were antagonistic to non-assignability clauses as restraints on the alienation of property in cases such as Hull v. Hostettler, 224 Mich. 365, 194 N.W. 996 (1923).

Atlantech Inc. v. Am. Panel Corp., 540 F. Supp. 2d 274 (D. Mass. 2008). A provision in an asset purchase agreement read, "None of the parties shall assign its rights or delegate its duties under the present contract without the prior consent of the other party." The court held that this "non-assignment" clause failed for two reasons. First, it was part of an earlier draft but it did not appear in the final version. The opinion then states, "Second, non-assignment clauses generally do not prevent contracts from being assigned. Instead, the obligor may have a cause of action for damages against the assignor for breach of the non-assignment clause" (citing and quoting of the Restatement (Second) of Contracts § 322(2)(b)).

The court does not elaborate the rationale for its statement that "generally" contractual prohibitions of assignments create only a duty in the assignor not to assign. While the language of Restatement (Second) § 322(2) contains the important caveat, "unless a different intention is manifested, its stated rationale requires careful attention to unpack this qualification. It recognizes that the policy against restraints on alienation has only "limited application to contractual rights" but concludes that because assignment has become such a common practice, the policy that "limits the validity of restraints on alienation has been applied to the *construction* of contractual terms open to two or more possible constructions." (§ 322, comment a, emphasis supplied). This language suggests that the favored construction of antiassignment clauses will create only a duty in the assignor not to assign while allowing the parties to manifest a different intention that will eliminate the power to assign.

[16] Bank of America, N. A. v. Moglia, 330 F.3d 942 (7th Cir. 2003), where Judge Posner, writing the opinion for the court, recognizes that "many states" require the "magic words" such as "null," "void" or "of no effect."

Condo v. Conners, 2010 Colo. App. LEXIS 696. Citing the *Rumbin* case referred to in note 14 of the main volume, the court noted the two approaches concerning provisions prohibiting assignments. Under the "modern approach," following Restatement (Second) of Contracts § 322(2)(b), a provision prohibiting the right to assign that fails to use "magic words" such as "void" does not remove the power to assign; it merely creates a promise not to assign making the assignor liable in damages for breaching that promise while continuing to recognize the assignment as effective. The "classical approach," however, views a provision prohibiting assignments as effective to remove the power to assign even in the absence of "magic words." The court noted that Colorado follows the classical approach. Thus, a provision stating that a party "shall not sell, assign, pledge or otherwise transfer its [membership] interest" in an LLC without the prior written approval of all members of the LLC made any attempted assignment "void" and of no effect.

[17] Rumbin v. Utica Mutual Ins. Co., 254 Conn. 259, 757 A.2d 526 (2000).

[18] 254 Conn. at 264, 757 A. 2d at 529.

Singer Asset Finance, LLC v. Wyner, 937 A.2d 303 (N. H. 2007). Wyner resolved a medical malpractice claim by entering into a structured settlement agreement containing the following clause: "[Wyner] … may not assign, anticipate, pledge or encumber said payments, and any attempt to do so shall not bind [the underlying tort suit defendant's insurer]." Applying New York law, the Supreme Court of New Hampshire found a similar New York case in Singer Asset Finance, LLC v. Bachus, 741 N.Y.S.2d 618 (2002) and concluded that the language in the anti-assignment provision demonstrated that "Wyner expressly, clearly and unequivocally agreed that 'she may not assign' her period payments" from the insurer and that the insurer was not required to recognize any such assignment. The court also rejected the argument that Wyner had waived the anti-assignment clause by entering into purchase agreements with Singer and honoring those agreements for eight years. Citing § 322(2)(C) of the Restatement (Second) of Contracts, the court noted that a contract term prohibiting assignment is for the benefit of the obligor, here the insurer. The protection in the clause, therefore, was not Wyner's to waive. The court also rejected Singer's argument that the anti-assignment provision would be nullified by the Uniform Commercial Code since the Code did not apply to the transaction between Wyner and Singer. The court also discussed the New York Structured Settlement Protection Act. This aspect of the opinion is discussed at § 47.9 of this supplement.

[19] 254 Conn. at 286, 757 A. 2d at 540.

[20] 254 Conn. at 284, 757 A.2d at 539, citing Grieve v. General Amer. Life Ins. Co., 58 F. Supp. 2d 319, 321 (D. Vt. 1999); Johnson v. First Colony Life. Ins. Co., 26 F. Supp. 2d 1227 (C.D. Cal. 1998); Henderson v. Roadway Express, 308 Ill. App. 3d 546, 720 N.E.2d 1108, 1109 (1999). A case noting the distinction between courts insisting on terms such as "void" or "invalid" and other courts recognizing the effectiveness of prohibiting the "power" to assign is In re Kauffman, 37 P.3d 845, 851–852 (Okla. 2001).

EXHIBIT Altanovo-22

§ 49.4. Assignment of Right and Delegation of Duty—Personal Services—Trust and Confidence

Where the right assigned is one to receive personal services, there is an immediate reflex cautioning against such an assignment. How can one assign rights to personal services? The fiduciary attorney-client relationship precludes the client from assigning her rights to a third party.[1] The same analysis would apply to any doctor-patient relationship just as it would to a teacher who attempted to assign her duties under her contract with a school district.[2] If a party has a contract for her portrait to be painted by a famous artist, the artist need not paint the portrait of an assignee. Where, however, a boardwalk sketch artist is providing sketches of any face that appears in an opposite chair for $25, the right to such a sketch is arguably assignable. There are, indeed, many situations in which rights to personal services can be assigned.

Peterson had a contract with a corporation that owned the television station where he appeared as an "anchor" news personality. The station was sold and the rights to the station's contract with Peterson were assigned. Beyond his regular news program, Peterson was featured in special programs, performing in his particular, unique style. Sometime after the assignment, Peterson argued that the original employer's right to his personal services was not assignable. The court recognized that the corporation had a duty to pay him for his personal, unique services, but the corporation had no duty to render personal services to Peterson. He complained that the executive producer and news director for whom he had a high regard had been replaced, allegedly resulting in fewer opportunities to display his talents. The evidence, however, belied this assertion since the special programs he had hosted under the new ownership continued and even resulted in awards. The court held that the original contract between the former owner and Peterson was not based upon a personal relationship or one of special confidence. By far, however, it was most important that his performance was not changed in any material way by the assignment to the new owner.[3]

The sale of a professional sports franchise will require the athletes on the team to perform for a different owner. In *Munchak Corporation v. Cunningham*,[4] William ("Billy") Cunningham played professional basketball for the Philadelphia 76ers but agreed to play for the Carolina Cougars who sought to enjoin him from playing for any other team. The owners of the franchise had sold the franchise along with the rights to players' contracts including Cunningham's contract. Cunningham argued that his contract for personal services was not assignable. The court recognized that North Carolina law precluded assignments of personal service contracts where the performance of such a contract required special skills and was based on the personal relationship between the parties. Where, however, the character of the performance and the resulting obligation was not changed, the court held that rights under such contracts may be assigned. Certain personal service contracts are not assignable where the obligor undertakes to serve only the obligee, but Cunningham had not even met all of the stockholders of the original franchised corporation. His contract expressly prevented him from being traded to another franchise without his consent, but it did not prohibit a change in the ownership of the same franchise for which he agreed to play. Like Peterson, Cunningham would pursue the identical performance. There was no material difference in his required performance due to a change in ownership.

Cunningham could not, however, delegate his duty to another party because his contract recognized his extraordinary and even unique skill and ability. The owners would not be receiving what they bargained for if Cunningham or Peterson were allowed to delegate their duties to others. In what became a famous statement, the Supreme Court of California explained the difference between the attempt to delegate personal performances requiring particular talent and skills and performance that do not require such unique abilities:

> All painters do not paint portraits like Sir Joshua Reynolds nor landscapes like Claude Lorraine, nor do all writers write dramas like Shakespeare or fiction like Dickens. Rare genius and extraordinary skill are not transferable, and contract for their employment are therefore, personal, and cannot be assigned. But rare genius and ordinary skill are not indispensable to the workmanlike digging down of a sand hill or the filling up of a depression to a given

level, or the construction of brick sewers with manholes and covers, and contract for such work are not personal and may be assigned.[5]

Duties involving unique abilities or artistic skills are not delegable because there is no objective standard to determine whether performance by a delegate would be substantially identical with the promisor's performance. A duty to render professional medical services cannot be delegated[6] just as the duty of an attorney cannot be delegated.[7] Where a contract required the duty of selecting entertainers, musicians, lecturers and others, the duty was not delegable,[8] and this would be true regardless of a superior reputation of the party to whom the attempted delegation was made. Duties of corporations may appear delegable since it is the responsibility of the corporation to ascertain the performance of the duty rather than a particular individual. A party, however, may and often does contract with a particular corporation because of the individual who will perform the duty. A delegation of that duty to another corporation may therefore be ineffective unless the same individual performed the duty. The delegation of a duty to perform architectural services that may involve unique ability and is normally nondelegable was delegable where the delegate was a new partnership consisting of two of the three original partners and the principal architect was one of the two new partners.[9]

Whether a duty under a contract is so "personal" or involves such unique skills that it may not be delegated requires a careful analysis of the subject matter of the contract and circumstances of the case within the overriding context of the intention of the parties.[10] In determining whether a franchise agreement for moving services was such a contract, the court noted that there is a plethora of case authority dealing with delegable duties such as painting pictures, authoring books, agreements to entertain and the like. Finding no special personal relationship, special knowledge, or unique skill or talent in a distributorship agreement involving the moving and storage business, the court emphasized that just because the duty is to render a personal services, its delegability is not precluded.[11]

In *The Macke Co. v. Pizza of Gaithersburg, Inc.*,[12] the defendant (Pizza) had contracted with the Virginia Coffee Service to have cold drink vending machines installed in several Pizza locations. The duties of Virginia included the installation and maintenance of the equipment, the full supply of beverages in the machines, and the payment of a commission on monthly sales to Pizza. Subsequently, Virginia's assets were purchased by Macke to whom the contracts with Pizza were assigned. Pizza claimed it had relied on the skill and judgment of Virginia. Though the delegated duty did include the rendition of services, the court viewed the contract essentially as the granting of a license or concession that had been originally granted to Virginia. Pizza had previously dealt with Macke and preferred Virginia whose service Pizza saw as more "personalized" since its president personally kept the machines in working order and paid the commissions in cash. The court, however, found precedent in the classic *British Waggon Company* case[13] where the lessor of railway cars promised to keep them in repair. The lessor went into liquidation, assigning the rentals and delegating the repair duty to the plaintiff. The court held that the lessee was not justified in refusing the repair services of the plaintiff since personal performance by the lessor corporation or its particular officers and servants was not a condition of the lessee's duty. No particular skill was required to keep the cars in good repair just as no particular skill was required to install and maintain the vending machines for Pizza. It should have made no material difference to the assignee that ordinary repairs were being made by the assignee to whom that duty had been delegated.

Even where no particular skill is required, however, performance by a specific person can be made a condition to the performance of a duty. There is no reason why the contract between Macke and Virgina could not have required the personal services of the president of Virginia that would have made performance by a assignee ineffective. The assigned contract, however, did not include such a requirement. Similarly, where the condition consists of the making of a promise, delegation of that duty is normally ineffective. Where, for example, a buyer has a contract right to land where the purchase price is to be secured by a mortgage and the buyer will supply his promissory note, the buyer may assign his right to purchase the land, but the seller need not accept an assignee's note in lieu of the buyer's note.[14]

A relationship of trust and confidence between the original parties is often said to preclude the delegation of a duty. Again, the professional services of physicians or lawyers come to mind, but there are many other examples. Beliner Foods, Inc. continued to operate as a a distributor of Haagen-Dazs ice cream after Haagen Dazs was acquired by Pillsbury in 1983. Pillsbury sought to purchase Berliner but, without advising Pillsbury, Berliner agreed to sell its business to Dreyers, which also manufactured premium ice cream competing with Haagen Dazs. The assigned contract between

Pillsbury and Berliner contained a "best efforts" clause that identified an exclusive territory and corresponding efforts to market the Haagen Dazs brand. Pillsbury terminated Berliners as a distrbutor on the footing that it defied common sense to leave the distribution of its Haagen Dazs product to a distributor under the control of a competitor. After balancing the respective harms to the parties, the court denied Berliner's motion for a preliminary injunction.[15] In the same year the United States Court of Appeals for the Seventh Circuit provided further elaboration in a similar case while agreeing with the holding in the *Berliner* case.

Nexxus made hair care products that were distributed in Texas under a contract with the Best Barber & Beauty Supply Company ("Best"). When Best was acquired by the Sally Beauty Company ("Sally"), Nexxus cancelled the distributorship agreement since Sally was owned by Nexxus' competitor, the Alberto-Culver Company. Sally claimed that Nexxus breached the contract, but Nexxus claimed that the contract was not assignable or, at least, not assignable to Sally. The district court granted the Nexxus motion for summary judgment on the footing that the contract was one for personal services and, therefore, it was not assignable. The Seventh Circuit rejected this rationale since there were conflicting affidavits filed on the fact question of personal services that would not allow summary judgment. The court, however, found that summary judgment was justified on a different rationale under the UCC, which it determined should apply to this distributorship agreement. Focusing on the language in UCC § 210(1) that allows a party to perform through a delegate "unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract," the court noted that Nexxus had contracted for the original distributor's "best efforts" in promoting the sale of Nexxus products in Texas.[16] It then agreed with the statement in *Berliner* that it defies common sense for a manufacturer to leave the exclusive distribution of its product in the hands of a competitor.[17]

The *Berliner* court had not mentioned UCC § 2-210, perhaps because it was unsure whether the dominant performance was distribution (services) rather than the sale of goods that would make UCC Article 2 applicable. Whether or not UCC § 2-210 should be applied to such contracts, however, the underlying principle reflected in that section is found in the Restatement (Second) of Contracts and is the critical principle in the law of assignment and delegation of contract rights. Does the holder of the correlative right have "a substantial interest in having the original promisor perform or control the acts required by the contract?"[18] In the opening section of this chapter, we suggested that this statement of the issue is an echo of the principle of materiality: should it make any material difference to the obligee whether the original promisor performs or whether the duty is performed by a third party to whom the duty was delegated?

It certainly makes a material difference to a manufacturer such as Nexxus or Haagen Dazs that their exclusive distributor does not have a loyalty to a competitor that owns the distributor. While the distributor can still perform since the change in ownership does not preclude that performance, the obligee is entitled to the complete, unfettered best efforts of that distributor which have necessarily been materially compromised by the change in ownership.

Even if the third party were not a competitor, the relationship between a manufacturer and an exclusive sales agent or exclusive distributor of that product is viewed as one of trust and confidence, which makes the personal performance of a distributor a condition precedent to the duty of the manufacturer.[19] Again, however, the essential rationale is that it should make a material difference to the obligee that the party it has chosen to market its product performs rather than some alternate stranger to the promisor. It is important to end this part of the discussion with an exception, if exception it is thought to be. A nondelegable duty to render personal services involving trust and confidence can be converted to a delegable duty if the obligee waives any objection or consents to receive the otherwise nondelegable performance.[20]

(A) The following case is noteworthy:

(1) Artists Rights Enforcement Corp. v. Estate of Benjamin E. King, 2016 U.S. Dist. LEXIS 171459 (S.D. N.Y. 2016). Artists Rights Enforcement Corporation ("AREC") sued the estate of renowned singer Ben E. King and others, *inter alia*, to enforce an Audit Agreement that King entered into with AREC before his death. Specifically, on December 15, 2014, King and AREC executed an agreement in which King retained AREC's "professional services" to begin an audit of Sony/ATV "regarding royalties previous paid" [sic] for certain Ben E. King hit songs. King died on or about April 30, 2015. Subsequently, the King family retained legal counsel to

terminate the Audit Agreement. AREC sued, arguing that the agreement continued "in full force and effect" after King's death. The King Estate filed a motion to dismiss, arguing that the Audit Agreement automatically terminated upon King's death or, alternatively, that defendants validly terminated it. The Estate claimed, *inter alia*, that the Audit Agreement was a personal services contract. The court explained:

> The central feature of a personal services contract is that the contract primarily entails the skill and labor of a particular individual. … . In determining whether a contract is one for personal services, courts consider many factors, including: "[t]he importance of trust and confidence in the relation between the parties, the difficulty of judging the quality of the performance rendered and the length of time required for performance." Restatement (Second) of Contracts § 367 cmt. b (1981). This inquiry can be "intensely fact oriented."

The court concluded that it was not clear whether the Audit Agreement should be characterized as a personal services contract. "It is true that the Audit Agreement has certain features of a personal services contract, including allusions to the relationship between King and AREC (for instance, it repeatedly references 'I' (King) and 'you' (AREC)). … . But the contract describes various tasks, including 'retain[ing] … Prager Metis to perform the audit,' 'advanc[ing] … the costs of the audit,' and providing separately for legal representation, that do not require the services of any particular individual. … . Given this factual complexity, the Court cannot determine that the contract is one for personal services as a matter of law." The court also could not conclude, as a matter of law, that the Audit Agreement established an agency relationship between AREC and King. Thus, the court rejected defendants' arguments, given the procedural posture of the case, that the Audit Agreement terminated automatically at King's death or else was validly terminated by defendants. The motion to dismiss was denied.

Footnotes — § 49.4:

[1] One National Bank v. Antonellis, 80 F.3d 606, 614 (1st Cir. 1996). Similarly, a claim for legal malpractice is not assignable because of the fiduciary relationship between lawyer and client. Roberts v. Holland & Hart, 857 P.2 492 (Ct. App. Colo. 1993). Similarly, it has been held that federal civil rights damages claims are not assignable: Carter v. Romines, 560 F.2d 395, 396 n. 1 (8th Cir. 1977): "Civil Rights damages may not be bought and sold in the market place."

[2] See Restaement (Second) of Contracts § 318, illus. 5.

[3] Evening News Association v. Peterson, 477 F. Supp. 77 (D.C. 1979). The court held that changes by the assignee in people who worked with Peterson such as the news director and the executive producer did not affect the assignability of the right.

[4] 457 F.2d 721 (1972).

[5] Taylor v. Palmer, 31 Cal. 240 at 247-248 (1866).

[6] Deaton v. Lawson, 40 Wash. 486, 82 P. 879 (1905).

[7] Fund of Funds, Ltd. v. Arthur Andersen & co., 567 F.2d 225, 234 (2d Cir. 1977).

[8] Standard Chautauqua Sys. v. Gift, 120 Kan. 101, 242 P. 145 (1926).

[9] Rosetti v. New Britain, 163 Conn. 283, 303 A.2d 714 (1972).

[10] See In re Compass Van & Storage Corp., 65 Bankr. 1007, 1011 (E.D.N.Y. 1986).

Mt. Peaks Fin. Servs. v. Roth-Steffen, 778 N.W.2d 380 (Minn. Ct. App. 2010). The Higher Education Act was amended to eliminate statutes of limitations on actions to recover defaulted student loans for certain classes of lenders (20 U.S.C. § 1091a). The plaintiff claimed it was exempt from Minnesota's statutes of limitations because it was a valid assignee of a lender within the statute's protected class. While the statute does not, by its terms, apply to assignees of the protected lenders, the court recognized that interpretation of federal statutes presume Congressional intent to preserve the common law. The common law has long recognized that an assignee has the same legal rights the assignor had before the assignment (Restatement (Second) of Contracts § 317). Contractual rights are generally assignable, including rights to receive payment on debts, obtain non-monetary performances, and recover damages. While recognizing that an assignor may not transfer personal rights such as recovery for personal injuries, the court noted that under the common law a student loan debt is assignable and does not fall under the personal rights exclusion. Not only is § 1091a consistent with the common law, its legislative history suggests that Congress considered the common law in its enactment. Application of the statute to assignees

of named lenders is consistent with its stated purpose to "ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory or administrative limitation on the period within which debts may be enforced." 20 U.S.C. § 1091a(1).

[11] Id.

[12] 259 Md. 479, 270 A.2d 645 (1970).

[13] British Wagon Co. v. Lea & Co., 5 Q.B.D. 149 (1880).

[14] Franklin v. Jordan, 224 Ga. 727, 164 S.E.2d 718 (1968) (assignment of option to purchase land did not relieve the assignor from his duty to provide his personal promissory note to the seller of the land. The plaintiff-assignee, therefore, was not entitled to specific performance.) See also E. M. Loews, Inc. v. Deutschmann, 344 Mass. 765, 184 N.E.2d 55 (1962) which was the basis for illustration 2 to the Restatement (Second) of Contracts § 319; Lojo Realty Co. v. Isaac G. Johnson's Estate, Inc., 253 N.Y. 579, 171 N.E. 791 (1930).

[15] Berliner Foods Corp. v. Pillsbury Co., 633 F. Supp. 557 (D. Md. 1986).

[16] UCC § 2-306(2) imposed a best efforts duty in exclusive dealing contracts.

[17] Sally Beauty Co. v. Nexxus Prods. Co., Inc., 801 F.2d 1001 (7th Cir. 1986).

[18] In re Estate of Sauder, 156 P.3d 1204 (Kan. 2007), cites this treatise in support of its holding that a farm tenancy is more than an estate in land. Rather, it is in the nature of a personal services contract since the farm tenant's skill and judgment are important to the lessor. A farm landlord typically does not view tenants as interchangeable and usually leases his farm only to tenants in which he reposes confidence.

[19] See Restatement (Second) of Contracts § 319, illus. 5.

[20] Seale v. Bates, 145 Colo. 430, 359 P.2d 356 (1961) (acceptance of assignment of dance lessons waived objections to the assignment); Brown v. Powell, 648 N.W.2d 329 (S.D. 2002) (awareness of assignment and acceptance of payments waived nonassignability clause). See also Financial Servs. of Puget Sound v. Phenneger, 1999 Wash App. LEXIS 2010 (citing this treatise in recognition of this principle at *11, but the assignment failed).

EXHIBIT Altanovo-23

KeyCite Yellow Flag - Negative Treatment
Distinguished by Lyons Sec. Services, Inc. v. U.S., Fed.Cl., September 16, 1997

6 Cl.Ct. 26
United States Claims Court.

MIL–TECH SYSTEMS, INCORPORATED, Plaintiff,
v.
The UNITED STATES, Defendant.

No. 221–84C.
|
Aug. 3, 1984.

Synopsis

Bidder sought declaratory and injunctive relief, inter alia, prohibiting the Army from awarding a contract for antennas to any entity other than bidder. On cross motions for summary judgment, the Claims Court, Nettesheim, J., held that in absence of statute or regulation prohibiting transfer of a bid, bidder, with insubstantial assets, nevertheless could be found ineligible based on transfer of bid by sale of all shares of stock in bidder for nominal consideration to nonbidding corporation in which bidder still existed as wholly owned subsidiary ready to perform the contract at the lowest price offered, since award to bidder would have subverted the integrity of the procurement process by countenancing bid brokering.

Clerk to dismiss complaint.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (7)

[1] **Public Contracts** Scope of review
United States Scope of review

Rejection of a bid based on the determination of ineligibility should not be overturned unless no rational basis exists for the contracting officer's determination. Walsh-Healey Act, § 1 et seq., 41 U.S.C.A. § 35 et seq.

1 Cases that cite this headnote

[2] **Public Contracts** Bidders
United States Bidders

Sale of all shares of stock in bidder to another corporation effected the transfer of the bid, where such shares represented ownership of precious little other than the bid. Walsh-Healey Act, § 1 et seq., 41 U.S.C.A. § 35 et seq.

1 Cases that cite this headnote

[3] **Public Contracts** Bidding and Bid Protests
United States Bidding and Bid Protests

A principal objective served by the procurement process is the public's interest in conserving government funds. Walsh-Healey Act, § 1 et seq., 41 U.S.C.A. § 35 et seq.

[4] **Public Contracts** Good faith; fairness
United States Good faith; fairness

Integrity of the bidding process should be preserved so that no bidder obtains an unfair advantage over another. Walsh-Healey Act, § 1 et seq., 41 U.S.C.A. § 35 et seq.

[5] **Public Contracts** Bidders
United States Bidders

Bidder who secures bid and then sells bid and assets relating to bid of negligible or insubstantial value for nominal consideration, plus commission for obtaining award of contract, or who sells all the bidder's stock for nominal value under the same circumstances obtains an unfair advantage over bidders who calculate their bids taking into account their costs of performance or costs of acquiring performance resources from others; such a process encourages bid brokering by any other name. Walsh-Healey Act, § 1 et seq., 41 U.S.C.A. § 35 et seq.

[6] **Public Contracts** Scope of review
United States Scope of review

Rationality of a decision on bidder eligibility, or any other matter entrusted to the contracting officer's discretion, can be measured against analogous principles that the Comptroller

General has developed in the absence of statute or regulation; as long as the decision is rational in that it reflects evenhanded application of a valid procurement policy and does not violate a statute or regulation, it will be upheld by the court.

2 Cases that cite this headnote

[7] **Public Contracts** Conditions and restrictions on bidders

United States Conditions and restrictions on bidders

In the absence of statute or regulation prohibiting transfer of a bid, bidder, with insubstantial assets, nevertheless could be found ineligible based on transfer of a bid by sale of all shares of stock in bidder for nominal consideration to nonbidding corporation in which bidder still existed as wholly owned subsidiary ready to perform the contract at the lowest price offered, since an award to bidder would have subverted the integrity of the procurement process by countenancing bid brokering. Walsh-Healey Act, § 1 et seq., 41 U.S.C.A. § 35 et seq.

1 Cases that cite this headnote

Attorneys and Law Firms

***27** Jacob B. Pompan, Alexandria, Va., for plaintiff; Fred Israel, Israel & Raley, Chartered, Washington, D.C., of counsel.

Ronald A. Schechter, Washington, D.C., with whom was Acting Asst. Atty. Gen., Richard K. Willard, Washington, D.C., for defendant.

Laurence Schor, Schnader, Harrison, Segal & Lewis, Washington, D.C., for intervenor Telex Communications, Inc.

OPINION

NETTESHEIM, Judge.

Plaintiff Mil-Tech Systems, Incorporated ("Mil-Tech"), seeks declaratory and injunctive relief, *inter alia,* prohibiting the United States Army, by its Communications-Electronics Command (the "Army"), from awarding the contract for 62,000 AS–1729/VRC antennas under Invitation for Bids No. DAAB07–83–B–B030 (the "IFB") to any entity other than Mil-Tech. The parties reduced their positions to cross-motions for summary judgment upon which argument has been heard. The issue of first impression is whether the contracting officer, in the absence of a statute or regulation prohibiting transfer of a bid, can find Mil-Tech ineligible for contract award because after bid opening Mil-Tech sold all its stock to another corporation for nominal consideration, although Mil-Tech continues to exist as a wholly-owned subsidiary of the acquiring corporation and the contract would be performed by Mil-Tech.

FACTS

The following facts are found based on the parties' submissions. [1] Although the IFB issued on May 6, 1983, originally requested bids for a single-year award of 62,000 antennas and an alternate multi-year award of 92,000 antennas, the Army subsequently determined to make award only of the first alternate. Mil-Tech no longer claims entitlement to the second alternate, so the subject of this action accordingly is restricted to the 62,000 quantity. At bid opening Mil-Tech's bid of $8,248,200 for the 62,000 antennas was the lowest of the nine bidders—$193,100 lower than the next low bidder, intervenor Telex Communications, Inc. ("Telex"). Telex, it appears, also offered a discount of $84,413; even so, Mil-Tech submitted the low bid.

On the date of bid opening, June 20, 1983, Mil-Tech was a new business, notwithstanding that Mil-Tech's president had substantial prior experience doing business under a similar name in another state. Mil-Tech's Articles of Incorporation, describing itself as "an electronic and mechanical design ***28** and manufacturing establishment," were signed on June 28, eight days after bid opening. The Commonwealth of Virginia issued Mil-Tech's Certificate of Incorporation on July 13, 1983, and Mil-Tech's first meeting of the three directors and shareholders was held on August 31, 1983, when Oliver W. Brown ("Oliver Brown"), sole shareholder of Mil-Tech, was elected president. The August 31, 1983 minutes also reveal that Oliver Brown contributed $5,000 to Mil-Tech for his 500 shares.

Mil-Tech was a *de facto* corporation under the laws of Virginia as of the date of bid opening, and defendant does not now contend otherwise. Oliver Brown had made every effort

since the first week of June 1983 to incorporate Mil-Tech well in advance of June 20, 1983, and the failure to secure articles by June 20 was due to neglect, illness, and error of counsel not representing Mil-Tech in this court.

Telex initially protested award to anyone but itself on June 28, 1983, based upon Mil-Tech's alleged failure to price all items. The contracting officer denied Telex's protest on July 15, 1983, and determined Mil-Tech's bid to be responsive because of the pattern of bid prices established in its bid. Telex next protested the award to Mil-Tech on July 21, 1983, and August 2, 1983, on the ground that Mil-Tech was not a corporate entity in existence as of the date of bid opening, so that the signature of Oliver Brown as president of Mil-Tech failed to obligate an existing entity, thus rendering Mil-Tech's bid nonresponsive. Telex charged as a second ground that Mil-Tech failed to reveal its affiliates, because telephone calls placed to the number identified in Mil-Tech's bid were answered on behalf of other entities, the owner of one of which attended bid opening as a representative of Mil-Tech. The contracting officer determined Mil-Tech to be responsive based on its *de facto* existence; noted that the second ground raised a question of eligibility, not responsiveness; and denied Telex's second protest on August 16, 1983.

The pre-award survey conducted by the Defense Contract Administration Services Management Area, Philadelphia ("DCASMA"), resulted in a recommendation on August 8, 1983, against award because it appeared that Mil-Tech lacked technical, production, financial, and quality assurance capabilities, as well as plant facilities and equipment and labor resources, and because Mil-Tech was not a "regular manufacturer" under the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35(a) (1982), 41 C.F.R. § 50–206.51 (1983) (the "Walsh-Healey Act"). [2] Based on the pre-award survey, the contracting officer notified Mil-Tech on August 10, 1983, that it was considered ineligible under the Walsh-Healey Act. On August 16 the contracting officer found Mil-Tech nonresponsible based on the "negative Pre-Award Survey" and "all other relevant data." The matter was referred on August 16 to the Small Business Administration (the "SBA") for a certificate of competence ("COC") and a determination of eligibility under the Walsh-Healey Act.

On September 9, 1983, the SBA notified Oliver Brown that he was ineligible for COC consideration because Brown was on probation for the misdemeanor federal tax violation of failing to deposit withholding taxes. [3] On September 12, 1983, according ***29** to a letter on that date from the SBA to the contracting officer, Oliver Brown advised the SBA that he "will transfer all stock" in Mil-Tech to his brother Charles L. Brown, Jr. The SBA's September 12 letter also requested a time extension to determine whether the transfer of stock affected Oliver Brown's "COC eligibility." Minutes of a joint meeting of shareholders and directors of Mil-Tech on September 9, 1983, state that on that date Charles Brown had announced his stock purchase. The minutes do not reveal what, if any, consideration Charles paid. Oliver Brown also resigned as Mil-Tech's president and director at this meeting. It is not clear whether the SBA declined to recognize the transfer to Charles.

At any rate, Mil-Tech then became a wholly-owned subsidiary of ATACS Corp. ("ATACS"), and Oliver Brown became a commissioned sales representative of ATACS. On September 18, 1983, the directors and shareholders of ATACS met to ratify ATACS' acquisition on September 16 from Charles Brown of 500 shares in Mil-Tech, which was all of Mil-Tech's outstanding stock, for $200 cash and $5,000 payable upon ratification by ATACS. The ATACS board also ratified an agreement to compensate Oliver Brown for his costs and efforts in submitting a bid on the subject procurement by payment of $24,800 upon the award of a contract by the Army to Mil-Tech and payment of a 50 percent sales commission on any savings in acquiring materials.

ATACS' board voted at the September 18 meeting to purchase a new issue of 9,500 shares of Mil-Tech stock in consideration for $50,000 plus the transfer of certain equipment to Mil-Tech valued by ATACS at $45,000. Upon Mil-Tech's securing a line of credit for contract performance, ATACS committed itself to issuing an irrevocable performance guarantee not to exceed $600,000. Charles Brown's resignation from Mil-Tech was presented at the September 18 meeting, and three of ATACS' five-member board became the new directors of Mil-Tech. The new directors, who were also authorized to vote Mil-Tech's shares, resolved that Mil-Tech would lease floor space in the ATACS building and "certain test equipment and other machinery," from ATACS for a total of $60,000 per year.

On the same date, the new Mil-Tech shareholders and directors met to elect two of their number officers of Mil-Tech; to accept the resignation of both Browns and the other Mil-Tech directors; and to authorize the stock issuance, lease, and application for line of credit. Mil-Tech's new president was also empowered to give the Army appropriate assurances of Mil-Tech's commitment to honor its bid.

The minutes of the ATACS and Mil-Tech board meetings, as well as other documents relating to Mil-Tech's evolution into the corporate family of ATACS, were included in Mil-Tech's September 20, 1983 submission to the SBA. The record does not reveal whether this submission found its way to the contracting officer. In any event, the new president of Mil-Tech met with "representatives" of the Army on September 19 and advised the Army of ATACS' purchase of Mil-Tech's stock. The Army, in turn, advised that it would look into the acquisition because, in the words of Mil-Tech's president, it might " 'violate the integrity of the procurement' process or be a legal impediment to contract award." Mil-Tech claims that after this meeting it was notified by the contracting officer that the Army considered Mil-Tech financially and technically responsible.

***30** Although the SBA drafted a telegram on September 22, 1983, to the effect that Mil-Tech, a wholly-owned subsidiary of ATACS, had the capacity and credit to complete the contract, defendant states that the message was cancelled. The draft memorialized a telephone conversation between the contracting officer and the SBA, wherein the SBA indicated that it was formally considering issuance of a COC on behalf of Mil-Tech. The SBA did advise the contracting officer on September 22: "In light of the stock transfers that have taken place and our prior discussions regarding the firm's eligibility for award ... the COC review and the case have been placed in suspense pending resolution of the question of eligibility for award." If the contracting officer were to determine that Mil-Tech was eligible, the SBA further stated, a new pre-award survey and a new responsibility determination would be necessary before a COC would be processed, unless the Army decided to make a direct award. The contracting officer withdrew the COC request on September 23 and wrote Mil-Tech on September 30, 1983, that the Army "may not" recognize the transfer of stock to ATACS for purposes of award: "Mil-Tech ... as presently constituted, has been determined ineligible to receive award ...."

In the meantime, on July 21, 1983, Telex had protested to the General Accounting Office (the "GAO") that Mil-Tech's bid should be rejected as nonresponsive. On October 3, 1983, Mil-Tech protested the contracting officer's determination of its ineligibility to the GAO. On January 30, 1984, the GAO issued its decision sustaining Mil-Tech's protest and denying Telex's protest. *Telex Communications, Inc.,* 84–1 C.P.D. ¶ 127 (1984). The GAO determined that the sale of stock to a non-bidding entity did not inhibit award to Mil-Tech because the bidding entity still existed and would perform the contract. Telex's arguments concerning post-bid incorporation and incomplete price submissions were denied, and the GAO dismissed Telex's contentions that Mil-Tech may have falsely certified that it did not have affiliates and that it did not pay a contingent fee to obtain the contract. Pertinent to the question of eligibility, the GAO noted that Mil-Tech had assets prior to the sale to ATACS consisting of an agreement to lease production facilities, arrangements for financing, letters of interest from potential employees, and a manufacturing plan.

On February 9, 1984, Telex requested reconsideration of the GAO's decision. The GAO denied that request on April 18. *Telex Communications, Inc.,* 84–1 C.P.D. ¶ 440 (1984) (denial of request for reconsideration). On February 28, 1984, having concluded that it satisfied all requirements for award, DCASMA recommended that Mil-Tech be awarded the subject contract. ATACS had issued to the Government on February 24, 1984, a full contract performance guarantee on Mil-Tech's behalf. A handwritten statement in the technical evaluation portion of the second pre-award survey reads: "[Mil-Tech] has the ability to meet contract requirements. It is essential that ATACS Corp. provide full support of its resources, as they agreed to do, as the parent company, to perform successfully as above." On April 25, 1984, an Army official informed Mil-Tech's counsel by telephone that the Army would make an award on April 30 and that counsel "would be happy with the result." This may indicate that the contracting officer had changed her decision, but definitely was the last signal given by the Army that it would bow to Mil-Tech's efforts to obtain contract award.

On May 3, 1984, Mil-Tech filed its action. On May 4, 1984, the Army sought reconsideration of the April 18, 1984, denial of Telex's request for reconsideration on the eligibility issue. Upon this court's call, as requested by defendant, the GAO reversed itself on re-reconsideration and found Mil-Tech ineligible primarily because the sale of Mil-Tech's stock to ATACS amounted to a prohibited sale of a bid to a nonbidding entity. *Mil-Tech Systems Inc.; The Department of the Army,* B–212385.4; B– ***31** 212385.5 (June 18, 1984) (denial of request for re-reconsideration). [4]

DISCUSSION

[1] The rejection of Mil-Tech's bid based on the determination of ineligibility should not be overturned

unless no rational basis exists for the contracting officer's determination. *Essex Electro Engineers, Inc. v. United States,* 3 Cl.Ct. 277, 280 (1983); *Harris Data Communications, Inc. v. United States,* 2 Cl.Ct. 229, 237 (1983) (citing *M. Steinthal & Co. v. Seamans,* 455 F.2d 1289, 1301 (D.C.Cir.1971)), aff'd, 723 F.2d 69 (Fed. Cir. 1983).

In this case the contracting officer determined that the transfer of stock from Mil-Tech to ATACS was not going to be recognized and that Mil-Tech "as presently constituted" was deemed ineligible for contract award. It was only in the course of Mil-Tech's protest before the GAO that the contracting officer elaborated upon the rationale for the ineligibility determination.

Sometime before the GAO's initial decision upholding Mil-Tech's protest on January 30, 1984, and after Mil-Tech filed its protest on October 3, 1983, the Contracting Officer's Statement was submitted to the GAO. The contracting officer pointed out that since the initial determination that Mil-Tech was a *de facto* corporation as of the date of bid opening, "It has ... become evident that Mil-Tech was not an operating corporation in any sense of the term nor did Mil-Tech possess any facilities or employees...." The contracting officer also made the following statements:

> Mil-Tech Systems, at the time of bid opening and at all times prior to the sale of stock to ATACS Corp., was no more than a shell corporation with no facilities, no ongoing contracts (no business transactions of any kind), and no employees; in short, with no tangible assets whatsoever. Mil-Tech had nothing of value to sell except for this one bid and Mil-Tech as it is presently constituted bears absolutely no resemblance to the entity that submitted the bid except in name. Award of this contract to Mil-Tech would in reality constitute an award to ATACS Corp., a company which failed to submit a bid despite more than adequate notification of the instant procurement in the Commerce Business Daily. It is the opinion of the Contracting Officer that to permit a company to take over the bid of another after bid opening, and thereby become eligible for award, would seriously compromise the integrity of the competitive bidding system. Such action would allow and even encourage the submission of bids through irresponsible paper corporations, affording the real principles [sic] the opportunity to avoid or ratify these bids in there [sic] own best interest. To permit such action would further facilitate the submission of bids by a nonresponsible party who could then, if low bidder, sell the potential contract for a profit. Such flagrant manipulation of the system cannot be tolerated.

> ... The question of stock ownership is relevant from a contractual point of view when it involves, as this case does, the substitution of a nonbidding entity for one which submitted the bid. It is important to note that the Contracting Officer did not look beyond the corporation by choice, but rather by necessity. Because Mil-Tech failed to satisfy any requirements of the Pre-Award Survey, the case had to be referred to the SBA. The SBA has independently established its own criteria for determining which companies may be considered eligible for COC processing. Mr. Brown's probationary status rendered Mil-Tech ineligible to even be considered for a COC. Mr. Brown's ***32** subsequent attempts to make Mil-Tech eligible for COC consideration by two rapid stock transfers are considered by the Contracting Officer to be a complete sham, and further, such actions on Mr. Brown's part caused the question of stock ownership to remain a central and relevant issue.

The issue is not whether the contracting officer failed to disclose an adequate basis for her determination, although she did put Mil-Tech in the position of guessing at the particulars. (For example, in the October 3, 1983 protest, Mil-Tech defended the contingent fee arrangement with Oliver Brown, to which the contracting officer responded, "The question of a contingent fee paid to Mr. Brown is not considered by the Contracting Officer to be a relevant issue. Rather, the transactions outlined in Mil-Tech's discussion are considered by the undersigned to be an outright sale of bid.") The issue for decision turns on whether the ineligibility determination was authorized and, if so, rational.

1. *Transfer of Mil-Tech's Bid*

The predicate for the contracting officer's decision condemning the sale of Mil-Tech's stock to ATACS was that Mil-Tech's bid had been transferred, a finding contested by Mil-Tech.

Mil-Tech's sold its stock for $5,200 to ATACS (after the interim sale to Oliver Brown's brother). On the date ATACS bought Mil-Tech's stock, Mil-Tech's assets consisted of $5,000 cash; the lowest responsive and non-responsible (as

of August 16, 1983) bid on a contract worth over $8 million; work product developed to perform the contract; and a lease and five employment agreements, all of which were contingent upon contract award.[5] The sale of all Mil-Tech's stock transferred to ATACS sole ownership of the bid. Assuming that Mil-Tech's assets—other than the bid—had any relationship to the value of its stock, the assets were of insubstantial value, *i.e.,* $5,200 paid for $5,000 cash and $200 in bid work product and contingent agreements. Even if the amount paid for the stock is not considered, Mil-Tech's stock represented ownership of precious little other than the bid. *See* *Keco Industries, Inc.,* 80–2 C.P.D. ¶ 165 (1982) (substitution of bidder upheld when substantial assets, including inventory, supplies, machinery, equipment, real estate, business records, and purchase and sales orders, transferred); *Information Services Industries,* 77–1 C.P.D. ¶ 425 (1977) (substitution of bidder disallowed when assets of negligible value transferred for nominal consideration); *Numax Electronics, Inc.,* 54 Comp.Gen. 580 (1975) (bid transfer incident to sale of an entire portion of business embraced by proposal can be permissible).

[2] Mil-Tech rebounds with the argument that a sale of assets differs from a stock sale because divesting oneself of assets leaves a bidder without the means to perform. Although Mil-Tech remained Mil-Tech after acquisition by ATACS, the corporation became a wholly-owned subsidiary of its new parent; Mil-Tech thus sold ownership of itself and its assets to ATACS; ***33** and Mil-Tech the subsidiary retained the bid. A sale of stock divesting Mil-Tech of ownership of itself, as it were, cannot mask the real divestiture of assets. While its assets remained with the new Mil-Tech, ATACS owned Mil-Tech. The sale of stock in this case effected the transfer of Mil-Tech's bid.

2. *Authority for the Contracting Officer's Decision*

Neither anti-assignment act, 31 U.S.C. § 3727 (1982) (claims) (formerly § 203), 41 U.S.C. § 15 (1982) (contracts), prohibits transfer of a bid. No regulation applicable to this procurement prohibits a bid transfer. The General Services Administration (the "GSA"), in contrast, has issued a regulation restricting bid transfers based on transfers of assets:

> After submitting a bid, if a bidder transfers all of his assets or that part of his assets related to the bid during the period between the bid opening and the award, the transferee may not take over the bid. Accordingly, the contracting officer shall reject the bid (see Comptroller General decision B–171959, September 3, 1971) [*I.D. Precision Components Corp.,* 51 Comp.Gen. 145 (1971)].

41 C.F.R. § 1–2.404–2(h) (1983). Army procurements after April 1, 1984, will be restricted by a similar regulation, which provides:

> After submitting a bid, if all of a bidder's assets or that part related to the bid are transferred during the period between the bid opening and the award, the transferee may not be able to take over the bid. Accordingly, the contracting officer shall reject the bid unless the transfer is effected by merger, operation of law, or other means not barred by 41 U.S.C. 15 or 31 U.S.C. 203.

FAR § 14.404–2(k), 48 Fed.Reg. 42,180 (1983). Although these regulations do not affect this procurement, they reveal that regulations can be promulgated to reach the same result as did the contracting officer in this case.

It is Mil-Tech's contention that without an authorizing statute or regulation, the contracting officer was powerless to ground ineligibility on ATACS's absorption of Mil-Tech as a wholly-owned subsidiary. Defendant responds that the authority for the contracting officer's decision cannot be so neatly circumscribed. According to defendant, the "significant policies behind the restrictions on transferring bids," "which go to the heart of the competitive bidding process," themselves authorize an ineligibility determination based on the transfer of a bid in the circumstances of this case.

[3] A principal objective served by the procurement process is the public's interest in conserving government funds. "Since the funds which the Government utilizes to purchase goods and services are derived solely from public sources, the

public has strong interest in the ability of the Government to fulfill its requirements in these areas at the lowest possible cost....” H.R.Rep. No. 312, 97th Cong., 1st Sess. 43 (1981) (accompanying the Federal Courts Improvement Act of 1982, 28 U.S.C. § 1491(a)(3) (1982)); *see Flight International Group, Inc. v. Federal Reserve Bank,* 583 F.Supp. 674, 683 (N.D.Ga.1984); *CCTW & M v. EPA,* 452 F.Supp. 69, 75, 79 (D.N.J.1978). *See generally United States v. John C. Grimberg Co.,* 702 F.2d 1362, 1371 (1983) (en banc). Moreover, the subject procurement was undertaken under the section 8(a) program, 15 U.S.C. § 637 (1982), so that due regard should be given to the program policies of developing business ownerships by socially and economically disadvantaged individuals, assisting such businesses to compete, and expanding the program for government procurement from these businesses. 15 U.S.C. § 631(e)(2).

Here, the lowest responsive and (after the second pre-award survey) responsible bid comes under scrutiny and should not be displaced unless prohibiting an award to any bidder other than Mil-Tech would undermine the integrity of the procurement process. The oft-canted phrase “preserving the integrity of the procurement process” ***34** has been described as the Government's adherence to its duty of following its own statutes and regulations. *See, e.g., M. Steinthal & Co. v. Seamans,* 455 F.2d at 1305; *Scanwell Laboratories v. Shaffer,* 424 F.2d 859, 864 (D.C.Cir.1970); *International Association of Firefighters, Local F–100 v. Department of the Navy,* 536 F.Supp. 1254, 1259 (D.R.I.1982). This would seem to support Mil-Tech's argument that absent a statute or regulation prohibiting bid transfers, the contracting officer could not declare Mil-Tech ineligible.

Defendant contends that substitution of a non-bidding party frustrates the procurement policy of requiring responsible parties to stand behind their bids. A bidder without means for performing a contract, short of transferring the bid to another entity, has the option of avoiding the consequences of its bid with impunity simply by being declared nonresponsible. According to defendant, a bidder who is in a position to avoid a contract by allowing the procuring agency to disqualify the bid for nonresponsibility (when the bidder well knew it was nonresponsible when it bid) could cause unnecessary costs and delays attendant on reprocurement if the other bids have expired. This policy, however estimable in the abstract, is not compelling in this case, because the bidder, who at bid opening lacks the ability to perform and who fails in an attempt to qualify himself, also can walk away from the award. Every indication is present that Mil-Tech, under Oliver Brown's stewardship, intended to stand behind its bid and to demonstrate the requisite ability to perform. Furthermore, the GAO does not penalize small businesses which enter into post-bid-opening agreements, including sales of substantial assets, to obtain performance resources. *See Telex Communications, Inc.,* 82–1 C.P.D. ¶ 127, at 3–4 (citing cases).

[4] The GAO decisions, however, do not permit a bidder to fortify its performance resources by sale of its bid unless accompanied by substantial assets to the end that not only a bid is being sold. *Keco Industries, Inc.,* 80–2 C.P.D. ¶ 165; *Information Service Industries,* 77–1 C.P.D. ¶ 425; *Numax Electronics, Inc.,* 54 Comp.Gen. 580. In *I.D. Precision Components Corp.,* 51 Comp.Gen. 145 (1971), the GAO held more strictly that bid transfers are to be avoided unless effected by operation of law to a legal entity which is the complete successor in interest to the successful (or original) bidder. *Accord* 43 Comp.Gen. 353, 372 (1963). The underlying policy for the decision in *I.D. Precision Components Corp.* was fairness to all bidders: “To permit a party to enter into the competition after bids have been opened by virtue of taking over the bid of one whose situation makes its responsibility questionable would seem to provide an unwarrented [sic] option to the prejudice of other bidders....” 54 Comp.Gen. at 148. Indeed, the integrity of the bidding process should be preserved so that no bidder obtains an unfair advantage over another. *See, e.g., Charles N. White Construction Co. v. Department of Labor,* 476 F.Supp. 862, 866 (N.D.Miss.1979); *International Engineering Co. v. Richardson,* 367 F.Supp. 640, 651 (D.D.C.1973).

This fairness policy demands that a bright line be drawn at the sale of a bid, whether the transaction transferring the bid takes the form of a sale of assets or stock. Permitting Mil-Tech to transfer its bid countenances bid brokering—the sale of a bid for a commission payable upon contract award. This was one aspect of unfairness identified by the contracting officer in her statement submitted to the GAO. If sale of a bid were allowed, a government contractor would no longer risk estimating the profit margin that could secure the low bid. The bidder could await his broker, who would present him with a *fait accompli* —the low responsive bid. The contractor need only determine

whether the profit is acceptable given the commission asked and costs of performance. Nothing would have stopped Mil-Tech, for example, from "shopping" the other eight higher bidders to see if any would take over Mil-Tech's bid at the lower margin Mil-Tech allowed itself, plus Oliver Brown's commissions. Such a process is unfair to bidders who stand behind their bids without ***35** knowing the amount of the bid against which they are bidding.

[5] A bidder who secures a bid and then sells the bid and the assets relating to the bid of negligible or insubstantial value for nominal consideration, plus a commission for obtaining award of the contract, or who sells all the bidder's stock for nominal value under the same circumstances has an unfair advantage over bidders who calculate their bids taking into account their costs of performance or the costs of acquiring performance resources from others. This process encourages bid brokering by any other name.

[6] The question becomes whether a procurement policy—in this case, the fairness policy—provides legal justification for a regulation or whether a regulation provides legal justification for a procurement policy. For example, the GSA in 41 C.F.R. § 1–2.404–2(h), quoted *supra* p. 33, cited to *I.D. Precision Components Corp.* to support its regulation prohibiting bid transfers accomplished by sale of assets. According to Mil-Tech's logic, the GSA's citation to a Comptroller General decision as authority for its regulation was surplusage. This logic is rejected. The contracting officer's decision in this case did not cite, but was consistent with, decisions of the GAO disallowing the transfer of a bid in conjunction with the sale to a nonbidding entity of assets of negligible or insubstantial value for nominal consideration. The rationality of a decision on bidder eligibility, or any other matter entrusted to the contracting officer's discretion, can be measured against analogous principles that the Comptroller General has developed in the absence of statute or regulation. As long as the decision is rational in that it reflects evenhanded application of a valid procurement policy and does not violate a statute or regulation, it will be upheld by the court. [6]

[7] That the sale of Mil-Tech was effected by a stock transfer does not distinguish the facts of this case from the reasoning employed by the GAO decisions. Mil-Tech may be a valid corporate entity standing ready to perform this contract at the lowest price offered. However, an award to Mil-Tech would subvert the integrity of the procurement process, because the record demonstrates that ATACS, in buying Mil-Tech's stock for $5,200, valued that stock based on assets consisting of $5,000 cash, Mil-Tech's bid, related work product, and contingent lease and employment agreements. Other bidders with assets of low value did not have the option of pricing the bid low, then securing a buyer who would take over the bid and furnish the wherewithal and ability to perform. A rational basis thus existed for the contracting officer's decision finding Mil-Tech ineligible. *See* *Information Service Industries,* 77–1 C.P.D. ¶ 425.

CONCLUSION

Based on the foregoing, defendant's motion for summary judgment is granted, and plaintiff's motions for summary judgment and preliminary injunctive relief are denied. [7] The Clerk of the Court will dismiss the complaint.

***36** IT IS SO ORDERED.

Costs to the prevailing party pursuant to 28 U.S.C. § 2412(a) (1982); RUSCC 54(d).

All Citations

6 Cl.Ct. 26, 32 Cont.Cas.Fed. (CCH) P 72,719

Footnotes

1 The parties dispute the relevance of the facts. Mil-Tech argues that because it is today an existing corporation, ready, willing, and able to perform the contract, the circumstances of its history are not determinative. Defendant argues that Mil-Tech is ineligible for contract award, because after bid opening Mil-Tech became a

wholly-owned subsidiary of the corporation that acquired all of Mil-Tech's stock for nominal consideration and because Mil-Tech's assets, ostensibly bearing some relationship to the value of its stock, were insubstantial.

2 The text summarizes the recommendations of the DCASMA, although Mil-Tech asserts that the pre-award survey should have spoken only to Mil-Tech's ability to obtain resources for performance.

3 The SBA document states that "a piece of information that rendered Mr. Brown ineligible for COC consideration" was noted and that Oliver Brown was so advised on September 9. Mil-Tech does not dispute that Oliver Brown's probation was the referenced information. The probation terminated four months ago. However, the facts remain that Mil-Tech encountered difficulties in demonstrating the ability to perform, *see supra* note 2, and that Mil-Tech's resorting to ATACS Corp. ("ATACS") was an attempt to remedy not only Oliver Brown's eligibility for COC consideration, but Mil-Tech's performance capability. Whether or not the SBA could question Brown's standing, therefore, is immaterial, since valid questions were raised concerning the stock transfer. Further, assuming that ATACS came to own all of Mil-Tech's stock only because of questions relating to Oliver Brown's standing, a sale of Mil-Tech's assets to ATACS would have led to the same result before the contracting officer and in this court. One final scenario—that ATACS would have supplied the requisite resources to Mil-Tech without a stock or asset purchase had Oliver Brown's standing not been questioned—is not borne out by the record. As of September 9, 1983, when the SBA advised Oliver Brown of his ineligibility for COC consideration, no indication is present that ATACS was in the picture; in fact, Oliver Brown had secured a contingent lease on September 1, 1983, with another lessor—not ATACS.

For the reasons argued by defendant in earlier briefs, this is not a case of constructive debarment.

4 Mil-Tech also protested unsuccessfully the award to Telex of a sole-source contract for 30,000 antennas based on urgent need. That portion of Mil-Tech's claim has been dismissed.

Mil-Tech insists that the court should not be persuaded by the GAO's latest decision because of the Army's tardiness in seeking it. The GAO deemed both the Army's request and Mil-Tech's protest untimely, but issued its decisions because the court had issued a call.

5 Considerable effort had been expended by Oliver Brown to acquire the physical and personnel resources to perform the contract upon award. As of the date ATACS bought Mil-Tech's stock, September 18, 1983, Oliver Brown had obtained a signed lease for premises dated September 1, 1983, contingent, however, upon contract award. Some five signed "Agreements of Employment Intent" (dated in July 1983) with key personnel were also contingent (and silent on renumeration). Moreover, Mil-Tech had, as of September 18, its own manufacturing plan, quality assurance manual, vendor quotations, engineering test plan, and material control sheets (detailing parts and machinery necessary to manufacture the antennas).

As of September 20, 1983, when the new Mil-Tech made its presentation to the SBA, ATACS had supplied a lease with ATACS and some of its personnel and did not include all of the foregoing bid work product in its listing of resources. Also infused into Mil-Tech by ATACS as of September 20 was $50,000 cash and $45,000 in equipment. This was not consideration for the sale, because Oliver Brown was no longer a stockholder of Mil-Tech. As a commissioned sales representative of the new Mil-Tech, Oliver Brown was to receive a substantial commission payable only upon award of the contract and a commission on cost savings for materials purchased for the contract.

6 Mil-Tech points out that ASPR 26–402, 32 C.F.R. § 26–402 (1983), allowing the Government post-award to recognize a successor in interest to a government contract, speaks both to asset and stock purchase transfers, but the GSA and FAR regulations, quoted *supra* p. 33, only prohibit transfer of assets. The GSA and FAR regulations could speak to a sale of stock. The fact that they do not, however, does not render the contracting officer's decision in this case either unauthorized or irrational. The GSA and FAR regulations

serve only to illustrate regulations consistent with the GAO's position in *I.D. Precision Instruments Corp.* prohibiting the transfer of a bid by the sale of assets.

7 The court finds (1) that plaintiff cannot succeed on the merits; (2) that denial of injunctive relief will irreparably harm plaintiff, because, absent an injunction, its damages would not include lost profits; (3) that the public interest would not be served by enjoining the contract award in that the integrity of the procurement process would be undermined; and (4) that the United States would suffer harm if injunctive relief were granted for the same reason that the public interest would be disserved and that, although intervenor Telex has not made any showing of harm, enjoining contract award would allow Mil-Tech to obtain an unfair advantage over other bidders.

EXHIBIT Altanovo-24

18 FCC Rcd. 3286 (F.C.C.), 18 F.C.C.R. 3286, 2003 WL 751038

Federal Communications Commission (F.C.C.)
Order on Reconsideration

IN THE MATTER OF TROMPEX CORPORATION

File No. 0000096244
DA 03-636
Adopted: March 5, 2003
Released: March 6, 2003

****1** ***3286** By the Deputy Chief, Policy & Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this action, we address a petition filed by Trompex Corporation ("Trompex") and Supra Telecommunications & Information Systems, Inc. ("Supra") requesting reconsideration of our decision that their actions following the 929 and 931 MHz Paging Auction, Auction No. 26 ("Auction No. 26") violated the Commission's rules. [1] Specifically, we found Trompex disqualified to be a Commission licensee, and dismissed the long-form application filed by Supra, for the 929 MHz B block licenses in Markets 001-051 because the parties violated section 1.2105(b)(2) and (c)(2) of the Commission's rules. [2] For the reasons set forth below, we uphold our actions in the *Order* and accordingly deny the petition for reconsideration.

II. BACKGROUND

2. In order to bid for licenses in a Commission auction, an interested party must timely file an application, known as a "short-form application," and submit an upfront payment to participate in the competitive bidding process. [3] A short-form application must contain certain basic information, including the name, ownership, and control of the potential bidder as well as the real party in interest. [4] A potential bidder may modify its short-form application to reflect, among other things, changes in ownership at any time before or during an auction, provided that such a change does not result in a change in control of the applicant. [5] If the change in ownership does result in a change in control of the applicant, the modification is deemed a major amendment to the application, which is not allowed after the initial filing date, and the ***3287** application will be dismissed. [6] If, however, a potential bidder timely submits its short-form application and upfront payment, and otherwise meets the competitive bidding requirements, the Commission will release a public notice including that entity as one of the applicants qualified to bid in the auction.

3. At the close of an auction, if an entity is the winning bidder for a license, it then must submit a more detailed application, known as a "long-form application." [7] The Commission uses the information provided on the long-form application, together with information provided on the bidder's short-form application, to determine if the winning bidder is qualified to hold the license(s) and, if applicable, whether it is eligible for a bidding credit. If a winning bidder fails to timely submit the required long-form application and does not establish good cause for any late-filed submission, it will be deemed to have defaulted and will be subject to default payments. [8] Moreover, for auctions of paging geographic-area licenses, section 22.213 of the Commission's rules states that the Commission "will not accept long-form applications for paging geographic area authorization from anyone other than the auction winners ...." [9]

**2 4. From February 24 to March 2, 2000, the Commission conducted Auction No. 26 for geographic-area paging licenses in the 929-930 MHz (929 MHz) band and 931-932 MHz (931 MHz) band. [10] Prior to the auction, Trompex timely submitted a short-form application and upfront payment to participate in Auction No. 26. [11] Based on its timely-filed short-form application and upfront payment, the Commission announced that Trompex was a qualified bidder that could participate in the auction. [12] At the close of the auction, the Commission released a public notice that announced, *inter alia*, that Trompex was the winning bidder for 51 929 MHz B block licenses in Markets MEA 001-051, [13] and that all winning bidders in Auction No. 26 had to submit their long-form applications on or before March 20, 2000. [14]

5. Trompex never filed a long-form application. Instead, another entity, Supra, filed a long-form application requesting that the Commission grant it the 51 licenses for which Trompex was the winning bidder in the auction. [15] Trompex's short-form application made no mention of Supra. Supra's *3288 long-form application referenced Trompex at two points, when it listed Trompex's gross revenues along with its own, [16] and when it stated, in one of the application's exhibits, that: "since the auction, Trompex Corporation has since [*sic*] designated Supra Telecommunications & Information Systems, Inc. as the real party in interest to continue with the licenses." [17]

6. On October 25, 2001, the Policy and Rules Branch of the Wireless Telecommunications Bureau's Commercial Wireless Division ("Branch") released an order addressing Trompex's qualification to acquire the 51 licenses for which it was the winning bidder in Auction No. 26 and Supra's long-form application for those licenses. Noting that Supra had not filed a short-form application to participate in Auction No. 26, we determined that Supra's use of Trompex's taxpayer identification number ("TIN") [18] to file its long-form application, coupled with a change of name and ownership of the applicant for the 51 licenses, was evidence that an unauthorized transfer of control occurred after the short-form filing deadline. [19] Because such a change in control is considered a "major amendment" to a short-form application made after the initial short-form filing deadline, we concluded that Trompex and Supra violated section 1.1205(b)(2) and (c)(2) of the Commission's rules. [20] Therefore, we found Trompex to be disqualified to acquire the 51 licenses for which it was the winning bidder in the auction [21] and dismissed Supra's long-form application. [22] On December 3, 2001, Trompex and Supra jointly filed a petition for reconsideration of our decision. [23]

III. DISCUSSION

7. For the reasons set forth herein, we uphold both our decision that Trompex was disqualified to hold the licenses for which it was the winning bidder in Auction No. 26, and was therefore *3289 in default, and our dismissal of Supra's long-form application. Trompex properly was deemed disqualified (and thus ineligible to acquire the licenses) and subject to default payments, because it failed to file a timely long-form application for the licenses won at auction, as required by section 1.2107(c) of the Commission's rules. [24] Supra's long-form application was properly dismissed because Supra was neither a winning bidder nor an applicant in Auction No. 26 and thus had no right under section 1.2107(c) to file a long-form application. [25] Supra's long-form application also was properly dismissed because Supra violated section 22.213 of the Commission's rules, which prohibits the filing of any long-form applications following a geographic-area paging auction by anyone that was not a winning bidder in the auction. [26]

**3 8. Trompex and Supra seek reconsideration of the Branch's decision on effectively two grounds. First, they argue that the Branch erroneously concluded that Supra and Trompex had the same TIN and that therefore an unauthorized transfer of control of Trompex occurred. [27] Second, the petitioners assert that Branch's actions in this case were unfair and lacking in due process because the Branch made its decision without seeking a clarification from the parties and/or allowing the parties an opportunity to correct any deficiencies in its filings. [28]

9. We disagree with the petitioner's claim that the factual premise of our decision was "wholly erroneous."[29] The petitioners allege that the decision was premised on the fact that Supra "had provided as its TIN, the same TIN as Trompex, and thus a conclusion was drawn that [Supra] had take [*sic*] control of Trompex and thus Trompex has effectuated a 'major amendment' to its short-form application."[30] The *Order*, however, does not state that the parties had the same TIN, but instead correctly states that Supra used Trompex's TIN to submit the long-form application.[31] Both a review of the long-form application and Commission records demonstrate that the *Order* was correct in that regard. On the long-form application, the field that asks for the applicant's TIN is filled in with "L00219635," which, according to Commission records, corresponds to the TIN on file for Trompex as well as the TIN used to file the long-form application on ULS.[32] However, the field asking for the TIN of the "Real Party ***3290** in Interest of the Applicant" is filled in with "L00220054," which according to Commission records corresponds to the TIN on file for Supra.[33] Moreover, based on the Commission's standard practice of importing the applicant's name from the short-form application into the applicant's name field on the long-form application, Supra must have actively replaced Trompex's name with its own as the applicant for the 51 licenses for which Trompex was the winning bidder in the auction. Therefore, despite knowing that it was neither an applicant nor a winning bidder, Supra used the TIN of another entity that was an applicant and a winning bidder in an effort to circumvent procedures established in ULS and in the Commission's rules.

10. The petitioners also assert that the Branch's conclusion that an unauthorized transfer of control had occurred was "wholly erroneous and without factually [*sic*] basis."[34] The petitioners state that the two corporations, Supra and Trompex, were formed and have always been and continue to be controlled by separate individuals, and that at no time has Supra held any ownership interest in Trompex.[35] Petitioners also declare that the only connection between the two entities was that the majority owners of each entity are acquainted and, following the end of Auction No. 26, informally agreed to "pursue the licenses under [Supra]."[36] However, it was reasonable to conclude that an unauthorized transfer of control occurred based on the information in Supra's long-form application; in addition to the very fact that Supra filed a long-form application for the licenses for which Trompex was the winning bidder, Supra also used Trompex's TIN to file the application and included Trompex's gross revenues with its own gross revenues to determine eligibility for a very small business bidding credit.

****4** 11. Regardless of whether an unauthorized transfer of control did or did not occur, the fact remains that the petitioners attempted to evade Commission licensing and assignment requirements and thereby violated Commission rules, making Trompex disqualified to hold the licenses and mandating the dismissal of Supra's long-form application. Specifically, by failing to file a long-form application for the licenses for which it was the winning bidder, Trompex violated section 1.2107(c) of the Commission's rules, which holds that a winning bidder that fails to file a long-form application following the auction is deemed to have defaulted and, thus, is disqualified to hold the licenses and subject to default payments.[37] Because Supra was not the winning bidder for the licenses for which it filed a long-form application, it was not authorized under section 1.2107(c) to file the application. Supra's long-form application also was properly dismissed because it violated section 22.213 of the Commission's rules by filing a long-form application when it, by its own admission, was neither the winning bidder for the subject licenses nor a party to a permissible paging partitioning agreement that was disclosed on any short-form application filed by a qualified bidder.[38] Instead, Supra was seeking a wholesale substitution of one party for another - a clear violation of both sections 1.1207(c) and 22.213.

***3291** 12. Moreover, the petitioners' actions following Auction No. 26 violated the integrity of the competitive bidding, licensing, and assignment processes that the Commission established to effect proper, administratively-sound assignment of spectrum. When adopting the rules for competitive bidding, the Commission created a process in which potential bidders are allowed to make minor changes to the information provided at the pre-auction stage, but determined that major modifications, including ownership changes or changes in the identification of parties to bidding consortia, would not be allowed.[39] In addition to prohibiting major amendments, the Commission's rules require ownership and other interest disclosures, including the identities of other bidders,[40] to allow for transparency in the competitive bidding process. This transparency levels the

playing-field among bidders, which is necessary because such information can affect the actions, strategies, and bids of other bidders. [41]

13. Allowing an entity to acquire licenses applied for, bid on, and won by another entity in a Commission auction would be contrary to the public interest because it could result in substantial injury to other bidders who based their bidding strategy on knowing those who they were competing against. If we were to allow an entity to submit an application for licenses bid on and won by another entity, such entities could gain an "unfair advantage over other bidders in the auction," and could even intentionally mislead other bidders. [42] Moreover, it would undermine the enforcement of competitive bidding rules that are specifically designed to protect against gaming the auction system. An elementary concept in distributing licenses through a competitive bidding process is that licenses will be awarded to the winning bidder, which is considered to be the party that values them most highly. The strict enforcement of our rules in this regard ensures that the ultimate purpose of the auction, which is to encourage and facilitate the provision of reliable service to the public, is achieved. Further, the Commission's competitive bidding rules fulfill the broader purpose of Section 309(j) of the Communications Act of 1934, as amended, [43] which created an efficient mechanism to assign a scarce resource to its most productive use. [44] ***3292** Therefore, we conclude that Supra's and Trompex's actions were not only contrary to the integrity of the auction process but also contrary to the public interest.

****5** 14. Finally, we deny the petitioners' argument that the Branch's actions were "unfair and lacking in due process." [45] The petitioners specifically object that the Commission's staff did not advise them of any further filings or information needed by the Commission and that the Branch made its decision "without seeking clarification from the parties involved." [46] We first note that there was nothing that the Commission staff could have told Trompex or Supra to do that would have remedied the errors made by both parties. The parties already had violated the Commission's auction and licensing rules and could not undo this with more filings. Second, the Commission is under no obligation to seek further clarification from the parties before making a decision based on the information submitted by the parties. In this case, the petitioners brought the decision upon themselves when they attempted to circumvent the normal Commission processes for licensing and assignment of wireless licenses. Both parties are deemed to be aware of the Commission's regulations and procedures, not only from the Commission's rules but also from the various public notices, the bidder information package, and other Commission documents released prior to the filing of the long-form applications. Therefore, we find no unfairness or lack of due process on the part of our decision to disqualify Trompex and dismiss Supra's long-form application. [47]

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405(a), and sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the Verified Petition for Reconsideration of Order No. DA 01-2480 Dismissing Long-Form Application and Imposing Default Penalties Upon Trompex's Up-Front Payment, filed by Trompex Corporation and Supra Telecommunications & Information Systems, Inc. on December 3, 2001, is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Linda C. Ray
Deputy Chief
Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau

1 Verified Petition for Reconsideration of Order No. DA 01-2480 Dismissing Long-Form Application and Imposing Default Penalties Upon Trompex's Up-Front Payment, filed by Trompex Corporation and Supra Telecommunications

& Information Systems, Inc. on December 3, 2001 ("Petition"). *See* Trompex Corporation, *Order*, 16 FCC Rcd. 18874 (Policy & Rules Br., Comm. Wir. Div., WTB 2001) ("*Order*").

2 47 C.F.R. § 1.2105(b)(2), (c)(2). *See Order*, 16 FCC Rcd. at 18876-77, ¶¶ 7-9.

3 *See* 47 C.F.R. § 1.2105(a).

4 *See* 47 C.F.R. §§ 1.2105(a)(2), 1.2112.

5 *See* 47 C.F.R. § 1.1205(c)(2).

6 *See* 47 C.F.R. § 1.1205(b)(2).

7 *See* 47 C.F.R. § 1.2107(c). *See also* 47 C.F.R. § 22.213 (filing of long-form application following an auction for paging geographic area authorizations).

8 47 C.F.R. § 1.1207(b). *See also* 47 C.F.R. § 1.1204(g) (procedures for calculating default penalties).

9 47 C.F.R. § 22.213. Section 22.213 also provides that "parties seeking partitioned authorizations pursuant to agreements with auction winners under § 22.221 of [Part 22]" may file applications. *Id*. Section 22.221 sets forth the procedures for seeking a license partitioned from a paging authorization won at auction. 47 C.F.R. § 22.221. As discussed *infra* paragraph 11 and note 38, the partitioning provisions are not relevant to the instant matter.

10 While paging stations in the 929 MHz band are authorized under 47 C.F.R. Part 90, Subpart P, the exclusive channel 929 MHz licenses are subject to the application filing, licensing procedure, auction procedure, construction, operation and notification rules and requirements set forth in 47 C.F.R. Part 22, which includes the rules for paging stations in the 931 MHz band. *See* 47 C.F.R. § 90.493. Therefore, the applicable auction rules for Auction No. 26 are contained in 47 C.F.R. Parts 1 and 22.

11 *See* FCC Form 175 filed by Trompex Corporation on January 19, 2000. *See also* Auction of 2,499 929 and 931 MHz Paging Licenses, *Public Notice*, 15 FCC Rcd. 2043, 2068 (2000).

12 *See* Auction of 929 and 931 MHz Paging Licenses, *Public Notice*, 15 FCC Rcd. 2838, 2848, 2869 (2000).

13 *See* 929 and 931 MHz Paging Auction Closes, *Public Notice*, 15 FCC Rcd. 4858, 4867-69 (2000) ("*Closing Public Notice*").

14 *Id.*, 15 FCC Rcd. at 4862, 4920.

15 *See* ULS File No. 0000096244 ("Supra Long-Form Application"). As noted in the Branch's order, Supra did not file a short-form application or otherwise participate in Auction No. 26. *Order*, 16 FCC Rcd. at 18875, ¶ 2.

16 Supra Long-Form Application, Exhibit C: Designated Entities.

17 Supra Long-Form Application, Exhibit D: Agreements & Other Instruments.

18 The Internal Revenue Service issues an entity's TIN. However, when an entity submits its IRS-issued TIN for identification purposes on Universal Licensing System ("ULS") filings, the system automatically converts the number into a "masked TIN" (*i.e.*, a different letter/number combination that is associated with the IRS-issued TIN) in order to keep the applicant's actual TIN confidential. *See* 47 C.F.R. § 1.923(h). For purposes of this *Order*, however, "TIN" will refer to the "masked TIN" of an entity.

19 *Order*, 16 FCC Rcd. at 18875, ¶ 4.

20 *See* 47 C.F.R. § 1.1205(b)(2)-(c)(2).

21 In addition, because the Branch found Trompex disqualified, it deemed Trompex to be in default, pursuant to 47 C.F.R. § 1.2109(c), and set forth the initial default payment of $26,343 for Trompex. *Order*, 16 FCC Rcd. at 18875-76, ¶¶ 5-6.

22 *Order*, 16 FCC Rcd. at 18875-77, ¶¶ 4, 9. The Branch noted that Supra stated that it was a wholly-owned subsidiary of Idowu, Inc., whose majority shareholder is Olukayode A. Ramos, a citizen of Nigeria. *Id*. at 18875, ¶ 2. Because the level of foreign ownership in Supra exceeded 25 percent, Supra was required to file a Petition for Declaratory Ruling for approval of its foreign ownership. *See* 47 U.S.C. § 310(b)(4). The Branch noted that Supra failed to make such a filing. *Order*, 16 FCC Rcd. at 18875 n.5.

23 The Petition was officially filed with the Commission's Office of the Secretary on December 3, 2001, which fell beyond the 30-day filing period for petitions for reconsideration. *See* 47 C.F.R. § 1.106(f). During the 30-day period following the release date of the *Order*, however, the Commission amended its procedural rules on an emergency, interim basis to require the filing or refiling of certain Commission filings because of the disruption of deliveries due to emergency events in Washington, DC. *See* Implementation of Interim Electronic Filing Procedures for Certain Commission Filings, FCC 01-345, 66 Fed. Reg. 62991 (Dec. 4, 2001). Because the petitioners followed the correct interim procedures, the Petition is considered timely filed as of the date the pleading was originally sent to the Commission, November 24, 2001. *See* Declaration of Mailing of Verified Petition for Reconsideration of Order No. DA 01-2480 Dismissing Long-Form Application and Imposing Default Penalties Upon Trompex's Up-Front Payment, filed by Mark E. Buechele, counsel for Trompex and Supra, on December 5, 2001.

24 47 C.F.R. § 1.2107(c).

25 *See id*.

26 47 C.F.R. § 22.213. *See also* 47 C.F.R. § 1.2107(c) (stating that a winning bidder must file the long-form application for the licenses for which it was the winning bidder pursuant to the rules governing the service authorizing the licenses).

27 Petition at 4.

28 *Id*. at 4-5.

29 *Id*. at 4.

30 *Id*. Trompex and Supra maintain that the long-form application "clearly indicates a TIN for [Supra] with the last two digits ending in '54'; whereas the short-form application provides a TIN for Trompex which has the last two digits ending in '92'." *Id*.

31 *Order*, 16 FCC Rcd. at 18875, ¶ 4 ("the use of Trompex's TIN on the long-form application submitted by Supra").

32 *See* Supra Long-Form Application, Line 10a. As stated above, ULS automatically converts an entity's IRS-issued TIN into a "masked TIN" (*i.e.*, a different letter/number combination that is associated with the IRS-issued TIN) in order to keep the applicant's actual TIN confidential. *See supra* note 18. In order to file a long-form application following an auction, the winning bidder can make the filing (and access previously filed information) only by using the same TIN that it used in filing its short-form application. The Commission has, in some cases, allowed an applicant to "update" the number initially used on a short-form application - *e.g.*, if the potential bidder did not yet have the TIN provided by the IRS, it could use a temporary identification until its official TIN was available - but in such cases, the Commission required the applicant to amend its short-form with its actual TIN once it was issued by the IRS.

33 Supra Long-Form Application, Line 15. The long-form application lists the name of the real party in interest of the applicant as Supra. *Id*. at Line 14.

34 Petition at 4.

35 *Id*. at 2.

36 *Id*.

37 47 C.F.R. § 1.2107(c). As noted above, the rule requires that a winning bidder submit the long-form application within 10 business days after being notified that it was the winning bidder. *Id*. In this case, winning bidders in Auction No. 26 were notified by the *Closing Public Notice* - Attachment A of which expressly listed Trompex as one of the winning bidders - that they were required to submit their long-form applications on or before March 20, 2000. *See* 15 FCC Rcd. at 4862, 4867-69, 4920.

38 47 C.F.R. § 22.213. *See also* 47 C.F.R. § 1.2107(c). As noted above, *supra* note 9, the Commission, pursuant to 47 C.F.R. § 22.213, also will accept post-auction applications for geographic area paging licenses from parties that had previously disclosed agreements with auctions winners to partition licenses under 47 C.F.R. § 22.221. In this case, neither party raised an intent to partition, and even if that had been their intention, Trompex and Supra failed to follow the proper procedures, which require that the potential bidder reflect that agreement in its short-form application and that both the winning bidder and the potential partitionee jointly file their long-form applications. *See* 47 C.F.R. § 22.221(a)-(b).

39 *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348, 2377, ¶¶ 167-68 (1994) (allowing applicants to make minor amendments to their short-form applications before the auction).

40 *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd. 7245, 7252, ¶¶ 40, 42 (1994) ("[c]oncealing bidder identities may give an advantage to larger bidders that have the resources to devote to discovering other bidders' identities."). Here, the Commission clearly elected to identify the bidders before and after Auction No. 26. *See* Auction of 929 and 931 MHz Paging Service Spectrum, *Public Notice*, 14 FCC Rcd. 18440, 18472 ("bidders will know in advance of this auction the identities of the bidders against which they are bidding."). The Commission likewise made available to all Auction No. 26 bidders the ownership information provided in the short-form applications by other bidders before the auction. *Id*. at 18453.

41 *See* Two Way Radio of Carolina, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd. 12035 (1999) ("*Two Way Radio*") (dismissing a request made by a winning bidder after the auction to change its bidding credit status).

42 *Two Way Radio*, 14 FCC Rcd. at 12043, ¶ 15.

43 47 U.S.C. § 309(j).

44 *See* BDPCS, Inc., BTA Nos. B008, B036, B055, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, B447, Frequency Block C, *Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17598, ¶ 14 (2000). As the House Committee on Energy and Commerce explained, "[a] carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves." H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580.

45 Petition at 4.

46 *Id*. at 4-5.

47 We also note that petitioners assert that the Public Interest Statement provided by Supra in an exhibit to its long-form application was sufficient to meet the requirements for foreign ownership of radio licenses, pursuant to 47 U.S.C. §

310(b)(4). Because we uphold the dismissal of Supra's long-form application due to Supra's ineligibility to apply for grant of these licenses, we need not address petitioners' claim.

18 FCC Rcd. 3286 (F.C.C.), 18 F.C.C.R. 3286, 2003 WL 751038

End of Document

EXHIBIT Altanovo-25

KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Litigation Bulletin, IRS LB, January 1, 1988

55 S.Ct. 266
Supreme Court of the United States

GREGORY
v.
HELVERING, Commissioner of Internal Revenue.

No. 127.
|
Argued Dec. 4, 5, 1934.
|
Decided Jan. 7, 1935.

Synopsis
On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Petition by Guy T. Helvering Commissioner of Internal Revenue, opposed by Evelyn F. Gregory, taxpayer, to review an order of the Board of Tax Appeals expunging a deficiency in income taxes.

Order of Board of Tax Appeals was reversed, and deficiency assessed (69 F. (2d) 809), and the taxpayer brings certiorari.

Judgment of the Circuit Court of Appeals affirmed.

West Headnotes (3)

[1] **Internal Revenue** Minimization, Avoidance or Evasion of Liability

Taxpayer can decrease amount of his taxes or altogether avoid them by means which law permits.

414 Cases that cite this headnote

[2] **Internal Revenue** Acts Constituting Reorganization in General

Transfer of some of assets of corporation owned wholly by taxpayer to new corporation owned wholly by taxpayer and created solely for purpose of receiving and transferring assets to taxpayer as liquidating dividend, after which new corporation was dissolved, *held* not "reorganization" within statute exempting from tax, gain arising out of transfer of assets by one corporation to another corporation pursuant to plan of reorganization. Revenue Act 1928, § 112(g), (i) (1), 26 U.S.C.A., § 112.

905 Cases that cite this headnote

[3] **Internal Revenue** Plan of Reorganization

Under statute exempting from tax gain arising out of transfer of assets by one corporation to another, "transfer" must be made pursuant to plan of reorganization and not pursuant to plan having no relation to business of either corporation. Revenue Act 1928, § 112(g), (i) (1), 26 U.S.C.A. § 112.

621 Cases that cite this headnote

Attorneys and Law Firms

****266** ***466** Mr. Hugh Satterlee, of Washington, D.C., for petitioner.

The Attorney General and Mr. J. Crawford Biggs, Sol. Gen., of Washington, D.C., for respondent.

Opinion

***467** Mr. Justice SUTHERLAND delivered the opinion of the Court.

Petitioner in 1928 was the owner of all the stock of United Mortgage Corporation. That corporation held among its assets 1,000 shares of the Monitor Securities Corporation. For the sole purpose of procuring a transfer of these shares to herself in order to sell them for her individual profit, and, at the same time, diminish the amount of income tax which would result from a direct transfer by way of dividend, she sought to bring about a 'reorganization' under section 112(g) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 816, 818, 26 USCA s 2112(g), set forth later in this opinion. To that end, she caused the Averill Corporation to be organized under the laws of Delaware on September 18, 1928. Three days later,

the United Mortgage Corporation transferred to the Averill Corporation the 1,000 shares of Monitor stock, for which all the shares of the Averill Corporation were issued **267 to the petitioner. On September 24, the Averill Corporation was dissolved, and liquidated by distributing all its assets, namely, the Monitor shares, to the petitioner. No other business was ever transacted, or intended to be transacted, by that company. Petitioner immediately sold the Monitor shares for $133,333.33. She returned for taxation, as capital net gain, the sum of $76,007.88, based upon an apportioned cost of $57,325.45. Further details are unnecessary. It is not disputed that if the interposition of the so-called reorganization was ineffective, petitioner became liable for a much larger tax as a result of the transaction.

The Commissioner of Internal Revenue, being of opinion that the reorganization attempted was without substance and must be disregarded, held that petitioner was liable for a tax as though the United corporation had paid her a dividend consisting of the amount realized from the sale of the Monitor shares. In a proceeding before the *468 Board of Tax Appeals, that body rejected the commissioner's view and upheld that of petitioner. 27 B.T.A. 223. Upon a review of the latter decision, the Circuit Court of Appeals sustained the commissioner and reversed the board, holding that there had been no 'reorganization' within the meaning of the statute. 69 F.(2d) 809. Petitioner applied to this court for a writ of certiorari, which the government, considering the question one of importance, did not oppose. We granted the writ. 293 U.S. 538, 55 S.Ct. 82, 79 L.Ed. 645.

Section 112 of the Revenue Act of 1928 (26 USCA s 2112) deals with the subject of gain or loss resulting from the sale or exchange of property. Such gain or loss is to be recognized in computing the tax, except as provided in that section. The provisions of the section, so far as they are pertinent to the question here presented, follow:

'Sec. 112. * * * (g) Distribution of Stock on Reorganization. If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock of securities shall be recognized. * * *

'(i) Definition of Reorganization. As used in this section * * *

'(1) The term 'reorganization' means * * * (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred. * * *' 26 USCA s 2112(g), (i) (1).

[1] [2] [3] It is earnestly contended on behalf of the taxpayer that since every element required by the foregoing subdivision (B) is to be found in what was done, a statutory reorganization was effected; and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result *469 or make unlawful what the statute allows. It is quite true that if a reorganization in reality was effected within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. United States v. Isham, 17 Wall. 496, 506, 21 L.Ed. 728; Superior Oil Co. v. Mississippi, 280 U.S. 390, 395, 396, 50 S.Ct. 169, 74 L.Ed. 504; Jones v. Helvering, 63 App.D.C. 204, 71 F.(2d) 214, 217. But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. The reasoning of the court below in justification of a negative answer leaves little to be said.

When subdivision (B) speaks of a transfer of assets by one corporation to another, it means a transfer made 'in pursuance of a plan of reorganization' (section 112(g) of corporate business; and not a transfer of assets by one corporation to another in pursuance of a plan having no relation to the business of either, as plainly is the case here. Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what actually occurred, what do we find? Simply an operation having no business or corporate purpose-a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created. But that corporation was nothing more than a contrivance **268 to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should

perform, no other function. ***470** When that limited function had been exercised, it immediately was put to death.

In these circumstances, the facts speak for themselves and are susceptible of but one interpretation. The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

Judgment affirmed.

All Citations

293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355, 35-1 USTC P 9043, 14 A.F.T.R. 1191, 1935-1 C.B. 193

EXHIBIT Altanovo-26

West's Annotated California Codes
Civil Code (Refs & Annos)
Division 4. General Provisions (Refs & Annos)
Part 4. Maxims of Jurisprudence

West's Ann.Cal.Civ.Code § 3528

§ 3528. Form and substance

Currentness

The law respects form less than substance.

Credits
(Enacted in 1872.)

Notes of Decisions (87)

West's Ann. Cal. Civ. Code § 3528, CA CIVIL § 3528
Current with urgency legislation through Ch. 168 of 2022 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

EXHIBIT Altanovo-27

24 Cal.App.2d 182, 74 P.2d 1085

THE PEOPLE, Respondent,
v.
RUSSELL O. JACKSON et al., Appellants.

Crim. No. 424.
District Court of Appeal, Fourth District, California.
December 22, 1937.

HEADNOTES

(1)
Criminal Law--Corporate Securities Act--Judgments--Motions--Appeal.
In this prosecution for violation of the Corporate Securities Act, for conspiracy to violate said act, and for grand theft, defendants' purported appeal from an order denying their motion in arrest of judgment did not lie as such order was not an appealable order, and any error committed by the trial court in denying such motion was reviewable on their appeal from the judgment.

(2)
Criminal Law--Double Jeopardy--Pleas--Separate Trial--Instructions.
In said prosecution, where defendants entered special pleas of former jeopardy and prior acquittal, and no evidence was produced in support of such pleas, the trial court did not abuse its discretion in refusing to grant a separate trial on such pleas, and it was incumbent on the court to instruct the jury to find for the prosecution on the issues raised by the pleas.

(3)
Criminal Law--Indictment--Pleading.
In said prosecution, the fact that certain language in the indictment was subject to the criticism of improper grammatical construction did not justify a reversal of the judgments, where during the progress of the trial it was made clear to defendants what was meant by the criticised verbiage, and other allegations of the indictment cured any uncertainty or ambiguity.

(4)
Criminal Law--Corporate Securities Act--Oil Royalties--Certificates-- Deeds--Securities--Construction.
In said prosecution, although the instruments which were claimed to have been dealt in without a broker's license by the corporation, of which defendants were officers, were in form deeds and purported to convey an interest in real property, they were in reality certificates of interest in oil titles and constituted securities within the meaning of the Corporate Securities Act, where the instruments themselves showed that what was intended to be conveyed thereby consisted of small fractional interests in oil which might be produced from certain described land, and the purchase thereof was advertised and represented to produce a definite monthly income for life, and the right to drill and develop the land described in the instruments was purely formal and illusory, and the act in question was to be construed in accordance with the fair import of its terms.

Blue sky laws, note, 87 **A. L. R.** 42. See, also, 6A, **Cal. Jur.** 541. ***183**

(5)
Criminal Law--Corporate Books--Secondary Evidence.
In said prosecution, where there was satisfactory proof that the corporate books had last been seen in the possession of defendants or their counsel, and defendants could not be compelled to produce any incriminating writing, and their counsel denied that they had possession of the books, the original documents which formed a necessary part of the prosecution's case were as effectually lost as though their actual loss or destruction had been conclusively established, and no error was committed in the reception of secondary evidence of the contents of the books.

(6)
Criminal Law--Corporate Securities Act--Corporate Officers--Knowledge-- Verdict--Evidence.
In said prosecution, although some of the instruments which formed the basis of specific violations of the Corporate Securities Act were signed by one of the defendants alone, such fact did not exonerate the other defendant, where both were corporate officers and controlled the corporation in whose name the instruments were executed, and the evidence relating to the purpose of the corporation and the business in which defendants were engaged, justified the inference that each was cognizant of the execution of the instruments in the name of the corporation by the other.

(7)

Criminal Law--Conspiracy to Obtain Property by False Promises-- Verdict--Evidence--Representations.

In said prosecution, where defendants persistently emphasized and represented that the prospective purchasers of oil royalties would receive from the royalties a stated monthly income for at least as long as they should live, it could not be said that the inference was not justified that the representations in fact amounted to promises that defendants would turn over to their customers oil royalties in sufficient quantity to yield the monthly returns which were so persistently emphasized, and a verdict of guilty of conspiracy to obtain property by false promises with fraudulent intent not to perform such promises had sufficient evidentiary support.

(8)

Criminal Law--Representations--Grand Theft--Verdict--Evidence.

In said prosecution, where defendants' representations that prospective purchasers of oil royalties would derive definite returns therefrom payable monthly looked to the future alone, and did not pretend to relate either to the present or to the past, they were insufficient to support a conviction of charges of grand theft consisting of the fraudulent acquisition by defendants of the purchasers' personal property by means of false representations or pretenses.

SUMMARY

APPEAL from judgments of the Superior Court of San Diego County and from an order denying a new trial. Lloyd E. Griffin, Judge. Affirmed in part and reversed in part. ***184**

The facts are stated in the opinion of the court.

COUNSEL

Hervey & Holt for Appellants.

U. S. Webb, Attorney-General, Frank Richards, Deputy Attorney-General, Thomas Whelan, District Attorney, Frank T. Dunn, Assistant District Attorney, and Victor C. Winnek, Deputy District Attorney, for Respondent.

Jennings, J.

The defendants have appealed from the judgments pronounced against them following their conviction of several offenses alleged to have been committed by them by an indictment which contained 15 separate counts. The first count of the accusatory pleading charged the defendants with having conspired to violate the provisions of section 6 of the Corporate Securities Act of California in the manner described in said count. The next eight counts alleged specific violations by the defendants of section 6 of the above-mentioned statute. Counts 10, 12, and 14 separately charged that the defendants on designated dates had conspired to obtain certain described property of named individuals by false promises with the fraudulent intent not to perform such promises. Each of the remaining counts, to wit: counts 11, 13, and 15 charged the defendants with the crime of grand theft. Upon the conclusion of the trial the jury returned separate verdicts finding defendants guilty of all the offenses of which they were accused except the offense of conspiracy alleged in count 14. Defendants thereafter presented a motion for a new trial which was granted as to the offenses alleged in counts 2, 7, 8, and 9 and denied as to the offenses alleged in the remaining ten counts. A motion in arrest of judgment was likewise denied as to the remaining ten counts. The appeal here perfected is taken not only from the judgments pronounced as aforesaid, but also from the court's order denying a new trial and from the order denying the motion in arrest of judgment. (1) With respect to the purported appeal from the last-mentioned order it is settled that an order denying a motion in arrest of judgment is not an appealable order. Any error committed by the trial court in denying such a motion is reviewable on an appeal from the judgment. (*People v.* ***185** *Williams,* 184 Cal. 590 [194 Pac. 1019]; *People v. Rubens,* 11 Cal. App. (2d) 576 [54 Pac. (2d) 98, 1107].)

(2) The first contention advanced by appellants which will here be considered is the contention that the trial court committed prejudicial error in advising the jury to return verdicts in favor of respondent on the pleas of former jeopardy and prior acquittal which the record indicates were entered by appellants to the accusation contained in each count of the indictment. The transcript shows that no evidence was produced during the trial in support of these pleas. It also appears, however, that before a jury was selected to try the cause appellants moved the court for a separate trial of the issues tendered by the special pleas which motion was denied and appellants thereupon objected to proceeding with the trial until the issues raised by such pleas had been determined, which objection was overruled.

Appellants concede that there is authority in this state which supports the action taken by the trial court in this case, i. e., submitting the issues raised by the special pleas to the same jury at the same time the issues presented by pleas of not guilty were submitted. That the concession thus made is proper and further, that when such pleas have been

entered and no evidence supporting them is produced, it is incumbent upon the trial court to instruct the jury to find for the prosecution on the issues raised by the special pleas is apparent from the decision in *People v. Newell,* 192 Cal. 659 [221 Pac. 622].

Appellants nevertheless insist that the peculiar circumstances of this case are such that it was error for the trial court to proceed to trial on the issues presented by their pleas of not guilty in the face of their demand for a separate trial of the special pleas and of their objection to going to trial until the issues raised by their special pleas had been determined. The circumstances which appellants contend are proper to make the instant case an exception to the general rule announced in *People v. Newell, supra,* are fully set forth in *Jackson v. Superior Court,* 10 Cal. (2d) 350 [74 Pac. (2d) 243]. In passing it should be noted that the offenses here charged against appellants are different offenses than those alleged in the case last cited and that the decision therein is for this reason not applicable to the present situation. In our opinion, the circumstances upon which appellants ***186** rely are not sufficient to create an exception to the general rule heretofore stated. We know of no rule requiring the trial of issues raised by the special pleas in advance of the regular trial. The course of the proceedings was confined to the discretion of the trial court and no abuse of such discretion is manifest from a refusal to grant a separate trial on the special pleas.

(3) A second contention which merits brief consideration relates to the sufficiency of the indictment. Appellants complain that the pleading whereby they were charged with the commission of the above-mentioned offenses is fatally defective. They particularly challenge the sufficiency of the first count wherein an attempt was made to accuse them of having conspired to violate the provisions of section 6 of the Corporate Securities Act. It may be remarked in passing that a demurrer which was interposed to the indictment was overruled. The language of the first count which is subjected to special criticism is as follows: "As a part of said conspiracy, it was agreed by and between said Russell O. Jackson and Frank A. Scott, acting as officers of the said Fidelity Sales & Holding Corporation, would purchase for and on behalf of said Russell O. Jackson and Frank A. Scott, certain securities." It is urged that this language is ambiguous, uncertain, and unintelligible. That the quoted sentence is not a model of proper grammatical construction may readily be conceded. That it is so uncertain and unintelligible as to demand reversal of that part of the judgment which relates to the first count of the indictment is not apparent. Review of the record herein shows that not only was it made abundantly clear to appellants as the trial progressed that what was charged against them by the criticised verbiage was that as officers of the corporation they would cause the corporation to purchase for them certain securities but close inspection of the involved allegations contained in the first count indicates that the language to which appellants except was clarified and its ambiguity and uncertainty cured by subsequent allegations. We think, therefore, that appellants' denunciation of the language at this stage of the proceeding is not justified and that the apparent incorrectness of grammatical construction of the quoted language does not warrant the penalty of reversal which is demanded. ***187**

(4) A third contention of appellants relates to the offenses alleged in counts 1, 3, 4, 5 and 6, of which they now stand convicted, and deserves serious consideration. The last-mentioned counts in effect charge that appellants caused the corporation of which they were officers to deal in designated securities when, as they well knew, said corporation had no broker's license permitting it so to deal. The securities in which it is alleged the corporation thus dealt are described in the indictment as certificates of interest in oil titles. The record shows that as a necessary part of its case in attempting to prove the commission by appellants of the offenses alleged in the above-mentioned five counts, the prosecution introduced in evidence a number of written instruments, some of which were executed either in the state of Texas or Oklahoma and others in California. Each of the instruments thus produced is entitled "Mineral Deed". One of the deeds thus entitled which was executed by the Fidelity Sales & Holding Corporation in the county of San Diego on May 20, 1935, will serve to illustrate the contention of appellants which is now being considered. This deed purported to convey to the American Fidelity Corporation, Ltd., an undivided one-half interest in and to all of the oil, gas, and other minerals in and under and that might be produced from certain described lands in the state of Oklahoma "together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating, and developing said lands for oil, gas, and other minerals and storing, handling, transporting, and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements. This sale is made subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease of record heretofore executed; it being under stood and agreed that said Grantee shall have, receive and enjoy the herein granted undivided interest in and to all bonuses, rents, royalties and other benefits which may accrue under

the terms of said lease in so far as it covers the above-described land from and after the date hereof, precisely as if the Grantee herein had been at the date of the making of said lease the owner of a similar undivided interest in and to the lands described and Grantee one of the lessors therein." The *habendum* clause of the instrument is the usual clause which appears in deeds conveying a fee title to land. ***188**

It is the contention of appellants that the various instruments introduced in evidence as aforesaid were deeds whereby interests in real property were transferred, that they do not come within the definition of "Securities" as this term is defined in the California Corporate Securities Act and that appellants could not therefore be successfully prosecuted therefor as charged in the indictment.

The word "security" is defined in section 2, subd. 7 of the Corporate Securities Act as amended (Stats. 1933, p. 2308). The only portion thereof which is relied upon by respondent as indicating that the mineral deeds produced in evidence come within the definition there given is the following: "Certificate of interest in an oil, gas, or mining title or lease." It is respondent's contention that the instruments, although in form deeds conveying interests in land, are in reality certificates of interest in oil titles.

In the face of the conflicting contentions thus advanced a statement of the factual background surrounding the execution of the deeds as this history was developed by the evidence produced during the trial may be of assistance. In attempting to reproduce the picture it will be provisionally assumed that the trial court made correct rulings with respect to the admission and rejection of evidence although in fairness to appellants it should be stated that certain rulings of the court relating thereto are questioned by them.

Two corporations occupy prominent positions in the story. They are the American Fidelity Corporation, Ltd., and the Fidelity Sales & Holding Corporation. The former was incorporated on August 29, 1932, and the latter on February 27, 1933. In February, 1935, the total number of shares of stock of the first-mentioned corporation which had been issued was 167. Of the stock thus issued the stock certificate book of the corporation showed that Russell O. Jackson held 85 shares, J. O. Hayes 80 shares, F. A. Scott one share and John K. Jackson one share. R. O. Jackson was the president and F. A. Scott the vice-president of this corporation. No stock was ever issued in the Fidelity Sales & Holding Corporation. R. O. Jackson was the president and F. A. Scott the vice-president of this corporation. The same suite of offices was used by both corporations. During the years 1934 and 1935 an extensive campaign of newspaper and radio advertising was carried on by the American Fidelity Corporation, ***189** Ltd., for the purpose of interesting the public in what was denominated its "Regular Monthly Income Plan". Thereby a large number of persons became interested in the proposal and considerable quantities of various types of securities were transferred to the corporation in exchange for the hereinabove described mineral deeds. That the volume of business thus carried on by this corporation was large and the profits resulting therefrom not inconsiderable, particularly to appellant Jackson, is apparent from the fact that at all times material to the present inquiry he, as president of the corporation, received a salary of $1,000 per month. He also received a cash dividend of $100 per share declared on December 14, 1935, and a cash dividend of $800 per share declared on February 1, 1936. Not only by means of the radio and newspaper advertising was the monthly income feature stressed but also to numerous prospective investors who called at the office of the company it was consistently emphasized that an exchange of stocks, bonds, and other property owned by them for the oil royalty deeds which the corporation had for sale would result in the payment to such persons of a definite monthly sum throughout the remainder of their lives and to their heirs after they should have passed from the sphere of mortal existence.

The manner by which these allegedly valuable interests in oil royalties were acquired by the American Fidelity Corporation, Ltd., and were passed on to those persons who surrendered their stocks and bonds in various well-known and long-established corporations and companies deserves mention. Some person in Texas or Oklahoma, usually J. O. Hayes, would execute a mineral deed in the form heretofore described conveying a designated interest in oil, gas, or other minerals which might thereafter be produced from land described in the deed to the Fidelity Sales & Holding Corporation. Thereafter this corporation would execute a similar deed conveying the oil royalty interest to the American Fidelity Corporation, Ltd. The last-mentioned corporation would then by like mineral deeds convey to its customers fractional parts of the interest which it had obtained from the Fidelity Sales & Holding Corporation. At first blush the interposition of the Fidelity Sales & Holding Corporation in the scheme would appear to be cumbersome and useless. However, when the entire history of a transaction of this character was exposed ***190** the reason for the presence therein of the holding corporation became clear. The

purchase and sale of one such interest may be noted for the purpose of illustrating the plan of operation. This particular interest was denominated 450 units Wilcox-Buxton Lease. The evidence showed that it was purchased by the Fidelity Sales & Holding Corporation from J. O. Hayes on May 10, 1935, for a consideration of $19,000 and sold on the same day to the American Fidelity Corporation, Ltd., for the sum of $23,625 and thereafter sold by the last-mentioned corporation to the public for $45,000. The gross profit accruing therefrom to the American Fidelity Corporation, Ltd., was therefore $21,375. However, the Fidelity Sales & Holding Corporation also derived a gross profit of $4,625 from the transaction so that the combined gross profit obtained by the two corporations was $26,000. It is apparent, therefore, that the Fidelity Sales & Holding Corporation was utilized in the scheme of operations as a convenient device for enlarging the spread of profit which would finally accrue to both corporations when the various interests were parceled out and sold to the public. In this connection it should be observed that the evidence indicated that the funds required for the purchases of such interests by the Fidelity Sales & Holding Corporation were uniformly furnished by the American Fidelity Corporation, Ltd. It should further be observed that the last-mentioned company held a broker's license issued by the state corporation department, whereas the holding corporation had no such license. In conformity with the regulations of the state corporation department reports of purchases and sales made by the American Fidelity Corporation, Ltd., were regularly submitted by this corporation to the state corporation department. In these reports the purchase price was consistently stated to be the price which the American Fidelity Corporation, Ltd., had paid the holding corporation, no mention being made of the price originally paid by the holding corporation when it acquired such interests.

Having in mind the above-stated history of the transactions whereby the various interests were acquired and sold, we may proceed to a consideration of appellants' contention that these property rights or interests were interests in real property and therefore not securities and that the Fidelity Sales & Holding Corporation was not required by law to have a broker's license ***191** in order to deal in such interests and that consequently the conviction of appellants of the offenses alleged in counts 1, 3, 4, 5 and 6 was improper and the judgment, so far as it relates to said counts, must be reversed.

It is admitted by both parties to this appeal that there is no California authority which bears directly upon the problem thus presented and that the question is a novel one in this state. It must, we think, be conceded that the various instruments entitled "Mineral Deeds" are in form deeds and that they purport to convey interests in real property. It must further be conceded that the term "Securities" in its ordinary meaning does not cover deeds to real property. However, as heretofore observed, the Corporate Securities Act of this state in section 2, subd. 7 thereof states that a certificate of interest in an oil, gas, or mining title or lease is a "security" for the purposes of the act. We find no unusual difficulty in arriving at the conclusion that the instruments under consideration, although they are in form deeds, in reality amount to certificates of interest in an oil or mining title and that they therefore come within the definition of securities, as stated in the statute. The deeds themselves show that what was intended to be conveyed thereby consisted of fractional interests in oil which might be produced from certain described land. No attempt was made to convey any other interest in the land. Undoubtedly, an owner of land may by suitable conveyance divest himself of his entire interest or a part thereof in whatever minerals may rest beneath the surface of the earth. There is nothing incomprehensible about dividing land horizontally as well as vertically. We suppose that the right or ownership of the landowner in the oil which is either known or suspected to be under the surface of the ground may be properly called an oil title just as we use the expression "land title" to signify ownership of the surface which is the commonly accepted meaning of the expression "land title" or "title in land". Another obstacle, however, presents itself in the process of reasoning whereby the conclusion is reached that the instruments under consideration come within the proper purview of the Corporate Securities Act. This difficulty occurs by reason of the use of the word "certificates". Admittedly, the instruments in question have the appearance and legal phraseology of deeds. There is nothing in them which indicates ***192** that they possess the character of mere certificates. No language is contained within them which is usually found in those instruments which are legally denominated "certificates". Nevertheless, although the instruments are undoubtedly deeds in form and by their terms convey more extensive rights than certificates, we are constrained to the opinion that they come within the scope of the statute.

In arriving at this conclusion we find material assistance in looking through the mere form of the instruments to the facts and circumstances which surrounded their execution. It should be and is an established principle of the law that the substance and not the mere form of transactions constitutes

the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit. (*People v. Ratliff,* 131 Cal. App. 763, 772 [22 Pac. (2d) 245]; *People v. Reese,* 136 Cal. App. 657, 672 [29 Pac. (2d) 450].)

The evidence showed the true character of the business in which appellants were engaged and in whose accomplishment the so-called "mineral deeds" were executed. Through the media of newspaper advertisements and radio programs and by oral representations the desirability of providing a definite monthly income for life was emphasized. By the same means the decrease in value of well-known securities and the failure of such securities to pay dividends, facts which at the time were only too familiar to the public, were continuously stressed and the ability of the American Fidelity Corporation, Ltd., to take over such securities and assure the owners relief from pecuniary worries and financial independence through payment to them of definite and satisfactory monthly income was persistently advertised. Such conduct is that which is generally practiced by those who are engaged in the business of selling stocks and bonds, familiar types of "securities", to the public. Furthermore, the evidence showed that in each and every instance the grantee in one of the mineral deeds executed by the American Fidelity Corporation, Ltd., did for a time receive at least the amount per month which had been promised. The peculiar and rapid decrease in such monthly payments need not here be mentioned since the pecuniary value of whatever the purchasers received is not a factor necessary to be considered in arriving ***193** at a determination of the real character of the instruments.

There is, however, another feature which deserves mention. This feature is the splitting up of the various interests which the American Fidelity Corporation, Ltd., had acquired into numerous fractional parts. We note, for example, that in one of the mineral deeds executed by the corporation to a purchaser the interest transferred was "an undivided 20/1280th". In a third it was a "10/1200th". In a fourth it was a "15/1280th". In a fifth instance it was described as "an undivided 2.100216 interest". These fractions are exceedingly small and when this feature is taken into consideration along with the emphasis placed upon the factor of monthly income it is apparent that the instruments, whereby such infinitesimal interests were transferred were neither issued nor received as deeds but that in fact they were nothing more than certificates of very small interests in oil titles. It should be noted that each of such deeds gave to the grantee the "right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas, and other minerals". Bearing in mind, however, that all the grantees named in such deeds were residents of San Diego County, whereas the lands were located in Oklahoma and Texas, and observing also the very small fractional interests conveyed, we have no hesitancy in declaring that the quoted language consists of empty words and that it was never anticipated that the grantees would ever avail themselves of the right so generously accorded to them.

As heretofore stated, there is a dearth of authorities in this state bearing on the question now under consideration. There are, however, two California decisions which, though not precisely in point, are of material assistance to the solution of the problem. The first of these is *Domestic & Foreign Petroleum Co., Ltd., v. Long,* reported in 4 Cal. (2d) at page 547 [51 Pac. (2d) 73]. In this case lessees under an oil and gas lease made assignments of percentages of oil and other substances to be produced during the lease and money to be derived from the sale thereof. Apparently the instruments of assignment were entitled "grant deeds" and used the words "grant" and "convey", terms manifestly appropriate to deeds rather than to certificates of interest. It was contended by the defendants in the action that the ***194** instruments were not securities as this term is defined in the Corporate Securities Act. This contention did not prevail and it was held that the instruments were securities. It should be observed that the assignments expressly provided that the grantors or such persons as they might designate should be the only persons authorized to drill for or produce oil and that the grantees should "not have any voice concerning said operations". In this regard the instruments analyzed in the cited decision differ from those which are the subject of inquiry in the present proceeding. Nevertheless, as heretofore pointed out, when due consideration is here given to the circumstance that the interests granted by the "mineral deeds" in the instant action were very small fractional interests in oil and gas to be produced from land located in Texas and Oklahoma and that such deeds were sold to California residents, no insurmountable difficulty is encountered in arriving at the conclusion that the grant of a right of ingress to and egress from the land "for the purpose of mining, drilling, exploring, operating, and developing said lands for oil, gas, and other minerals, etc." was not in fact a substantial right but rather that it was a purely formal right never expected to be utilized and therefore a most immaterial, wholly unimportant provision which we are at liberty to disregard in attempting to discover the true character of the instruments. Being persuaded to the

view that the grant of a right to drill and develop the land described in the so-called "mineral deeds" was, under the circumstances, purely formal and manifestly illusory we find most pertinent to the present problem the following quotation from page 555 of the cited case: "Instruments such as those in the Craven case (*People v. Craven,* 219 Cal. 522 [27 Pac. (2d) 906]) and the instant case are not issued to persons who expect to reap a profit from their own services and efforts exerted in the management and operation of oil-bearing property, but to those in the category of investors, who, for a consideration paid, stipulate for a right to share in the profits or proceeds of a business enterprise or venture to be conducted by others." The second decision to which we refer is *People v. Rubens,* 11 Cal. App. (2d) 576 [54 Pac. (2d) 98, 100, 1107]. In this latter case the defendant owned an oil lease on land located in Sacramento County, California. By the terms of the lease he was authorized to prospect for, ***195** sink wells and produce oil and gas from the land. He thereupon proceeded to sell interests in the enterprise under the fictitious name of Capitol Lease Development Company and operated the oil development business in the name of a corporation having 25,000 shares, of which he was the president and manager and owned all but two shares of the issued stock. Each of the instruments whereby the interests were conveyed was entitled an "Option to Purchase Oil and Gas Lease Assignment" and purported to give to the vendee named therein an "option to purchase oil and gas lease assignments of [an undivided] five sixty-fourths (564) of an acre" of the entire tract of land but failed to describe the allotted portion thereof. Another term of the instrument provided that within 30 days from the "bringing in" of the first well on the entire tract of land the purchaser should pay an additional designated sum of money which would entitle such vendee to a community lease for his proportionate interest in the entire project. A certain proposed drilling program to be effectuated by the above-mentioned corporation was set out in the instrument which further stipulated that the corporation would, upon completion of the contracts to purchase the interests, execute to each of the purchasers a community lease for his proportionate interest in the entire project on a designated participating basis. Attached to each of such instruments was the detailed form for the proposed community lease which amounted to a contract making each purchaser a *pro rata* shareholder in the oil producing enterprise to be conducted on the entire tract of land. The defendant was charged with issuing and selling certificates of interests in an oil and gas lease without having secured a permit therefor in violation of the Corporate Securities Act. After conviction upon this and other charges contained in the indictment under which he was prosecuted he appealed from the judgments of conviction. One of the principal questions presented on the appeal was whether or not the above-described instruments were securities as this term is defined in the Corporate Securities Act. The reviewing court, although it concluded that each unit or share sold by the defendant represented a five sixty-fourths undivided portion of an acre of land, nevertheless found that the instruments in which the defendant was shown to have been dealing were in fact securities as that term is defined in the Corporate Securities Act. ***196**

In addition to the above-cited California authorities our attention has been particularly directed to a very recent decision of the Supreme Court of Rhode Island which presents a striking factual similarity to that which appears in the instant proceeding. The decision to which reference is thus made is *State v. Pullen,* decided on June 14, 1937, and reported in 192 Atl. at page 473. In this case the state of Rhode Island brought an action to restrain the sale of securities by the defendant, because of his failure to register with the division of banking and insurance, as a broker or salesman of securities. The trial court found in plaintiff's favor and on appeal by the defendant the judgment was affirmed. The securities in which the defendant was dealing were called oil royalties founded upon a lease agreement whereby the owner of lands in Texas leased the same to an oil company for the sole purpose of mining and operating for oil and gas. The lease contained a covenant expressly permitting assignment of the respective estates of the lessor and lessee but it was provided that before such assignment should bind the lessee a written transfer of the assignment was required to be furnished to the lessee. In accordance with this provision the lessor proceeded to sell to purchasers fractional shares of his rights to receive oil royalties and to effectuate the same executed instruments which were entitled "Mineral Deeds". These instruments were substantially similar to the mineral deeds now being considered on the present appeal and constituted the written evidence of the rights which the defendant in the cited case desired to sell in Rhode Island. The Rhode Island statute defined the term "security" as follows: "The term 'security' or 'securities' shall mean and include the currency of any government other than the United States, in whatever form the same may be dealt in, any bond, stock, treasury stock, note, debenture, certificate of interest in a profit sharing agreement, certificate of interest in an oil, gas or mining lease, evidence of indebtedness, or any form of commercial paper, transferable certificates of interest or participation, or transferable shares, or similar evidences of beneficial interest issued by any person as defined in subdivision (b) of this section."

It was contended in the cited case, just as is here contended, that the mineral deeds constituted written evidence of interests in realty and that they did not come within the ***197** meaning of the above-quoted language of the statute. In disposing of this contention the Rhode Island court declared that the technical nature of the instruments was inconsequential in view of the purpose and design of the statute regulating the sale of securities. The court therefore proceeded to look through the legal form of the documents and announced that in reality they amounted to investment contracts which were peculiarly adapted to perpetuation of the evil which the statute was designed to eradicate. It was held therefore that the instruments, although deeds in form technically representing evidence of interests in real property, primarily constituted evidence of shares in oil produced under an oil lease and that they came within the meaning of the statutory definition of "securities".

It is proper to observe that, in so deciding, the court was careful to point out that the proceeding which it was considering was equitable in character, that it was not a criminal action for enforcement of the penalties provided by the act and that strict construction of the statute was not therefore required.

In this respect the cited case is essentially different from the instant action. We are nevertheless constrained to the view that the reasoning of the Rhode Island Supreme Court is applicable to the problem which is here presented. The instruments which we have here are essentially similar in form to those that were considered in the cited case. The purpose of our statute is the same purpose which the Rhode Island court declared was the purpose of the statute of that state. (*People v. Craven,* 219 Cal. 522 [27 Pac. (2d) 906].) In *People v. White,* 124 Cal. App. 548 [12 Pac. (2d) 1078], the defendant had been convicted of the offenses of selling securities without having secured a permit from the commissioner of corporations and of grand theft. On appeal one of the legal principles which he relied upon in support of his contention that the instruments in which the evidence showed he had dealt were not "securities" as defined by our statute was the familiar rule requiring strict construction of penal laws. In disposing of the contention thus presented the appellate court used the following language at page 555 of the cited volume: "Appellant here contends that it is the rule that criminal statutes are subject to the rule of strict construction, and that under a strict construction the contracts ***198** in question do not come within the provisions of the Corporate Securities Act. Whatever may be the rule elsewhere, in this state the common-law rule that penal statutes are to be strictly construed has no application, and statutes of this state are to be construed according to the fair import of their terms and with a view to effect the object of the statute as well as to promote justice. (Pen. Code, sec. 4; Pol. Code, sec. 4; Civ. Code, sec. 4.)" We think therefore that, having in mind the purpose of the Corporate Securities Act, we are not compelled to construe the statute in compliance with the common-law rule of strict construction but that we should rather indulge in a construction of the act in accordance with the fair import of its terms.

(5) A fourth contention of appellants relates to the admission of certain evidence. During the trial witnesses produced by respondent were allowed to testify as to observations which they had made of the books of the two corporations hereinabove mentioned and excerpts from the books were received in evidence. In each instance where such evidence was admitted appellants interposed timely objection the chief basis of which was that it was improper to admit secondary evidence of the contents of the books in the absence of proof that the books themselves were lost or had been destroyed. It must, however, be noted that possession of the corporate books was traced to appellants themselves or to the counsel who represented them and inquiry by the court as to whether or not counsel had the books in their possession at the time of trial brought a negative response.

Examination of the record impels the conclusion that the trial court ruled correctly in admitting the evidence. The extracts taken by the auditors from the books of the two corporations formed a necessary and logical part of respondent's case. There was satisfactory proof that the books had last been seen in the possession of appellants or their counsel. Certainly the court could not compel appellants to produce any incriminating writing. (*People v. Chapman,* 55 Cal. App. 192 [203 Pac. 126].) Counsel for appellants in whose office the evidence indicated the books had last been seen categorically denied in reply to the court's inquiry that they had possession of the books. It is apparent that for all practical purposes the original documents which formed a necessary part of respondent's case were as effectually lost as ***199** though their actual loss or destruction had been conclusively established. Under these circumstances no error was committed in the reception of secondary evidence of the contents of the books. (Code Civ. Proc., sec. 1855; *People v. Powell,* 71 Cal. App. 500, 513 [236 Pac. 311].)

(6) A fifth contention advanced by appellants relates to their conviction of the offenses charged in the third, fourth, fifth, and sixth counts of the indictment. As heretofore noted, it was alleged in these counts that appellants, acting as officers of the Fidelity Sales & Holding Corporation, had committed specific violations of section 6 of the Corporate Securities Act by causing the corporation on designated dates, to act as a broker in selling the hereinabove described mineral deeds. It is urged that, at most, the evidence which was produced by respondent to establish the commission of the offenses thus alleged was insufficient to support Jackson's conviction of any more than two thereof, and likewise insufficient to support Scott's conviction of more than two of the offenses. The basis for this contention exists in the four mineral deeds which were relied upon by respondent as the final link in the chain of evidence whereby the prosecution sought to prove the commission of the four specific offenses charged in the above-mentioned counts of the indictment. Two of these deeds were executed by appellant Jackson alone as president of the Fidelity Sales & Holding Corporation and two by appellant Scott alone as vice-president of the corporation. From this fact it is declared that there was no showing that Scott participated in or had any knowledge of the execution by Jackson of the two deeds which bore Jackson's name alone and likewise that there was an entire lack of evidence to connect Jackson with the execution of the two deeds to which Scott's signature was appended.

The contention thus presented is devoid of merit. If fails to take into consideration the numerous circumstances which surrounded the business in which appellants were shown to have been engaged as these circumstances were developed by the evidence. Examination of the record impels the conclusion that the evidence submitted by respondent was ample to justify the jury in drawing the inference that each of the appellants was fully cognizant of the execution of deeds in the name of the corporation by the other. Evidence which was not contradicted showed that Jackson was president and ***200** Scott vice-president of this corporation in which no stock was ever issued. That these two individuals completely controlled and dominated the corporation is plain and that it was used by them as a convenient auxiliary to the American Fidelity Corporation, Ltd., of which appellants were likewise the principal officers in the business of dealing in oil royalties is also clear. That the Fidelity Sales & Holding Corporation was created and used by appellants for the purpose of increasing the amount of profit derived by the American Fidelity Corporation, Ltd., from the sale of royalties is not open to doubt. That the former corporation was purely a dummy manipulated and used by appellants in the business of dealing in oil royalties is apparent. These circumstances and others that might be mentioned render it inconceivable that either of the appellants who were shown to have been so closely associated in the business of dealing in oil royalties could have been ignorant and uninformed as to the execution of the mineral deeds by the other as an officer of the corporate dummy which they jointly controlled.

The remaining contentions developed by appellants on this appeal relate to their conviction of the offenses charged in counts 10, 11, 12, 13 and 15. As heretofore noted, these offenses were conspiracy to obtain property by false promises with the fraudulent intent not to perform such promises and grand theft. Counts 10 and 12 alleged the commission by appellants of the crime of conspiracy and the remaining three counts charged the offense of grand theft.

(7) With respect to their conviction of the crime of conspiracy as charged in counts 10 and 12 appellants complain that the evidence produced by respondent to prove the charge was insufficient to justify the jury's verdict of guilt. It is pointed out that section 182 of the Penal Code defines “Criminal Conspiracy” and that subdivision 4 of the section makes it a crime for two or more persons to conspire to obtain money or property by false promises with fraudulent intent not to perform such promises. It is strenuously urged that all the evidence bearing upon this particular charge of conspiracy which was submitted showed that the statements which were relied upon as constituting promises were mere statements of opinion and were not and could not from their nature be regarded as promises. Without attempting to restate the voluminous evidence relating to the ***201** representations which appellants made in their endeavors to persuade their patrons to surrender property which they owned in return for the so-called oil royalties it may be said that the effect of all such representations was that the prospective purchasers would receive from the royalties a stated monthly income for at least as long as they should live. Appellants maintain that the representations thus made did not and could not amount to promises but that they were obviously no more than mere predictions that the oil royalties would yield certain returns and that, bearing in mind the peculiar character of the investments, it is clear that the statements attributed to them were mere expressions of opinion. In this connection it is pointed out that it is recognized that no one can definitely know the exact quantity of oil which exists beneath the surface of the earth even in a proven oil field. It is further declared that the testimony

of respondent's witnesses regarding this feature showed that they understood that appellants were not guaranteeing that the royalties would yield the various returns stated and even if they did have a different understanding they must have realized from the very nature of the investments which they were making the obvious impossibility of any such guaranty.

Again it must be remarked that we may not overlook the circumstantial background against which the various specific sales of oil royalties made by appellants were projected. The obvious credulity of appellants' victims is too plain to be disregarded. The very emphasis placed upon the repeated representation that the investment of comparatively small amounts of money would yield not probably or possibly but certainly, and not approximately but surely, specified, definite returns each month for as long a time as the investors should remain alive is an outstanding circumstance to which we may not close our eyes. Under the circumstances which surrounded the sales of oil royalties we are not prepared to say that the jury could not reasonably have inferred that the representations in fact amounted to promises that appellants would turn over to their customers oil royalties in sufficient quantity to yield the monthly returns which were so persistently emphasized. True enough, in each instance the exact quantity of the fractional interest was plainly stated in the various mineral deeds. Nevertheless, having in mind the certainty and definiteness of fixed, undiminishing monthly ***202** payments continuously and constantly stressed by appellants, we may not in fairness declare that the credulous victims of appellants could not have understood that the representations meant that sufficient quantities of oil royalties would be provided to yield the promised returns. If such was the situation, and inspection of the record impels the conclusion that the jury may well have inferred that it was from the mass of evidence bearing upon the matter that was placed before it, then no difficulty is encountered in determining that false promises were in fact deliberately made by appellants with the positive intent not to perform them.

(8) Appellants further complain of their conviction of the crime of grand theft as charged in the 11th, 13th, and 15th counts of the indictment. The contention advanced with respect to these charges is likewise insufficiency of the evidence to support the jury's verdict. It is again urged that the representations which were shown to have been made by them related exclusively to the future and hence could amount to nothing more than mere predictions or expressions of opinion. It must be conceded that all of the evidence which was produced in support of the grand theft charges showed that the representations made by appellants related to the future. Again, without attempting to state in detail the various representations upon which respondent relied to establish the necessary element of false pretenses it is proper to say that each and all of the representations were in effect that the persons to whom they were made would, if they should purchase the oil royalties, derive definite returns therefrom payable monthly.

Before attempting an analysis of the representations thus shown to have been made certain general observations are in order. In the first place, it is apparent that the offenses of grand theft of which appellants were accused consisted of the fraudulent acquisition by appellants of certain described personal property of others by means of false representations or pretenses. We do not understand that there is any contention to the contrary by the respondent. In the second place, it is clear that the conviction of appellants of the charges of grand theft may not be sustained on the ground that the representations amounted to false promises. In this respect there is a marked distinction between the charges of conspiracy contained in the 10th and 12th counts of the ***203** indictment and the charges of grand theft contained in the 11th, 13th, and 15th counts. In those counts which alleged the commission of conspiracy it was fully and carefully alleged that the conspiracy which appellants had committed was a conspiracy to obtain property by false promises with fraudulent intent of nonperformance. The accusation thus made was drawn under section 182 of the Penal Code wherein the crime of “criminal conspiracy” is defined and follows the exact language of subdivision 5 of said section. The accusation of grand theft was drawn in accordance with the provisions of section 484 of the Penal Code wherein the crime of theft is defined. The last-mentioned statute makes no reference to promises. The words therein contained which are important to the present discussion are “representation” and “pretense”. It is necessary, therefore, to approach the matter now under consideration with a distinct realization that promises, however false and fraudulent they may be, cannot support a conviction of grand theft as defined in section 484 of the Penal Code.

The obvious distinction between the offenses of criminal conspiracy with whose commission appellants were accused and the charges of grand theft made against them provides a proper introduction to a familiar principle of criminal jurisprudence which, in our opinion, furnishes a key to the solution of the immediate problem now under consideration. The offense specified in each of the three counts of the

indictment now being considered is what was formerly denominated the crime of obtaining money, property, or labor by false pretenses. This last-mentioned offense is still denounced by section 532 of the Penal Code. However, as has been heretofore pointed out, the effect of section 484 of the Penal Code as it now reads is merely to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. (*People v. Myers,* 206 Cal. 480, 483 [275 Pac. 219]; *People v. Bratton,* 125 Cal. App. 337, 341 [14 Pac. (2d) 125]; *People v. Brock,* 21 Cal. App. (2d) 601 [70 Pac. (2d) 210].) There is no inconsistency between sections 484 and 532 of the Penal Code and the applicable provisions of the former have in effect repealed the identical provisions of the latter. (*People v. Carter,* 131 Cal. App. 177, 182 [21 Pac. (2d) 129].) ***204**

Since it is abundantly apparent that the only evidence submitted which tended to prove that appellants had committed the crime of grand theft indicated that they had obtained certain property by means of false representations it becomes necessary to measure these representations by the test of a familiar and well-settled legal principle peculiarly applicable to the offense of obtaining property by false pretenses or representations. This established principle is that the representations shown to have been made must relate either to an existing or to a past fact. (*People v. Wasservogel,* 77 Cal. 173 [19 Pac. 270]; *People v. Walker,* 76 Cal. App. 192 [244 Pac. 94]; *People v. Moore,* 82 Cal. App. 739 [256 Pac. 266]; *People v. Robinson,* 107 Cal. App. 211 [290 Pac. 470]; *People v. Reese,* 136 Cal. App. 657 [29 Pac. (2d) 450].) Representations which in reality amount to no more than mere predictions of events to occur in the future or which in fact consist of expressions of opinion do not satisfy the statutory requirements and a conviction obtained on the strength of such representations may not be sustained. (*People v. White,* 85 Cal. App. 241, 250 [259 Pac. 76].) The representations which it was shown appellants had made to the persons mentioned in the grand theft counts of the indictment were statements that looked to the future alone. They did not pretend to relate either to the present or to the past. Measured by the above-mentioned test it is manifest that the representations do not constitute a proper evidentiary basis for the conviction of grand theft which appellants suffered.

Respondent makes some effort to sustain the jury's verdict finding appellants guilty of the grand theft charges by arguing that appellants advertised and represented to the public that they had a certain well-conceived plan whereby they would assure to investors the payment of a definite monthly income for life whereas it appeared that in reality they had no such plan. It is, we believe, a sufficient answer to this contention to observe that the evidence which respondent produced which related directly to the persons named in the three grand theft counts of the indictment showed that to each of such persons appellants made oral representations the effect of which was as heretofore mentioned. Furthermore, it is not at all clear that respondent made satisfactory proof of the exposition to the public by ***205** appellants of the so-called "monthly income plan". Respondent did produce what purported to be copies of portions of radio programs broadcast to the public which were marked for identification but apparently these documents were not received in evidence. In any event the essence of the "plan" as developed was that prospective investors, by turning over to appellants securities, the income from which had either suffered diminution or entirely ceased, might be assured of definite monthly income in the future. The basic idea of the plan was therefore an assurance of future income and is vulnerable to the same criticism as are the oral representations shown to have been made directly to the persons designated in the grand theft counts.

The final complaint presented by appellants relates to a number of instructions which they offered and which it is contended the trial court erroneously refused to give and to certain other instructions which were given by the court which it is claimed contained incorrect statements of legal principles. Examination of the entire body of the instructions given by the court impels the conclusion that the jury was fully, fairly and correctly advised thereby of the various legal principles applicable to the evidence and that no reversible error was committed in the refusal to give certain instructions prepared and offered by appellants.

For the reasons stated herein the attempted appeal from the order denying the motion of appellants in arrest of judgment is dismissed. Those portions of the judgments and of the order denying the motion of appellants for a new trial which relate to the crime of grand theft as alleged in counts 11, 13, and 15 of the indictment are reversed. The remainder of the judgments and order denying a new trial from which this appeal has been perfected are and each of them is affirmed.

Barnard, P. J., and Marks, J., concurred.

A petition by appellants to have the cause heard in the Supreme Court, after judgment in the District Court of

Appeal, was denied by the Supreme Court on January 20, 1938. ***206**

EXHIBIT Altanovo-28

232 Cal.App.4th 1332
Court of Appeal, Fifth District, California.

GRAND PROSPECT PARTNERS, L.P.,
Plaintiff, Cross–Defendant and Respondent,
v.
ROSS DRESS FOR LESS, INC. et al.,
Defendants, Cross–Complainants and Appellants.

F067327
|
Filed January 12, 2015
|
As Modified on Denial of Rehearing February 9, 2015
|
Review Denied May 20, 2015
|
Certified for Partial Publication. *

Synopsis

Background: Commercial landlord brought action against tenant for declaratory relief, breach of contract, and unjust enrichment. Tenant cross-complained for declaratory judgment. The Superior Court, Tulare County, No. VCU237296, Paul A. Vortmann, J., issued an oral ruling during the jury trial that tenant had breached the lease by failing to pay rent and terminating the lease but that there was no unjust enrichment, and then entered judgment on a special jury verdict on the issue of damages. Tenant appealed.

Holdings: The Court of Appeal, Franson, J., held that:

excusing commercial tenant from opening store or paying rent in absence of anchor store was not procedurally unconscionable;

excusing commercial tenant from opening store or paying rent in absence of anchor store was an unenforceable penalty;

excusing commercial tenant from opening store or paying rent was a forfeiture; but

allowing commercial tenant to terminate lease after 12 months without an anchor store was not an unenforceable penalty or forfeiture.

Affirmed as modified.

Procedural Posture(s): On Appeal; Judgment; Motion for Attorney's Fees.

****239** APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge. (Super.Ct. No. VCU237296)

Attorneys and Law Firms

Arnold & Porter, Sean M. SeLegue, Jerome B. Falk, Jr., Jeremy McLaughlin, San Francisco; Bartko, Zankel, Bunzel & Miller, Benjamin K. Riley, Simon R. Goodfellow, San Francisco; Dowling Aaron, Donald R. Fischbach and Steven M. Vartabedian, Fresno, for Defendants, Cross–Complainants and Appellants.

Bingham McCutchen, Stephen Zovickian and Robert A. Brundage, San Francisco; Caswell Bell & Hillison, Robert K. Hillison and Kimberly L. Mayhew, Fresno, for Plaintiff, Cross–Defendant and Respondent.

Caldwell Leslie & Proctor, Christopher G. Caldwell, Michael D. Roth and Albert Giang, Los Angeles, for California Retailers Association, The Gap, Inc., Bed Bath & Beyond Inc., H & M Hennes & Mauritz L.P., Petco Animal Supplies, Inc., and VF Outdoor, Inc. as Amicus Curiae on behalf of Defendants, Cross–Complaints and Appellants.

OPINION

FRANSON, J.

***1336** This appeal addresses whether cotenancy provisions [1] in a lease for retail space in a shopping center are unconscionable or ****240** unreasonable penalties and, thus, not binding on the landlord. The enforceability of cotenancy provisions has not been discussed in an opinion published by a California appellate court. This opinion does not establish a categorical rule of law holding cotenancy provisions always, or never, are enforceable. ***1337** Instead, it illustrates that the determination whether a cotenancy provision is unconscionable or an unreasonable penalty depends heavily on the facts proven in a particular case. Here, the facts show the provisions were not unconscionable and only the "rent abatement provision" operated as an unreasonable penalty.

Grand Prospect Partners, L.P. (Grand Prospect), the owner and operator of the Porterville Marketplace shopping center,

filed this action to challenge the enforceability of provisions in its commercial lease with Ross Dress for Less, Inc. (Ross). The provisions conditioned Ross's obligation to open a store and pay rent on Mervyn's operating a store in the shopping center on the commencement date of the lease, and also granted Ross the option to terminate the lease if Mervyn's ceased operations and was not replaced by an acceptable retailer within 12 months.

The opening cotenancy condition was not satisfied because Mervyn's filed for bankruptcy and closed its store in 2008. As authorized by the lease, Ross took possession of the space, but never opened for business, never paid rent, and terminated the lease after the 12-month cure period expired.

Grand Prospect claims Ross was obligated to pay rent for the full 10-year term of the lease because the provisions authorizing rent abatement and termination were unconscionable or, alternatively, an unreasonable penalty and thus unenforceable. The trial court agreed with both theories, found Ross had breached the lease by failing to pay rent and terminating the lease, and directed the jury to determine the amount of damages resulting from each breach. The jury awarded $672,100 for unpaid rent and approximately $3.1 million in other damages caused by the termination.

Ross appealed, contending the cotenancy provisions in the lease were not procedurally and substantively unconscionable and were not an unreasonable penalty.

As to unconscionability, which requires proof of both procedural and substantive unconscionability, we conclude the evidence establishes there was no procedural unconscionability. The parties were sophisticated and experienced in the negotiation of commercial leases for retail space, their negotiations involved several drafts of the letter of intent and subsequent lease, and Grand Prospect's decision to approach Ross first about renting the space was a free and unpressured choice. Ross's insistency on cotenancy provisions during negotiations did not make the lease a contract of adhesion or otherwise deprive Grand Prospect of a meaningful choice.

As to unreasonable penalties, the rent abatement and termination provisions must be examined separately because they involve separate consequences triggered by different (albeit, partially overlapping) conditions. As a ***1338** general rule, a contractual provision is an unenforceable penalty under California law if the value of the property forfeited under the provision bears no reasonable relationship to the range of harm anticipated to be caused if the provision is not satisfied.

Here, the trial court's determination that the rent abatement provision constituted an unreasonable penalty is supported by its findings of fact that (1) Ross did not anticipate it would suffer any damages from Mervyn's not being open on the ****241** lease's commencement date and (2) the value of rent forfeited under the provision was approximately $39,500 per month. There is no reasonable relationship between $0 of anticipated harm and the forfeiture of $39,500 in rent per month and, therefore, the trial court correctly concluded the rent abatement provision was an unenforceable penalty.

As to the lease termination provision, California courts have adopted a specific rule that holds no forfeiture results from terminating a commercial lease based upon the occurrence of contingencies that (1) are agreed upon by sophisticated parties and (2) have no relation to any act or default of the parties. These facts are present in this case and, therefore, the rule compels the conclusion that the termination provision did not constitute a forfeiture. Because no forfeiture occurred as a result of the termination, the termination provision did not create an unreasonable penalty.

We therefore modify the judgment to award damages only for unpaid rent.

FACTS

The Parties

Ross is the nation's largest retailer of off-price apparel and home fashion. The trial court found Ross had more than 259 stores in California and more than 1,000 stores nationwide. In 2008, Ross's annual sales totaled more than $6.4 billion.

Grand Prospect is a California limited partnership. Its sole asset is a shopping center named the Porterville Marketplace, located in Porterville, California.

Grand Prospect is managed by David H. Paynter, its sole general partner. Paynter received a bachelor's degree in business administration, majoring in finance. At the time of trial, he had over 33 years of experience in real estate. In 1998, Paynter formed his current company, Paynter Realty and Investments, which is based in Tustin, California. Paynter Realty and Investments is involved in both development of

shopping centers and managing those ***1339** properties. Paynter testified that he had been a partner in developing over 60 shopping centers and that Paynter Realty and Investments currently owned and operated seven shopping centers. Two of those shopping centers (in Clovis and Visalia) leased space to Ross.

Grand Prospect's sole limited partner is John F. Marshall, who is a 50 percent owner. Marshall is a commercial real estate broker who received a college degree in business administration in 1974. Marshall started working in real estate in 1976, moved exclusively to commercial real estate in 1979, and started his own real estate company in 2001. His company specialized in selling and leasing shopping centers. Marshall met Paynter in 1983 when both were working on a shopping center project in Turlock. Marshall was familiar with Ross, having acted as its broker in numerous lease transactions between 2002 and 2011.

The Negotiations

In 2005, a former grocery store building became available at the Porterville Marketplace and Marshall contacted Ross to see if Ross would be interested in the location. In October 2005, Marshall (acting as Grand Prospect's broker) showed Mike Seiler of Ross the site and several other locations in Porterville. Seiler worked with Marshall to prepare a letter of intent, which was similar to the one used for a store in a Clovis shopping center managed by Paynter. Seiler, not Marshall, was responsible for the letter's contents. After making changes, Seiler e-mailed the letter of intent to Marshall and directed him to forward it to Paynter.

****242** The first version of the letter of intent presented to Paynter was dated October 20, 2005, set the initial term of the lease at 10 years with minimum rent for the first five years at $10.50 per square foot with an increase to $11 for the second five years. The letter of intent provided four five-year renewal options, each with a $0.50 increase in rent. The letter of intent also contained cotenancy provisions that required, at commencement and throughout the full term of the lease, 70 percent of the leasable floor area in the center be occupied by retail tenants, including Target and Mervyn's occupying 87,000 and 76,000 square feet, respectively.

The negotiations of the letter of intent were delayed when Paynter learned Target was considering moving out of the shopping center. Eventually, Target decided to stay in Porterville Marketplace and expand its store. As a result, Paynter delivered his revisions to the letter of intent to Ross in the spring of 2007.

After further negotiations, the final letter of intent, dated July 11, 2007, was signed by the parties. The minimum rent was $13.25 for the first 10 ***1340** years and $14 for the first option period with $0.50 increases for each of the three remaining option periods. The calculation of the 70 percent occupancy requirement stated that it would exclude Ross "and Target as to the Commencement Date to be further negotiated in the lease, from the numerator and denominator...." Target was required to occupy 126,000 square feet on the commencement date and during the term of the lease; Mervyn's 76,000 square feet.

With the nonbinding letter of intent in place, the parties began negotiating the lease for 30,316 square feet of space in the Porterville Marketplace.

On April 4, 2008, the lease for a Ross store at Porterville Marketplace was executed on behalf of Ross by James Fassio, executive vice president, and Gregg McGillis, group vice president of real estate (the Lease). Four days later, Paynter signed the Lease on behalf of Grand Prospect.

The terms of the Lease's cotenancy provisions required Mervyn's to be operating its business in 76,000 square feet on the commencement date of the Lease.[2] Other aspects of the cotenancy provisions are described in part I.B., *post.*

Actions Taken Under the Lease

In early July 2008, Grand Prospect notified Ross the construction work on the store had been completed and Ross, if it chose, could take delivery early.[3] Jack Toth, then Ross's director of real estate responsible for the San Joaquin Valley, responded with an e-mail stating Ross intended to take delivery on February 9, 2009, as stated in the Lease.

In late July 2008, Mervyn's filed for reorganization under federal bankruptcy law. In October 2008, the bankruptcy case was converted to a liquidation under chapter 7 of the United States Bankruptcy Code. The Mervyn's store in the Porterville Marketplace closed on December 31, 2008.

In October 2008, Paynter became aware that Mervyn's was going to close its stores and, as a result, Grand Prospect could not ****243** meet the opening cotenancy requirement in the Lease. Paynter contacted Toth and told him about

Mervyn's liquidation. On October 24, 2008, Toth sent Paynter an ***1341** e-mail asserting: "We negotiated hard for the Mervyn's co-tenancy because it makes a huge difference to us financially. Without Mervyn's, we will open very soft and it will take much longer for Ross to get established in Porterville." Toth made two proposals for amending the Lease. Under the first, Ross would pay 2 percent of sales as rent and, once a suitable replacement tenant was found, would go back to full rent. Under the second proposal, the requirement for Mervyn's as a cotenant would be eliminated and Ross would pay a fixed rent of $10 per square foot for the initial term (versus $13.25).

The parties were unable to negotiate a modification of the Lease. On February 6, 2009, Ross advised Grand Prospect that it accepted delivery of the store as the Lease required, "subject to all its rights under the Lease, including the Required Co-Tenancy provisions of Section 6.1.3." The February 9, 2009, delivery date meant that the commencement date of the Lease was May 10, 2009. [4]

On May 10, 2009, neither Mervyn's nor a replacement anchor tenant was open for business in the Porterville Marketplace. Relying on the cotenancy provisions in the Lease, Ross opted not to open a store or pay rent.

In January 2010, Grand Prospect notified Ross that it had entered into a lease with Kohl's Department Stores to occupy 24,000 square feet of the Mervyn's 76,000-square-foot space. Ross regarded Kohl's as an acceptable replacement for Mervyn's, but concluded the lease between Grand Prospect and Kohl's did not cure the cotenancy failure because (1) Kohl's had not leased the required 76,000 square feet and (2) Kohl's was not scheduled to open within the 12-month cure period.

On January 21, 2010, Ross advised Grand Prospect that it would terminate the Lease 30 days after the expiration of the 12-month period.

In May 2010, one year after the commencement date, Ross provided Grand Prospect with formal notice that it was terminating the Lease because the reduced occupancy had remained in effect for 12 consecutive months.

Grand Prospect leased the Ross space to Famous Footwear (6,000 square feet) and Marshalls of California, LLC (24,316 square feet), in 2011. These businesses opened and began paying rent in July and March of 2012, respectively. These leases also contained cotenancy requirements.

***1342 PROCEEDINGS**

In April 2010, before Ross terminated the Lease, Grand Prospect filed a complaint against Ross for declaratory relief, breach of contract and unjust enrichment. Grand Prospect requested (1) a judicial declaration that the cotenancy provisions were unenforceable and (2) money damages for unpaid rent, future rent and expenditures on tenant improvements.

In June 2010, Ross filed a cross-complaint against Grand Prospect, seeking a judicial declaration of the parties' rights and duties under the Lease.

In November 2012, a jury trial began. On the 13th day of the jury trial, December 17, 2012, the trial court issued an oral ruling on the issues that had been reserved for the court. It determined the cotenancy provisions were unconscionable and were an unenforceable penalty and struck those provisions from the Lease. By ****244** striking the cotenancy provisions from the Lease, the court found that Ross had breached the lease by failing to pay rent and terminating the Lease. The court rejected Grand Prospect's cause of action for unjust enrichment.

The jury was then instructed on two issues related to damages. First, the jury was directed to determine the amount that would reasonably compensate Grand Prospect for Ross's failure to pay rent and its termination of the Lease. Second, the jury was directed to determine the amount of damages, if any, Grand Prospect could have avoided with reasonable efforts and expenditures.

The special verdict form submitted to the jury required findings as to four items of damages. The first item addressed the worth of the unpaid rent that had been earned at the time of termination. The jury found this amount was $672,100. The jury's findings on the three other damage items, relating to the termination of the Lease, brought Grand Prospect's total damages to $3,785,714.86.

After the trial court decided Grand Prospect's contested motion for attorney fees and denied Ross's motion for a new trial, it entered an amended judgment of $4,701,990.83

in favor of Grand Prospect, which included an award of approximately $916,275 in attorney fees and costs.

Ross timely appealed.

*1343 DISCUSSION

I. Cotenancy Provisions

A. *Overview*

Cotenancy requirements are included in retail leases for the benefit of the tenant. They generally require other stores in the shopping center to be occupied by operating businesses. (1 *Retail Leasing, supra,* § 7.1, p. 7-2.) Their purpose is to assure the tenant that "there is [¶] [a] critical mass of key tenants or occupants as well as a sufficient population of other retailers that have opened for business or will concurrently open when the tenant is required or intends to open; and [¶] [a] satisfactory level of occupancy by these tenants or occupants during the term of the lease after the tenant has opened." (1 *Retail Leasing, supra,* § 7.2, p. 7-2.) Cotenancy provisions usually are found only in retail leases. (*Ibid.*)

Cotenancy provisions can be categorized as *opening* cotenancy requirements and *operating* cotenancy requirements. (1 *Retail Leasing, supra,* § 7.4, p. 7-4.) "Opening cotenancy requirements condition the tenant's obligation to open for business or commence paying minimum rent on satisfaction of the cotenancy requirement." (*Ibid.*) "Operating cotenancy requirements condition the tenant's obligation to either continue to conduct business or to continue to pay minimum rent on the active operation of certain named tenants and/or a predetermined level of occupancy within the shopping center." (*Id.* at pp. 7-4 to 7-5.)

The major points covered by cotenancy provisions are (1) the specific named cotenants and level of occupancy required, (2) any right the landlord has to cure failures to meet a cotenancy requirement, and (3) the tenant's remedies if a cotenancy failure occurs. (1 *Retail Leasing, supra,* § 7.1, p. 7-2.) These three major points can be resolved by the landlord and tenant in many different ways. Consequently, there is no standard form of cotenancy requirements. (See *id.* §§ 7.27-7.29, pp. 7-17 to 7-26 [two forms of opening cotenancy requirements, with three alternatives in the second form]; 2 Miller & Starr, Cal. Real Estate Forms (2d ed. 2005) § 2:21, pp. 512-563 [cotenancy requirements addressed in § 2.2 of sample retail lease ****245** for space in large shopping center under construction].)

Variation in cotenancy requirements may occur because a particular tenant's business concerns about other tenants might be more complex than simply avoiding vacancies. For instance, a national greeting card store chain might be more concerned that the center's supermarket continues in business than the center's other stores because it has ascertained its stores perform ***1344** better in shopping centers anchored by a supermarket. (1 *Retail Leasing, supra,* § 7.2, p. 7-3.) As to the tenant's remedies on the failure of the *opening* cotenancy requirement, they might include (1) the right to delay the opening of the tenant's store, (2) payment of alternative rent, (3) termination of the lease, or (4) a combination of these remedies. (*Id.* , §§ 7.13-7.15, pp. 7-10 to 7-12.) Further variation can occur if a landlord seeks to impose conditions on the tenant's exercise of these remedies. (*Id.* , § 7.20, p. 7-14.) Conditions may include the absence of a tenant default in the lease and, in the case of rent abatement, the tenant's continued operation of its business on the premises. (*Ibid.*) Finally, how these various points are resolved during the negotiation of a commercial lease "varies greatly depending on the relative bargaining strength of the landlord and the tenant." (*Id.*, § 7.3, p. 7-3.)

The variation in cotenancy requirements, and the remedies given to a tenant when the requirements are not met, prevents the application of a categorical rule of law regarding enforceability. For instance, there is no general principle of California law holding cotenancy provisions in a commercial retail lease can never be unconscionable. Similarly, there is no categorical rule holding cotenancy provisions are unreasonable per se and therefore unenforceable penalties. Instead, the validity of a cotenancy provision depends upon the facts and circumstances proven in a particular case.

B. *Cotenancy Requirements in the Lease*

The cotenancy requirements in the Lease are set forth in sections 1.7.1, 1.7.2 and 6.1.3. The provisions relevant to this appeal concern Mervyn's absence from the shopping center on the commencement date and the continuation of this vacancy for 12 months. As a result of these events, Ross paid no rent and, as soon as allowed, exercised an option to terminate the Lease.

1. *Commencement Date Cotenancy Requirements*

Section 1.7.1 of the Lease required Mervyn's and Target to occupy no less than 76,000 and 126,000 square feet of leasable floor area, respectively, on Ross's commencement date. In addition, section 1.7.2 required 70 percent of the leasable floor area to the shopping center to be occupied by operating retailers. [5]

****246** ***1345** 2. *Commencement Date Reduced Occupancy Period*

Section 6.1.3(b) of the Lease defined a "Commencement Date Reduced Occupancy Period" as beginning with the failure of one of the required tenants to be open for business on the commencement date of the Lease and continuing until cured. Because Mervyn's had closed its store, a "Commencement Date Reduced Occupancy Period" began. As a result, section 6.1.3(b) provided that Ross was not required to open its store for business. That section also stated that, "regardless of whether [Ross] opens for business in the Store, no Rent shall be due or payable whatsoever until and unless the Commencement Date Reduced Occupancy Period is cured." For purposes of this opinion, this term of the Lease is referred to as the "rent abatement provision". [6]

Section 6.1.3(b) also provided Ross with an option to terminate the Lease conditioned upon (1) the Commencement Date Reduced Occupancy Period continuing for 12 months and (2) Ross giving 30 days' notice of termination prior to the expiration of the Commencement Date Reduced Occupancy Period. Section 6.1.3(b)'s reference to 12 months did not limit the free rent to the first 12 months of the Lease and did not limit the cure period to those months. Rather, the 12-month period identifies when Ross accrued an option to terminate the Lease.

II. Unconscionability

A. *Fundamental Principles*

Unconscionability is a defense to the enforcement of an entire contract or particular contractual provisions. (Civ.Code, § 1670.5, subd. (a).) ***1346** "Unconscionability" does not have a precise legal definition, but has been described as extreme unfairness. (Black's Law Dict. (9th ed. 2009) p. 1663; see *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 487, 186 Cal.Rptr. 114 (*A & M Produce*) [no precise definition of substantive unconscionability can be proffered].)

The unconscionability defense to the enforcement of a contract was codified in Civil Code section 1670.5 in 1979. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1398, 1 Cal.Rptr.2d 446; see Stats. 1979, ch. 819, § 3.) The statute did not create new law, but simply codified the existing common law. (*Beasley v. Wells Fargo Bank, supra,* at p. 1398, 1 Cal.Rptr.2d 446.) Civil Code section 1670.5 provides in full:

> "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse ****247** to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> "(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." [7]

Some of the common law principles of unconscionability were set forth by Judge J. Skelly Wright in his oft-cited formulation of the doctrine:

> "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (*Williams v. Walker-Thomas Furniture Co.* (D.C.Cir.1965) 121 U.S. App.D.C. 315 [350 F.2d 445, 449].)

The first California court to quote this formulation was the Fourth Appellate District. (*A & M Produce, supra,* 135 Cal.App.3d at p. 486, 186 Cal.Rptr. 114.) Judge Wright's formulation has been repeated by our Supreme Court and the Ninth Circuit of the United States Court of Appeals. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1133, 1145, 1159, 163 Cal.Rptr.3d 269, 311 P.3d 184; *Ingle v. Circuit City Stores, Inc.* (9th Cir.2003) 328 F.3d 1165, 1170 [arbitration agreement signed by employee as part of job application was unconscionable under Cal. contract law].) The formulation contains both a procedural and a substantive element. (***1347** *Pinnacle Museum TowerAssn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217 (*Pinnacle*); Leff,

Unconscionability and the Code—The Emperor's New Clause (1967) 115 U. Pa. L.Rev. 485 [seminal article discussing procedural and substantive elements of unconscionability].)

The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression and surprise [8] due to unequal bargaining power. (*Pinnacle, supra,* 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217.)

In contrast, the substantive element is concerned with the fairness of the agreement's actual terms and assesses whether they are overly harsh or one-sided. (*Pinnacle, supra,* 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217.) Thus, substantive unconscionability is described by the phrases " ' "unduly oppressive," ' " " ' "so one-sided as to 'shock the conscience,' " ' " and " 'unreasonably favorable to the more powerful party.' " (See *Sonic-Calabasas A, Inc. v. Moreno, supra,* 57 Cal.4th at p. 1145, 163 Cal.Rptr.3d 269, 311 P.3d 184.)

1. Burden and Sliding Scale

The party challenging the validity of a contract or a contractual provision bears the burden of proving unconscionability. ****248** (*Pinnacle, supra,* 55 Cal.4th at p. 247, 145 Cal.Rptr.3d 514, 282 P.3d 1217.) California is among the jurisdictions requiring both elements be shown. (*Ibid.;* cf. *Maxwell v. Fidelity Financial Services, Inc.* (1995) 184 Ariz. 82, 90, [907 P.2d 51, 59] [unconscionability can be established by a showing of substantive unconscionability alone].) The evidence presented must show the circumstances that existed at the time the contract was made because the determination of unconscionability is not based on hindsight in light of subsequent events. (Civ.Code, § 1670.5, subd. (a); *Sonic-Calabasas A, Inc. v. Moreno, supra,* 57 Cal.4th at p. 1164, 163 Cal.Rptr.3d 269, 311 P.3d 184.)

The elements of procedural and substantive unconscionability need not be present to the same degree because they are evaluated on a sliding scale. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*).) Consequently, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude the term is unenforceable, and vice versa. (*Ibid.*)

2. Procedural Unconscionability

The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an ***1348** absence of meaningful choice. (*Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 808, 49 Cal.Rptr.3d 555; see *Pinnacle, supra,* 55 Cal.4th at p. 247, 145 Cal.Rptr.3d 514, 282 P.3d 1217.)

In general, California law allows oppression to be established in two ways. First, and most frequently, oppression may be established by showing the contract is one of adhesion. (*McCaffrey, supra,* 224 Cal.App.4th at p. 1349, 169 Cal.Rptr.3d 766 [oppression generally entails a contract of adhesion]; see *Pinnacle, supra,* 55 Cal.4th at p. 246, 145 Cal.Rptr.3d 514, 282 P.3d 1217 [procedural unconscionability generally takes the form of a contract of adhesion].) [9] The principles that define a "contract of adhesion" are discussed and applied in part II.C. of the Discussion, *post.*

In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract. (*Sonic-Calabasas A, Inc. v. Moreno, supra,* 57 Cal.4th at p. 1125, 163 Cal.Rptr.3d 269, 311 P.3d 184.) The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure [10] exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged ****249** provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney. (See *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796, 137 Cal.Rptr.3d 773; DiMatteo & Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action* (2006) 33 Fla. St. U. L.Rev. 1067, 1077 [the merchant-consumer distinction described as a metafactor in unconscionability cases as relatively few merchant unconscionability claims are upheld; presence of an attorney in precontract negotiations diminishes the likelihood a contract will be held unconscionable].)

In Ohio, another jurisdiction that examines both procedural and substantive unconscionability, an appellate court stated: "Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties,

e.g., 'age, education, intelligence, business acumen and ***1349** experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question.' " (*Collins v. Click Camera & Video, Inc.* (1993) 86 Ohio App.3d 826, 834, 621 N.E.2d 1294, 1299.)

To summarize, courts evaluating procedural unconscionability must consider the totality of the circumstances surrounding the negotiation and formation of the contract, giving particular consideration to factors that affect the presence of oppression or the absence of a meaningful choice.

3. Substantive Unconscionability

Substantive unconscionability is not susceptible of precise definition. (*Sonic-Calabasas A, Inc. v. Moreno, supra,* 57 Cal.4th at p. 1163, 163 Cal.Rptr.3d 269, 311 P.3d 184.) It appears the various descriptions—unduly oppressive, overly harsh, so one-sided as to shock the conscience, and unreasonably favorable to the more powerful party—all reflect the same standard. (*Id.* at pp. 1145, 1159, 163 Cal.Rptr.3d 269, 311 P.3d 184.) Substantive unconscionability is not concerned with a simple old-fashioned bad bargain. (*Ibid.*)

"Factors courts have considered in evaluating whether a contract is substantively unconscionable include the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." (*Hayes v. Oakridge Home* (2009) 122 Ohio St.3d 63, 69 [2009 Ohio 2054, 908 N.E.2d 408, 414].)

B. *Standard of Review*

The legal principles that define the doctrine of unconscionability demonstrate that numerous factors are relevant to determining whether a contract or a particular provision is unconscionable. Despite the numerous factual issues that may bear on the question, unconscionability is ultimately a question of law for the court. (*McCaffrey, supra,* 224 Cal.App.4th at p. 1347, 169 Cal.Rptr.3d 766.) Where the trial court's determination of unconscionability turned on the resolution of conflicts in the evidence or on factual inferences to be drawn from the evidence, we consider the evidence in the light most favorable to the trial court's determination and review the trial court's factual findings under the substantial evidence standard. (*Ibid.*) When some facts of a case are determined under the foregoing rule and other facts are undisputed because there are no material conflicts in the evidence, the appellate court conducts a de novo review of those facts and makes its own unconscionability determination. (*Ibid.*)

****250** Our application of the de novo standard of review is illustrated by ***1350** *Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 22 Cal.Rptr.3d 189, a case in which we (1) concluded the plaintiff had failed to prove procedural unconscionability and (2) reversed the trial court's determination that the arbitration agreement in question was unenforceable.

C. *Contract of Adhesion*

1. The Lease as a Whole

Grand Prospect contends the Lease was a contract of adhesion. Ross argues that its unwillingness to sign a lease without the protection of cotenancy clauses cannot transform a heavily negotiated lease between sophisticated parties into a contract of adhesion. Ross also contends there is no case law supporting the position that procedural unconscionability exists merely because a party viewed one of many points under discussion as critical to reaching a deal, while willingly negotiating numerous other material terms, including price.

The California Supreme Court has defined the term "contract of adhesion" to mean (1) a standardized contract[11] (2) imposed and drafted by the party of superior bargaining strength (3) that provides the subscribing party only the opportunity to adhere to the contract or reject it. (*Armendariz, supra,* 24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Von Nothdurft v. Steck* (2014) 227 Cal.App.4th 524, 535, 173 Cal.Rptr.3d 827.)

We conclude the undisputed facts of this case establish the Lease was not a contract of adhesion. First, it was not a standardized, preprinted form. (See *Von Nothdurft v. Steck, supra,* 227 Cal.App.4th at p. 536, 173 Cal.Rptr.3d 827 [management agreement "was not a preprinted form contract"].)

Second, and more importantly, Grand Prospect was given the opportunity to negotiate the terms of the Lease. To

reach an agreement acceptable to both sides, the parties went through multiple drafts of a letter of intent and five versions of the Lease. Furthermore, the Lease was based on the earlier Clovis lease, which was the product of negotiations between Paynter and Ross's attorney Theani Louskos. She also represented Ross in finalizing the Grand Prospect Lease. The facts establish that Grand Prospect's choices were not limited to rejecting or adhering to the draft of the Lease first presented by Ross.

***1351** Therefore, the Lease itself does not fit the definition of a contract of adhesion.

2. Clause of Adhesion

A question presented by the facts of this case is whether the Lease should be classified as a contract of adhesion because the cotenancy requirements were presented by Ross on a take-it-or-leave-it basis. We conclude this aspect of Ross's negotiating posture did not make the Lease a contract of adhesion.

In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862, the court used language that suggests a *clause* might qualify as a contract of adhesion when it stated, "even if the clause at issue ****251** here is not an adhesion contract, it can still be found unconscionable." (*Id.* at p. 1100, 118 Cal.Rptr.2d 862.) In *Szetela,* a credit card company inserted a notice in its customer's billing statement that stated the cardmember agreement was being amended to include an arbitration clause. (*Id.* at p. 1096, 118 Cal.Rptr.2d 862.) If the customer did not wish to accept the terms of the amendment, the only option was to notify the credit card company, which would then close the account. (*Id.* at p. 1097, 118 Cal.Rptr.2d 862.) When the customer challenged the arbitration clause as unconscionable, the court analyzed the process by which that clause was added to the contract, not the formation of the original contract. The court stated:

> "Procedural unconscionability focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position. When the weaker party is presented the clause and told to 'take it or leave it' without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present. [Citation.] These are precisely the facts in the case before us. Szetela received the amendment to the Cardholder Agreement in a bill stuffer, and under the language of the amendment, he was told to 'take it or leave it.' His only option, if he did not wish to accept the amendment, was to close his account. We agree with Szetela that the oppressive nature in which the amendment was imposed establishes the necessary element of procedural unconscionability." (*Id.* at p. 1100, 118 Cal.Rptr.2d 862.)

Szetela does not establish that the inclusion of a take-it-or-leave-it clause in an agreement makes the entire contract one of adhesion. Instead, it establishes that when a clause *is added to a contract by an amendment,* the inquiry into procedural unconscionability is concerned with the circumstance surrounding the negotiation and formation of the amendment, not the original contract. Where the amendment contains a single clause, that clause or the amendment can be described accurately as a contract of adhesion. It does not follow, however, that the inclusion of a take-it-or-leave-it clause in a negotiated agreement turns the entire agreement into a contract of adhesion.

***1352** In summary, we do not interpret *Szetela* to mean that when the relatively stronger party insists on including a particular provision in a contract, the entire contract becomes a contract of adhesion. Therefore, the Lease was not a contract of adhesion by virtue of Ross insisting that it contain cotenancy provisions.

D. *General Circumstances Relevant to Procedural Unconscionability*

1. Sophistication

The circumstances relevant to procedural unconscionability include age, education, intelligence, business acumen and experience. Paynter received a bachelor's degree in business administration. At the time of trial, he had over 33 years of experience in real estate. In 1988, Paynter and an attorney left a development company and formed their own company to develop shopping centers. In 1998, the attorney returned to the practice of law and Paynter formed his current company, Paynter Realty and Investments, which is based in Tustin. Paynter Realty and Investments is involved in both development of shopping centers and managing those properties. Its management fee is typically 3 to four4 percent of the rent collected. Paynter testified that he had been partner in developing over 60 shopping centers and that Paynter Realty and Investments currently owned and operated seven

shopping centers. Paynter's limited ****252** partner, John Marshall, was equally experienced, and had earlier acted as Ross's broker in numerous lease transactions.

Paynter's age, education, intelligence, business acumen and experience are not among the factors that support a finding of procedural unconscionability. The record shows Paynter was college-educated, very experienced in developing and managing shopping centers, and successful in that business. In short, Paynter was sophisticated and these factors did not place him at a disadvantage in bargaining with Ross.

Paynter's sophistication means that his decision not to seek the advice of an attorney to assist him in the negotiations with the attorney representing Ross was not significant. From earlier business dealings with Ross, Paynter and Marshall were familiar with the terms Ross wanted in the Lease and they understood the cotenancy terms without an explanation of those terms from a lawyer.

2. Time Pressure

The trial court did not find, and it does not appear from the evidence in the record, that Ross exerted time pressure on Paynter and, as a result, prevented him from fully understanding how the cotenancy provisions would operate. ***1353** Cotenancy provisions were in the first letter of intent presented by Marshall to Paynter in 2005 and the Lease was not signed until April 2008. Ross did not impose deadlines during the negotiations for the purpose of pressuring Paynter into making a quick, ill-considered decision that would have been more favorable to Ross than it could have obtained without any time pressure. Therefore, time pressure is not a factor that supports a finding of procedural unconscionability.

3. Economic Pressure

The record does not contain evidence showing Grand Prospect was economically vulnerable and such vulnerability was exploited by Ross during the negotiations. For example, there is no evidence that Grand Prospect was having difficulty servicing its debt or that a balloon payment on a loan was coming due and, therefore, Grand Prospect was willing to accept onerous terms in order to begin receiving rent from the space. The only economic pressure apparent in this case is the same pressure that every commercial landlord experiences when a space is vacant and not generating rent.

4. Pressure from Coercion or Threats

The record contains no evidence that Ross used coercion or threats while negotiating the Lease. For example, Ross did not threaten Paynter by saying that, if he did not agree to the Lease and its cotenancy requirements, breaches would be "found" in Ross's other leases with him and payment of rent under those leases would be stopped.

5. Relative Bargaining Power

Ross had an advantage in bargaining power because it was the larger company in terms of financial resources and personnel. Also, at the time the Lease was being negotiated, Ross was negotiating leases at many other locations. The fact that Ross was opening stores at other locations made the opening of a store in Porterville less important to Ross than it was to Grand Prospect.

The fact that Ross had more bargaining power than Grand Prospect does not mean that inequality in power resulted in no real negotiations and an absence of a meaningful choice for Grand Prospect. (See *Aron v. U-Haul Co. of California, supra,* 143 Cal.App.4th at p. 808, 49 Cal.Rptr.3d 555.) ****253** Here, the parties negotiated before the letter of intent was signed and negotiated further before the Lease was signed. One of the points subject to further negotiation was the specific terms of the cotenancy requirements. Although Ross would not agree to a lease without cotenancy requirements, the terms for the tenant remedy and ***1354** landlord cure were subject to negotiation, and Ross eventually agreed to a base monthly rent well above its original offer.

6. Meaningful Choices

The record shows that John Marshall of Grand Prospect, who had acted as Ross's broker in numerous earlier lease transactions, first approached Ross as a prospective tenant. The record also shows that Ross was Grand Prospect's first choice to fill the vacancy and that Paynter was familiar with the contents of the leases used by Ross, including its cotenancy provisions. There were other companies that Grand Prospect could have approached about the empty space. Thus, Paynter had a meaningful choice when he began to pursue Ross as a tenant. The fact that other companies

would have required cotenancy provisions in any lease they signed with Grand Prospect does not mean the choice made by Paynter was not meaningful. The specifics of the cotenancy requirements vary and Paynter decided to pursue a company that would pay higher rent, rather that pursuing a company that would have accepted cotenancy provisions more favorable to Grand Prospect, at a lower rent.

7. Conclusion

Based on the foregoing factors, we conclude there were real negotiations between the parties and Paynter was given meaningful choices both in initiating contact with Ross and during the negotiations of the Lease. (See *Aron v. U-Haul Co. of California, supra,* 143 Cal.App.4th at p. 808, 49 Cal.Rptr.3d 555.) The fact Ross insisted upon cotenancy provisions is not determinative because the specifics of those provisions were subject to negotiations. Therefore, we conclude there was no procedural unconscionability in this case and, thus, unconscionability does not provide a ground for invalidating the cotenancy provisions in the Lease. (See *Crippen v. Central Valley RV Outlet, Inc., supra,* 124 Cal.App.4th 1159, 22 Cal.Rptr.3d 189 [trial court reversed because plaintiff failed to prove arbitration agreement was procedurally unconscionable].)

III. PENALTIES

A. *Standard of Review*

Whether a contractual provision is an unenforceable penalty is determined by the trial court, not the jury. (*Beasley v. Wells Fargo Bank, supra,* 235 Cal.App.3d at p. 1393, 1 Cal.Rptr.2d 446.) As a result, the issue has been described as a question of law. (*Ibid.*) However, the validity of a provision alleged to be an unlawful penalty "is not really a classic question of law, but is one of fact that, because of its character, is nevertheless committed to judicial determination." (***1355** *Id.* at p. 1394, 1 Cal.Rptr.2d 446.) Thus, a trial court decides, in light of all the facts, including the whole instrument, whether the provision in question is an unlawful penalty. (*Ibid.*)

Despite the nature of the trial court's decision, some courts have stated the determination whether a provision constitutes an unlawful penalty is subject to de novo on appeal. (*Harbor Island Holdings v. Kim* (2003) 107 Cal.App.4th 790, 794, 132 Cal.Rptr.2d 406.)

Based on the foregoing precedent, we conclude the ultimate question of a provision's invalidity as a penalty is a ****254** question of law subject to de novo review, but the factual foundation for appellate review consists of (1) the facts that are not in dispute and (2) the facts that are established by viewing the conflicting evidence in the light most favorable to the trial court's judgment. (See *A & M Produce, supra,* 135 Cal.App.3d at p. 489, 186 Cal.Rptr. 114.)

B. *Conditional Provisions Sometimes Are Penalties*

The first legal question raised by the parties' contentions is whether a contract provision triggered by one or more conditions precedent can be deemed a penalty under California law. We conclude conditional provisions sometimes can operate as penalties.

1. General Principles

Ross's argument that a condition precedent is not a penalty is contrary to a treatise on contract law that devotes a chapter to the topic of *conditions* and promises that cause a forfeiture or penalty. (14 Williston on Contracts (4th ed. 2013) ch. 42, pp. 403–594.) When justice requires, a court "can excuse the performance of conditions and promises otherwise agreed to by the parties. The fact that a promise or condition, if not excused, will operate harshly or unfairly in a particular case does not in itself justify a court in excusing its performance, but the law has long strictly scrutinized—and often prohibited through the use of a principle inherently incapable of precise articulation or application—the enforcement of forfeitures or penalties even though the parties' agreement refers to them as 'liquidated damages' or some other innocuous term." (14 Williston on Contracts, *supra,* § 42:1, pp. 404-407, fns. omitted.)

The treatise's reference to both conditions and promises indicates that, contrary to Ross's position, it is possible for a condition precedent to operate as a penalty. More explicitly, the treatise states: "A condition may be as penal in its effects as a promise to pay a penalty." (14 Williston on Contracts, *supra,* § 42:6, p. 444, fn. omitted.) The treatise also asserts that "relief against ***1356** the effect of penalties should depend as little as possible on the form a transaction takes." (*Id.* at p. 445, fn.omitted.) In short, phrasing a forfeiture of payment in conditional language does not exempt it from judicial scrutiny.

2. California's Approach to Conditions and Penalties

We believe the treatise accurately described the law of California, which does not allow unreasonable penalties or forfeitures simply because they are imaginatively drafted as contractual conditions.

First, the Legislature has directed California courts to put substance before form. Civil Code section 3528 states: "The law respects form less than substance." Adhering to this fundamental principle, our Supreme Court has "consistently ignored form and sought out the substance of arrangements which purport to legitimate penalties and forfeitures. [Citations.]" (*Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, 737, 108 Cal.Rptr. 845, 511 P.2d 1197 [charges assessed on late installment payments that were calculated as a percentage of the entire unpaid balance of the loan, not the amount of the overdue installment, were invalid penalties].) Pursuant to the substance-over-form principle, a court must determine a contract provision's true function and operation when evaluating its legality. (*McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512, 523, 163 Cal.Rptr.3d 225 (*McGuire*).)

Second, a California appellate court has applied the substance-over-form principle ****255** to a contractual provision drafted as a condition. In *Fox Chicago R. Corp. v. Zukor's* (1942) 50 Cal.App.2d 129, 122 P.2d 705 (*Fox Chicago*), the landlord and lessee entered a series of lease amendments reducing the rent to below the previously agreed upon $4,100 per month. (*Id.* at p. 131, 122 P.2d 705.) As modified, the lease amendments included a clause providing that, in the event of a default, the lessee would be obligated to pay the entire unpaid portion of the $4,100 rent for each and every month the lessee had paid a smaller amount. (*Ibid.*) When the lessee breached the lease by removing certain fixtures from the premises without the landlord's consent, the landlord sued and demanded approximately $159,000 under the provision. (*Id.* at p. 133, 122 P.2d 705.) The lessee filed a demurrer, which the trial court sustained without leave to amend. (*Id.* at p. 130, 122 P.2d 705.) The appellate court affirmed on the ground the landlord's recovery of rent at the initial rate constituted a penalty. (*Id.* at p. 136, 122 P.2d 705.)

On appeal, the landlord argued the $159,000 was merely a debt payable upon the happening of a certain event. (*Fox Chicago, supra,* 50 Cal.App.2d at p. 134, 122 P.2d 705.) The court concluded there was no debt. Instead, the language of the lease modification and surrounding circumstances convinced the court the ***1357** provision was a penalty. (*Ibid.*) "Where the language of a condition thus appears upon a fair construction to be a penalty, the obligation is thereby invalidated. Any provision by which money or property is to be forfeited without regard to the actual damage suffered calls for a penalty and is therefore void." (*Ibid.*)

The appellate court also addressed the fact the obligation to pay prior rent reductions was worded as a condition:

> "There is nothing in ... the lease [provision] that might remove it from the category of a penalty. It is not necessary that a penalty be designated as such in specific terms before it may be so classified. A condition in a contract providing for the payment of money not earned is just as much a penalty as though it had been stipulated to penalize the promisor should he default in the performance of his promise. [Citation.] If the lease had contained a provision that the breach of any condition thereof should obligate him to pay to the lessor the sum of $159,000, there would be no question of its being properly classified as a penalty. But cloaked in the innocent verbiage of a condition requiring the lessee to pay $159,000 in the event he should fail to perform some covenant which is collateral to the main covenant, it is equally a penalty. [Citation.] A provision in a contract exacting the payment of moneys for the violation of a collateral agreement is opposed to public policy and is not bereft of its vice because it may appear in the form of a condition. [Citation.]" (*Fox Chicago, supra,* 50 Cal.App.2d at p. 134, 122 P.2d 705.)

The statements in *Fox Chicago* that a lease provision drafted as a condition might be classified as a penalty are consistent with decisions involving other types of contracts. For instance, in *Henck v. Lake Hemet Water Co.* (1937) 9 Cal.2d 136, 69 P.2d 849 (*Henck*), a water supply contract stated that timely payment for the yearly bill was a condition precedent of the right to receive water. The water company did not send a notice that the bill was due, the buyer did not pay on time, and the company declared the contract terminated and refused to reinstate it after the buyer tendered the amount due with interest. Our Supreme Court affirmed the trial court's reinstatement of the contract, stating: "If the breach of such a condition works a ****256** forfeiture, equity in a proper case may grant relief." (*Id.* at p. 142, 69 P.2d 849); see *Root v. American Equity Specialty Ins. Co.* (2005) 130 Cal.App.4th 926, 939-940, 30 Cal.Rptr.3d 631

[nonoccurrence of conditions precedent in contracts excused when nonoccurrence works a forfeiture].

Notwithstanding the foregoing cases, California courts have recognized that some conditional provisions in a contract do not operate as a forfeiture or penalty. In *Blank v. Borden* (1974) 11 Cal.3d 963, 115 Cal.Rptr. 31, 524 P.2d 127, the Supreme Court examined a real estate listing agreement that provided the broker would be paid the full 6 percent commission if ***1358** the owner withdrew the listing. (*Id.* at p. 966, 115 Cal.Rptr. 31, 524 P.2d 127.) The court acknowledged it must look to the substance rather than form in determining the true function and character of an arrangement challenged as a voidable penalty. (*Id.* at p. 970, 115 Cal.Rptr. 31, 524 P.2d 127.) The court then stated the listing agreement in question presented the owner with a true option or alternative. Specifically, the owner could continue the listing or could change his mind about selling the property, terminate the exclusive listing agreement, and pay the sum specified in the contract. The court concluded the payment required upon termination was valid because it did not have "the invidious qualities characteristic of a penalty or forfeiture." (*Ibid.*.) In summary, a contract provision that provides a party with a true alternative performance—that is, an alternative that provides a rational choice between two reasonable possibilities—does not involve an unenforceable penalty. (*Id.* at p. 971, 115 Cal.Rptr. 31, 524 P.2d 127; see *Parsons v. Smilie* (1893) 97 Cal. 647, 32 P. 702 [land purchaser's decision not to satisfy a condition subsequent by operating a lumberyard on the property for five years was willful and therefore he did not qualify under Civ.Code, § 3275 for relief from forfeiting property back to seller].)

Here, the conditions contained in the Lease regarding Mervyn's and the occupancy of its space did not provide Grand Prospect with an alternative performance because, at the time the Lease was made, Grand Prospect did not own the space or have any opportunity to affect, much less control, Mervyn's decision to cease its operations.

3. California's Test of Invalid Penalties

Under California law, the characteristic feature of a penalty is the lack of a proportional relationship between the forfeiture compelled and the damages or harm that might actually flow from the failure to perform a covenant or satisfy a condition. (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977, 73 Cal.Rptr.2d 378, 953 P.2d 484.) In other words, an unenforceable penalty "bears no reasonable relationship to the range of actual damages the parties could have anticipated would flow" from a breach of a covenant or a failure of a condition. (*Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495, 497, 78 Cal.Rptr.3d 24.)

Therefore, the general rule for whether a contractual condition is an unenforceable penalty requires the comparison of (1) the value of the money or property forfeited or transferred to the party protected by the condition to (2) the range of harm or damages anticipated to be caused that party by the failure of the condition. If the forfeiture or transfer bears no reasonable relationship to the range of anticipated harm, the condition will be deemed an unenforceable penalty.

****257** ***1359** C. *Separate Conditions with Separate Consequences*

The next legal question we address is whether the test for invalid penalties should be applied to section 6.1.3(b) as a whole or whether the rent abatement provision and termination provision should be analyzed separately. We conclude the provisions must be analyzed separately.

Ross's right to rent abatement is separate from its option to terminate because (1) the abatement of rent existed whether or not Ross subsequently exercised its option to terminate the Lease, (2) each right was triggered by different (albeit, partially overlapping) conditions, and (3) each provision resulted in different consequences to the landlord-tenant relationship between Grand Prospect and Ross. Pursuant to section 6.1.3(b) of the Lease, the right to rent abatement came into existence if there was a Commencement Date Reduced Occupancy Period and continued in effect until the reduced occupancy was cured. In contrast, the option to terminate arose if the Commencement Date Reduced Occupancy Period continued for 12 consecutive months and was exercised by Ross giving a termination notice before the reduced occupancy was cured.

Given the distinct features of the rent abatement and termination provisions, we conclude the validity of each provision must be determined separately.

IV. Rent Abatement

A. *Overview of Validity of Rent Abatement Provisions*

There is no general rule of law that states all rent abatement provisions in a commercial lease are valid or invalid. As the following cases from other jurisdictions indicate, whether a particular rent abatement provision operates as an unreasonable penalty depends upon the specific facts and circumstances of the case.

1. Rent Abatement Provisions That Were Penalties

In *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust* (2004) 156 Ohio App.3d 65 [2004 Ohio 411, 804 N.E.2d 979 (*Mark-It Place*), a grocery store's lease included an exclusive use provision that required an abatement of rent while a violation was in effect. (*Id., 804 N.E.2d* at p. 1002.) The landlord later leased space in the shopping center to Wal-Mart without including a provision prohibiting Wal-Mart from selling groceries and other foodstuffs listed in the grocery store's exclusive use provision. (*Id.* at pp. 985-986.) The trial court concluded the lease's rent abatement provision ***1360** was a valid liquidated damages clause and not an unenforceable penalty. (*Id.* at p. 987, fn. 4.) The appellate court disagreed, noting that the Wal-Mart lease could run for 50 years and conceivably allow the tenant to remain in the shopping center without paying rent for that period. (*Id.* at p. 1003.) As a result, the court concluded the provision abating the rent was a draconian penalty prohibited by Ohio case law. (*Ibid.*)

Consequently, *Mark-It Place* provides an example of a rent abatement provision that was deemed an unenforceable penalty.

In *Sunny Isle Shopping Center, Inc. v. Xtra Super Food Centers, Inc.* (D.V.I.2002) 237 F.Supp.2d 606, a tenant operating a supermarket in a shopping center had a lease that stated the landlord would not permit another tenant to sell food for consumption off premises and a violation of the covenant would allow the tenant to withhold its rent. (*Id.* at pp. 607-608.) The landlord violated this provision by leasing space to Kmart Corporation, a company that offered groceries for sale. (*Id.* at p. 608.) The tenant began withholding rent and the landlord filed suit ****258** seeking a declaration that the provision was unenforceable. (*Ibid.*) The tenant moved for summary judgment on the landlord's claim that the rent-withholding provision was an unenforceable penalty. (*Id.* at p. 612.) The district court denied the motion because it was unclear from the evidence whether the tenant had suffered any financial loss since Kmart's arrival or whether any such losses were attributable to Kmart's sale of food products. The existence of these factual questions precluded the court from determining the rent-withholding provision was enforceable and granting the tenant summary judgment. Accordingly, this case provides an example of a provision for the abatement of rent that *might* be deemed an unenforceable penalty.

2. Rent Abatement Provisions That Were Not Penalties

Some challenges to rent abatement provisions in commercial leases have failed. The federal decisions include *Red Sage Limited Partnership v. Despa Deutsche Sparkassen Immobilien-Anlage-Gasellschaft mbH* (D.C.Cir.2001) 347 U.S. App.D.C. 75 [254 F.3d 1120] (rent abatement provision resulting from breach of exclusive use covenant was enforceable) and *N. Providence, LLC v. The Great Atlantic & Pacific Tea Company, Inc.* (S.D.N.Y.2014) 510 B.R. 42 (forfeiture of rent during period landlord did not pay construction allowance was enforceable under N.J. law).

Decisions from state appellate courts include *Majestic Cinema Holdings, LLC v. High Point Cinema* (2008) 191 N.C.App. 163, 662 S.E.2d 20 (reversed trial court's decision that lease provision requiring the landlord to open 15,000 square feet of adjacent retail space or forgo rent from tenant ***1361** was unenforceable penalty) and *Bates Advertising USA, Inc. v. 498 Seventh, LLC* (2006) 7 N.Y.3d 115, 818 N.Y.S.2d 161, 850 N.E.2d 1137, 1140 (enforceable rent abatement was keyed to the number of days of landlord's nonperformance and varied from a half-day to a day depending upon the importance of the item of work not completed by landlord).

The foregoing cases demonstrate that there is no categorical rule of law holding rent abatement provisions are enforceable or unenforceable. Thus, it is possible to draft a rent abatement provision that is reasonably related to the anticipated harm likely to be suffered.

B. *Rent Abatement Provision Was a Penalty in This Case*

Generally, a contractual provision is an unenforceable penalty if the value of the money or property forfeited or transferred to the party protected by the provision bears no reasonable relationship to [12] the range of harm anticipated to be caused to that party by the failure of the provision's requirements. (See pt. III.B.3., *ante.*)

The application of the legal test defining contractual penalties requires this court to identify (1) the value of property forfeited or transferred by Grand Prospect and (2) the anticipated harm or damages that Ross was likely to have experienced as a result of the failure of the conditions specified in the rent abatement provision. The reference to *anticipated* harm or damage indicates that courts examine the circumstances that existed at the time of the ****259** making of the contract when determining if the provision is enforceable.

1. Value of Property Forfeited or Transferred

Under the terms of the Lease, Grand Prospect (1) transferred to Ross the right to possession of the retail space and (2) lost the right to receive monthly rent. Regardless of whether the loss is conceptualized as the forfeiture of possession of real estate or rent, we conclude the value of the rights relinquished by Grand Prospect pursuant to the rent abatement provision can be quantified by the rental rate set forth in the Lease.

The Lease specified the minimum rent as $33,473.92 per month. The Lease also required Ross to pay a pro rata share of (1) the costs for maintaining and repairing the shopping center's common areas, (2) real property taxes and assessments, and (3) certain insurance premiums.

***1362** Ross's pro rata share of these items is reflected in the calculations of Stuart Harden, a certified public accountant retained by Grand Prospect as an expert witness. Harden calculated the amount of damages Grand Prospect experienced from May 10, 2009, to June 11, 2010, using Civil Code section 1951.2. Under this statute, when a tenant's breach of a lease causes a termination, a landlord may recover "[t]he worth at the time of award of the unpaid rent which had been earned at time of termination." (Civ.Code, § 1951.2, subd. (a)(1).) Harden calculated (1) the unpaid rent as $513,320 and (2) the accrued interest as $158,780, using an interest rate of 10 percent. Harden added these two figures together and concluded the damages for the 13-month period were $672,100.

The jury accepted Harden's calculations when it answered "$672,100" to a question in the special verdict form about "[t]he worth at the time of award of the unpaid rent which had been earned at the time of termination."

Based on the trial court's finding that the withheld rental payments for 13 months totaled $513,320 (which is consistent with the jury's finding as to damages), we conclude that the value of the property rights Grand Prospect relinquished pursuant to the rent abatement provision was approximately $39,500 per month.

2. Trial Court's Findings as to the Harm Anticipated

At page 4 of its statement of decision, the trial court explicitly found "Ross did not anticipate any damage, *i.e.,* lost sales or profits, if or because Mervyn's would not be open on the Commencement Date." The court also found "the presence of Mervyn's was not a condition material to Ross under the Lease...." The court reiterated its findings about anticipated harm at page 16 of its statement of decision when it compared that harm to the value of the property forfeited by Grand Prospect:

> "[T]he withheld Rent of $513,320 for the 13 months Ross maintained possession of the Premises[ ] bears no reasonable relationship to the actual damages Ross anticipated it would have suffered *if it had opened its store* at the [Porterville] Marketplace even though Mervyn's was not open on the Commencement Date because Ross did not anticipate it would suffer any damages in such an event." (Italics added.)

Ross does not challenge these findings of fact by the trial court on the ground they are unsupported by substantial evidence. Such a challenge would have failed in light of the e-mails and trial testimony of the Ross executives (Toth, McGillis and Fassio) cited by the trial court. The executives testified that no study or analysis was done to determine ****260** the impact of Mervyn's traffic on Ross's potential sales or, alternatively, the impact of Mervyn's ***1363** closure on Ross's potential sales. Furthermore, in October 2008 after the Ross executives learned of the Mervyn's closure, they held the view that the Porterville Marketplace remained a desirable location for a store. McGillis testified that he was unable to state, one way or the other, whether the closure of Mervyn's stores in shopping centers where Ross was present adversely affected Ross's sales.

3. Ross's Theory of Error as to Anticipated Harm

Ross contends the trial court's analysis is "deeply flawed" because the "court assumed—without analysis—that the relevant inquiry was whether Ross expected to sustain losses *if it opened and operated the store,* and paid rent, despite Mervyn's closure." Ross contends the legally relevant evaluation of the cotenancy provisions "should have recognized that Ross would be entitled to defer opening its store as a way of mitigating its damages if Mervyn's failure to operate its store were deemed a 'breach' by Grand Prospect."

Ross argues that, in the situation where Ross mitigated its damages by not opening a store, the parties anticipated that the failure of the opening cotenancy requirement would have damaged Ross in the sum of (1) the $38,000 rent and common area charges it would have paid during the 12-month period, (2) all of the costs Ross would have incurred in building out and preparing to open the store, (3) unavoidable costs of maintaining the premises during that period, and (4) the loss of profits Ross expected to earn from operating the store with both Mervyn's and Target open for business in the shopping center.

We conclude Ross's arguments have failed to identify a legal error in the trial court's analysis of the anticipated harm the cotenancy provisions purportedly addressed.

First, Ross has not shown it objected to the trial court's statement of decision on the ground it omitted the relevant legal analysis.

Second, Ross has cited no legal authority to support its position that an inquiry into anticipated harm is limited to whether the tenant expected to sustain losses if it did *not* open and operate the store. Ross's position about the relevant inquiry is not consistent with the applicable legal standard. Under that standard, a court evaluating a contractual provision that might be a penalty must consider *the range of harm or damages anticipated* to be caused to that party by the failure to meet the contractual requirement by evaluating the circumstances existing at the time the contract was made. In considering this range, a court may not focus on a single scenario to the exclusion of ***1364** others, which is what Ross argues the trial court should have done. Consequently, Ross's argument about the relevant inquiry fails to identify trial court error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193 [appellant has the burden of affirmatively demonstrating prejudicial error].)

Third, the trial court's findings about anticipated harm support an implied finding regarding the causation of the purported harm described by Ross. Specifically, if the parties anticipated that Ross would have no damages if it opened and operated the store, then it logically follows that any lost profits resulting from Ross's decision not to open the store would not flow from (i.e., been caused by) Mervyn's absence. Instead, the loss of profits would be caused by Ross's own decision not to open the store—that is, the losses would have been self-inflicted.

****261** Fourth, Ross appears to assert that, when it decided not to open the store, it was motivated by the desire to mitigate its damages. Under the well-established principles of appellate practice, we cannot accept (1) the factual assertion as to Ross's motivation or (2) the assertion that Ross, in fact, mitigated any damages by deciding not to open a store. The trial court made no such findings on these specific points and this court may not presume the existence of these purported facts. The judgment of the trial court is presumed correct and all intendments and presumptions are indulged to support that judgment. (*Denham v. Superior Court, supra,* 2 Cal.3d at p. 564, 86 Cal.Rptr. 65, 468 P.2d 193.) Under this principle and the doctrine of implied findings, an appellant such as Ross is not entitled to presume the existence of facts that support its claim of error unless the existence of that fact is the only reasonable deduction to be drawn from the evidence. Viewing the evidence in the light most favorable to the judgment, we must conclude Ross's decision was not motivated by the desire to mitigate its damages, but was part of a failed strategy to renegotiate the rent and achieve greater profits from a store at that location. Similarly, we must conclude that Ross caused, rather than mitigated, any damages it might have experienced because it was not operating a store at the Porterville Marketplace.

In summary, Ross has failed to demonstrate the trial court erred in its analysis of the damages or harm anticipated to flow from the failure of the conditions in the rent abatement provision.

4. Comparison of Anticipated Harm to Value Forfeited

The trial court's finding that there was no anticipated damage expected to flow from the Mervyn's vacancy makes the final step of the penalty analysis—the comparison of anticipated harm to the value of the property forfeited—relatively simple.

***1365** The value of the property forfeited by Grand Prospect was approximately $39,500 per month. As found by the trial court, no harm was anticipated to result from the Mervyn's vacancy. Therefore, we agree with the trial court's determination that there was no reasonable relationship between the value of the property forfeited by Grand Prospect ($39,500 per month) and the anticipated harm to Ross ($0 per month). Accordingly, the trial court correctly concluded the rent abatement provision was an unenforceable penalty.

5. Civil Code Section 3275

In reaching its conclusion that the rent abatement provision was an unenforceable penalty, the trial court referred to Civil Code section 3275, which provides:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

The trial court addressed the requirement for making full compensation to the other party by finding Ross's compensation would be the cost of installing and removing its signs. The court stated Ross did not offer evidence and no evidence was admitted as to these costs. As a result, the court did not require Grand Prospect to compensate Ross for these costs.

Ross argues Civil Code section 3275 is not applicable to the facts of this case because the cotenancy provisions were conditions, not an "obligation" as that term is used in the statute. (See ****262** *Parsons v. Smilie, supra,* 97 Cal. at p. 654 [question noted but not decided].) We reject Ross's proposed interpretation of the statute. (See *Root v. American Equity Specialty Ins. Co., supra,* 130 Cal.App.4th at pp. 939-940, 30 Cal.Rptr.3d 631.) Instead, we conclude contracts are a type of "obligation" covered by Civil Code section 3275. (See Civ.Code, § 1428 [obligations are created by contract or operation of law].) Therefore, the phrase "the terms of an obligation" includes the terms of a contract, even when those terms are drafted as conditions precedent. (See Civ.Code, §§ 1434 [conditional obligation defined], 1436 [condition precedent defined].) Consequently, if a conditional provision in a contract constitutes an illegal penalty, then the affected party "incurs a forfeiture" for purposes of Civil Code section 3275 and "may be relieved therefrom." (Civ.Code, § 3275.)

Therefore, the trial court did not err when it applied Civil Code section 3275 to the rent abatement provision in the Lease.

V. Termination Provision

Section 6.1.3(b) of the Lease provided Ross with an ongoing option to terminate the Lease upon 30 days' notice if the Commencement Date ***1366** Reduced Occupancy Period continued for 12 consecutive months and Ross's termination notice was given before the reduced occupancy was cured. Our analysis of whether the termination provision operated as a forfeiture begins with the rules that govern the termination of a commercial lease. If a forfeiture occurred, then we will subject the termination provision to scrutiny under the general rule that requires a reasonable relationship between the value of the property forfeited and the anticipated harm.

A. *Rule of Law Applicable to a Commercial Lease Termination Provision*

California courts have developed a specific rule that applies to termination provisions in commercial leases. The rule was stated by the California Supreme Court in *C.M. Staub Shoe Co. v. Byrne* (1915) 169 Cal. 122, 145 P. 1032 (*Staub Shoe*), which involved a commercial lease with a provision stating the lease shall cease and become null and void if the premises were damaged by fire and the damage was so severe that it could not be repaired within 60 days. (*Id.* at pp. 126-127, 145 P. 1032.) After a fire occurred, the tenant wanted to remain in possession and claimed the repairs could be completed within 60 days. The landlord disagreed and seized the property. The tenant filed an action for damages resulting from its exclusion from the property. (*Id.* at p. 124, 145 P. 1032.) After a bench trial, a judgment was entered in favor of the landlord. (*Id.* at p. 125, 145 P. 1032.) Our Supreme Court upheld the judgment for the landlord, stating "the ... clause makes entirely reasonable provision for the various contingencies that might result in case of fire or other injury to the building or premises. There is here no basis for applying the rule of strict interpretation against conditions involving forfeiture. (Civ. Code, sec. 1442.) The clause terminating the lease in certain contingencies does not declare a forfeiture. It fixes events, having no relation to any act or default of the parties, upon which it is agreed that the lease shall end." (*Id.* at p. 129, 145 P. 1032; *Caswell v. Gardner* (1936) 12 Cal.App.2d 597, 600, 5 P.2d 1222 [contingent termination provision in lease

did not result in a forfeiture]; see also 7 Miller & Starr, Cal. Real Estate (3d ed. 2011) Landlord and Tenant, § 19:186, pp. 578-579 [exercise of an option to terminate lease].)

****263** Similarly, in *11382 Beach Partnership v. Libaw* (1999) 70 Cal.App.4th 212, 82 Cal.Rptr.2d 533, a landlord and a tenant entered into a commercial lease that stated either party could cancel the lease if a fire destroyed the premises within two years before the lease expired. (*Id.* at p. 215.) After a fire, the tenant exercised a five-year option under the lease. The landlord canceled the lease, returned the tenant's latest rent check and threatened legal action to recover possession of the premises. The tenant filed a declaratory relief action and the landlord filed a cross-complaint for damages and quiet title. The trial court found for the landlord, holding the cancellation provision prevailed over ***1367** the tenant's option to extend the lease. On appeal, the judgment quieting title in the landlord was affirmed. (*Id.* at p. 220.) The appellate court relied upon *Staub Shoe* to conclude the tenant had failed to establish a forfeiture occurred when the lease was cancelled. (*11382 Beach Partnership v. Libaw, supra,* at pp. 217-218.)

Based on these cases, we conclude that when a commercial lease contains a clause allowing termination upon the occurrence of contingencies that (1) are agreed upon by sophisticated parties and (2) have no relation to any act or default of the parties, no forfeiture results from the exercise of the termination clause. This specific rule of law controls over the general test usually applied to determine if a contract provision is an unenforceable penalty. In others words, the law declares that certain termination provisions do not create a forfeiture and, therefore, those provisions cannot be deemed unenforceable penalties or a forfeiture from which relief can be granted under Civil Code section 3275.

B. *Application of Law to Facts of This Case*

The facts of this case show that the foregoing rule regarding termination provisions in commercial leases applies to the termination provision in section 6.1.3(b) of the Lease. First, Ross's right to terminate the Lease was based on contingencies (i.e., conditions) that were agreed upon by sophisticated parties. Second, the conditions that triggered the right to terminate had no relation to any act or default of the parties because, when the Lease was made, neither Ross nor Grand Prospect could control whether Mervyn's continued to operate a store in the shopping center or whether that space would be occupied by the type of anchor tenant specified in the Lease.

Because these facts are not disputed, the application of the rule set forth in *Staub Shoe* and confirmed in subsequent cases presents a question of law. (See *Weakly-Hoyt v. Foster* (2014) 230 Cal.App.4th 928, 179 Cal.Rptr.3d 734, [application of law to undisputed facts presents a question of law subject to de novo review].) Pursuant to that rule, we conclude the termination provision exercised by Ross did not cause a forfeiture. Therefore, the trial court committed legal error when it concluded (1) the termination provision was unenforceable, (2) the termination provision could be severed from the Lease, (3) Ross breached the Lease by exercising the option to terminate the Lease, and (4) this breach of the Lease entitled Grand Prospect to recover damages resulting from the termination of the Lease. The proper conclusion is that the termination provision is valid and Ross could rely on it to terminate the Lease.

Correcting this legal error is straightforward because the special verdict form completed by the jury separated Grand Prospect's damages before ***1368** termination from ****264** the other items of damage. Consequently, this court can modify the judgment by implementing the jury's finding as to the worth of the unpaid rent earned at the time of termination ($672,100) from the three other categories of damages that should not have been awarded.

VI. Additional Issues[**]

DISPOSITION

The amended judgment filed April 18, 2013, is modified such that the reference to “the sum of $3,785,714.86” shall be reduced to “the sum of $672,100.00” and the matter is remanded for further proceedings in accord with this opinion regarding the award of attorney fees. After those proceedings, the trial court shall make appropriate modifications, including replacing the amended judgment's reference to “a total award of $4,701,990.83” with an amount that reflects the damage award of $672,100 plus the attorney fees awarded by the trial court on remand.

The parties shall bear their own costs on appeal.

WE CONCUR:

Kane, Acting P.J.

Peña, J.

All Citations

232 Cal.App.4th 1332, 182 Cal.Rptr.3d 235, 15 Cal. Daily Op. Serv. 325, 2015 Daily Journal D.A.R. 409

Footnotes

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part VI.

1 Lease provisions that require other stores in a shopping center to be occupied by operating businesses generally are referred to as cotenancy requirements or conditions. (See 1 Retail Leasing: Drafting and Negotiating the Lease (Cont.Ed.Bar 2014) ch. 7, pp. 7-1 to 7-29 (rev. 11/14) (*Retail Leasing*).)

2 Grand Prospect was not Mervyn's landlord because Mervyn's owned its building in the shopping center. Therefore, Grand Prospect had no control over whether Mervyn's continued to operate in the shopping center. After Mervyn's closed its store, Grand Prospect purchased the building and subsequently leased most of the space to Kohl's Department Stores.

3 The construction of the Ross tenant improvements cost Grand Prospect more than $2.3 million.

4 The Lease defined the commencement date as 90 days following the delivery date.

5 Section 1.7.1 of the Lease also included the following operating condition: “Provided that the Required Co-Tenancy set forth in Sections 1.7.1 and 1.7.2 is satisfied on the Commencement Date, during the remainder of the Term, the Required Co-Tenant shall be either Mervyn's or Target occupying no less than the Required Leasable Floor Area indicated in (a) and (b) above. The Required Co-Tenant may be replaced by a nationally or regionally recognized Anchor Tenant (as herein defined) reasonably acceptable to Tenant, operating in no less than the Required Leasable Floor Area of the Required Co-Tenant being replaced. An ‘Anchor Tenant’ is a national retailer with at least one hundred (100) stores or a regional retailer with at least seventy-five (75) stores occupying no less than the Required Leasable Floor Area of the Required Co-Tenant being replaced.”

6 The rent abatement provision might have allowed Ross free rent for the 10-year initial term of the Lease and perhaps during the optional renewal periods, so long as the vacancy of Mervyn's space was not cured with a replacement anchor tenant.

However, the “Commencement Date Reduced Occupancy Period” clearly was curable, even though the Lease's requirement that Mervyn's and Target be operating *on the commencement date* could not be satisfied by a substitute tenant operating in the same space on the commencement date. The commencement date requirement focused solely on commencement date operations by Mervyn's and Target and was significant because, if satisfied, for the remainder of the Lease the required cotenant could be *either* Mervyn's or Target. In contrast to the commencement date requirement, the provision regarding the Commencement Date Reduced Occupancy Period involved an examination of circumstances existing after the commencement date. For instance, if the type of national or regional retailer described in section 1.7.1 of the Lease began operating in Mervyn's space on or before the commencement date, there would have been no Commencement Date Reduced Occupancy *Period*.

7 Civil Code section 1670.5 was adopted verbatim from section 2-302 of the Uniform Commercial Code, but expanded its coverage to include all contracts, not just those for the sale of goods. (*Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, 81 [2 Cal.Rptr.2d 845].)

8 This case does not involve surprise and, therefore, that aspect of procedural unconscionability is not discussed further. (See *McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330, 1349, 169 Cal.Rptr.3d 766 (*McCaffrey*) [surprise typically involves a provision hidden within the prolixity of a preprinted form contract].)

9 We recognize that showing a contract is one of adhesion does not always establish procedural unconscionability. (See *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1470, fn. 2, 92 Cal.Rptr.3d 153 [in some situations, the oppression typically inherent in adhesion contracts is minimal].)

10 Pressure can come from a stronger party using high-pressure tactics, coercion or threats short of duress. (See *Lovey v. Regence BlueShield of Idaho* (2003) 139 Idaho 37, 42, [72 P.3d 877, 882].) Pressure also can be generated by surrounding circumstances such as market conditions and factors affecting timing. (*Ibid.;* see Comment, *The Philosophical Dimensions of the Doctrine of Unconscionability* (2003) 70 U. Chi. L.Rev. 1513, 1514 [urging unconscionability be "defined solely by reference to external factors that may prevent parties from making free choices"].)

11 We note that California Supreme Court decisions more recent than *Armendariz* have not included the "standardized contract" element in their descriptions of adhesion contracts. (See *Sonic-Calabasas A, Inc. v. Moreno, supra,* 57 Cal.4th at p. 1133, 163 Cal.Rptr.3d 269, 311 P.3d 184; *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979.) Thus, it is possible to have a contract of adhesion when a contract is used in one transaction—that is, is not standardized for use in multiple transactions.

12 The phrase "bears no reasonable relationship to" is synonymous with "bears no rational relationship to" (*Sybron Corp. v. Clark Hosp. Supply Corp.* (1978) 76 Cal.App.3d 896, 903, 143 Cal.Rptr. 306) and "without regard to" (*Ebbert v. Mercantile Trust Co.* (1931) 213 Cal. 496, 499, 2 P.2d 776; *Fox Chicago, supra,* 50 Cal.App.2d at p. 134, 122 P.2d 705).

** See footnote *, *ante*, page 1332.

End of Document

EXHIBIT Altanovo-29

197 Va. 554
Supreme Court of Appeals of Virginia

HENRY C. BOLLING
v.
HAWTHORNE COAL AND COKE COMPANY, A CORPORATION.

Record No. 4405.
|
November 28, 1955.

***554** Present, All the Justices.

Synopsis

Action was brought for declaratory judgment to establish right of plaintiff to remove certain structures from realty, and the defendant filed a cross-bill denying right of plaintiff to remove the structures. The Circuit Court of Wise County, George Morton, J., entered judgment adverse to the defendant, and the defendant appealed. The Supreme Court of Appeals, Spratley, J., held that where instruments, which constituted the contract of the parties, contained obvious inconsistencies, conflicts, and ambiguities, extrinsic evidence concerning preliminary negotiations between parties and meaning of language used in connection with surrounding facts and circumstances should have been considered, not for varying or contradicting the plain terms of the instruments, but to determine the real meaning and intention of the parties.

Reversed and remanded.

VIRGINIA REPORTS SYNOPSIS

Appeal from a decree of the Circuit Court of Wise county. Hon. George Morton, judge presiding.

Reversed and remanded.

The opinion states the case.

VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

(1) Fixtures — Parties May Fix Character of Property by Contract.

1. Parties to an agreement may fix the character and ownership of property, which in the absence of contract would be held a fixture, where no absurdity or general inconvenience would result.

(2) Contracts — Instruments Simultaneously Executed — Constitute Single Contract.

2. Bolling owned a tract of land on which was located a coal and coke plant. In negotiations prior to July 1, 1948, he agreed to sell this land to Hawthorne. On that date the parties executed a Lease and Option, under which the land was leased to Hawthorne for a term of four years, with option to buy at the end of the term, lessee agreeing to return the property in operating condition if the option was not exercised. Simultaneously they executed an Agreement setting the rental at $4,000 a month (the fair rental being $2,000), allowing Hawthorne to set the purchase price if the option was exercised, allowing cancellation by Hawthorne after 24 months, and giving it the right to remove all ‘equipment, improvements and machinery‘ placed on the premises by it if the lease was cancelled or upon failing to exercise the option. In the instant suit to determine Hawthorne's right to remove two coal tipples and certain plumbing and heating equipment after cancellation of the contract it was held that the Lease and Option and the Agreement constituted a single contract and should be read as one instrument.

(3) Contracts — Nature of Transaction as Lease or Sale — Intention of Parties Controls.

3. Despite the studied effort to give the transaction the appearance of a lease, its obvious purpose and natural effect were to consummate a contract of conditional sale. The nature of a transaction is to be determined from the ruling intention of the parties as gathered from their language and the circumstances surrounding its use.

(4) Contracts — Ambiguity — Extrinsic Evidence Admissible.

4. There were obvious inconsistencies and ambiguities in the two instruments which created doubt as to the real meaning of the parties and required that extrinsic evidence be received in explanation.

(5) Real Property — Improvements — Permanent Improvements Held Property of Owner.

5. Under the agreement of the parties, evidenced by their contract as explained by the extrinsic evidence, upon cancellation of the contract by Hawthorne, Bolling was entitled to the tipples and other permanent improvements placed on the premises by Hawthorne, and Hawthorne to all personal property so placed by it, not permanently annexed to the realty. Bolling was furthermore entitled to his damages

for failure by Hawthorne to return the plant in operating condition.

END OF VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

Attorneys and Law Firms

****161 *555** *M. M. Long* and *Joseph Michael Kuczko,* for the appellant.

Greear, Bowen, Mullins & Winston, for the appellee.

Opinion

JUDGE: SPRATLEY

SPRATLEY, J., delivered the opinion of the court.

This is a proceeding by Hawthorne Coal and Coke Company, a corporation, hereinafter referred to as Hawthorne, for a declaratory judgment against Henry C. Bolling, establishing its right to remove a railroad coal tipple, a domestic coal tipple, a heating plant, and certain plumbing fixtures in a store and office building constructed or placed on the lands of Bolling by Hawthorne. Petitioner prayed the Court 'to construe and interpret' an 'Agreement' between the parties, dated July 5, 1948, a copy of which was filed with its petition.

Bolling filed an answer and cross-bill, denying the right of Hawthorne to remove the tipples, the heating system or the plumbing fixtures, on the ground that under a 'Lease and Option,' dated July 5, 1948, and referred to in the 'Agreement' of that date, it was understood and agreed by the parties at the time that the entire contract constituted a sale of the lands, coal and coke plant therein described, on an installment basis; that it was agreed ***556** between the parties before and at the time of the execution of the two instruments that in no event should buildings or other permanent fixtures placed upon the premises by Hawthorne be considered as improvements subject to be removed by the latter; that the tipples are permanent structures attached to the freehold and the heating plant and plumbing fixtures in question are permanent fixtures fastened to buildings in such a manner as would cause great damage to the buildings if removed; that Hawthorne has not complied with its contract to return said property in as good condition as when received by it, and in a condition to operate as a going concern; that under the terms of its contract Hawthorne has the right to remove such equipment, improvements and machinery as can be removed without damage to the buildings, but in no event has it the right to remove any of such property until it has fully complied with the terms of its original agreement; and that he, Bolling, was willing to try to reach an agreement with Hawthorne as to the value of any equipment and machinery placed by it upon the property which were not replacements for like property of Bolling that had become broken, damaged, removed or destroyed during Hawthorne's occupancy. A copy of the said 'Lease and Option' was annexed to the answer.

In his cross-bill, Bolling alleged damages to his property, both personal and real, and prayed for a judgment in the sum of $30,000 against Hawthorne.

Voluminous evidence was taken by depositions, and the Court delivered a written opinion, in which it held that the pertinent provisions of the 'Agreement' were not in conflict with any provision in the 'Lease and Option;' that the contentions of Bolling were in contradiction of the written instruments; and that Hawthorne was entitled to recover from Bolling all of the equipment, improvements and machinery placed by it on the premises in question and 'in addition, a fair rent for the time they had been used by Bolling, or the fair value of such equipment, improvements and machinery at the time that Bolling took possession, with interest from that time; and that the defendant is entitled to recover from Hawthorne such damages as he may have sustained by its failure to turn back the leased premises to the defendant as a going concern, and in shape to operate, in as good condition as when received from lessors, reasonable wear and tear excepted.'

The parties being unable to arrive at an amicable settlement of ***557** their differences, the Court entered a decree in accordance ****162** with its opinion, and referred the cause to special commissioners, who were directed to ascertain and report what equipment, machinery and improvements of Hawthorne were withheld by Bolling; the fair cash and fair rental value of each piece or article of said property as of July 1, 1950; the damages which Bolling may have sustained by reason of Hawthorne's failure to turn back the 'leased premises' as a going concern, etc.; and any other matter or thing deemed relative or pertinent.

The two instruments to be construed were simultaneously executed on July 5, 1948, to take effect as of July 5, 1948. One is called an 'Agreement;' and the other is called 'Lease and Option.' Both were prepared in Bolling's office, Bolling being an attorney at law, on his paper, and typed by his secretary, as dictated by Walter A. Kelley, counsel for Hawthorne. Present

in addition to Kelley and Bolling were H. L. Thompson, President of Hawthorne, Wallace Powers, a law associate of Kelley's, and Jack L. Sullivan, agent of H. L. Thompson, and Vice-President of Hawthorne.

The pertinent provisions of the instrument called ‘Lease and Option‘ are:

‘That for the sum of $1.00, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Lessors (H. C. Boling and wife) do hereby demise, lease and let unto the Lessee, (Hawthorne) its successors and assigns, those certain lots, tracts or parcels of land, together with all the buildings, improvements, rights, privileges and appurtenances thereunto pertaining, lying and being in the County of Wise, State of Virginia, and more particularly bounded and described as follows: (Here follows a description of approximately nineteen acres of land.)

<‘1. TERM>

‘This lease shall be fully effective and in force for a period of four (4) years, extending from the beginning of the first day of July, 1948, to the end of the 30th day of June, 1952, and the Lessee for itself and successors and assigns, agrees and covenants to pay unto the Lessors in advance on or before the 10th day of the month, a monthly rental to be agreed upon by Lessors and Lessee.

<‘2. OPTION TO PURCHASE>

‘Lessors hereby give and grant to the Lessee, its successors and ***558** assigns, the exclusive right or option to purchase at any time within thirty (30) days from the 30th day of June, 1952, all property of every kind, whether real or personal, leased to the Lessee, by the terms of this agreement, at a price to be determined by agreement of the Lessors and Lessee.

‘In the event of Lessee electing to exercise this option the Lessors shall convey all real estate to Lessee by general warranty deed, and all personal property by a proper bill of sale.

<‘3. REMEDIES OF LESSORS>

‘The Lessors shall have all the usual rights and remedies provided by statute for the collection and enforcement of rents payable hereunder as between landlord and tenant. If the Lessors do not receive any rental when due, the Lessors may at their option, and in either event, give notice in writing to the lessee of such default, and if the Lessee shall fail to pay the same within thirty days after receipt of such notice, then the Lessors may at their option, terminate all rights of the Lessee hereunder and Lessors shall be entitled to possession of the lands, together with all improvements, machinery, equipment and all property of every kind and nature thereon, upon written notice of the Lessee.

<‘6. OPERATION OF PROPERTY>

‘Lessee shall operate the property in a careful workmanlike manner, and keep the same in a good state of repair at its own cost and expense, and ****163** in the event of the termination of this Lease and Agreement, Lessee shall turn over the property and all improvements, fixtures and equipment thereon to Lessors, as a going concern, and in shape to operate, in as good condition as when received from Lessors, reasonable wear and tear excepted.

<‘9. REMOVAL OF EQUIPMENT>

‘Lessee shall have the right to remove at any time, all or any part of the machinery, equipment and personal property leased herein, provided it is replaced by machinery, equipment and personal property of equal or greater value.

<‘12. SUCCESSORS AND ASSIGNS>

* * *

‘All previous negotiations between the parties are merged in this ***559** instrument, which contains the complete agreement of the parties, except such conditional terms, conditions and covenants as are contained in that separate writing, designated therein and herein as 'AGREEMENT,’ entered into by and between the HAWTHORNE COAL AND COKE COMPANY, INC., and H. C. BOLLING, dba., HAWTHORNE COAL AND COKE COMPANY, bearing the same date as the date hereto, and executed simultaneously with the execution of this agreement.‘

In the ‘Agreement‘ we find the following provisions:

‘WITNESSETH THAT, in consideration of $1.00 and the mutual promises contained herein and in the said 'LEASE AND OPTION,’ the parties hereto agree as follows:

'3. RENTAL: HAWTHORNE agrees to pay BOLLING the sum of $4,000.00 per month for a period of 48 months, unless this agreement and the 'LEASE AND OPTION' are cancelled as provided in Paragraph 5 below. All rental shall be due and payable in advance on or before the 10th day of the month. This rental has been agreed upon by HAWTHORNE AND BOLLING, and is the rental to be agreed upon by the Lessors and Lessee in Paragraph 2 of Article 1, of the 'LEASE AND OPTION' referred to herein.

'4. OPTION TO PURCHASE: HAWTHORNE shall have the right to purchase all property set forth in the lease and agreement, including any additions thereto at the expiration of 48 months from date, at a price to be determined by HAWTHORNE, in its sole and absolute discretion, provided that all past due rentals are paid in full.

'5. CANCELLATION: HAWTHORNE shall have the right to cancel this agreement and the 'LEASE AND OPTION,' upon giving BOLLING ninety (90) days written notice of its intention to do so, provided, however, that if HAWTHORNE exercises this right of cancellation prior to the expiration of 24 months from date, it shall pay to BOLLING a minimum rental of $96,000.00 representing rent for 24 months. When 24 months rental have been paid, HAWTHORNE shall be under no obligation to continue to operate the property, provided it has given the notice set forth herein, and all past due rentals have been paid in full.

'6. OPERATION: The property is to be operated in a careful and business like manner, and in the event of cancellation or the failure of HAWTHORNE to exercise the option to purchase the property, all property set forth in the 'LEASE AND OPTION' is to be turned over to BOLLING in as good condition as when turned over to HAWTHORNE, reasonable wear and tear excepted. In the event of such ***560** cancellation or failure to exercise the option to purchase, BOLLING shall have the exclusive right for 90 days, to purchase all equipment, improvements and machinery placed on the property by HAWTHORNE, at a price to be determined by three appraisers, one to be appointed by HAWTHORNE, one by BOLLING and the third by the two so appointed. In the event BOLLING DOES ****164** NOT elect to purchase such equipment, improvements and machinery, HAWTHORNE shall have the right to remove the same, provided all past due rentals are paid and the properties are left in a condition to operate as a going concern.

'7. ADVANCE OF RENTAL: HAWTHORNE agrees to pay BOLLING six (6) months advance rental, amounting to $24,000, the receipt of which is hereby acknowledged, which sum is to be applied on the rental accruing for the 19th through the 24th months' occupancy. In the event this agreement and the 'LEASE AND OPTION' are cancelled in accordance with the provisions in Paragraph 5, prior to the expiration of 24 months, then this rental advanced shall be applied on the minimum rental provided for therein.'

* * *

In Clause 14 it is provided that:

'All previous negotiations between the parties are merged in this instrument, which contains the complete agreement of the parties, except such conditional terms, conditions and covenants as are contained in that separate writing, designated therein and herein as 'LEASE AND OPTION' entered into by and between THE HAWTHORNE COAL & COKE COMPANY, INC., and H. C. BOLLING: bearing the same date as date hereto, and executed simultaneously with the execution of this agreement.'

In another clause the Fork Junction Coal Company guarantees the payment of '24 months rental by Hawthorne.'

'A large number of witnesses testified and numerous exhibits were filed. The evidence may be summarized as follows:

Prior to the execution of the two instruments, Bolling was the owner of approximately nineteen acres of land, on which certain coke ovens were located, and he was operating and doing business under the name of Hawthorne Coal and Coke Company. In May, 1948, Jack L. Sullivan, a representative of H. L. Thompson, the President of the Red Ash Pocahontas Coal Company and owner of the Fork Janction Coal Company, told Bolling that Thompson was ***561** interested in the Hawthorne property. After some negotiations between Sullivan and Bolling, Thompson came to see Bolling at the plant and continued negotiations. Subsequently, he conferred with Bolling by writing and telephone calls. Bolling said that on July 1st, 1948, he reached an agreement over the telephone, whereunder Thompson agreed to buy the plant for $192,000 by paying $24,000 as a down payment and the balance in four years. Thompson wanted to pay the balance in three years, while Bolling desired the payments to extend over a five-year period. A compromise was reached fixing the period at four years.

The date of July 5th was set for the closing of the transaction, and it was agreed that the sale would be made as of July 1, 1948. Inventories of the stock and merchandise belonging to the operation were taken on the night of July 1st by Sullivan, and on the same day Bolling wrote Thompson confirming the sale of the property on a 'lease purchase basis at the figure mentioned in our agreement letters of June 19 and 21. * * *.' He added that Sullivan understood the situation and had been delivered a copy of the letter.

On July 5th, Thompson, Kelley and Powers, attorneys for Thompson, and Sullivan came to the office of Bolling at Norton, Virginia, to close the transaction as agreed upon between Bolling and Thompson. Kelley brought with him forms of instruments which he said had been used by Thompson in similar transactions. Kelley dictated two instruments to Bolling's secretary. Bolling expressed surprise when the drafted instruments were presented to him, because he said the conditions, price and payments had already been agreed upon and only the details were lacking. Kelley explained that the purpose of two instruments was to try to avoid federal income taxes on a capital investment, and that he ****165** thought he could get the Tax Department to construe the monthly installments as rental. Thompson made two or three changes, while Bolling suggested one change. Thompson was in a hurry to leave, and left before the papers were completed and executed, advising Bolling that Sullivan would act for the corporation. According to Bolling, he and Thompson had discussed the tipples the former had under construction, and it was agreed by Thompson that any buildings and tipples constructed or completed by Hawthorne would remain a part of the real estate in the event the purchase price was not fully paid and the plant was returned to Bolling; but that machinery would be classified as personal property, and they could ***562** arbitrate the price which he had to pay if he desired to purchase it. He said that Thompson, during their discussion, remarked that he had been raised in Giles County, Virginia, and understood the law to be that no buildings his Company might put on the premises could be removed, and there was 'no need to worry one minute about the completion of the payments on the contract, because we have bought the property.' H. L. Thompson did not appear as a witness and contradict this testimony, nor was his absence explained.

Hawthorne took possession of the property as of July 1, 1948. In June, 1949, Hawthorne purchased the property of the Norton Coal Company, one mile distant from the Bolling plant, and transferred to the Norton plant considerable of the former operations of the Hawthorne plant. Representatives of Hawthorne subsequently got in touch with Bolling on several occasions requesting him to agree to rewrite the instruments in order that it might obtain consent of the Bureau of Internal Revenue to pay income taxes on the basis of rentals instead of a purchase. Bolling, in the meantime, made his income tax returns on the basis of a sale of the property. Bolling said he refused to make any change and he was then advised by Hawthorne that it would not take the plant as a gift, because it was in a run down condition and in bad shape, and that its taxes would be in excess of the amount of the worth of the plant. Upon Bolling's continued refusal, Hawthorne, on August 11, 1949, notified Bolling of its intention to cancel the agreement and lease and option at the end of the 24-month period thereof, that is, on June 30, 1950. Nothing was said in the notice about the removal of the tipples, nor was there any expression of an intention to remove them, or attempt to do so until June 30, 1950, the last day of Hawthorne's possession. Bolling thereupon refused Hawthorne the right to remove any permanent improvements on the property.

The keys to the plant were delivered to Bolling on July 1, 1950. Bolling began an examination and inspection of his plant, and found that it had been damaged considerably and was not in a condition to operate. Ovens were not burning, some had to be repaired; the roof of one of the tipples was leaking; the machinery was in need of repair; tools and other personal property were missing; the buildings had been broken into; and a water tank had not been filled and its timbers had dried to such an extent it would not hold water, and Bolling was not able to get the plant in full operation until subsequent to August 8, 1950. He further found that Hawthorne had ***563** not then paid real estate taxes amounting to $388 during the two years it had the plant.

The records disclosed that Hawthorne had not listed the tipples or any permanent structure or property of any kind on Bolling's property for taxation in its name, and that the United States Bureau of Internal Revenue had filed a tax assessment as a lien against Hawthorne in the sum of $3,934.08. Hawthorne charged off the cost of the two tipples as depreciation during the two years of its occupation of the premises. Upon Hawthorne's refusal to disclose to the Clerk of Wise County, Virginia, the consideration for the Lease and Option, recordation was denied.

During the time Hawthorne had possession of the premises it constructed a domestic tipple costing $41,252.37 and a railroad tipple costing $15,077.53. It placed on ****166** the

premises a large crusher costing $2,800; installed a boiler and heating plant, as well as a plumbing system in the office building and made certain other improvements. The domestic tipple was built on concrete piers that extended four feet in the ground, with steel rods placed in the concrete. Its upright timbers, eight by eight inches in size, and larger, of green, rough oak timber, were drilled for the steel rods placed in the concrete piers. It was seventy-five feet high and approximately one hundred and twenty feet long. The railroad tipple, erected on wood sills, was smaller but built of substantial material of a similar nature. The timbers of both tipples were bolted together and nailed with forty and sixty penny nails. The siding on the tipples consisted of aluminum strips put on with screw nails. According to the testimony, the nails and bolts in the green lumber rust quickly and can not be removed without splitting the timbers, or cutting them off above the ends of the nails. The screw nails in the siding cannot well be removed.

W. A. Thompson, who was in charge of the construction of the two tipples, said the buildings could not have been made more permanent unless their timber uprights had been set in the soft concrete, and then they would have rotted. Seven months were required by a crew of from five to fifteen men to erect the tipples.

According to a statement filed on behalf of Bolling his loss and damage amounted to $38,000 for expenditures required to put the property in operation as a going concern.

Kelley testified that during the negotiations leading up to the final form of the agreement the words ‘equipment, improvements and ***564** machinery‘ were discussed at some length by all interested parties; that it was contemplated the small tipple would be installed next to the railroad siding which was already in existence, and the domestic tipple would be built where some work had been started by Bolling; that it was agreed in the event it was necessary to cancel the lease, or upon failure to exercise its option to purchase, Hawthorne would have the right to remove all equipment, improvements and machinery put by it on the property, and that in the discussion it was further agreed that the word ‘improvements‘ contemplated a permanent fixture to the property which, under ordinary circumstances, could not be removed.

Sullivan, the Vice-President of Hawthorne, testified that it was his understanding Hawthorne was buying the property; that the tipples were to be built and fastened to the land; that he never heard anything about removing them; that no instructions were given to him to build them in sections so that they could be removed; but that there was an understanding the machinery placed on the premises would be appraised, and if the price was not satisfactory to Bolling, it could be retained by Hawthorne.

It appears that prior to the sale, Bolling had expended $2,250 on a railroad sidetrack to the site of the railroad tipple, which he had already started to build. Holes had been dug for concrete piers. Several concrete forms had been built, and heavy lumber for the construction of the tipples had been delivered to the site at a cost of more than $2,000. Hawthorne completed the construction of this tipple, one of the two structures here involved.

It was undisputed that $2,000 per month was a fair and reasonable rental for the premises.

The evidence is not in material conflict as to the nature, character and construction of the tipples, or that they, together with the boiler, heating system and the plumbing fixtures, were intended to constitute permanent additions or improvements to the plant and were constructed and installed as such. The preponderance of the evidence is that it would cost as much, if not more, to tear down the tipples and remove them to another site as to erect tipples of new material.

It is clear that the coal and coke plant was not turned over to Bolling in as good condition in all particulars as when received by Hawthorne, and that it was not in a condition to operate as a going concern. ****167** Officers and representatives of Hawthorne conceded ***565** that parts of the boiler and heating system and the plumbing fixtures could not be well removed without damage to the buildings in which they were contained; while Bolling admitted that certain equipment and machinery belonged to Hawthorne and was subject to its removal upon its compliance with the terms of its contract.

The only real conflict in the evidence is that between Kelley and W. A. Thompson, who succeeded Sullivan in the management of the plant, on one side and Bolling on the other, relating to the alleged oral agreement and understanding between H. L. Thompson and Bolling that the tipples and permanent improvements were not to be removed from the land. W. A. Thompson, however, was not present during the discussions between H. L. Thompson and Bolling, either before or at the time of the execution of the written instruments. Kelley was not present when Bolling said that he

and H. L. Thompson agreed upon the terms and details of the transaction prior to July 5th. H. L. Thompson did not testify in the case, and it is argued that his failure to appear and testify contrary to the evidence of Bolling creates a presumption that his testimony would have been adverse to Hawthorne. *McGehee v. Perkins,* 188 Va. 116, 126, 49 S.E.(2d) 304.

Bolling assigns seventeen errors to the action of the trial court, many of which assignments overlap. The primary question, however, is the ownership of two tipples, the boiler and heating plant, and plumbing fixtures placed on the premises by Hawthorne. Bolling concedes that Hawthorne has a right to 'remove all improvements of the same class and type as 'equipment and machinery,'' when such removal will not damage the realty. Hawthorne contends that it has a right to remove all improvements placed by it on the property whether they were permanently attached to the freehold or not. In its brief and argument at the bar of this Court, it further contends that the items in dispute constitute 'trade fixtures' and as such are removable by it as a tenant of the leased premises, citing a number of cases and authorities. It denies that the transaction constituted a sale, that there is any ambiguity or conflict between the two written instruments involved, and that it had any oral agreement with Bolling that the structures, improvements, or fixtures in question should belong to him, if the contract was not fully consummated.

The contentions of the parties raise three questions: (1) whether the transaction between the parties was one of bargain and sale resulting ***566** in a contract of conditional sale, or merely a lease with option to purchase; (2) whether the provisions of the two instruments are conflicting and ambiguous; and (3) if the contract is ambiguous, who is entitled to the ownership of the tipples, the boiler and heating plant, and plumbing fixtures, in question.

In view of what will be hereinafter said, we do not think that the law relating to 'trade fixtures' as between landlord and tenant is involved. Here we are concerned as to whether the parties by an agreement between themselves fixed the character and ownership of the property involved. It is well settled in Virginia that the parties to an agreement may fix the character and ownership of property which, in the absence of a contract would be held to be a fixture, where no absurdity or general inconvenience would result from the transaction. *Tunis Co. v. Dennis Co.,* 97 Va. 682, 687, 34 S.E. 613.

It is conceded that the two instruments constitute one and only one contract relating to the same subject matter. They must be regarded as parts of one transaction and receive the same construction as if their several provisions were in one and the same instrument. *Portsmouth Refining Corp. v. Oliver Refining Co.,* 109 Va. 513, 64 S.E. 56, 132 Am.St.Rep. 924; *Luck v. Wood, et al.,* 144 Va. 355, 132 S.E. 178; *Texas Co. v. Northup,* 154 Va. 428, 153 S.E. 659.

Did the contract between the parties constitute a lease, a lease with option ****168** to purchase, or a contract of conditional sale? The solution of this question is to be reached upon a close scrutiny of all of the provisions of the two instruments and the consideration of them as a whole. The answer is not to be found in the name which the parties gave to the instruments, and not alone in any particular provision they contain, disconnected from all others; but in the ruling intention of the parties gathered from the language they used and the circumstances surrounding its use. We must look to the purpose of the instruments, their substance and not their form. Merely giving to them a particular name or form did not take away the nature and effect of the transaction. Where it is doubtful whether a paper constitutes an agreement of sale, a lease, or a lease with option to purchase, the pertinent and explanatory circumstances, correspondence, dealings and negotiations leading up to and surrounding the execution of the contract are properly admissible in evidence. ***567** *Arbuckle Bros. v. Gates & Brown,* 95 Va. 802, 805, 30 S.E. 496; *Turner and Happersett v. Hall and Connor,* 128 Va. 247, 254, 104 S.E. 861; *Murch v. Wright,* 46 Ill. 487; *Phelan v. Stockyards Bank,* 134 Okl. 13, 276 P. 175; *Crowell v. Brim,* 191 Ga. 288, 12 S.E.(2d) 585; *Heryford v. Davis,* 102 U.S. 235, 26 L.ed. 160.

Here it is not denied that at the time the instruments were executed the purchase of the property by Hawthorne was contemplated. The instruments, however, show a studied attempt to give the transaction the form and appearance of a lease; but the obvious purpose and the natural effect were to consummate a contract of conditional sale. If there was merely a lease, Hawthorne would hardly have paid $24,000 in cash at the time of the execution of the instruments, expended more than $60,000 on permanent structures and fixtures, and agreed to pay monthly installments of $4,000, when the fair monthly rental of the premises was not more than $2,000. The written instruments were in pursuance of an attempt to create the appearance of the relation of landlord and tenant between the parties, and at the same time constitute the relation of vendor and vendee. In this respect they were ambiguous and capable of being understood in more than one sense. They had

in them elements of a conditional sale, and they savored of a lease in some respects.

Are any of the several provisions of the two instruments in conflict? Clause 6 of the Lease and Option provides that 'in the event of the termination of this Lease and Agreement, Lessee shall turn over the property and all improvements, fixtures and equipment thereon to Lessors, as a going concern, and in shape to operate, in as good condition as when received from Lessors, reasonable wear and tear excepted.' Clause 6 of the Agreement provides that, 'In the event of the cancellation or failure of Hawthorne to exercise the option to purchase the property, all property set forth in the 'Lease and Option' is to be turned over to Bolling in as good condition as when turned over to Hawthorne, reasonable wear and tear excepted.' Then this clause goes on to say that 'In the event of such cancellation or failure to exercise the option to purchase, Bolling shall have the exclusive right for 90 days, to purchase all equipment, improvements and machinery placed on the property by Hawthorne, * * *' and that 'In the event Bolling does not elect to purchase such equipment, improvements and machinery, Hawthorne shall have the right to remove the same, provided all past due rentals are paid and the properties are left in a condition to operate as a going concern.'

In the third clause of the Lease and Option, it is provided that if ***568** Hawthorne shall fail to pay the 'rental' when due or within thirty days after written notice of default, Bolling may at his option terminate all rights of Hawthorne thereunder, and Bolling shall become 'entitled to possession of the lands, together with all improvements, machinery, equipment and all property of every kind and nature thereon.'

The words 'the property' in Clauses 6 of the Agreement and Lease and Option ****169** obviously refer to the real estate conceded to be owned by Bolling. In its petition. Hawthorne prays for the construction and interpretation of the words 'equipment, improvements and machinery' in Clause 6 of the Agreement. Our inquiry will, therefore, be directed to what the parties really meant by the use of the above three words. In the sixth Clause of the Lease and Option Bolling became entitled to the 'property and all improvements, fixtures and equipment thereon, as a going concern, * * * in as good condition as when received from Lessee,' etc., in the event of the *'termination of the Lease and Agreement,'* and in the third Clause of that instrument became entitled to the 'lands, together with all improvements, machinery, equipment and all property of any kind and nature thereon,' upon *default of the payment of the monthly installments.* (Emphasis added.)

In the agreement it is provided that, in the event of 'cancellation or failure of Hawthorne to exercise the option to purchase *the property, all property set forth in the Lease and Option* is to be turned over to Bolling *in as good condition as when turned over to Hawthorne.'* It is then added that in the event of such cancellation or failure to exercise the option, *Bolling shall have the exclusive right to purchase 'all equipment, improvements and machinery placed on the property by Hawthorne* at a price to be determined * * *.' Then is added the proviso that if *'Bolling does not elect to purchase such property Hawthorne shall have the right to remove the same, provided all past due rentals are paid and the properties are left in a condition to operate as a going concern.'* (Emphasis added.)

Under Clause 4 of the Agreement, Hawthorne was given 'the right to purchase all property set forth in the Lease and Agreement, including *any additions thereto, at the operation of 48 months from date, at a price to be determined by Hawthorne,* in its sole and absolute discretion, provided that all past due rentals are paid in full.' (Emphasis added.) Undoubtedly, the structures ***569** erected by Hawthorne and the heating and plumbing systems were additions to the property, constituting improvements thereon, and were to be included in the sale of the plant in the event Hawthorne exercised its option to purchase, possibly at the price of $1.00. It is difficult to understand why it was necessary to make a provision for Hawthorne's 'purchase' of 'any additions' to the property at the expiration of 48 months, if the 'additions' were to be regarded as 'improvements' removable by it upon the exercise of its right to cancel at that time, under the very next clause of the agreement.

In the fourth clause of the Lease and Option the specific words 'buildings, structures and personal property' are employed. In the fifth clause we find 'buildings and structures', as well as 'houses.' In the sixth clause the word 'fixtures' is included between 'improvements' and 'equipment' as characterizing the property to be turned over to Bolling. In the ninth clause reference is made to the replacement of 'machinery, equipment and personal property.' In the granting clause of the Lease and Option, we find the words 'all buildings, improvements, rights.'

Following the description of the real estate involved, the following language is used in the Lease and Option:

'Together with all coke ovens, equipment, machinery, supplies, accessories and personal property, including parts, tools, furniture, *fixtures, tipple, tipple machinery* and parts, tracks and all other incidental equipment and *attachments on said land, whether attached to the realty or not,* used by Lessors in the operation of the coal, coke and store business.' (Emphasis added.)

A few lines further reference is made to 'all real and personal property, the *equipment,* supplies, *buildings, fixtures and any other property,* used by Lessors in the operation of the said business.' (Emphasis added.)

In the agreement only is there a provision giving Hawthorne the right to remove ****170** 'equipment, improvements and machinery' placed by it on the premises, and that is based on the happening of a specific event and upon its compliance with the several conditions specified in the contract.

In Black's Law Dictionary, DeLuxe Edition, the word 'improvements' is defined as 'A term used in leases, of doubtful meaning. It would seem to apply principally to buildings, though generally it extends to the amelioration of every description of property, whether ***570** real or personal; but, when contained in any document, its meaning is generally explained by other words. ' Here its meaning is somewhat cloudy and confused by its inclusion between the words 'equipment' and 'machinery,' and in one instance by the substitution of the word 'fixtures.' Where there is doubt as to its meaning, the sense in which it is used must be gathered from the context and the subject matter of the instrument or writing in which it is used. See 'Improvement,' Permanent Edition, Vol. 20, Words and Phrases, pages 313 *et seq.*

The obvious inconsistencies, conflicts and ambiguities in the two instruments support the contention of Bolling that their provisions create doubt as to the real meaning and interests of the parties, and require that extrinsic evidence should be received in explanation.

The preliminary negotiations between the parties and the meaning of the language used in connection with the surrounding facts and circumstances are to be considered not for varying or contradicting the plain terms of the instruments; but in order to determine the real meaning and intention of the makers of the instruments. In this consideration, the Court, as nearly as possible, must place itself in the position of the parties, in order to arrive at a proper construction of their contract. *Ford v. Street,* 129 Va. 437, 106 S.E. 379; *Virginian Ry Co. v. Avis,* 124 Va. 711, 98 S.E. 638; *Cary v. N.W. Mut. Life Ins. Co.,* 127 Va. 236, 103 S.E. 580; *Jones v. Gammon,* 140 Va. 704, 125 S.E. 681.

In the construction of contracts 'the academic definition of words is often important, but more important still is the purpose of the covenant. ' *Krikorian v. Dailey,* 171 Va. 16, 24, 197 S.E. 442.

In determining whether chattels used in connection with realty are to be considered as fixtures, 'In the absence of any specific agreement between the parties as to the character of a chattel placed upon the freehold, the three general tests are as follows: (1) Annexation of the chattel to the realty, actual or constructive; (2) Its adaptation to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) The intention of the owner of the chattel to make it a permanent addition to the freehold.' *Danville Holding Corp. v. Clement,* 178 Va. 223, 232, 16 S.E.(2d) 345; *Mullins v. Sturgill,* 192 Va. 653, 658, 66 S.E.(2d) 483.

It follows that the trial court erred in holding that there was no conflict between the provisions of the two instruments with reference to the ownership of the improvements placed upon the ***571** premises by Hawthorne, whether the agreement between the parties constituted a lease, a lease with option to purchase, or a conditional sale. The controlling question is what was the agreement between the parties as to the removal or non-removal of the improvements placed on the property by Hawthorne. In determining that question we are governed by the law of contracts and not by the law of fixtures.

In our opinion, the evidence shows that the agreement between the parties constituted a contract of conditional sale; that H. L. Thompson, the President of Hawthorne, agreed to purchase the plant from Bolling, paying for it partly by cash, and the balance in monthly installments, with the understanding that if the contract was terminated or cancelled by it, Bolling was to be entitled to the tipples and other permanent improvements placed by it on the premises; that Hawthorne was entitled to all personal property, placed by it on the premises, not permanently annexed ****171** to the realty; that Hawthorne did not turn back the plant to Bolling 'as a going concern, and in shape to operate, in as good condition as when received, reasonable wear and tear excepted;' and that Bolling is entitled to such damages as he incurred by reason of such default.

For the foregoing reasons, the decree of the trial court of August 16, 1954, is reversed, and the case remanded for such further proceedings as may be necessary and proper, in accordance with the views herein expressed, and for any other matter or thing deemed relative or pertinent to the determination of the rights of the respective parties.

Reversed and remanded.

All Citations

197 Va. 554, 90 S.E.2d 159

EXHIBIT Altanovo-30

8 Cal.App.3d 216
Court of Appeal, Second District, Division 4, California.

Alvin J. McCOWN, Plaintiff and Appellant,
v.
James R. SPENCER, Jr., et al.,
Defendants and Respondents.

Civ. 34311.
|
May 27, 1970.
|
Rehearing Denied June 17, 1970.
|
Hearing Denied July 22, 1970.

Synopsis
Action by intended buyer of realty against vendors for damages caused by vendor's alleged breach of escrow agreement. The Superior Court of Los Angeles County, Bayard Rhone, J., granted judgment for defendant notwithstanding the verdict and, alternatively, ordered new trial and plaintiff appealed. The Court of Appeal, Dunn, J., held that under escrow agreement, which provided that before specified date buyer or his nominee would deliver specified sum of cash and seller would deliver deed, that time was of the essence and that if conditions were not complied with by specified date party who had complied could, in writing, demand return of performance and that if no such demand were made escrow was to be closed as soon as conditions were complied with, either party could satisfy his obligations after specified date and require escrow to close, in absence of written demand by other for return of his deposit, and that vendors were estopped from asserting nominee's failure to timely perform where nominee replied on vendor's statements on specified date that he need not worry, that escrow would close and that he would sign amendment on approval of attorney and nominee was never informed that attorney had disapproved papers and did not learn of purported termination of escrow until property had been sold to another.

Judgment and order reversed.

Procedural Posture(s): On Appeal.

West Headnotes (17)

[1] **Appeal and Error** Postverdict motions; judgment notwithstanding verdict (JNOV)

On appeal from judgment notwithstanding verdict evidence must be considered in light favoring appellant and all inferences therefrom drawn in appellant's favor.

1 Cases that cite this headnote

[2] **Appeal and Error** Judgment in General

Generally, all inferences are drawn by reviewing court in favor of sustaining judgment.

[3] **Deposits and Escrows** Construction of escrow agreements in general

Under escrow agreement, which provided that before specified date buyer or his nominee would deliver specified sum of cash and seller would deliver deed, that time was of the essence and that if conditions were not complied with by specified date party who had complied could, in writing, demand return of his performance and that if no such demand were made escrow was to be closed as soon as conditions were complied with, either party could satisfy his obligations after specified date and require escrow to close, in absence of written demand by other for return of his deposit.

1 Cases that cite this headnote

[4] **Real Property Conveyances** Waiver of default or delay

Where purchaser's nominee relied on vendor's statement, on date by which escrow agreement for sale of realty was to be performed, with right of either party to perform thereafter in absence of prior written demand by other for return of his performance, that purchaser need not worry that escrow would close and that vendor would sign amendment relating to purchase price on approval by attorney and nominee was never informed that attorney had disapproved papers and purchaser did not learn of attempted

termination of escrow until after sale of property to another, vendors, sued for breach of contract, were estopped to assert purchaser's failure to timely perform.

1 Cases that cite this headnote

[5] **Assignments** By assignor

An assignor may not maintain an action on a claim after making an absolute assignment to another; his right to demand performance is thereby extinguished with the assignee acquiring such right.

15 Cases that cite this headnote

[6] **Assignments** By assignor

To "assign" within meaning of rule that assignor may not maintain action to claim after making absolute assignment to another ordinarily means to transfer title or ownership of property.

15 Cases that cite this headnote

[7] **Assignments** Nature and essentials in general

An assignment, to be effective, must include manifestation to another by owner of his intention to transfer right, without further action, to such other person or to a third person.

11 Cases that cite this headnote

[8] **Assignments** Nature and essentials in general

It is substance and not form of transaction which determines whether assignment was intended.

7 Cases that cite this headnote

[9] **Assignments** Nature and essentials in general

If from entire transaction and conduct of parties it appears that intent was to pass title to chose in action, assignment will be held to have taken place.

20 Cases that cite this headnote

[10] **Assignments** Nature and essentials in general

Intent is of major significance in determining whether transfer constitutes assignment.

1 Cases that cite this headnote

[11] **Assignments** Weight and sufficiency

Evidence, including evidence that purchaser who had nominated another under escrow agreement and who subsequently discussed closing of escrow with vendors and deposited check and advised escrow holder to close it on performance by vendors, sustained finding that purchaser had not assigned his rights to nominee and therefore was not without right to maintain action for breach.

1 Cases that cite this headnote

[12] **Judgment** Where evidence is conflicting or where different inferences may be reasonably drawn therefrom

Basic requirement for sustaining judgment n. o. v. is want of substantial conflict in evidence.

5 Cases that cite this headnote

[13] **Appeal and Error** Sufficiency of evidence

Specification that there was no evidence of any fraud or anything whatever that might constitute an estoppel was insufficient to support award of new trial on ground of insufficiency of evidence. West's Ann.Code Civ.Proc. § 657.

1 Cases that cite this headnote

[14] **New Trial** Power and duty of court in general

Terms "accident" and "surprise" within statute defining grounds for new trial are given substantially the same meaning. West's Ann.Code Civ.Proc. §§ 657, 658.

[15] **New Trial** Necessity and sufficiency in general

Under some circumstances, absence of supporting affidavits on motion for new trial on ground of accident or surprise is noncalamitous and other support appearing in record may be accepted. West's Ann.Code Civ.Proc. §§ 657, 658.

2 Cases that cite this headnote

[16] **New Trial** Necessity and sufficiency in general

Granting of new trial on ground that submission of issue not raised by pleadings constituted surprise or accident was error in absence of supporting affidavit and timely claim of surprise. West's Ann.Code Civ.Proc. § 657.

1 Cases that cite this headnote

[17] **New Trial** Verdict contrary to law or instructions

Words "against the law" in statute authorizing new trial where verdict is against the law do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the judgment. West's Ann.Code Civ.Proc. § 657.

6 Cases that cite this headnote

Attorneys and Law Firms

****215** ***219** Culliton & Hunter, and Daniel J. Culliton, Los Angeles, for plaintiff and appellant.

Boyle, Atwill & Stearns, and James B. Boyle, Pasadena, for defendants and respondents.

Opinion

DUNN, Associate Justice.

This is an action brought by the intended buyer of real property against the sellers for damages caused by the sellers' alleged breach of their escrow agreement. The case went to trial on the basis of the first and fifth causes of action pleaded in a second amended complaint. The first cause of action was for breach of contract. The fifth cause of action ***220** purported to sound in fraud but merely alleged statements made by the sellers, after a closing date specified in the escrow agreement, upon which statements plaintiff relied for an extension of the time for performance. Accordingly, the trial court treated it as pleading an excuse, by way of estoppel, for nonperformance by plaintiff.

A verdict was returned for plaintiff and, on defendants' motions, the court thereafter granted judgment for the defendants notwithstanding the verdict for plaintiff[1] and, alternately, ordered a new trial. (Code Civ.Proc. s 629.) Plaintiff appeals from the judgment and from the order granting the new trial. (Code Civ.Proc. s 904.1, formerly s 963.)

The evidence disclosed that on May 14, 1963 escrow instructions were prepared and signed by the parties at a branch of Union bank, as escrow holder. They provided for a total sale price of $160,000, of which $75,000 was to be in cash, an encumbrance of $75,000 was to be assumed by the buyer and $10,000 was to be evidenced by a promissory note bearing 6 percent interest. Outside of escrow, plaintiff had handed to defendants a check for $5,000, apparently as earnest money, to be deposited by defendants in the escrow and credited against the cash required of plaintiff.

Pertinent parts of the escrow instructions read:
'Prior to August 14, 1963 Buyer will hand or cause to be handed to you, $75,000, $5,000 of which is deposited herewith by Seller. Seller will hand you a deed * * * to enable you to comply with these instructions, all of which funds and documents you are instructed to use or deliver at any time if prior to said date, As qualified by the provisions set forth in paragraph 5 (emphasis added) * * * all conditions of this escrow have been complied with

.....

'.....
'The unsecured promissory note shall be drawn on form to be approved by the principals hereto, in the principal amount of $10,000.00, executed by Alvin J. McCown, a married man, or nominee, in favor of James R. Spencer, Jr. and Kathryn Spencer, husband and wife, as joint tenants * * * with interest at six (6) % Per annum * * *. Principal payable on or before thirty (30) days from date of close of escrow.

'.....

'5. If any of the conditions of this escrow are not complied with prior to the date specified on the first line on page one of these instructions any party who **216 has fully complied with his instructions may, in writing, subsequent *221 to that date * * * demand return of his money, documents and/or property, upon receipt of which demand * * * you shall withhold action except to mail copies of such demand to all other parties * * *. If no such demand is made you are to close the escrow as soon as the conditions (except as to time) have been complied with.

'* * * * * *

'8. THESE AND ALL ADDITIONAL OR AMENDED INSTRUCTIONS SHALL BE SUBJECT TO THE FOLLOWING:

'* * * * * *

'(g) Time is of the essence of these and all additional or changed instructions.'

[1] [2] A brief review of the evidence is required. In considering appellant's appeal from the judgment notwithstanding the verdict, the evidence must be considered in the light favoring appellant, all inferences therefrom being drawn in appellant's favor. Hergenrether v. East, 61 Cal.2d 440, 442, 39 Cal.Rptr. 4, 393 P.2d 164 (1964); Bufano v. City and County of San Francisco, 233 Cal.App.2d 61, 68, 43 Cal.Rptr. 223 (1965). This is contrary to the usual rule on appeal whereby all inferences are drawn in favor of sustaining the judgment and therefore in favor of a respondent.

The evidence discloses that appellant and the respondents had been acquainted for several years. Respondent, Dr. James Spencer, Jr., informed appellant that he had received an offer of $150,000 for his property. Appellant offered to buy it for $160,000 and the escrow ensued. By an oral side-agreement, with which we are not here concerned, respondents retained an option to maintain a one-sixteenth interest in the property, representing the proportion that the $10,000 (to be evidenced by the promissory note) bore to the total purchase price. Because of this interest, respondents joined in appellant's successful efforts to have the property rezoned so that it might be improved by the construction of a convalescent hospital. After the rezoning, they tried to obtain $200,000 as a price for the property whereupon, being unsuccessful, appellant suggested recontacting respondents' original offeror, Mr. Milligan who, on learning of the rezoning, offered to purchase the property for $180,000. Appellant then named Milligan as his nominee.

A modification of the escrow instructions, dated June 24, 1963, was signed by both sides and by Milligan, calling for a payment by Milligan of $25,000 to appellant, $5,000 of which is deposited herewith,' following which title to the property was to be vested in Milligan (or his nominee) contingent upon approval of a tract subdivision map by responsible authorities. *222 The modification provided: 'Upon receipt in escrow of written waiver from E. J. Milligan of the aforementioned contingency, you are instructed to accept all further instructions in this escrow from said nominee, and all funds deposited by me herein are to be used for the credit of and upon instructions of said vestee.'

Thereafter several discussions were had with Milligan, or his representative, who desired to extend the term of the escrow; but on June 26th and again on July 11th, 1963, respondents sent letters to the escrow holder, to appellant and to Milligan advising of respondents' intention to abide strictly by the time provisions of the escrow and stating no time extension had been, or would be, granted.

Before August 13, 1963, respondents deposited in escrow an executed deed granting title in the property, and also deposited a form of promissory note acceptable to them. Neither on nor before August 13th did appellant perform under the escrow and on August 23, 1963 respondents sold the property for $170,000 to a savings and loan association with whom Milligan had arranged to 'warehouse' it, I.e.: to purchase it, giving him an option to repurchase **217 it at a later date. Appellant's lawsuit followed soon thereafter. A number of points are raised, requiring separate discussion.

I. Did Respondents' Sale Of The Property Constitute A Breach Of The Escrow Contract?

As noted, sellers and buyer agreed that, before August 14, 1963, each would deliver a deed, or cash and a note, respectively, to the escrow holder, further agreeing that 'time is of the essence.' Paragraph 5 of the instructions went on to provide that if a condition of the escrow was not met before August 14th, then any party who had fully complied could, in writing, After that date demand the return of whatever he had deposited with the escrow holder; and, 'If no such demand is

made you are to close the escrow as soon as the conditions (except as to time) have been complied with.'

[3] Appellant contends, and respondents dispute, that paragraph 5 does away with 'prior to August 14, 1963' as the closing date of the escrow. This means that, though respondents performed, appellant nevertheless could satisfy his escrow obligations after August 13th and require the escrow to close unless respondents, after August 13th but before appellant performed, made a written demand for return of the papers they deposited. We agree this is the correct interpretation. (See: Weisberg v. Ashcraft, 223 Cal.App.2d 793, 36 Cal.Rptr. 188 (1963).) Since time was of the essence, strict compliance with the date of performance was required, if ***223** demanded after the date specified, and performance within a 'reasonable' time after demand would be impermissible. Accordingly, if the buyer had not performed by the end of August 13th, then on August 14th the sellers could have given a written demand for return of the deed they had deposited. But the sellers gave no such demand until August 23rd, when a demand letter was addressed to appellant and the bank. Since appellant had not fully performed by that date, the sale of the property by respondents to a third party on August 23rd would not constitute a breach of the contract, absent other considerations.

This leads us to the next question, namely, whether the sellers were estopped to terminate the escrow by their letter dated August 23rd. If they were, their sale of the property that date constituted a breach of the agreement.

II. Were Respondents Estopped From Terminating The Escrow and Selling The Property To A Third Party?

The trial court instructed the jury on the nature of an estoppel in the terms of Code Civ.Proc. s 1962, subd. 3 (now contained in Evid. Code, s 623) and submitted to the jury a number of special verdicts. (Code Civ.Proc. s 625.) One of these inquired: 'Do you find that defendants by their conduct or action are estopped to claim that plaintiff or his nominee did not perform the contract in time?' to which the jury responded 'Yes.' The special verdict went on to inquire, 'If yes, what action or conduct of defendants constituted such estoppel?' The jury found that: 'The defendant gave no indication that anything was wrong with the escrow; however, he refused to sign papers before consulting with his lawyer.'

After the hearing on respondents' motion for judgment n.o.v. the court made a minute order of its ruling. In it was stated, among other things: 'There was no evidence of any fraud or anything whatever that might constitute an estoppel whereby the plaintiff or his nominee was justified or led to believe that the time was extended. The action of the defendant which the jury characterized as estoppel occurred after the time had already run out.' (Emphasis added.) We consider whether there was any evidence of estoppel. If there was, then the granting of the judgment n.o.v. on this ground was error.

It is apparent from the quotation of the minutes that the trial judge misconstrued the contract, concluding the agreement ****218** terminated by its own terms on August 14th and that respondents' conduct thereafter could not work an extension of the time for performance. As pointed out, we hold otherwise.

***224** The evidence disclosed that at noontime on August 14, 1963, Dr. Spencer, one of the two respondents, went to the bank branch holding the escrow. A Mr. Allen was there, representing the nominee, Mr. Milligan. Allen requested that respondents sign a document '* * * which stated that the total consideration in this escrow was $180,000 * * *.' Dr. Spencer testified this was the first time he had heard such a figure and, as a result, he refused to sign the document, returning to his office. Later that afternoon, appellant and his attorney went to the office of respondent Dr. Spencer. They found Milligan already there. He had procured some papers from the escrow clerk which he desired Spencer to sign.

Appellant's attorney, as a witness for appellant, testified: 'He (Dr. Spencer) said he was sure that everything was in proper order, that he didn't think there were any problems and everything was sailing along all right, that he just wanted to talk to his lawyer before he signed these papers.' Spencer told them his own attorney was out of town but he intended to see him the next day. Dr. Spencer never signed the documents but on August 15th his wife did, so that if the attorney approved them when he returned, only the signature of her husband would be needed.

Between August 15th and 19th appellant telephoned respondents several times. On two of these occasions Dr. Spencer told him that he believed everything was in order, saying 'that the escrow would close and not to worry about it.' Despite this reassurance, appellant concluded that closure of the escrow was being held up because his nominee, Milligan, was not acceptable to respondents. For that reason he secured a cashiers check for $72,000 and on August 21st took it to the escrow, instructing the bank by letter to hold it until respondents deposited a grant deed in escrow (he apparently was unaware a grant deed already was deposited) and

complied with the terms of the original escrow instructions. With the $5,000 previously paid into escrow, a total of $77,000 was thus made available.

[4] Subdivision 3 of former Code of Civ.Proc. s 1962 reads: 'Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.' This states a rule of estoppel. The evidence recited would support a finding that respondents were estopped from terminating the escrow on the date and in the manner which they attempted. Appellant relied upon Spencer's statements to him that he need not worry, that the escrow would close and he would sign the amendments on the return of, and approval by, his attorney. Appellant's failure completely to perform was thus excusable and respondents were estopped to contend otherwise. Appellant was never informed that the ***225** attorney disapproved of these papers nor did he learn of respondents' attempted termination of the escrow until he received respondents' letter dated August 23rd. But before receiving it, respondents, by their absolute sale of the property on August 23rd, had placed it beyond their own ability to perform and had thus breached the contract.

III. Did Appellant Assign His Rights As Buyer Under The Escrow Agreement, Resulting In Loss Of Standing To Sue?

Respondents urged that appellant did more than designate Milligan as his nominee; that, in fact, he assigned all of his rights to Milligan and as a result had no standing in court. This issue was presented to the jury by instructions, the court also submitting a special verdict which read: 'Did plaintiff assign his rights as purchaser under the escrow agreement with ****219** James R. Spencer, Jr. and Kathryn Spencer to E. J. Milligan?' The jury responded, 'No'.

Despite this verdict the court, in ruling on the motion for judgment n.o.v., made a finding in its minute order as follows: 'From a careful review of all the evidence, the Court concludes that Milligan was not a mere nominee, but he had 'bought the deal' and was in legal effect an assignee. Therefore, on the two grounds: i.e. (1) (that plaintiff and nominee did not perform in time) and (2) the plaintiff had assigned his contract to purchase to Milligan, the motion for judgment notwithstanding the verdict be and is hereby granted.'

[5] **[6]** **[7]** **[8]** **[9]** An assignor may not maintain an action upon a claim after making an absolute assignment of it to another; his right to demand performance is extinguished, the assignee acquiring such right. (5 Cal.Jur.2d Rev. 478, 'Assignments' s 71; Vol. I, Restatement of the Law of Contracts 180, s 150.) To 'assign' ordinarily means to transfer title or ownership of property (Commercial Discount Co. v. Cowen, 18 Cal.2d 610, 614, 116 P.2d 599 (1941)), 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. (Cockerell v. Title Ins. & Trust Co., 42 Cal.2d 284, 291, 267 P.2d 16 (1954).) It is the substance and not the form of a transaction which determines whether an assignment was intended. (Bergin v. van der Steen, 107 Cal.App.2d 8, 16, 236 P.2d 613 (1951); Anglo California Nat. Bank, etc. v. Kidd, 58 Cal.App.2d 651, 655—656, 137 P.2d 460 (1943).) If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place. Goldman v. Murray, 164 Cal. 419, 422, 129 P. 462 (1912); Norton v. Whitehead, 84 Cal. 263, 268, 24 P. 154 (1890); California Pac. Title Co., etc. v. Moore, 229 Cal.App.2d 114, 117, 40 Cal.Rptr. 61 (1964).

***226** **[10]** **[11]** From the foregoing it will be evident that 'intent' is of major significance. Appellant testified that after August 14, 1963 he told respondents' attorney, 'My position is that I am entitled to buy this property.' He called respondents on August 15, 16, 17, 18 and 19, successfully reaching Dr. Spencer twice, to discuss the close of escrow; on August 21st he deposited a check for $72,000 and advised the escrow holder to close it on performance by the sellers. This evidence, and inferences reasonably deducible from it, tends to negate any intent by appellant to assign his rights to Milligan.

[12] A basic requirement for sustaining a judgment n.o.v. is that no substantial conflict in the evidence exists. Robinson v. North American Life & Cas. Co., 215 Cal.App.2d 111, 118, 30 Cal.Rptr. 57 (1963). The judgment ordered for defendants, notwithstanding the verdict for plaintiff, must be reversed since the evidence was in conflict on the points foundational to the trial court's rulings: that appellant's rights were assigned to Milligan and that respondents were not estopped to contend appellant's failure fully to perform excused their termination of the escrow.

We now come to a discussion of the trial court's granting of respondents' motion for new trial.

IV. Did The Trial Court Properly Grant A New Trial To Respondents?

Respondents' 'Notice of Intention To Move For New Trial' stated three grounds as follows: (1) accident or surprise, (2) insufficiency of the evidence and (3) the verdict is against the law. The sole support for the motion was that it was 'on the minutes of the Court.' No affidavits were filed in support.

Code of Civil Procedure, section 657 requires that, if a motion for a new trial be granted, the court specify its grounds **220 and its reasons.[2] Purporting to comply with this section, the court's minute order stated:
'1. Insufficiency of the evidence. The evidence is insufficient in the same particulars as set out specifically above in granting the motion for judgment notwithstanding the verdict and they are incorporated herein at this place with the same changes and effect as if repeated at this point.
*227 '2. Accident or suprise, (sic) which ordinary prudence would not have guarded against. The Court submitted to the jury the issue of estoppel but this issue was not raised by the pleadings nor in the pretrial statement and the Court now concludes that it was in error to submit this issue to the jury.

'3. The verdict is against the law. As indicated above, the evidence is insufficient. The evidence showed without contradiction that the defendants fully performed their agreement and that neither the plaintiff nor his 'nominee' ever performed his or their agreement.

'The special verdict of the jury shows that the defendants did nothing by way of fraud or estoppel to prevent the plaintiff ro his nominee from closing the contract. Hence the general verdict which is contrary to the special verdict must be set aside.'

Insufficiency of the evidence. First to be considered is the adequacy of the trial court's statement of insufficiency. The Ground is fully stated; we look to see if the Reason behind it is adequately supporting. (Mercer v. Perez, 68 Cal.2d 104, 65 Cal.Rptr. 315, 436 P.2d 315 (1968).)

The court's 'reason' merely refers to the order granting the judgment n.o.v. The latter order stated only that: 'There was no evidence of any fraud or anything whatever that might constitute an estoppel * * *. The action of the defendant which the jury characterized as estoppel occurred after the time had already run out.' (Emphasis added.) That minute order also concluded that Milligan was an assignee as a matter of law. (See: fn. 1.) As we have noted, the trial court's legal conclusions were erroneous on both issues. It is apparent the court granted a new trial on this ground because it believed there was a total lack of any material evidence to support the verdict, rather than because the court, after weighing it, believed the evidence failed to proponderate and the jury should have reached a different verdict.

[13] In Mercer v. Perez, Supra, 68 Cal.2d pp. 116—117, 65 Cal.Rptr. p. 323, 436 P.2d p. 323, the following is said: 'Thus in Greenwood v. Boque, 53 Wash.2d 795, 337 P.2d 708, * * * (a Washington case) the only 'reason' stated by the trial court for granting the plaintiffs' motion for new trial after a verdict for the defendants in an automobile accident case was that 'there was no evidence to justify a verdict except on behalf of the plaintiffs' * * *. The Supreme Court of Washington observed that the trial court's statement 'is of no assistance to an appellate court. It amounts to no more than an invitation to search the record, * * *" In the case at bench, the trial court's order states in part: 'There was no evidence of any fraud or anything whatever that might constitute an estoppel.' Such a specification is inadequate **221 and is of little assistance to us and, as we have noted, the conclusion expressed is incorrect. We do not read a later case, *228 Kincaid v. Sears, Roebuck & Co., 259 Cal.App.2d 733, at page 738, 66 Cal.Rptr. 915 (1968), as placing any different interpretation upon the intent of Mercer. Accordingly, we hold the granting of a new trial on the ground stated is insufficiently supported.

Accident or surprise which ordinary prudence could not have guarded against. One ground stated for granting the new trial was 'accident or surprise.' The court's stated reason was: 'The Court submitted to the jury the issue of estoppel but this issue was not raised by the pleadings nor in the pretrial statement and the Court now concludes it was in error to submit this issue to the jury.' The foregoing is not a recital of 'accident or surprise', as that term is used in Code Civ.Proc. s 657. Rather, it states the court's conclusion that it instructed the jury on an issue not raised by the pleadings and therefore committed an error at law.

[14] **[15]** The terms 'accident' and 'surprise', as used in Code Civ.Proc. s 657, are given substantially the same

meaning. Kauffman v. De Mutiis, 31 Cal.2d 429, 432, 189 P.2d 271 (1948); South Santa Clara etc. Dist. v. Johnson, 231 Cal.App.2d 388, 406, 41 Cal.Rptr. 846 (1964). Section 658 of the Code of Civil Procedure specifies that an application for new trial made on such ground '* * * must be made upon affidavits.' No affidavits were filed by respondents in support of their motion for new trial. Under some circumstances, the absence of a supporting affidavit is noncalamitous and other support appearing in the record may be accepted (see: Webber v. Webber, 33 Cal.2d 153, 163—164, 199 P.2d 934 (1948)), but such circumstances are not here present.

[16] During argument of respondents' motion for directed verdict, the court stated, for the first time of record, that it interpreted appellant's fifth cause of action as spelling out estoppel. Counsel for respondents did not then claim surprise and move for a continuance, ask to reopen the case and produce further evidence, or move for a mistrial. The rule has been stated: '* * * where a situation arises which might constitute legal surprise, counsel cannot speculate on a favorable verdict. He must act at the earliest possible moment for the 'right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause." Kauffman v. De Mutiis, Supra, 31 Cal.2d at 432, 189 P.2d at 273. (Also see: Baker v. Berreman, 61 Cal.App.2d 235, 241, 142 P.2d 448 (1943).) There here being no supporting affidavit and no timely claim of surprise, the granting of a new trial on this ground was error.

[17] The verdict is against the law. As its third and last ground for ***229** granting a new trial the court stated 'the verdict is against the law.' [3] The minute order shows that the court granted a new trial on this ground on the premise that the evidence was totally insufficient. Such a reason, if supported by the record, is a proper one. Thus: '(6) A decision can be said to be 'against law' only: * * * (3) where the evidence is insufficient in law and without conflict in any material point. * * * (8) '(T)he words 'against law' do not import a situation in which the court weighs conflicting evidence and merely finds a balance against the judgment." Kralyevich v. Magrini, 172 Cal.App.2d 784, 789, 342 P.2d 903, 906, (1959). (And see: Thompson v. Guyer-Hays, 207 Cal.App.2d 366, 375, 24 Cal.Rptr. 461 (1962); Opp v. Sykes, 194 Cal.App.2d 208, 211, 15 Cal.Rptr. 1 (1961).)

****222** Counsel for respondents entertained an erroneous concept of the application of estoppel in this case. During the hearing of his motion for judgment n.o.v. and for a new trial, he argued: '* * * to invoke the doctrine of estoppel evidence had to be produced that the defendants did something Prior to August the 14th * * *.'; '* * * there is no evidence of any kind produced which would lead the plaintiff to believe that he didn't have to perform Prior to August the 14th.'; and 'the estoppel issue goes to the point as to whether or not we did anything Before August the 14th * * *.' (Emphasis supplied in each instance.)

The trial court accepted this concept. Had the court been correct in deciding that only conduct before August 14th could create an estoppel, then the granting of a new trial because the verdict was 'against the law' would have been proper; there was no evidence of such conduct before August 14th. But, as we have noted, an estoppel could be based upon acts occurring after August 14th and evidence of such acts was received.

The court's minute order also stated: 'The special verdict of the jury shows that the defendants did nothing by way of fraud or estoppel to prevent the plaintiff or his nominee from closing the contract. Hence the general verdict which is contrary to the special verdict must be set aside'. Actually, in its special verdict the jury Did find that respondents were estopped to claim appellant failed to perform in time. That being so, the general verdict conformed precisely with the special verdict.

The jury did Not find the conduct occurred After August 14th, but this is implicit in its finding that: 'The defendant gave no indication that anything was wrong with the escrow; however, he refused to sign papers before consulting with his lawyer.' Without dispute, the refusal to sign papers ***230** occurred after August 14th. The trial judge believed any conduct after that date was immaterial to establish an estoppel. There being no evidence of estoppel before that date, he concluded the general verdict was contradicted by the special verdict. We hold just the opposite.

We have reviewed the entire record with an eye to affirming the order granting a new trial on the two grounds last discussed, as directed by the language of section 657. [4] However, we have been unable to find any substantial error which would support either ground. Accordingly, the order granting a new trial on any of the three grounds specified cannot be sustained.

Judgment for defendants notwithstanding the verdict for plaintiff is reversed; the order granting defendants a new trial likewise is reversed.

FILES, P.J., and JEFFERSON, J., concur.

All Citations

8 Cal.App.3d 216, 87 Cal.Rptr. 213

Footnotes

1 The court specified two grounds for ordering judgment n.o.v.: '(1) that there was not performance by the plaintiff or his 'nominee' within the time specified; and (2) the plaintiff had assigned his contract to purchase to Milligan * * *.'

2 Code Civ.Proc. s 657 states in part: 'When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated. * * * On appeal from an order granting a new trial * * * (a) the order shall not be affirmed upon the ground of insufficiency of the evidence to justify the verdict * * * unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of insufficiency of the evidence * * * it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order * * * and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.'

3 Such ground is to be distinguished from the confusingly similar seventh ground furnished by Code Civ.Proc. s 657, subd. 7, namely, 'error in law'. (See: 3 Witkin Cal.Procedure, 1954 ed., pp. 2062—2063, 'Attack On Judgment In Trial Court' s 17.)

4 This reads: 'On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except * * * (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence * * *.'

EXHIBIT Altanovo-31

53 Cal.App.4th 350
Court of Appeal, Second District, Division 1, California.

RECORDED PICTURE COMPANY [PRODUCTIONS] LIMITED et al., Plaintiffs and Respondents,
v.
NELSON ENTERTAINMENT, INC., Defendant and Appellant.

No. B097326.
|
March 6, 1997.
|
As Modified on Denial of Rehearing April 3, 1997.
|
Review Denied June 11, 1997.

Synopsis
Producers of motion picture brought action against distributor and subdistributor, seeking to recover 70 percent of gross receipts from home video release of picture. The Superior Court, Los Angeles County, No. C697133, Jerry Pacht, Temporary Judge, granted summary judgment for producers. Subdistributor appealed. The Court of Appeal, Masterson, J., held that: (1) subdistributor was not bound by obligations imposed by agreement between producers and distributor; (2) subdistributor did not have constructive knowledge of content of agreement between producers and distributor when it entered into subdistribution contract with distributor; (3) doctrine of equitable assignments did not require subdistributor to pay producers 70 percent of its gross receipts; (4) fiduciary relationship did not exist between producers and subdistributor; and (5) as between producers and subdistributor, producers had to incur any harm or loss occasioned by distributor's failure to comply with producer-distributor agreement.

Reversed and remanded with directions.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (30)

[1] **Contracts** Trade and Business

Subdistributor which had home video rights to motion picture did not receive benefit of agreement between producers of picture and distributor, and thus, subdistributor was not bound by obligations imposed by that agreement; producers transferred to distributor all domestic distribution rights in the movie in perpetuity, and producers also assigned copyright in the picture to distributor, while contract between distributor and subdistributor only authorized subdistributor to distribute movie in home video market, and subdistributor's distribution rights terminated after seven years and reverted to distributor. West's Ann.Cal.Civ.Code § 1589.

4 Cases that cite this headnote

[2] **Assignments** On contract assigned

General rule is that mere assignment of rights under executory contract does not cast upon assignee the obligations imposed by contract upon assignor; rule is otherwise, however, where assignee assumes such obligations. West's Ann.Cal.Civ.Code § 1589.

8 Cases that cite this headnote

[3] **Assignments** On contract assigned

Whether there has been assumption of contractual obligations by assignee is to be determined by intent of parties as indicated by their actions. West's Ann.Cal.Civ.Code § 1589.

2 Cases that cite this headnote

[4] **Assignments** Nature and extent of rights of assignee in general

Assumption of contractual obligations by assignee may be implied from acceptance of benefits under contract. West's Ann.Cal.Civ.Code § 1589.

9 Cases that cite this headnote

[5] **Assignments** On contract assigned

Civil code provision regarding assumption of contractual obligations by acceptance of benefits requires assignee of executory contract to accept burdens of contract when all the benefits of full performance have inured to him. West's Ann.Cal.Civ.Code § 1589.

11 Cases that cite this headnote

[6] **Copyrights and Intellectual Property** Transfer in part; divisibility

Transfer of anything less than a totality of a work is license and not assignment.

[7] **Contracts** Trade and Business

Subdistributor which had home video rights to motion picture was "licensee," rather than assignee of agreement between producers of picture and distributor, where producers transferred to distributor all domestic distribution rights in the movie in perpetuity, and producers also assigned copyright in the picture to distributor, while contract between distributor and subdistributor only authorized subdistributor to distribute movie in home video market, and subdistributor's distribution rights terminated after seven years and reverted to distributor. West's Ann.Cal.Civ.Code § 1589.

2 Cases that cite this headnote

[8] **Landlord and Tenant** Rights and liabilities of sublessees

Unless sublessee has assumed lessee's contractual obligations, it is not liable to original lessor in damages for breach of covenants in parent lease.

[9] **Landlord and Tenant** Rights and liabilities of sublessees

Sublessee is liable only to his own lessor, that is, sublessor, since he does not acquire the whole estate, but only a portion of the unexpired term.

[10] **Landlord and Tenant** Liability of assignee in general

Landlord and Tenant Subletting

Generally, assignee of lessee is liable to landlord for rent under original lease, while sublessee is not.

[11] **Contracts** Trade and Business

Subdistributor which had home video rights to motion picture did not have constructive knowledge of content of agreement between producers of picture and distributor when it entered into subdistribution contract with distributor, and thus, it was not bound by provision in producer–distributor agreement which required it to pay producers 70 percent of its gross receipts; although subdistributor had constructive notice of information contained in recorded documents, those documents did not describe payment terms of producer–distributor agreement, when subdistributor entered into subdistribution contract, it had no reason to believe that terms of that contract were inconsistent with producer–distributor agreement, and distributor expressly warranted in subdistribution contract that it had exclusive authority to grant home video rights to subdistributor.

3 Cases that cite this headnote

[12] **Real Property Conveyances** Record as notice of unrecorded instrument

Absent suspicious or other circumstances warranting reasonable investigation, recorded document does not put potential purchaser on notice of content of referenced, unrecorded document.

[13] **Landlord and Tenant** Rights and liabilities of sublessees

It is duty of person contracting for sublease to ascertain provisions of original lease; subtenant is charged with notice of existence of original lease, and is bound by its terms and conditions.

2 Cases that cite this headnote

[14] **Landlord and Tenant** Rights and liabilities of sublessees

Landlord and Tenant Subletting

While landlord can take possession from subtenant for violating terms of main lease, subtenant cannot be held liable to landlord for amounts due under that lease.

[15] **Assignments** Equitable Assignments

Doctrine of equitable assignment did not require subdistributor which had home video rights to motion picture to pay producers of picture 70 percent of its gross receipts in accordance with agreement between producers and distributor; subdistributor was not assignee of producer–distributor agreement, rather he was licensee, producers cited no evidence suggesting that they intended subdistributor to take title to, or ownership of, rights granted distributor, and producer–distributor agreement provided that "This Agreement is not for the benefit of any third party and shall not be deemed to give any right or remedy to any such third party."

5 Cases that cite this headnote

[16] **Assignments** Equitable Assignments

Assignments Weight and sufficiency

Evidence of equitable assignment must be clear and specific, and assignor must not retain any control over the fund or any authority to collect.

4 Cases that cite this headnote

[17] **Assignments** Nature and essentials in general

Assignments By assignor

To "assign," within meaning of rule that assignor may not maintain action to claim after making absolute assignment to another, ordinarily means to transfer title or ownership of property.

2 Cases that cite this headnote

[18] **Assignments** Nature and essentials in general

Assignment, to be effective, must include manifestation to another person by owner of his intention to transfer right, without further action, to such other person or to third person.

6 Cases that cite this headnote

[19] **Assignments** Nature and essentials in general

It is substance and not form of transaction which determines whether assignment was intended.

4 Cases that cite this headnote

[20] **Assignments** Nature and essentials in general

If from entire transaction and conduct of parties it clearly appears that intent of parties was to pass title to property, then assignment will be held to have taken place.

5 Cases that cite this headnote

[21] **Fraud** Fiduciary or confidential relations

Fiduciary relationship did not exist between subdistributor which had home video rights to motion picture and producers of picture; only connection between the parties was that each of them had agreement with distributor.

2 Cases that cite this headnote

[22] **Contracts** Scope and extent of obligation

Contract cannot be source of duty, fiduciary or otherwise, to breach that contract.

3 Cases that cite this headnote

[23] **Principal and Agent** Nature of agent's obligation

Agent undertakes fiduciary obligations with respect to his principal.

1 Cases that cite this headnote

[24] **Trusts** Duty of trustee in general

Trustee undertakes fiduciary obligations with respect to beneficiaries of trust.

1 Cases that cite this headnote

[25] **Fraud** Fiduciary or confidential relations

Fiduciary relationship is created when person reposes trust and confidence in another and person in whom such confidence is reposed obtains control over other person's affairs.

9 Cases that cite this headnote

[26] **Fraud** Fiduciary or confidential relations

Typical distribution contract, negotiated at arm's length, does not create fiduciary relationship between owner of product and distributor.

14 Cases that cite this headnote

[27] **Estoppel** Acts making injury possible as between actor and another equally blameless

As between producers of motion picture and subdistributor which had home video rights to the picture, producers had to incur any harm or loss occasioned by distributor's failure to comply with its agreement with producers which obligated it to require that subdistributor for home video release pay 70 percent of its gross receipts directly to producers, even though subdistributor failed to review producer–distributor agreement before entering into contract with distributor; producers chose distributor as main distributor of movie despite serious doubts about distributor's integrity and with full knowledge of distributor's alleged reputation as litigious company that withheld payment from creditors, while subdistributor, on the other hand, had no basis to suspect distributor of possible wrongdoing.

1 Cases that cite this headnote

[28] **Estoppel** Acts making injury possible as between actor and another equally blameless

Where one of two innocent parties must suffer because of fraud of a third, loss must be borne by person whose negligence or misplaced confidence made injury possible.

[29] **Contracts** Trade and Business

Subdistributor which had home video rights to motion pictire under subdistribution contract requiring it to pay 50% of net receipts to distributor did not become liable to producers merely because it continued to pay distributor under subdistribution contract after learning about content of distributor's contract with producers entitling producers to 70% of home video gross receipts after distributor recouped certain costs and providing that distributor was to instruct subdistributor to account directly to producers for those amounts, nor did subdistributor's failure to interplead the disputed funds into court make it liable under the producer-distributor agreement. West's Ann.Cal.Civ.Code § 386.

[30] **Judgment** Existence or non-existence of fact issue

While allegations in plaintiffs' complaint could be considered in denying their summary judgment motion, they could not be used to defeat defendant's motion.

1 Cases that cite this headnote

Attorneys and Law Firms

****744** ***355** Wyman, Isaacs, Blumenthal & Lynne, Bruce Isaacs, Robert Wyman, Valerie Waldman, Jason A. Forge,

Proskauer Rose Goetz & Mendelsohn, Bruce Fader, Deirdre Silver, for Defendant and Appellant.

***356** Greenberg Glusker Fields Claman & Machtinger, Bertram Fields, Robert S. Chapman, Lee A. Dresie, for Plaintiffs and Respondents.

Opinion

MASTERSON, Associate Justice.

The producers of a motion picture entered into a written agreement with a distributor to exploit the picture domestically in the theatrical, television, and home video markets. The agreement contemplated that the distributor would enter into a separate contract with a subdistributor for home video release and obligated the distributor to require that the subdistributor pay 70 percent of the gross receipts directly to the producers.

****745** The distributor entered into a subdistribution contract but did not require the subdistributor to pay anything directly to the producers. Moreover, despite the provision in the producer-distributor agreement requiring that the producers receive 70 percent of the gross receipts, the distributor agreed to a 50/50 split of the net receipts between itself and the subdistributor. The subdistributor approved this arrangement without actual knowledge of the terms of the producer-distributor agreement.

The producers filed this action against the distributor and the subdistributor, seeking to recover 70 percent of the gross receipts from the home video release of the picture. The producers and the subdistributor filed cross-motions for summary judgment. The trial court ruled in favor of the producers, concluding that the subdistributor was bound by the 70 percent gross receipts provision in the producer-distributor agreement, not by the 50 percent net receipts provision in its own contract. The subdistributor has appealed, arguing that its obligations are governed by its contract with the distributor, not by the producer-distributor agreement to which it was not a party. We agree and reverse.

BACKGROUND

Plaintiffs Recorded Picture Company [Productions] Limited and Screenframe Limited were the producers of the motion picture "The Last Emperor." On May 12, 1986, plaintiffs (the "producers") entered into a written agreement granting Hemdale Film Corporation ("Hemdale") all domestic distribution rights to the picture—theatrical, television, and home video—in perpetuity.[1] The parties further agreed that "upon delivery of the Picture to Hemdale, the ***357** worldwide copyright to the Picture (including all elements thereof) shall be owned by Hemdale or its designee."

According to the producers, "[i]t was contemplated by the parties ... that, rather than actually distributing the Picture itself in certain media, Hemdale would appoint other distributors ('subdistributors') which would carry out the physical distribution of the Picture...." To that end, the agreement provided that "Hemdale may distribute and market the Picture directly or cause it to be distributed through licensees or subdistributors.... Hemdale shall also have the sole and exclusive control of all terms and conditions of licensing and sublicensing the Picture, and all rights herein granted, including, but not limited to, outright sales or percentage agreements, the type and amount of rental or fee and the duration of the term."

In exchange for the grant of distribution rights, Hemdale agreed to pay the producers an advance of $8 million. With respect to the home video rights, the agreement provided that Hemdale could recoup its advance and that the producers and Hemdale would share in the home video proceeds as follows: "Hemdale shall retain the first Five Million Dollars ($5,000,000) of the amounts received from ... [the] video company [i.e., subdistributor]. Hemdale shall retain the excess over Five Million Dollars ($5,000,000) of such advance or guarantee until Hemdale has recouped the Eight Million Dollars ($8,000,000) ... (taking into account the Five Million Dollars ($5,000,000) retained as aforesaid) and the costs of prints and advertising paid or incurred by Hemdale and/or its assignees or licensees in connection with the picture.... Any additional Gross Receipts from Videogram Exploitation shall be divided Thirty Percent (30%) to Hemdale and Seventy Percent (70%) to Producer." Under this provision, after Hemdale recouped its advance and other specified costs, the producers were entitled to 70 percent of *all* home video gross receipts, whether received by Hemdale or a subdistributor. (*Recorded Picture Company [Productions] Limited v. Hemdale Film Corporation* (Oct. 17, 1991) B055186 [nonpub. opn.].)

However, in the words of the producers, "[they] did not trust Hemdale" because it was "a company that had the reputation of being difficult to collect from and of forcing ****746** those with whom it dealt to engage in costly and time

consuming litigation to enforce their rights." Accordingly, in an attempt to ensure that they received their share of the gross receipts, the producers ***358** provided in the agreement that "Hemdale shall instruct the applicable videogram distributor to account directly to Producer for the amounts payable to Producer [i.e., 70 percent of the gross receipts]...." [2]

Hemdale began negotiations with defendant Nelson Entertainment, Inc. ("Nelson"), regarding the home video distribution of "The Last Emperor." On August 17, 1987, Hemdale messengered documents to Nelson concerning the chain of title of "The Last Emperor" and requested that Nelson approve the chain of title. The producer-Hemdale agreement was not included among those documents. In a letter of response, Nelson stated: "We are not normally in the practice of issuing an 'approval' as you have requested. We basically rely upon the representations and warranties of our grantor, and upon those in the chain of title who have prepared, supplied or opined upon the rights documents supplied." Despite Nelson's requests for a copy of the producer-Hemdale agreement, Hemdale did not provide one.

On or about August 20, 1987, Nelson executed a written contract with Hemdale (dated as of May 29, 1987) granting Nelson the exclusive right to distribute "The Last Emperor" in the domestic home video market for seven years. Hemdale retained the copyright in the picture. Hemdale expressly "represent[ed] and warrant[ed] that [it] ha[d] the sole and exclusive right and authority to make the grant of rights to [Nelson]." In exchange for the home video rights, Nelson agreed to pay Hemdale an advance of $6.5 million, to be paid in several installments. The proceeds from the home video distribution were to be divided between Nelson and Hemdale as follows: (1) Nelson would retain 30 percent of the gross receipts as its distribution fee; (2) Nelson would retain an amount equal to certain of its distribution expenses (with a ceiling of 20 percent of gross receipts); and (3) after Nelson recouped its $6.5 million advance plus interest, Nelson and Hemdale would share equally in any net receipts. The contract required Nelson to pay 50 percent of the net receipts directly to Hemdale. There was no provision in the contract requiring that Nelson pay any amount directly to the producers. ***359** At the time it entered into the contract with Hemdale, Nelson did not have actual knowledge of the terms of the producer-Hemdale agreement.

On June 9, 1988, the producers sent Nelson a letter, stating in part: "[U]nder Hemdale's agreement with the [producers], after Hemdale recoups its advance to the [producers], the [producers are] entitled, with certain limited exceptions, to 70% of the gross receipts of distributors and subdistributors in the home video field, and such distributors and subdistributors are to account directly to the [producers] for [the producers'] share of the gross. The failure to include such provisions in your agreement with Hemdale was a material breach of the [producer-Hemdale] Agreement." Upon receipt of this letter, Nelson learned for the first time about the division of proceeds required by the producer-Hemdale agreement (with the producers to receive 70 percent of gross receipts) and that its contract with Hemdale (under which Nelson and Hemdale would share net receipts equally) might be in conflict with the producer-Hemdale agreement. By letter of June 21, 1988, Nelson again requested that Hemdale provide it with a copy of the producer-Hemdale agreement. As of mid-August, ****747** Nelson still had not received a copy of that agreement. [3]

In late August 1988, the producers filed this action against Hemdale and Nelson, among others. In April 1992, the producers filed a second amended complaint, which was the operative pleading at the time of the summary judgment proceedings below. The second amended complaint alleged causes of action against Hemdale for breach of contract and declaratory relief. Against Nelson, the producers alleged causes of action for conversion, imposition of trust, breach of fiduciary duty, breach of agency duties, inducing breach of contract, and declaratory relief. In essence, the amended complaint alleged that Hemdale and Nelson owed the producers 70 percent of the home video gross receipts (in accordance with the producer-Hemdale agreement) despite Nelson's entitlement to 50 percent of the net receipts under the Hemdale–Nelson contract.

In July 1992, Nelson filed a cross-complaint against Hemdale, alleging claims for breach of contract and indemnity. In addition to damages for breach of contract, Nelson sought to be indemnified in the event it was found liable to the producers.

At some point during the litigation, Hemdale filed for bankruptcy. As a result, the producers' attempt to hold Nelson liable for the payments due under the producer-Hemdale agreement took on added significance.

***360** In July 1994, Nelson filed a motion for summary judgment on the producers' complaint, arguing that it had no duty to pay them in accordance with the producer-Hemdale agreement. The producers filed a cross-motion for summary judgment. After full briefing and oral argument, the trial court

denied Nelson's motion and granted the producers' motion. The trial court reasoned that when Nelson entered into the contract with Hemdale, it either knew or should have known about the terms of the producer-Hemdale agreement. That knowledge, according to the trial court, made Nelson liable to the producers for 70 percent of the home video gross receipts under Civil Code section 1589, which provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

Based on gross receipts received through March 31, 1994, the trial court entered judgment against Nelson for the principal sum of $6,507,960.90 plus interest in the amount of $283,497. The trial court further ordered that Nelson pay the producers 70 percent of all video gross receipts generated from and after April 1, 1994.[4] Nelson filed a timely appeal from the judgment.

DISCUSSION

Summary judgment is appropriate if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ.Proc., § 437c, subd. (c).)

A. The Producers' Motion for Summary Judgment

A cause of action is deemed to have merit unless (1) one or more of the elements of the cause of action cannot be separately established or (2) a defendant establishes an affirmative defense to that cause of action. (Code Civ.Proc., § 437c, subd. (n).) A plaintiff seeking summary judgment meets its burden of showing that there is no defense to a cause of action by proving each element of the cause of action entitling it to judgment on that claim. ***361** *Id.* § 437c, subd. (*o*)(1).) Once the plaintiff has met that burden, the ****748** burden shifts to the defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Ibid.*)

"In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. We must determine whether the facts as shown by the parties give rise to a triable issue of material fact. In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed." (*Hanooka v. Pivko* (1994) 22 Cal.App.4th 1553, 1558, 28 Cal.Rptr.2d 70, citations omitted.) We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. (*Kelleher v. Empresa Hondurena de Vapores, S.A.* (1976) 57 Cal.App.3d 52, 56, 129 Cal.Rptr. 32.) In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true. (See *Zeilman v. County of Kern* (1985) 168 Cal.App.3d 1174, 1179, fn. 3, 214 Cal.Rptr. 746.) Finally, "[w]e are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale." (*Mancuso v. Southern Cal. Edison Co.* (1991) 232 Cal.App.3d 88, 95, 283 Cal.Rptr. 300.)

In moving for summary judgment, the producers argued that Nelson was bound by the 70/30 gross receipts provision in the producer-Hemdale agreement on five alternative grounds: (1) Civil Code section 1589, (2)[5] Nelson's constructive knowledge of the terms of the producer-Hemdale agreement, (3) the doctrine of equitable assignments, (4) Nelson's relationship to the producers as a fiduciary, and (5) Nelson's failure to review the producer-Hemdale agreement before entering into a contract with Hemdale. The trial court relied on only the first of these theories in ruling for the producers, finding that Nelson had to pay the producers in accordance with the producer-Hemdale agreement because it had accepted the benefits of that agreement. We conclude that the trial court erred in that respect. We further conclude that none of the producers' alternative arguments are sufficient to support summary judgment. We therefore reverse the granting of the producers' motion.

1. Civil Code Section 1589

[1] We acknowledge the wisdom of the maxim that one who accepts the benefit of a contract or transaction is also obligated to accept the burdens ***362** thereof, but find that the maxim has no application to this case. Nelson accepted the benefit of its contract with Hemdale, and it must therefore accept the burdens of *that* contract. Since Nelson did not receive the benefit of the producer-Hemdale agreement, it is not bound by the obligations imposed by that agreement.

[2] **[3]** **[4]** "The general rule is that the mere assignment of rights under an executory contract does not cast upon the assignee the obligations imposed by the contract upon

the assignor.... The rule is otherwise, however, where the assignee assumes such obligations.... '[W]hether there has been an assumption of the obligations is to be determined by the intent of the parties as indicated by their acts, the subject matter of the contract or their words.' ... Assumption of obligations may be implied from acceptance of benefits under the contract. (Civ.Code, § 1589 ....)" (*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 745, 282 Cal.Rptr. 620, citations omitted.)

[5] Civil Code section 1589 "has generally been held to apply only where the person accepting the benefit was a party to the original transaction." (*Fruitvale Canning Co. v. Cotton* (1953) 115 Cal.App.2d 622, 626, 252 P.2d 953, overruled on other grounds in *Lucas v. Hamm* (1961) 56 Cal.2d 583, 590–591, 15 Cal.Rptr. 821, 364 P.2d 685.) However, under a well established exception to the general rule, section 1589 "requires the *assignee* of an executory contract to accept the burdens when *all* the benefits of a full performance have inured to him." ****749** (*Fruitvale, supra,* 115 Cal.App.2d at p. 626, 252 P.2d 953, italics added; accord, *Wilson v. Beazley* (1921) 186 Cal. 437, 444, 199 P. 772; *Cutting Pack. Co. v. Packers' Exch.* (1890) 86 Cal. 574, 577, 25 P. 52.) " '... [W]here after the assignment is made, the executory provisions of the contract are fully performed, *the benefit inuring solely to the assignee,* and where by his actions he holds himself out as personally liable and recognizes the original contract as binding upon him, he is liable to the other party equally with the assignor.' " (*Fruitvale, supra,* 115 Cal.App.2d at p. 626, 252 P.2d 953, italics added in *Fruitvale;* accord, *Fanning v. Yoland Productions, Inc.* (1957) 150 Cal.App.2d 444, 448–450, 310 P.2d 85.) [6]

[6] **[7]** Here, Nelson was not an assignee of the producer-Hemdale agreement, nor did it accept or receive all of the benefits of that agreement. The ***363** producers transferred to Hemdale all domestic distribution rights in "The Last Emperor"—theatrical, television, and home video—in perpetuity. The producers also assigned the copyright in the picture to Hemdale. In contrast, the Hemdale–Nelson contract authorized Nelson to distribute the picture in the home video market only; Nelson did not receive the distribution rights for theatrical or television release. Further, Nelson's distribution rights terminated after seven years (and reverted to Hemdale), while Hemdale received the distribution rights in perpetuity. Moreover, Hemdale retained the copyright in the picture. Under these circumstances, Nelson was a licensee, not an assignee. "A transfer of anything less than a totality of a work is a license and not an assignment." (*International Film Exchange, Ltd. v. Corinth Films, Inc.* (S.D.N.Y.1985) 621 F.Supp. 631, 635; accord, *Key Maps, Inc. v. Pruitt* (S.D.Tex.1978) 470 F.Supp. 33, 38–39; Webster's Third New Internat. Dict. (1993) p. 1304, col. 2 [defining "license" as "the grant of some but not all of the rights embraced in a copyright"].)

We decline to adopt the rule proposed by the producers—that a company must comply with a contract to which it is not a party if it has accepted even a portion of the benefits of that contract through a subsequent, separate agreement with one of the original contracting parties. Such a rule would lead to absurd consequences. For instance, if Nelson had entered into an additional agreement with a different distributor for each state, then those 50 distributors (or, more accurately, sub-subdistributors) would be separately liable to the producers for the full 70 percent of gross receipts from home video release although each one would have received only a small fraction of that sum. We reject this illogical and unjust result. (See *Stone v. Owens* (1894) 105 Cal. 292, 297–298, 38 P. 726 [creditors who are paid by contractor from proceeds received for work done under construction contract ***364** have not received a "benefit" of that contract within the meaning of Civil Code section 1589; to hold otherwise ****750** would give section 1589 "an outrageously unjust[ ] effect"].)

[8] **[9]** **[10]** We also find unpersuasive the producers' analogy to the landlord-tenant context. The producers contend that Nelson is liable to them in the same way that a sublessee would be liable to a landlord under the main lease (i.e., the agreement between the landlord and the lessee/sublessor). To the contrary, unless a sublessee has assumed the lessee's contractual obligations, it "is not liable to the original lessor in damages for breach of covenants in the parent lease.... A sublessee is liable only to his own lessor, that is, the sublessor, since he does not acquire the whole estate, but only a portion of the unexpired term." (*Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, 242, 73 P.2d 1163; see *id.* at pp. 242–246, 73 P.2d 1163; accord, 6 Miller & Starr, Cal. Real Estate (2d ed. 1989) § 18:60, p. 125 ["the subtenant is not liable to his landlord for the tenant's covenants contained in the master lease"]; 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 639, p. 825 [because "[t]he sublessee

is normally neither in privity of contract nor privity of estate with the lessor, ... the lessor has no action against him for rent"]; cf. *Samuels v. Singer* (1934) 1 Cal.App.2d 545, 554, 36 P.2d 1098 ["the *wrongful* occupant of real property [is obligated] to pay to the owner the *reasonable value* of the use thereof during the period of such occupancy" (italics added)].) [7]

In language appropriate to the producers' landlord-tenant analogy, one Court of Appeal has stated: "As between [the landlord] and ... [the] sublessees there was neither privity of estate nor privity of contract.... [The landlord], therefore, could not sue the undertenants upon the original lessee's covenant to pay the rent, unless the undertenants had assumed the lease, nor could an action be maintained for the use and occupation of the premises, unless there had been an agreement for the use of the premises express or implied between the lessor and the sublessee.... When, however, the original lessee becomes insolvent, equity will compel the subtenant to make all future payments of rent to the lessor *according to the terms of the* ***365** *sublease* ...." (*City Investment Co. v. Pringle* (1925) 73 Cal.App. 782, 788, 239 P. 302, citations omitted, italics added.) Under this reasoning, the producers might be able to maintain a claim against Nelson if Hemdale is insolvent, but, even in that event, the producers would be limited to enforcing *Nelson's* obligations under the *Hemdale–Nelson contract.* Here, the producers are improperly seeking to hold Nelson responsible for *Hemdale's* duties under the *producer-Hemdale agreement.*

In sum, since Nelson did not "accept the benefit" of the producer-Hemdale agreement, it is not subject to the burdens of that agreement under Civil Code section 1589.

2. Nelson's Knowledge of the Terms of the Producer–Hemdale Agreement

[11] The producers contend that Nelson had constructive knowledge of the content of the producer-Hemdale agreement when it entered into the subdistribution contract with Hemdale. Such knowledge, the producers argue, precludes Nelson from relying on the 50/50 net receipts provision of its contract with Hemdale and requires it to honor the 70/30 gross receipts provision in the producer-Hemdale agreement. We find this contention without merit inasmuch as Nelson did not have constructive knowledge of the payment provisions in the producer-Hemdale agreement.

While Nelson may have had actual knowledge of the *existence* of the producer-Hemdale agreement when it entered into the subdistribution contract, it did not have actual ****751** knowledge of the pertinent *terms* of the producer-Hemdale agreement (i.e., the provisions entitling the producers to direct payment of 70 percent of the gross receipts). Given this lack of actual knowledge, the producers argue that Nelson had constructive knowledge of the terms of the producer-Hemdale agreement because Hemdale had recorded a UCC–1 financing statement with the California Secretary of State and a copyright mortgage with the United States Copyright Office. (See fn. 2, *ante.*) [8]

No doubt, the recording of the UCC–1 and the copyright mortgage in 1986 put Nelson on constructive notice of the information contained in *those* ***366** documents. (See *T & O Mobile Homes, Inc. v. United California Bank* (1985) 40 Cal.3d 441, 446–448, 220 Cal.Rptr. 627, 709 P.2d 430 [discussing effect of recordation of UCC–1 form]; 17 U.S.C. § 205(c) ["Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document...."].) Both the UCC–1 and the copyright mortgage referenced the existence of the producer-Hemdale agreement. In addition, the UCC–1 indicated that, with respect to "The Last Emperor," Hemdale had a security interest in, among other things, "[a]ll rights, title and interest in and to all goods, chattels, property, equipment, accounts, contract rights and general intangibles heretofore or hereafter created in connection with the production of or any dealings in the Picture." The copyright mortgage stated that the producers "do[ ] hereby mortgage and assign to Hemdale and its successors and assigns ... [a]ll rights, title and interest in and to the Picture ... and all copyrights, right of copyright and renewal and extension of copyright."

[12] However, neither the UCC–1 nor the copyright mortgage described the payment terms of the producer-Hemdale agreement. Consequently, the producers contend that a recorded document provides constructive knowledge not only of its own content but also of the content of any other document referenced therein. We reject this contention. Absent suspicious or other circumstances warranting a reasonable investigation, a recorded document does not put a potential purchaser on notice of the content of a referenced, unrecorded document. (See *American Medical International, Inc. v. Feller* (1976) 59 Cal.App.3d 1008, 1020, 131 Cal.Rptr. 270; *Gates Rubber Co. v. Ulman* (1989) 214 Cal.App.3d 356, 365, 262 Cal.Rptr. 630 [applying *American*

Medical International]; *Pacific Trust Co. TTEE v. Fidelity Fed. Sav. & Loan Assn.* (1986) 184 Cal.App.3d 817, 820–821, 825, 229 Cal.Rptr. 269 [junior lienholder had constructive notice of senior lienholder's prior recorded deed of trust and was on inquiry notice as to terms of promissory note, which was referenced in deed]; Civ.Code, § 19 ["Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."]; see also *Roberts v. Fitzallen* (1898) 120 Cal. 482, 483–484, 52 P. 818 [in foreclosure action against grantee who assumed mortgage, attorney fee provision contained in note was not binding on grantee since provision did not appear in recorded mortgage].)

When Nelson entered into the subdistribution contract with Hemdale, it had no reason to believe that the terms of that contract were inconsistent with any provisions in the producer-Hemdale agreement. Indeed, to the ***367** extent Nelson had knowledge (constructive or actual) of Hemdale's rights through the UCC–1 or the copyright mortgage, it appeared that Hemdale had full authority to enter into a subdistribution contract calling for an equal share of net receipts between the two parties to that contract. Moreover, Hemdale expressly warranted in the subdistribution contract that it had the exclusive authority to grant the home video rights to Nelson. In short, at the time the subdistribution contract was executed, nothing would have raised Nelson's suspicions about whether Hemdale was ****752** acting in conformity with the producer-Hemdale agreement.[9] Accordingly, Nelson was not on "inquiry notice" as to the terms of the producer-Hemdale agreement—which were not described in the recorded documents—and Nelson was not deemed to have had constructive knowledge of the content of the producer-Hemdale agreement.

[13] **[14]** Finally, we are unwilling to hold that, regardless of the circumstances, a subdistributor is always charged with knowledge of the terms of the main distribution agreement. We recognize that somewhat similar rules have been adopted with regard to the transfer of real property. By way of example, "[i]t is the duty of a person contracting for a sublease to ascertain the provisions of the original lease; and a subtenant is charged with notice of the existence of the original lease, and is bound by its terms and conditions." (*Pedro v. Potter* (1926) 197 Cal. 751, 760, 242 P. 926.) Of course, this particular rule furthers the important common law principle favoring the free alienability of real property by allowing the landlord to retake possession of the leased premises regardless of who—the tenant or the subtenant—has violated the terms of the main lease. (See *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 354–355, 358, 6 Cal.Rptr.2d 467, 826 P.2d 710; *Kendall v. Ernest Pestana, Inc., supra,* 40 Cal.3d at p. 494, 220 Cal.Rptr. 818, 709 P.2d 837, 6 Miller & Starr, Cal. Real Estate, *op. cit. supra,* § 18:60, p. 126; see also Civ.Code, § 711 [codifying common law principle against restraints on alienation].) However, no such principle applies to the non-real property at issue here. Moreover, while a landlord can take possession from the subtenant for violating the terms of the main lease, the subtenant cannot be held liable to the landlord for amounts due under that lease. (See pt. A.1, *ante.*) Accordingly, in this case, since the producers seek to hold Nelson liable under the main (producer-Hemdale) agreement, analogies to real property law do not support their requested relief. (Cf. *Enterprise Leasing Corp. v. Shugart Corp., supra,* 231 Cal.App.3d at pp. 745–746, 282 Cal.Rptr. 620 [declining to apply real property law in determining assignee's obligations under a lease of personal property].)

***368 3. Equitable Assignment**

[15] The producers contend that their right to 70 percent of the gross receipts under the producer-Hemdale agreement was binding on Nelson under the doctrine of equitable assignments. We disagree.

[16] "Evidence of an equitable assignment must be clear and specific, [and] the assignor must not retain any control over the fund or any authority to collect." (*Iriart v. Southwest Fertilizer etc. Co.* (1958) 51 Cal.2d 270, 275, 332 P.2d 285.) It has also been said that an equitable assignment "is implied from the conduct of the parties rather than established by express words of formal assignment." (*First Nat. Bank v. Pomona Tile Mfg. Co.* (1947) 82 Cal.App.2d 592, 606, 186 P.2d 693.) The doctrine of equitable assignments is typically used to enforce an attempted assignment of rights that is technically defective or to create a right of subrogation. (See, e.g., *Kelly v. Kelly* (1938) 11 Cal.2d 356, 364, 79 P.2d 1059 ["equity will uphold assignments[ ] not valid at law"]; *Fidelity National Title Ins. Co. v. Miller* (1989) 215 Cal.App.3d 1163, 1174, 264 Cal.Rptr. 17 [" '[E]quitable assignment or right of subrogation is a creature of equity and applies to all cases where one party involuntarily pays a debt

for which another is primarily liable and which in equity and good conscience should have been paid by the latter....' "].)

[17] **[18]** **[19]** **[20]** Nevertheless, an "equitable assignment" is still an "assignment." "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.... It is the substance and not the ****753** form of a transaction which determines whether an assignment was intended.... If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the [property], then an assignment will be held to have taken place." (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 225, 87 Cal.Rptr. 213, citations omitted.)

As we have already held, Nelson received a *license* of certain rights granted Hemdale under the producer-Hemdale agreement; Nelson did not receive an assignment. (See pt. A.1., *ante*.) Moreover, the producers cite no evidence suggesting that they intended Nelson to take title to, or ownership of, the rights granted Hemdale. If anything, just the opposite is true; the producer-Hemdale agreement stated that "[n]either party shall have the right to assign its rights or obligations hereunder without the written consent of the other." No such consent was given. Further, the producers and Hemdale ***369** provided that "[t]his Agreement is not for the benefit of any third party and shall not be deemed to give any right or remedy to any such third party."

In light of this evidence, we conclude that the doctrine of equitable assignments did not require Nelson to pay the producers 70 percent of the gross receipts.

4. Nelson's Alleged Role as a Fiduciary

[21] The producers argue that Nelson's relationship to them was fiduciary in nature since Nelson was a trustee or agent with regard to the distribution proceeds. As a fiduciary, so the argument goes, Nelson had a duty to ignore the 50/50 net receipts provision in its own contract and instead comply with the 70/30 gross receipts provision in the producer-Hemdale agreement. We reject this contention for several reasons.

[22] First, the producers rely on the Hemdale–Nelson contract—Nelson's only connection to The Last Emperor—in arguing that Nelson owed them the duties of a fiduciary. Having invoked the "fiduciary" mantle, the producers then assert that Nelson was obligated to pay them in accordance with the producer-Hemdale agreement. In other words, as the producers see it, the Hemdale–Nelson contract gave rise to a fiduciary duty requiring Nelson to disregard the payment terms of that very contract. This is a non sequitur. We think it clear that the Hemdale–Nelson contract did not contain such a self-destruct mechanism: a contract cannot be the source of a duty (fiduciary or otherwise) to breach that contract.

Second, assuming arguendo that Nelson's *indirect* relationship with the producers was fiduciary in nature, we think Nelson would also be a fiduciary as to Hemdale, with whom it had a *direct* relationship. If that were the case, we fail to understand how Nelson's role as a fiduciary would require it to comply with the payment provisions in the producer-Hemdale agreement. After all, Nelson was not a party to that agreement and did not know about the 70/30 gross receipts provision when it entered into the Hemdale–Nelson contract. If anything, Nelson's role as a fiduciary would obligate it to satisfy the express terms—the 50/50 net receipts provision—of its own contract with Hemdale. Simply put, Nelson's alleged fiduciary duty did not require it to simultaneously comply with conflicting, irreconcilable payment terms. The provisions of the Hemdale–Nelson contract would govern Nelson's obligations.

[23] **[24]** Finally, we conclude that there was no fiduciary relationship between Nelson and the producers. Unquestionably, an agent undertakes fiduciary ***370** obligations with respect to his principal, as does a trustee with respect to the beneficiaries of a trust. (See *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579–1580, 36 Cal.Rptr.2d 343 [agent]; *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 Cal.App.3d 264, 280, 218 Cal.Rptr. 205 [trustee].) However, in this case, no fiduciary obligations existed between the producers and Nelson.

[25] "A 'confidential relation' in law may be defined to be any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of ****754** the other party without the latter's knowledge or consent. A 'fiduciary relation' in law is ordinarily synonymous with a 'confidential relation.' " (*Bacon v. Soule* (1912) 19

Cal.App. 428, 434, 126 P. 384.) As stated more recently, "[a] fiduciary relationship is created where a person reposes trust and confidence in another and the person in whom such confidence is reposed obtains control over the other person's affairs." (*Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 809, 22 Cal.Rptr.2d 636.)

[26] Under these principles, the typical distribution contract, negotiated at arm's length, does not create a fiduciary relationship between the owner of a product and the distributor. (*Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 653–655, 192 Cal.Rptr. 732; *Anthony Distributors, Inc. v. Miller Brewing Co.* (M.D.Fla.1995) 162 F.R.D. 169, 171; *OKI Distributing, Inc. v. Amana Refrigeration, Inc.* (S.D.Ohio 1994) 850 F.Supp. 637, 647; see also *Gonsalves v. Hodgson* (1951) 38 Cal.2d 91, 98–99, 237 P.2d 656 [no fiduciary relationship where parties engaged in course of arm's length dealing].)

In *Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 32 Cal.Rptr. 73, the Court of Appeal rejected the argument that a fiduciary relationship existed between a film producer and a distributor, stating: "The [distribution] contract is an elaborate one which undertakes to define the respective rights and duties of the parties.... A mere contract or a debt does not constitute a trust or create a fiduciary relationship." (*Id.* at pp. 731–732, 32 Cal.Rptr. 73; see *id.* at pp. 732–734, 32 Cal.Rptr. 73 [discussing cases].) Obviously, if a ***371** fiduciary relationship does not exist between a producer and a distributor, then no such relationship exists between a producer and a subdistributor. [10]

5. Nelson's Failure to Review the Producer–Hemdale Agreement

[27] Although Nelson requested that Hemdale provide it with a copy of the producer-Hemdale agreement, it did not receive one until after entering into the subdistribution contract. Nelson admits that it was putting itself "at risk" by not adequately verifying the chain of title as to the rights it was purchasing from Hemdale. Nelson also knew that the producer-Hemdale agreement might be critical in determining the integrity of the chain of title, depending upon its content. Nevertheless, Nelson went forward with the subdistribution contract without having obtained and reviewed Hemdale's agreement with the producers.

Had Nelson reviewed the producer-Hemdale agreement before entering into the subdistribution contract, it would have discovered the 70/30 gross receipts provision and could have insisted on changes in its own contract or could have refused to enter into any contract with Hemdale. Based on this scenario, the producers contend that Nelson is in the same position as a person who buys a car from a thief without adequately verifying title. Plainly, "a thief cannot transfer valid title." (*Naftzger v. American Numismatic Society* (1996) 42 Cal.App.4th 421, 428, 49 Cal.Rptr.2d 784.) We find the producers' analogy unconvincing.

Unlike a car thief, who has no ownership interest in the item he sells, Hemdale owned the domestic home video rights to "The Last Emperor." It conveyed those rights to Nelson for a seven-year period. In doing so, Hemdale simply failed to structure the subdistribution contract in accordance with the payment terms of its agreement with the producers. Consequently, this is not a case where the purchaser (Nelson) acquired something that the seller (Hemdale) did not own. The correct way to view it is that Hemdale sold something at the wrong price.

[28] We have previously recognized that "[a]n owner who entrusts his property to ****755** another bears some responsibility for creating a situation whereby an ***372** innocent purchaser is led to buy goods from an agent who is acting in excess of his authority. The law sometimes protects the innocent purchaser's title against the defrauded owner, depending upon the circumstances." (*Naftzger v. American Numismatic Society, supra,* 42 Cal.App.4th at pp. 429–430, 49 Cal.Rptr.2d 784, italics omitted.) "Where one of two innocent parties must suffer because of the fraud of a third, the loss must be borne by the person whose negligence or misplaced confidence made the injury possible." (*Miller v. Wood* (1963) 222 Cal.App.2d 206, 209, 35 Cal.Rptr. 49; accord, *Correa v. Quality Motor Co.* (1953) 118 Cal.App.2d 246, 252–253, 257 P.2d 738; *Carter v. Rowley* (1922) 59 Cal.App. 486, 489, 211 P. 267; Civ.Code, § 3543.)

[29] Before executing their agreement with Hemdale, the producers contemplated that Hemdale would use a subdistributor to release "The Last Emperor" in the home video market. Because the producers did not trust Hemdale with the home video proceeds, they attempted to protect their interest by requiring Hemdale to instruct the subdistributor to pay 70 percent of the gross receipts directly to them. That attempt failed because Hemdale did not so instruct Nelson

and instead agreed to a 50/50 split of net receipts, with no provision that any amount be paid to the producers, directly or indirectly.

In contrast to the producers' actual distrust of Hemdale, Nelson had no reason to believe that, in negotiating the subdistribution contract, Hemdale would disregard the terms of its agreement with the producers. Significantly, the UCC–1 and the copyright mortgage, both of which were executed by the producers, indicated to Nelson that Hemdale owned all rights, title, and interest in "The Last Emperor," including all contract rights. Those documents did not suggest any limitations on Hemdale's ability to structure payment terms with a subdistributor. Consistent with the content of the UCC–1 and the copyright mortgage, Hemdale represented to Nelson that it had full authority to enter into what became the Hemdale–Nelson contract. Nelson reasonably relied on that representation.

Given this evidence, we conclude that, as between the producers and Nelson, the producers must incur any harm or loss occasioned by Hemdale's failure to comply with the producer-Hemdale agreement. The producers chose Hemdale as the main distributor of "The Last Emperor" despite serious doubts about Hemdale's integrity and with full knowledge of Hemdale's alleged reputation as a litigious company that withholds payment from creditors. Nelson, on the other hand, had no basis to suspect Hemdale of possible wrongdoing. Moreover, in light of their distrust of Hemdale, the producers could have taken a variety of actions not only to protect their own ***373** interest in the home video release of the picture but also to shield potential subdistributors from the type of litigation that Nelson has had to face. [11]

Our conclusion does not ignore the fact that Nelson knowingly took a "risk" by failing to obtain and review the producer-Hemdale agreement before entering into the subdistribution contract. Nelson readily concedes that there were risks associated with its conduct. For example, if Hemdale had not acquired the home video rights to "The Last Emperor," Nelson's failure to review the producer-Hemdale agreement (which would have disclosed this hypothetical lack of ownership) would have brought this case within the producers' car thief analogy; Nelson would have paid for something ****756** that Hemdale did not own. [12] However, based on the situation that actually existed, we conclude that Nelson's willingness to take some form of "risk" did not require that it fill Hemdale's shoes under the producer-Hemdale agreement. [13]

In sum, neither Civil Code section 1589, Nelson's knowledge of the existence of the producer-Hemdale agreement, the doctrine of equitable assignments, an alleged fiduciary relationship between the producers and Nelson, nor Nelson's failure to review the producer-Hemdale agreement before entering into the subdistribution contract entitled the producers to summary judgment.

B. Nelson's Motion for Summary Judgment

"A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more ***374** elements of the cause of action cannot be established [or that there is a complete defense to that cause of action].... Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action." (*Hanooka v. Pivko, supra,* 22 Cal.App.4th at p. 1558, 28 Cal.Rptr.2d 70, citations omitted; see also Code Civ. Proc., § 437c, subd. (*o*)(2).)

[30] Having rejected the grounds which would support summary judgment for the producers, the question remains as to whether Nelson is entitled to summary judgment. Not surprisingly, the contentions raised by Nelson's motion for summary judgment were identical to those raised in the producers' cross-motion. We have already resolved all of those contentions in Nelson's favor. It follows that, as a matter of law, the producers' claims against Nelson are without merit. [14] Accordingly, the trial court should have granted summary judgment for Nelson.

DISPOSITION

The judgment is reversed. On remand, the trial court shall vacate its order denying defendant Nelson Entertainment, Inc.'s motion for summary judgment, shall enter a new order granting that motion, and shall enter judgment in favor of Nelson and against the plaintiffs. Nelson is entitled to recover its costs on appeal.

SPENCER, P.J. and ORTEGA, J., concur.

All Citations

53 Cal.App.4th 350, 61 Cal.Rptr.2d 742, 97 Cal. Daily Op. Serv. 1741, 97 Daily Journal D.A.R. 3237

Footnotes

1 By “domestic” rights, we refer to the agreement's “territory,” which was defined as “[t]he United States and Canada and their respective territories and possessions, and all ships and airplanes of the registry, nationality or flag of the United States or Canada (regardless of location), and the Red Cross and other civilian installations and military establishments operated by any of the armed forces of the United States or Canada (regardless of location).”

2 In connection with the agreement, Hemdale filed a UCC–1 financing statement with the California Secretary of State and the New York Department of State in June 1986. That document referenced the existence of the producer-Hemdale agreement (but did not describe all of its terms) and indicated that Hemdale had a security interest in “The Last Emperor.” The UCC–1 listed the producers as debtors and Hemdale as the secured party. Similarly, in August 1986, Hemdale filed a “mortgage and assignment of copyright” with the United States Copyright Office. The copyright mortgage referenced the existence of the producer-Hemdale agreement (without describing all of its terms) and indicated that the producers had assigned the copyright in “The Last Emperor” to Hemdale. Both the UCC–1 and the copyright mortgage were signed by representatives of the producers. Neither document mentioned anything about how or what the producers were to be paid for the distribution rights granted Hemdale.

3 On June 13, 1988, the producers had sent Nelson a portion of their agreement with Hemdale, which included the provision requiring that any home video subdistributor pay 70 percent of the gross receipts directly to the producers.

4 As of March 31, 1994, gross receipts were $14,297,087. Under the Hemdale–Nelson contract, Nelson would have recovered (out of gross receipts) its $6.5 million advance plus $183,759 in interest, distribution expenses of $2,859,417 (a portion of its total distribution expenses), a distribution fee of $4,289,126, and its 50 percent share (approximately $232,000) of net receipts. Thus, Nelson would have earned a profit exceeding $2.5 million under the terms of its own contract (as of March 31, 1994). However, under the trial court's ruling, Nelson would incur an out-of-pocket loss of approximately $3.9 million (as of March 31, 1994). As a practical matter, the trial court's decision means that Nelson would never make a profit from distributing “The Last Emperor” in the home video market.

5 As a corollary to section 1589, Civil Code section 3521 states that “[h]e who takes the benefit must bear the burden.”

6 The cases cited by the producers are consistent with the rule that Civil Code section 1589 may apply to a party to the original contract, to an assignee of the contract, to a person who accepts all of the benefits of the contract, or to a person who expressly assumes the obligations of the contract. (See *Weidner v. Zieglar* (1933) 218 Cal. 345, 348–350, 23 P.2d 515 [plaintiff was bound by obligations imposed on beneficiaries of declaration of trust where he expressly assumed those obligations as an assignee]; *Halperin v. Raville* (1986) 176 Cal.App.3d 765, 771–772, 222 Cal.Rptr. 350 [son was liable for loans that plaintiff had made to father where money was borrowed for “father/son business” and son had played significant role in obtaining

loans from plaintiff]; *Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 Cal.App.2d 666, 675–677 & 676, fn. 3, 53 Cal.Rptr. 551 [where corporation acquired all of partnership's assets, it was bound by contract entered into by partnership regardless of whether documents showed that particular contract was expressly assigned to corporation]; *Pecarovich v. Becker* (1952) 113 Cal.App.2d 309, 248 P.2d 123 [coach of professional football team could recover under personal services contract against defendant who owned one-half interest in franchise where defendant was "full partner" in the enterprise, assumed the management, control, and operation of the team, and was coach's "joint employer"]; *Walmsley v. Holcomb* (1943) 61 Cal.App.2d 578, 580–582, 143 P.2d 398 [sublessee was liable under terms of original lease where he agreed to "take over" the lease and where there was an "executed oral assignment" of original lease]; *Woodley v. Woodley* (1941) 47 Cal.App.2d 188, 117 P.2d 722 [where father's will left real property to defendant son upon condition that portion of rental proceeds be paid monthly to other son, defendant's acceptance of property obligated him to make payments to his brother]; *Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp.* (9th Cir.1982) 677 F.2d 771, 772–773 [lessee of aircraft was bound by exculpatory clause in warranty provision of purchase agreement where lessee expressly assumed that provision in lease].)

7 Just as the cases interpreting Civil Code section 1589 recognize a distinction between an assignment and a license, the landlord-tenant decisions distinguish between an assignment of a lease (which transfers the lessee's entire interest in the property) and a sublease (which transfers only a portion of the lessee's interest). (See *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 492, fn. 2, 220 Cal.Rptr. 818, 709 P.2d 837 [defining lease assignment and sublease].) In general, an *assignee* of the lessee is liable to the landlord for rent under the original lease (at least for the period of possession), while a *sublessee* is not (absent an assumption of the lease). (See *Hartman Ranch Co. v. Associated Oil Co., supra,* 10 Cal.2d at pp. 242–246, 73 P.2d 1163; *Kelly v. Tri–Cities Broadcasting, Inc.* (1983) 147 Cal.App.3d 666, 676–679, 195 Cal.Rptr. 303, 6 Miller & Starr, *op. cit. supra,* §§ 18:55, 18:60, pp. 115–118, 125–127.)

8 At some point, Nelson received a copy of those two documents, although it is not clear if it obtained them before entering into the contract with Hemdale. However, on August 17, 1987, before executing the contract, Nelson received a summary of the documentation relating to the chain of title. That summary described the content of the copyright mortgage, stating that Hemdale had acquired from the producers all rights, title and interest in "The Last Emperor," including all contract rights.

9 For instance, the producers do not contend that the 50/50 net receipts provision in the Hemdale–Nelson contract was unusual in the industry or that it gave Nelson an unbelievably high percentage of the receipts.

10 The *Waverly* court did state that the distributor owed a fiduciary duty to the producer to provide an accounting of proceeds received from subdistributors. (See 217 Cal.App.2d at pp. 731, 734, 32 Cal.Rptr. 73.) Here, that duty would govern the relationship between the producers and Hemdale, but it would not extend from the producers to Nelson. In that regard, the producer-Hemdale agreement provided: "Producer shall not have direct auditing rights with respect to such videogram distributor [i.e., subdistributor]; provided, however, that if Hemdale declines to exercise its audit rights under its agreement with such videogram distributor, Producer may require Hemdale to exercise such rights, which Hemdale shall do and failing which Producer may do in Hemdale's name...."

11 For instance, assuming the producers could not have found a main distributor other than Hemdale, they could have sold Hemdale only the theatrical and television rights and entered into a contract directly with Nelson for the home video rights. Alternatively, even with Hemdale as the main distributor in all fields, the producers could have retained the right to pre-approve any subdistribution contract and mentioned that right in the UCC–1 and copyright mortgage; they could have included information in the UCC–1 and copyright mortgage about

their terms of payment (without disclosing confidential financial data); or they could have simply monitored Nelson's negotiations with Hemdale more closely and contacted Nelson before it agreed to a final contract.

12 We express no view on the appropriate remedy in such a case.

13 Our analysis properly focuses on the parties' conduct and knowledge *before* Nelson executed a contract with Hemdale. After entering into that contract, Nelson was bound thereby unless its performance was excused under one of the theories advanced by the producers. We have concluded that none of those theories applied. Thus, Nelson did not become liable to the producers merely because it continued to pay Hemdale under the subdistribution contract after learning about the content of the producer-Hemdale agreement. Nor did Nelson's failure to interplead the disputed funds into court make it liable under the producer-Hemdale agreement. (See Code Civ.Proc., § 386.)

14 In deciding whether summary judgment for Nelson is proper, we construe the evidence most favorably to the producers (as plaintiffs) and draw all reasonable inferences in their favor. Under that standard, we find that there is no triable issue of material fact. For example, although the producers admittedly distrusted Hemdale, there is no evidence that Nelson did so. Indeed, the “evidence” on that point was supplied by the allegations in the producers' complaint. While those allegations can be considered in denying the producers' summary judgment motion, they cannot be used to defeat Nelson's motion. (See *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 222, fn. 3, 31 Cal.Rptr.2d 525; *Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 988–989, 245 Cal.Rptr. 463.) In short, as the producers stated in their brief, “[b]oth plaintiffs and Nelson agreed, and still agree, that there are no material disputed facts applicable to the cross-motions.”

EXHIBIT Altanovo-32

107 Cal.App.2d 8
District Court of Appeal, Second District, Division 2, California.

BERGIN
v.
VAN DER STEEN et al.

Civ. 18354.
|
Oct. 23, 1951.
|
Rehearing Denied Nov. 14, 1951.
|
Hearing Denied Dec. 18, 1951.

Synopsis
T. M. Bergin brought an action against Barney van der Steen and Beulah Anderson and others for commissions on concession sales. The Superior Court, Los Angeles County, Allen W. Ashburn, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that plaintiff, as successor in interest to the assignor of the original concession contract, was entitled, under the terms of the assignment, to receive commissions on sales made under a substituted concession agreement, but that under the evidence admissible against defendant van der Steen, said defendant was not personally liable for commissions on sales made after the substituted contract term.

Modified and affirmed.

West Headnotes (20)

[1] **Contracts** Alternative stipulations and options

The general rule that an option contained in a contract must be exercised before expiration of original term is not applicable where the parties have manifested an intention that the power is to continue for a reasonable time after the close of the original term.

1 Cases that cite this headnote

[2] **Contracts** Intention of Parties

Parties' intent is controlling in construing contract.

1 Cases that cite this headnote

[3] **Contracts** Intention of Parties

The intent of parties to a contract may be found from the circumstances of the execution of the contract, the conduct and declarations of the parties pursuant to its terms, and the nature and custom of the business concerned.

1 Cases that cite this headnote

[4] **Contracts** Reasonableness of construction

A fair and reasonable interpretation of contract, rather than one leading to harsh and unreasonable results, is always preferred.

3 Cases that cite this headnote

[5] **Contracts** Weight and sufficiency

In action involving concession contract which contained an option for renewal, finding that parties intended that concessionaire should have a reasonable time after expiration of original term in which to exercise option was based upon substantial evidence.

1 Cases that cite this headnote

[6] **Appeal and Error** Particular Cases and Contracts

Where evidence in action involving concession contract supported finding that assignees of concession contract knew that option contained therein was intended to continue for a reasonable time after termination of contract, finding could not be disturbed on appeal.

[7] **Partnership** Property and Transactions to Be Included

Where income to partnership from concessions was substantial, option to renew contract was

an asset of the partnership for which surviving partner would have to account to administratrix of deceased partner.

[8] **Partnership** Property and Transactions to Be Included

Where option to renew concession contract was an asset of partnership, surviving partner in relinquishing option would be presumed to have intended to dispose of the asset in the regular course of settlement of partnership affairs.

[9] **Assignments** To assignor

Where partnership was assignee of concession contract which contained renewal option, and concession seller would not execute new concession contract in favor of widow, who was executrix of deceased partner, unless surviving partner and executrix of deceased partner relinquished renewal option rights, such relinquishments would be an assignment within purview of agreement which gave assignor of concession contract a right to commissions on sales in event substituted concession agreement was obtained by assignee or subsequent assignee.

[10] **Assignments** Nature and essentials in general

It is the substance and not the form of a transaction which determines whether an assignment is intended.

4 Cases that cite this headnote

[11] **Contracts** Excuses for Nonperformance or Defects

Where performance of a contract after a temporary suspension does not impose a substantially greater burden upon promisor, his duty is suspended only during the period his performance was hindered and he must thereafter perform.

[12] **Contracts** Duration of Contract in General

Where performance of concession contract at horse racing club was prevented during part of term of contract by temporary suspension of horse racing, upon resumption of racing, the contract would not be extended beyond its normal termination date for an additional period equal to the period during which performance was suspended, in the absence of any agreement to the contrary.

[13] **Contracts** Weight and sufficiency

In action involving five year concession contract at horse racing club, evidence supported finding that contract was intended to remain in existence for five racing meets and that contract was to extend beyond its normal termination date for an additional period equal to the period during which performance was suspended by temporary suspension of horse racing.

[14] **Contracts** Weight and sufficiency

In action by assignor's successor to recover, pursuant to assignment agreement, percentage of sales made by subsequent assignee under substituted concession agreement, evidence admissible against surviving member of assignee-partnership would not support finding that substituted concession agreement was to be extended if performance thereunder were temporarily suspended.

[15] **Assignments** Pleading

In action by assignor's successor to recover, pursuant to assignment agreement, a percentage of sales made by subsequent assignee under substituted racing track concession agreement, complaint, which alleged that parties to substituted agreement had construed the five year term of a substituted concession agreement to mean five racing seasons, when read in conjunction with incorporated exhibits, was sufficient to state cause of action for commissions on sales made after time term of

substituted concession agreement would have expired if racing had not been temporarily suspended during war years.

[16] **Pleading** Objections raised on appeal

Where appellants criticized pleading for first time on appeal, an interpretation as favorable as possible would be given pleading with a view to upholding judgment.

[17] **Assignments** Weight and sufficiency

In action involving concession contract, evidence sustained finding that subsequent assignee of concession contract had assumed obligation under original assignment agreement to pay assignor and its successor a percentage of gross proceeds from concession operations. West's Ann.Civ.Code, § 1589.

[18] **Assignments** Presumptions and burden of proof

In action involving obligation under assignment of concession contract, absence of consideration for subsequent assignment raised inference that ultimate assignee would assume obligations which rested upon her assignor, as prior assignee.

1 Cases that cite this headnote

[19] **Frauds, Statute Of** Agreements not to be performed within one year

Where assignor of five year concession contract which contained renewal option and such assignor's successor had completely performed under assignment agreement which gave assignor commissions on sales by assignees and subsequent assignees, such agreement was taken outside statute of frauds requiring contracts not performable in one year to be signed by person to be charged. West's Ann.Civ.Code, § 1624, subd. 1.

4 Cases that cite this headnote

[20] **Assignments** Weight and sufficiency

In action by successor in interest to assignor of concession contract for commissions on concession sales, wherein assignee defended on ground that he was liable only in the event his immediate assignee was holder of concession rights, evidence supported finding that such immediate assignee had not made further assignment.

Attorneys and Law Firms

****615** ***10** John W. Preston, Harry C. Cogen and Aaron L. Lincoff, Los Angeles, for appellant Beulah Anderson.

Leo K. Gold, Beverly Hills, for appellant Barney Van Der Steen.

Birger Tinglof, Los Angeles, for respondent.

Opinion

MOORE, Presiding Justice.

Respondent recovered judgment for sums aggregating in excess of $54,800 as commissions on the gross dollar sales of liquors, foods and tobaccoes at the Del Mar Turf Club. The appeal demands a reversal upon a number of grounds which will appear with the unfolding of the story.

On April 4, 1937, the club by a written instrument granted respondent a concession for the sale of such commodities at the Del Mar Race Track for the term of five years, ending with the racing season of 1941. By the same contract respondent was awarded an option for an additional period of five years from and after the close of the first five-year period. Immediately thereafter respondent assigned his concession agreement to Del Mar Caterers, a corporation of which he was sole shareholder. After operating the concession for ***11** three years, the Caterers on April 24, 1940, assigned to appellant van der Steen and William L. Anderson as buyers, the original concession agreement. By such assignment the buyers agreed that no transfer of the concession would be made or any new agreement be substituted without written notice to the Caterers or without the execution and delivery to Caterers by the new concessionaire of his agreement to be bound by all the terms and conditions of the assignment.

Neither should the buyers by a transfer of the concession be released from their obligations to the Caterers. As an integral part of the concession agreement, a supplemental contract was executed by the same parties whereby Caterers agreed that upon the expiration of the original term of the concession agreement at the close of the 1941 racing meet it would 'not submit any bid to the club for the concession privileges during the optional five year term'; and the buyers agreed that in the event the concession is extended or renewed or 'if any new or substituted concession agreement is entered into by us (the buyers), or either of us, or our assignees or by any firm or corporation in which we, or either of us, are interested, we agree to pay or cause to be paid, to you (Caterers) the equivalent of 2 1/2% of the gross dollar sales made by the concession during the added period of five years commencing with the 1942 racing meet.

The concession was operated by the buyers during the 1940 racing season, but on April 9, 1941, prior to the commencement of the 1941 meet, Mr. Anderson deceased. His widow, appellant Beulah Anderson, qualified as executrix of his estate and acted in that capacity until June 2, 1944, when the probate proceedings were terminated. As surviving partner, van der Steen conducted the concession during the 1941 season and paid Caterers as provided by the 1940 contract; also he paid to Mrs. Anderson her decedent's share of the profits of 1941 for which she accounted to the estate.

After the close of the 1941 racing meet, neither respondent nor his corporation submitted a bid to the Turf Club for the concession privileges during the optional five-year term, nor did either make any effort to acquire any rights under the option, respondent having obligated himself by the supplemental contract of April 24, 1940, to refrain from bidding and having relied upon the assumption that the buyers would perform as they had agreed by such contract. But appellant Beulah Anderson obtained from the Turf Club a new concession agreement for the additional period of five years following ***12** the expiration of the first five-year period. However, the Turf Club required as conditions precedent to the effectiveness of the new concession to Mrs. Anderson, that the surviving partner and the ****616** executrix of decedent both should 'waive and relinquish any and all options, rights and privileges granted the Concessionaire' under the agreement of April 4, 1937, between the Turf Club and respondent.[1] The court found that the new agreement of the Club with Mrs. Anderson is a 'new or substituted concession agreement' within the meaning of the supplemental agreement of April 24, 1940, and that it was so intended to be by both appellants; that by the waivers the latter signed on October 27, 1941, appellants 'intended to, and did, transfer and assign unto, and vest in Beulah Anderson individually all optional concession rights and privileges' then and previously owned by the partnership * * * composed of Barney van der Steen and decedent; and that 'by the execution of the referred to waivers and relinquishments * * * defendants intended to, and did, make Beulah Anderson an assignee and a new or substituted concessionaire' within the meaning of the supplemental agreement.

By respondent's agreement with Turf Club April 4, 1937, the Concessionaire was given a reasonable time after the expiration of the first five years within which to exercise the option of renewal. The court found that such reasonable time had not expired before the substituted agreement was made and that by the Turf Club's agreement of September 30, 1941, with Mrs. Anderson, the concession granted respondent in April, 1937, was extended and renewed within the meaning of respondent's agreement with the 'buyers' on April 24, 1940.

***13** Racing meets were forbidden by governmental regulations during 1942, 1943 and 1944. In July, 1945, in contemplation of the resumption of racing, Mrs. Anderson and the Turf Club executed another agreement whereby the parties stipulated that 'the suspension of racing * * * as the result of wartime restrictions and regulations shall be understood to have merely suspended said Agreement of September 30, 1941, and the period of time during which said Agreement was inoperative * * * shall be deemed added to said contract and shall extend its term accordingly.'

Immediately prior to the 1945 meet, without assigning her concession agreement, Mrs. Anderson pretended to sell the concession business to her two daughters and one Sam Dunham. Although the trio thereafter operated the concessions, from all the evidence the court found that there was no actual transfer of the concession rights and that title thereto was vested in Mrs. Anderson.

The court determined that appellant van der Steen was liable under the terms of the 1940 agreement to which he was a party. Mrs. Anderson's liability was based upon her implied assumption of the obligations imposed by that contract.

[1] **[2]** **[3]** **[4]** The first assignment of error is that the additional five-year option granted under the 1937 concession contract could not have been effectively transferred or assigned because the initial contract itself terminated prior to the exercise of the option. It is argued that the first five-year period ended on September 6, 1941, the final day of the 1941 racing season, and that consequently the new concession

agreement between Mrs. Anderson and the Turf Club of September 30, 1941, came at least 24 days too late to be a valid exercise of the power to renew the contract. In support of the general rule that an option contained in a contract must be exercised before the expiration **617 of the original term or such power is extinguished, numerous authorities are cited. San Pedro Salt Company v. Hauser Packing Company, 13 Cal.App. 1, 108 P. 728; Robertson v. Drew, 34 Cal.App. 143, 145, 166 P. 838; 3 Williston on Contracts [Rev.Ed.] sec. 853, p. 2391. However, such general rule is not applicable where the parties have manifested an intention that the power is to continue for a reasonable time after the close of the original term of the contract. It is elemental that a contract will be so interpreted as to ascertain the intention of the parties. Such intent may be found from the circumstances of its execution, the conduct and declarations of the parties pursuant to its terms and the nature and custom *14 of the business concerned. 3 Williston on Contracts, [Rev.Ed.] secs. 618–9, p. 1779. A fair and reasonable interpretation is always preferred rather than one leading to harsh and unreasonable results.

[5] Based upon substantial evidence, the court herein found that the parties to the initial concession agreement intended the concessionaire to have such reasonable time. The contract itself is indefinite on this point, stating merely that 'Concessionaire is granted * * * an option for an additional period of five years from and after the close of the first five-year period. * * *' Nothing is stated therein to indicate time to be of the essence of the agreement. On the contrary, considering the nature of the enterprise and the surrounding facts and circumstances it is a reasonable interpretation that the parties contemplated a reasonable time within which the option could be exercised. It must be borne in mind that the brief season during each year when Del Mar was operated was itself uncertain. The time for the racing meet was annually set by the State Horse Racing Board. After the close of any racing meet the concessions are inoperative for approximately ten months before reopening. Under such circumstances, is it likely that the parties considered 'time of the essence' in exercising the option?

[6] Additional evidence of the fact that the parties contemplated a reasonable period of time within which to act on the Club's offer is supplied by their later conduct. For example, defendant van der Steen, on a check he sent to Bergin after the close of the 1941 meet, wrote on the accompanying voucher: 'Happy to send you this check—you have an interest at Del Mar—why not help us to keep Hotel Del Mar open during the winter months—this will help your interest—in time to come. * * *' From that occurrence it is a reasonable inference that van der Steen apparently believed that the time had not yet expired for him to exercise the option and that Bergin would still be entitled to a share of gross sales under the 1940 contract. Furthermore, the act of the Turf Club in insisting upon waivers by van der Steen and Mr. Anderson's estate is likewise further evidence that the Club considered the option right as still subsisting. If the officials of the club communicated to appellants the idea that the club could not grant a concession to Beulah Anderson by reason of the fact that an option to continue the concession granted to respondent in 1937 was still available to respondent's assignees, appellants' knowledge thus gained was basis sufficient to warrant *15 the inference that they both knew that they should exercise the option for renewal which would have entitled respondent to his share of the earnings for the additional five years. It is reasonable to infer from this act that the Club did not consider it could grant a concession to Beulah Anderson since an option existed by which others could continue concession operations. It follows that the trial court's determination that appellants knew that they were holders of the option being based upon substantial evidence cannot be disturbed.

[7] [8] The second assignment urged by appellants is that the trial court erred in finding that the 'waivers' of October 27, 1941, were actually an assignment to Beulah Anderson of all the optional concession rights granted in the 1937 contract, and that it was intended by appellants thereby to make her an assignee and a 'new or substituted concessionaire' within the meaning of the 1940 agreement. Appellants argue that van der Steen as surviving partner could not create new partnership obligations; **618 that to assign or exercise the five-year option would be inconsistent with his duties to wind up and settle the partnership business and therefore his waiver transferred nothing and was meaningless. The answer to such contention is that the power to exercise the option in the 1937 contract was an extremely valuable partnership asset; the profits realized by the concessionaires from their operations during the 1941 season alone totaled over $28,000. For such an asset van der Steen was in duty bound to account to Mrs. Anderson. Therefore, it was presumptively his intention, in whatever he did, to dispose of the asset in the regular course of the settlement of the partnership affairs.

[9] [10] Also, appellants contend that the waiver executed at the instance of the Turf Club cannot possibly be construed to be an assignment inasmuch as it does not purport to transfer

any right from van der Steen and the estate to any one. It is true that on the face of neither instrument does the conventional language of an assignment appear, but when the circumstances surrounding their execution are viewed in a realistic light it is apparent that by use of a 'waiver and relinquishment' it was sought to assign valuable contractual rights to Mrs. Anderson disguised in an innocent terminology. Looking behind the trappings of the transaction, keeping in mind the advantages to be gained by appellants by obtaining a new contract without any obligation to pay respondent a portion of their profits and considering the benefits to be derived by the Turf Club in effecting its release from the terms of its ***16** original concession, no doubt remains that the right to renew the valuable concession privileges was legally lodged in van der Steen with some equitable ownership in the beneficiaries of the estate of Mr. Anderson, and it is clear that the Turf Club recognized this fact and for an additional reason required the way to be cleared in order to grant new rights to the widow. The waivers were the means adopted for transferring to her these rights previously owned by the partnership. As the trial judge pointedly observed, it is the substance and not the form of a transaction which determines whether an assignment was intended. Appellant van der Steen cannot avoid his obligation under the 1940 contract with Del Mar Caterers to 'pay or cause to be paid' 2 1/2 per cent of gross sales for the five-year-option period in the event of a renewal agreement by him or his assignees merely by a roundabout method which seeks to avoid calling the transaction an 'assignment' or 'transfer.' It would be unreasonable to assume that van der Steen relinquished his interest in this valuable concession contract merely out of the goodness of his heart. Yet, that is the interpretation he would seem impliedly to urge upon this court since he failed to appear at the trial where he might have given his explanation under oath. From all of the circumstances the trial court's determination is entirely reasonable and in accord with lofty ethical concepts.

[11] It is contended that, even assuming that the trial court was correct on other points, respondent is not entitled to recover for any years subsequent to 1946. They argue that this was the last year of the five-year term granted to Mrs. Anderson by the Turf Club contract and that the later agreement between them extending operations over the 1947–49 period cannot inure to respondent's benefit inasmuch as the original contractual obligations to him had been discharged. Unquestionably, the temporary frustration of the concessionaire occasioned by the war did not thereby discharge his duty to render performance for the balance of the five-year period which, after the war, included 1945 and 1946. Where performance of a contract after a temporary suspension does not impose a substantially greater burden upon such promisor his duty is suspended only during the period his performance was hindered and he must thereafter perform. Autry v. Republic Productions, Inc., 30 Cal.2d 144, 149, 180 P.2d 888; United States Trading Corp. v. Newmark Grain Co., 56 Cal.App. 176, 187, 205 P. 29; Rest. Contracts, sec. 462.

[12] **[13]** ***17** The problem presented here is whether the period of the contract was ultimately extended beyond its normal termination ****619** date for an additional period equal to the period during which performance was suspended. Absent any agreement of the parties as to their intent, the rule would seem to be that no extension results. Rest. Contracts, sec. 462, illustrations 3 and 5. But the instant situation is not devoid of guidance. Mrs. Anderson's clarifying agreement of July, 1945, indicates that it was intended that any suspension of performance pursuant to the contract should also act to extend the overall period of the agreement. This subsequent contract specifically recites that 'the parties hereto desire to clarify * * * said agreement of September 30, 1941 * * *.' Thereby is an admission on her part that such was the meaning of the ambiguous clause in the original contract. Accordingly, the court's finding that it was intended that the contract should remain in existence for five racing meets is supported by the evidence.

[14] However, this 1945 clarification was not admitted as evidence against van der Steen since he was in no way a party to it. The record is thus barren of any evidence binding him. Therefore, in the absence of a showing of a contrary intent it must be held that his liability terminated with the end of the 1946 meet.

Mrs. Anderson argues also that as to her the respondent's complaint fails to state a cause of action in that only legal conclusions are alleged. The complaint charges that defendants obtained the concession agreement pursuant to the provisions of paragraph 2(a) of the 1940 agreement which with the 1937 contract is incorporated in the pleading, and provides for the payment of 2 1/2 per cent of the gross dollar sales which defendants have received ever since the 1942 racing season. The complaint further alleges that the defendants construed the phrase, to wit, 'the term of five years, commencing with the 1937 season and ending with the season of the year 1941' to mean a term comprising a total

of five racing-meet seasons and that the meets of 1942, 1943, and 1944 were held in the years 1945, 1946, and 1947.

[15] **[16]** Construed liberally in favor of plaintiff the complaint when read in conjunction with the incorporated exhibits alleges that appellant Anderson obtained, and still retained, the concession rights for the optional five-year period; that after having operated the concessions and collected the receipts she was a new or substituted concessionaire and assignee of ***18** van der Steen and decedent Anderson and as such would pay plaintiff the 2 1/2 per cent of gross sales. While the complaint may not be celebrated as a model declaration of ultimate facts yet, inasmuch as appellants are making their criticisms for the first time, an interpretation as favorable as possible will be given with a view to upholding the judgment. 21 Cal.Jur., Pleading, sec. 31, p. 55.

[17] Mrs. Anderson demands reversal on the further ground that the record does not support the finding that she impliedly assumed the obligation under the 1940 contract to pay Bergin a percentage of gross proceeds from her concession operations. However, the record reveals that Mrs. Anderson had full knowledge of her husband's contract with Bergin; that she knew from her position as executrix of the great value of the concession agreement; that she thereafter received an assignment of the contract from van der Steen whereby she received the benefit of the valuable option for renewal and further gained the advantage of Bergin's fidelity to his promise to refrain from entering a competitive bid at the time for renewal. In pursuance of Civil Code section 1589[2] the court could correctly hold Mrs. Anderson impliedly to have assumed the obligations as well as expressly to have received the rights under the assigned contract. The California rule appears somewhat narrower than the provision of the Restatement of Contracts, section 164(2) that an assignee is held impliedly to undertake performance of the duties imposed by a contract merely by ****620** virtue of an assignment thereof. It is here held in conformance with section 1589, supra, that acceptance of the benefits of a transaction is equivalent to a consent to all the obligations thereby imposed. Weidner v. Zieglar, 218 Cal. 345, 350, 23 P.2d 515; Brady v. Fowler, 45 Cal.App. 592, 595, 188 P. 320.

[18] Moreover, the fact that no consideration was shown for the assignment from van der Steen to Beulah Anderson is also of significance. From this fact it is a reasonable inference that it was contemplated that the assignee would assume the obligations then resting upon the assignor. See Jegen v. Berger, 77 Cal.App.2d 1, 6, 174 P.2d 489.

[19] There is no merit in appellant Anderson's argument that respondent's claim is barred by the statute of frauds ***19** in that it comes within section 1624(1) of the Civil Code, the one-year section.[3] The answer to this contention is that Bergin has completely performed his promises under the 1940 contract, having assigned his rights under the original agreement and having thereafter refrained from bidding for concession privileges at the end of the 1941 season. Such agreement is thereby taken out of the operation of the statute. Dutton v. Interstate Inv. Corp., 19 Cal.2d 65, 70, 119 P.2d 138; Rest. Contracts, sec. 198.

Neither can reversal be predicated upon the ground that respondent Bergin was under a legal disability to maintain this action as assignee of Del Mar Caterers because the formal assignment of July 28, 1948, was made when the corporation's rights, powers and privileges had been suspended for failure to pay its franchise taxes. It is not necessary to consider the merits of this defense inasmuch as, pursuant to respondent's motion to reopen the case, additional evidence was introduced of a prior assignment to Bergin between April 24, 1940, and June of that year. This evidence established that at a meeting of the corporation's board of directors held during that period all corporate assets were transferred to respondent in consideration of his relinquishment of his stock.

[20] The last assignment made on behalf of appellant van der Steen is that he cannot properly be held liable under the 1940 contract since the evidence shows the concessions to have been sold to, and operated by, Dunham and others and not by Mrs. Anderson. Without going into an interpretation of the contract between van der Steen and Del Mar Caterers to determine whether he was to be liable *only* in the event his immediate assignee were holder of the concession rights (a somewhat unreasonable construction) it is sufficient answer to appellant's contention to point out that the court below found that Mrs. Anderson did not part with all rights under her contract. Respondent's testimony that Dunham informed him as late as 1947 that he only worked for Mrs. Anderson and that she was in charge supports the court's finding that she enjoyed full benefits of her contract, never having assigned such contract itself. Indeed, her contract barred assignment without consent of the Turf Club.

***20** The judgment in its entirety will be affirmed as to appellant Anderson but will be modified as to appellant van der Steen as follows: (1) Strike from the judgment to wit: 'that plaintiff have and recover from defendants Barney van der Steen and Beulah Anderson and each of them the following sums of money' and also strike paragraphs (a) through (e), and substitute in lieu thereof the following, to wit: 'that plaintiff have and recover from defendant Beulah Anderson the following sums of money:

(a) The sum of $10,906.59, with interest thereon at 7% per annum from September 3, 1945;

(b) The sum of $10,214.52, with interest thereon at 7% per annum from September 14, 1946;

****621** (c) The sum of $10,803.73, with interest thereon at 7% per annum from September 20, 1947;

(d) The sum of $10,841.01, with interest thereon at 7% per annum from September 11, 1948;

(e) The sum of $12,103.56, with interest thereon at 7% per annum from September 10, 1949.

It Is Further Ordered, Adjudged and Decreed that plaintiff have and recover from defendant Barney van der Steen the following sums of money:

(a) The sum of $10,906.59, with interest thereon at 7% per annum from September 3, 1945;

(b) The sum of $10,214.52, with interest thereon at 7% per annum from September 14, 1946; which said sums when paid shall constitute a payment on the sums to be paid by defendant Anderson.'

As so modified the judgment is affirmed.

McCOMB, J., concurs.

Hearing denied; SHENK and CARTER, JJ., dissenting.

All Citations

107 Cal.App.2d 8, 236 P.2d 613

Footnotes

1 Exhibit 18: 'The undersigned, as Executrix of the last Will and Testament of William L. Anderson, Deceased, does hereby waive and relinquish any and all options, rights and privileges granted the 'Concessionaire' under and by virtue of that certain agreement dated April 4, 1937, by and between Del Mar Turf Club and T. M. Bergin, and which rights and privileges vested in the said William L. Anderson by virtue of an assignment of said agreement of April 4, 1937.

'Dated: Oct. 27, 1941.

'Estate of William L. Anderson,

'Deceased,

'By Beulah Anderson, Executrix.'

Exhibit 19: 'The undersigned, as one of the assignees of T. M. Bergin, does hereby waive and relinquish any and all options, rights and privileges granted the 'Concessionaire' under and by virtue of that certain agreement dated April 4, 1937, by and between Del Mar Turf Club and the said T. M. Bergin.

'Dated Oct. 27, 1941.

'Barney Van Der Steen'

2 Section 1589, Civil Code. 'A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.'

3 Section 1624, Civil Code. 'The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

'1. An agreement that by its terms is not to be performed within a year from the making thereof;'

EXHIBIT Altanovo-33

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD., Claimant, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	ICDR CASE NO: 01-18-0004-2702

REQUEST BY VERISIGN, INC. TO PARTICIPATE AS *AMICUS CURIAE* IN INDEPENDENT REVIEW PROCESS

Ronald L. Johnston
Ronald.Johnston@arnoldporter.com
James S. Blackburn
James.Blackburn@arnoldporter.com
Maria Chedid
Maria.Chedid@arnoldporter.com
Tiffany M. Ikeda
Tiffany.Ikeda@arnoldporter.com
ARNOLD & PORTER
777 S. Figueroa Street, 44th Floor
Los Angeles, California 90017
Tel: 213.243.4000
Fax: 213.243.4199

Counsel to Proposed *Amicus Curiae* VeriSign, Inc.

TABLE OF CONTENTS

Page

VeriSign, Inc. ("Verisign") hereby submits this Request to Participate as an *Amicus Curiae* in the Independent Review Process ("IRP") initiated by claimant Afilias Domains No. 3 Limited ("Afilias") on November 14, 2018, including participation in the pending Request for Emergency Panelist and Interim Measures of Protection ("Interim Relief Request"). On the granting of this Request, Verisign will submit separate responses to the Requests of Afilias for Independent Review and Interim Relief. Nu Dotco, LLC ("NDC"), referenced below, also is filing a request to participate as an *amicus curiae* in this IRP.

I. INTRODUCTION

1. Through this IRP, Afilias seeks to (i) contravene the contract rights of NDC to enter into a Registry Agreement with ICANN for the .web gTLD; (ii) interfere with Verisign's right to operate the .web gTLD upon the consent of ICANN to an assignment of the Registry Agreement to Verisign; and (iii) preliminarily and permanently enjoin the transfer or delegation to Verisign or NDC of the .web gTLD. Verisign is a real party in interest in this IRP. It is threatened with irreparable injury and a serious impairment of its rights both by the request for an emergency stay and the permanent relief sought by Afilias in this IRP.

2. NDC is the winner of the public auction for .web, having paid $135 million for the right to operate the .web gTLD. Verisign is the prospective assignee of .web under its executory contract with NDC, subject to the condition that ICANN consent to the assignment of a Registry Agreement between NDC and ICANN. Afilias seeks a declaration that (i) "ICANN must disqualify NDC's bid for .web" because of Verisign's financial arrangement with NDC; and (ii) ICANN must award the right to operate .web to Afilias. (IRP at p. 25). Afilias postures its allegations, plainly in fact directed against Verisign and NDC, as a strained claim that ICANN violated its Articles and Bylaws by failing to credit Afilias's allegations and disqualify NDC. Indeed, NDC's and Verisign's alleged conduct during the application process and auction for the

.web gTLD is the gravamen of each of Afilias's claims, including those alleging (without merit) violations of ICANN's Bylaws.[1]

3. Under the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (the "Supplementary Procedures"), Verisign has material interests in this Dispute that mandate it be allowed to participate as an *amicus* in this proceeding. Appendix, Ex. 1. Verisign should not be forced to sit on the sidelines while Afilias seeks to use this IRP to unwind the results of the public auction and contravene its contract rights.

4. Granting Afilias's requested stay, or Afilias's request for permanent relief reversing the award of the .web gTLD, without participation by both Verisign and NDC would be fundamentally unfair, a failure of due process, and render the decision unenforceable. It is a well-established principle of law that neither a court nor an arbitration panel is permitted to adjudicate a party's interests without the participation of the party. *See, e.g., Martin v. City of Corning*, 25 Cal. App. 3d 165, 169 (1972) (party to contract that action sought to enjoin was an *indispensable party* to the proceeding as "his interests would inevitably be affected by a judgment rendering the contract void or enjoining further payment to him thereunder."); *Miracle Adhesives Corp. v. Peninsula Tile Contractors' Assn.*, 157 Cal. App. 2d 591, 593 (1958) ("Persons 'whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action' are indispensable parties, and *the action cannot proceed without them*.") (emphasis added). Arbitration panels are not immune from these basic principles of due process and fairness. *See Westra Constr., Inc. v. U.S. Fid. & Guar. Co.*, No. 1:03-cv-0833, 2006 WL 1149252, at *2 (M.D. Pa. Apr. 28, 2006) (a nonparty to an arbitration can challenge an arbitration award "when the nonparty is adversely affected by the decision."). For the same reasons, proceeding with Afilias's requests either for preliminary or permanent injunctive relief

[1] In reality, the IRP is simply a continuation of Afilias's years-long campaign to interfere with Verisign's and NDC's contractual rights regarding .web for Afilias's own financial benefit. ICANN is the respondent in name only. There is no doubt that NDC and Verisign are the real targets of Afilias's IRP, both by reason of the claims made and the relief sought.

in the absence of Verisign and NDC would be contrary to the policies underlying the Supplemental Procedures (see Bylaws, § 4.3(n)(iv)), which "are intended to ensure ***fundamental fairness and due process***," and the Supplementary Procedures, which mandate that the IRP Panel "lean in favor" of broad participation of an *amicus curiae* and require that the Emergency Panelist weigh the "balance of hardships," which must include the interests of the persons impacted by the requested relief (see Supplementary Procedures, § 7 at fn.4, § 10 at p.12). Appendix, Exs. 1-2 (emphasis added).

5. Verisign requests that it be granted the right to participate as an *amicus curiae* in Afilias's IRP, including by but not limited to: (i) submission of briefs on all substantive issues considered by the Emergency Panelist or the IRP Panel, including Afilias's Interim Relief Request; (ii) submission of evidence relevant to the claims made by Afilias in its IRP, including in connection with Afilias's Interim Relief Request; (iii) access to all filings or evidence submitted by either ICANN or Afilias in the IRP; and (iv) full participation in any hearings before the Emergency Panelist or the IRP Panel.

II. VERISIGN SHOULD BE ALLOWED TO PARTICIPATE AS *AMICUS* BECAUSE IT HAS A "MATERIAL INTEREST" IN THIS DISPUTE

6. Pursuant to the Supplementary Procedures, "[a]ny person, group, or entity that has a material interest relevant to the Dispute . . . may participate as an *amicus curiae* before an IRP Panel . . ." (Appendix, Ex. 1, Oct. 25, 2018 Supplementary Procedures, Section 7). Certain entities are automatically "deemed to have a material interest relevant to the Dispute," including entities that were "part of a contention set for the string at issue in the IRP" and entities whose actions are significantly referred to in briefings before the IRP Panel. (*Id.*) The Supplementary Procedures ***require*** that entities with a material interest relevant to the Dispute "***shall*** be permitted to participate as an *amicus* before the IRP Panel." (*Id.*) (emphasis added).

7. The Supplementary Procedures further provide that "[d]uring the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of

amicus curiae and in then considering the scope of participation from *amicus curiae*, the ***IRP Panel shall lean in favor of allowing broad participation of an amicus curiae*** as needed to further the purposes of the IRP set forth in Section 4.3 of the ICANN Bylaws." (Appendix, Ex. 1, Oct. 25, 2018 Supplementary Procedures, Section 7) (emphasis added).

8. Verisign has a material interest in this Dispute and should be permitted to participate as an *amicus curiae*. It has an executory contract with NDC, a member of the Contention Set for .web, and NDC and Verisign are mentioned ***over 200 times*** in Afilias's IRP request. Indeed, the alleged actions of NDC and Verisign are at the core of this Dispute and form the singular basis for Afilias's allegations that ICANN violated its Articles of Incorporation and Bylaws. Accordingly, under the Supplementary Procedures, Verisign is presumptively deemed to have a material interest relevant to the Dispute and must be allowed to participate as an *amicus*.

9. Because of its material interest in this Dispute, Verisign would be directly harmed by Afilias's request for an emergency stay as well as Afilias's request for a reversal of the .web award. More specifically, if the stay were granted, (i) it would delay the delegation of the .web gTLD, resulting in NDC's and Verisign's inability to compete in the new gTLD marketplace; (ii) NDC and Verisign would continue to lose revenue that would have been generated from .web registrations and continue to lose market share, including a "head start" from the delay in entering the market; (iii) Verisign will lose the use of $135 million, the amount of the winning bid that is being held by ICANN pending resolution of this Dispute; and (iv) NDC and Verisign will continue to suffer harm to their business reputations as a result of Afilias's false and misleading statements, in this proceeding and publicly to the Internet community, concerning Verisign's and NDC's compliance with the Applicant Guidebook.

10. This IRP will benefit from Verisign's participation. Verisign will provide relevant evidence concerning its agreement to provide funds for the public auction. Second, as part of its evidence, Verisign intends to demonstrate that Afilias violated the Blackout Period imposed by both the Auction Rules and the Bidder Agreement, and therefore lacks standing to

prosecute this IRP. Third, Verisign will provide evidence of the harm it will suffer from further delay in the delegation of .web, which is critical to the balance of the hardships element of Afilias's Interim Relief Request. Fourth, Verisign intends to offer evidence of Afilias unclean hands, not only in its collusive and anti-competitive efforts to ***rig the auction in its favor***, but then in its **false public attacks on Verisign, NDC, and ICANN** as part of a campaign to coerce ICANN to reverse the .web award. Finally, Verisign will provide evidence contradicting Verisign's allegations of anti-competitive conduct.

11. For the reasons discussed herein, Verisign has a material interest in this Dispute and must be permitted to participate as an *amicus curiae*.

III. BACKGROUND

12. Verisign's material interest in this Dispute is evident from the history both pre and post the public auction for .web. NDC, having prevailed as the winner of the 2016 public auction for .web, and Verisign, as the potential assignee of the .web gTLD and the target of Afilias's allegations of anti-competitive conduct, both have critical interests in this Dispute.

13. As discussed below, Afilias's repeated attempts to interfere with NDC's and Verisign's rights, and to delay the transfer of the .web gTLD to NDC or Verisign, continues to cause serious injury to NDC, Verisign, and consumers, including persons who have had to wait years to reserve .web domain names.

ICANN and the New gTLD Process

14. ICANN launched the New gTLD Program application process in 2012. (Appendix, Ex. 3.) It invited any interested party to apply for the creation of a new gTLD and the opportunity to be designated as the operator of that gTLD. As the registry operator, the applicant would be responsible for managing the assignment of names within the gTLD and maintaining the gTLD's database of names and IP addresses. When the application window for the new gTLDs opened on January 12, 2012, ICANN received almost 2,000 applications for new gTLDs from primarily private, non-governmental entities—including some of the world's largest

companies—interested in acquiring the right to operate new gTLDs as a business to sell domain names to the public. (*Id.*)

15. In connection with the New gTLD Program, ICANN published the Applicant Guidebook (the "Guidebook") and the Auction Rules for New gTLDs ("Auction Rules"), which prescribe the requirements for new gTLD applications to be approved and the criteria by which they are evaluated. (Appendix, Exs. 4-5.)

16. By soliciting applications to operate the new gTLDs, ICANN promised to evaluate applications and oversee the auction process in accordance with the Applicant Guidebook and the Auction Rules, and applicable rules and regulations. The Applicant Guidebook and Auction Rules set forth the mutual understandings, rights, and obligations of ICANN and respective applicants for new gTLDs with respect to the New gTLD Program.

17. Only one registry operator can operate a gTLD consisting of the same letters. In the event more than one application for the same or similar gTLDs passes all of ICANN's applicable evaluations, the applications are placed in a string contention set ("Contention Set") that can be resolved through a public auction governed by auction rules established by ICANN in the Guidebook or by private resolution among the members of the Contention Set. The Guidebook provides that the Contention Set will be resolved through a public auction, unless all members of the Contention Set agree otherwise. (Appendix, Ex. 4.)

18. Because ICANN does not specify how applicants might privately resolve the Contention Set, applicants sometimes agree to resolve the Contention Set through a private auction, the terms of which may vary depending on the agreement between the members of the Contention Set. ICANN does not dictate the terms of a private auction. Unlike a public auction, neither ICANN nor the Internet community generally receive any proceeds from a private auction. Instead, in a private auction, the money put forward by the highest bidder at the auction is paid to the losing bidders for their private gain.

19. If all applicants in a Contention Set do not agree to a private auction or some other private resolution of a Contention Set, a gTLD is assigned based on a public auction

administered by ICANN. Consistent with ICANN rules, a public auction is open, competitive, and transparent and its proceeds benefit the public.

20. The Guidebook is clear that "[a]n applicant that has been declared the winner of a contention resolution process ***will proceed by entering into the contract execution step***" for the execution of the registry agreement to operate the gTLD. (Appendix, Ex. 4, Guidebook, Module 4, § 4.4) (emphasis added).

NDC's Application for .Web

21. On June 13, 2012, NDC submitted an application to ICANN to acquire the right to operate the .web gTLD. (Declaration of Jose Ignacio Rasco III ("Rasco Decl."), ¶ 2.[2]) Six other entities also applied for the right to operate the .web gTLD: Web.com Group, Inc., Charleston Road Registry Inc., Schlund Technologies GmbH ("Schlund"), Dot Web Inc. ("Dot Web"), Ruby Glen LLC ("Ruby Glen"), and Afilias. NDC's application passed all applicable evaluations by ICANN in June 2013 and was placed in a Contention Set with the other applicants for the .web gTLD, pursuant to the procedures set forth in the Guidebook. (*Id.* ¶ 3.)

22. In accordance with ICANN's application requirements, NDC's application stated that it was a Delaware limited liability company and identified three people as its officers: Jose Ignacio Rasco III, CFO; Juan Diego Calle, CEO; and Nicolai Bezsonoff, COO. It listed Mr. Rasco as its "Primary Contact" and Mr. Bezsonoff as its "Secondary Contact." It identified two owners having at least 15% interests: Domain Marketing Holdings, LLC, and Nuco LP, LLC. (*Id.* ¶ 4.)

23. The Guidebook 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." (Appendix, Ex. 3, Guidebook, Module 1, § 1.2.7) (emphasis added).)

[2] The Rasco Decl. is submitted in support of NDC's request to participate as an *amicus curiae*.

24. Contrary to the unsupported allegations by Afilias, ***there has never been a change in NDC's control, and no one other than those named in the application has ever owned more than a 15% interest in NDC. Furthermore, there were no changes in circumstances that rendered untrue or inaccurate any information in NDC's application.*** (Rasco Decl. ¶ 5.)

The Agreement Between NDC and Verisign

25. On August 15, 2015, more than three years following the submission of NDC's application, NDC and Verisign entered into an executory agreement ("Agreement") by which (i) Verisign agreed to provide the funds for NDC to bid in the auction for the .web gTLD, and (ii) if NDC prevailed at the auction, upon execution of the registry agreement between ICANN and NDC, and ***upon further application to ICANN and with ICANN's consent***, NDC would assign the registry agreement for the .web gTLD to Verisign. (Rasco Decl. ¶ 6.) Contrary to the false claims of Afilias in this proceeding and elsewhere, the Agreement did not transfer ownership, management, or control of NDC to Verisign, and Verisign has never had any direct or indirect legal or beneficial ownership or other interest in NDC, or been assigned any rights or obligations of the .web gTLD application. (*Id.* ¶ 7.)

26. Under the terms of ICANN's New gTLD Registry Agreement (the "Registry Agreement"), "neither party may assign any of its rights and obligations under this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld." (Appendix, Ex. 6, Registry Agreement, § 7.5.) NDC and Verisign intend to seek ICANN's consent to assign the .web gTLD from NDC to Verisign. As the long-standing operator of the .com and .net gTLDs, Verisign is eminently qualified to operate the .web gTLD pursuant to ICANN's requirements.

27. By this IRP, Afilias seeks to nullify (i) NDC's right to enter the registry agreement as the winner of the auction and (ii) Verisign's right—upon application to ICANN and with ICANN's consent—to an assignment of the Registry Agreement from NDC.

Afilias's Illegal Collusion with Other Bidders to Interfere with a Competitive Auction and Its Attempt to Bribe NDC

28. On April 27, 2016, ICANN scheduled a public auction for the .web gTLD, notified all members of the Contention Set, and provided them with instructions and deadlines to participate in the auction. (Appendix, Ex. 7.) ICANN provided the .web Contention Set with a deadline of June 12, 2016, to notify ICANN as to whether the applicants in the .web Contention Set unanimously agreed to resolve the Contention Set privately, in lieu of a public auction. Although certain members of the Contention Set requested (repeatedly, *see infra*) a private resolution of the Contention Set, NDC informed the other applicants that it wished to proceed with a public auction.

29. Upon NDC refusing to agree to resolve the Contention Set by private auction, Afilias, and other members of the Contention Set operating in concert with Afilias, attempted to coerce NDC into a private auction, on terms whereby the auction proceeds would be paid to the losing bidders rather than to ICANN, which could then invest in the improvement of the Internet. Furthermore, Afilias and other bidders proposed that a private auction be performed pursuant to collusive and potentially illegal terms about who could win and who would lose the auction, including guarantees of auction proceeds to certain losers of the auction. When NDC refused to agree to such terms, Afilias and other members of the Contention Set initiated baseless proceedings against NDC, and later ICANN, attempting to delay a public auction and, when those efforts failed, to set aside the results of the auction. This IRP is merely a continuation of Afilias's campaign to secure .web through any means. (Rasco Decl. ¶¶ 8-17.)

30. On June 6, 2016, Donuts Inc. ("Donuts"), the parent company of Contention Set member Ruby Glen, contacted NDC to ask it to reconsider its decision to forego a private resolution of the Contention Set and for a two-month delay of the public auction. (*Id.* ¶ 8). On June 7, 2016, Mr. Rasco, on behalf of NDC, informed Donuts that NDC would not change its position and would not agree to postpone the public auction. (*Id.*)

31. On June 7, 2016, Afilias contacted Mr. Juan Calle of NDC and asked him to reconsider NDC's decision to forego a private resolution of the Contention Set. (*Id.* ¶ 9.) To induce NDC to participate in a private resolution, Afilias offered to "guarantee [NDC] score[s] at least ***16 mil if you go into the private auction and lose***." *Id.*, Ex. A (emphasis added). NDC declined Afilias's offer, whereupon Afilias offered to increase the guaranteed payment to $17.02 million. (*Id*.) NDC again declined Afilias's offer. (*Id.*) Afilias's offers to "guarantee" the amount of a payment to NDC as a losing bidder are an explicit offer to pay off NDC to not compete with Afilias in bidding on .web.

32. On June 23, 2016, in a bid to delay the upcoming public auction, Donuts and Ruby Glen falsely represented to ICANN that NDC had changed its ownership and/or management structure, but had not reported that change to ICANN as required. (*Id.* ¶ 10.) Donuts and Ruby Glen requested that ICANN delay the public auction based on these misrepresentations. (*Id.*)

33. ICANN contacted NDC on June 27, 2016, to investigate the accuracy of Donuts' and Ruby Glen's complaint. (*Id.* ¶ 11.) Mr. Rasco responded that same day and confirmed that there had been no changes to NDC's ownership and/or management. (*Id.*)

34. Ruby Glen further objected to the scheduled public auction to the ICANN Ombudsman in late June 2016. (*Id.* ¶ 12.) In support of its efforts to delay the public auction, Ruby Glen made the same misrepresentations to the Ombudsman as it made above to ICANN. (*Id.*) Upon information and belief, after communications with NDC, the Ombudsman advised ICANN and Ruby Glen that there were no grounds for a delay of the auction. (*Id.*)

35. On July 5, 2016, Oliver Mauss of Schlund, another member of the .web Contention Set, emailed Mr. Calle a proposal for an "alternative private auction," touting its alleged numerous advantages over an ICANN public auction. (*Id.* ¶ 13, Ex. B.) So-called "benefits" of this alternative form of private auction model, according to Mr. Mauss, included that the winning participant would pay less for the gTLD than it would in an ICANN public auction; it "divides the participants into groups of strong and weak"; the "weak players are

meant to lose and are compensated for this with a pre-defined sum"; "the strong players bid for the asset"; and "the losing weak players receive a lower return than in the Applicant Auction." (*Id.* (emphasis added).)

36. On July 8, 2016, NDC had a further conversation with Christine Willett, the Vice President of Operations, Global Domains Division, for ICANN. (*Id.* ¶ 14.) Mr. Rasco told Ms. Willett that there was no basis to delay the scheduled public auction for .web. (*Id.*) Mr. Rasco reiterated to Ms. Willett that neither the ownership nor management of NDC had changed since NDC filed its .web application and, accordingly, there was no need to update the application. (*Id.*) During their call, Ms. Willett stated that she understood that the attempt to delay the public auction was motivated by the desire of Donuts, Afilias, and the other applicants to hold a private auction. (*Id.*) Mr. Rasco advised Ms. Willett that he had the same understanding. (*Id.*)

37. On July 11, 2016, Mr. Rasco confirmed in writing to Ms. Willett that NDC had made clear to other applicants that it had no desire to participate in a private auction and that it was committed to participating in ICANN's scheduled public auction. (*Id.* ¶ 15.)

38. On July 11, 2016, two other applicants—Radix FZC ("Radix"), on behalf of applicant Dot Web, and Schlund—filed objections with ICANN to proceeding with a public auction. (Appendix, Exs. 8-9.) Their objections were made on the same grounds as the objections by Donuts and Ruby Glen. (*Id.*) The objections by Radix and Schlund used identical language. They each told ICANN: "We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches." (*Id.*)

39. Despite the concerted efforts of Afilias, Donuts, and other members of the Contention Set to avoid a public auction, on July 13, 2016, ICANN denied their requests to postpone the public auction. (Appendix, Ex. 10.) ICANN found "no basis to initiate the

application change request process or postpone the auction" based on any change in NDC's management. (*Id.*) ICANN also informed the applicants that the request must be denied because the deadline for requesting a postponement had passed on June 12, 2016, prior to their requests to delay the public auction. (*Id.*)

40. On July 17, 2016, Donuts/Ruby Glen and Radix jointly filed with ICANN a request for reconsideration ("RFR") of ICANN's determination that the auction proceed as planned. (Appendix, Ex. 11.) As with the previous attempts to delay the auction, the RFR contained a number of wholly false allegations with respect to NDC. Once again, Donuts/Ruby Glen and Radix jointly accused NDC of failing to report a change in control, when in fact no such change had occurred. Donuts/Ruby Glen and Radix made further false representations that NDC and ICANN violated the Applicant Guidebook. In fact, NDC complied with the Guidebook at all times during the .web application process. Finally, Donuts/Ruby Glen and Radix made misleading representations that any delay in the auction would be harmless. To the contrary, applicants, parties providing funding for such auctions, and consumers have an interest in allowing the auction to proceed in a timely and orderly fashion, and a delay of the auction based on the spurious grounds offered by Donuts/Ruby Glen and other members of the Contention Set would harm all of these interests.

41. The RFR acknowledged the concerted actions of Donuts/Ruby Glen and other members of the Contention Set to postpone the public auction. Although the RFR claimed that each company had "their own concerns" in proceeding with the .web public auction, the RFR quoted only one company's correspondence with ICANN as the basis for the misrepresentations of all three companies in seeking a reversal of ICANN's decision. (*Id.*) In fact, the objecting parties' opposition to a public auction was part of their collusive efforts to replace a public auction with a private auction.

42. On July 21, 2016, ICANN again rejected Donuts/Ruby Glen's and Radix's attempt to delay the auction by denying Donuts' RFR. (Appendix, Ex. 12.) ICANN found no

change in control of NDC and thus no requirement for NDC to update or change its application, nor any reason to delay the auction for the .web gTLD. (*Id.*)

43. In the weeks leading up to the scheduled July 27 auction for the .web gTLD, members of the Contention Set continued to attempt to pressure NDC into resolving the Contention Set via a private auction in lieu of ICANN's public auction. On several occasions, Mr. Rasco and/or Mr. Calle of NDC were contacted by Steve Heflin and John Kane of Afilias, Jonathon Nevitt of Donuts, and/or Oliver Mauss of Schlund for this purpose. On each such occasion, Mr. Rasco or Mr. Calle responded that NDC was not interested in participating in a private auction. (Rasco Decl. ¶ 16.)

44. Importantly, on July 22, 2016, five days before the Auction's July 27, 2016 commencement date, after the deposit deadline for the Auction had passed—and ***during the Blackout Period***—Afilias reiterated its earlier offers to NDC. John Kane of Afilias sent this text message to Mr. Rasco of NDC: "If ICANN delays the auction next week would you again consider a private auction?" (*Id.*, ¶ 17, Ex. C.) This renewed offer constitutes a prohibited discussion regarding bids, bidding strategies and settlement of the Contention Set, during the Blackout Period.

45. Once the deposit deadline for an ICANN administered auction passes, both the Bidder Agreement and the Auction Rules for new gTLD auctions prohibit all applicants within a Contention Set from "cooperating or collaborating with respect to, ***discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies or discussing or negotiating settlement agreements***…" until the auction has completed and full payment has been received from the winner. (Appendix, Ex. 13, Bidder Agreement, § 2.6; Auction Rules, Clause 68). Violation of this "Blackout Period" is a "serious violation" of ICANN's rules under the Bidder Agreement and Auction Rules, so much so that applicants are warned that such violations may result in forfeiture of the violator's application. (*Id.*, Bidder Agreement, § 2.10; Auction Rules, Clause 61).

46. Afilias's text message during the Blackout Period was a direct inquiry regarding the parties' strategies for the upcoming auction, including the terms for the auction, and seeking to enter into a settlement of the auction, all of which were in plain violation of the Blackout Period.

47. Afilias is a sophisticated applicant with full knowledge and awareness of the rules, including those pertaining to the Blackout Period. Moreover, Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the .web auction) sent every member of the Contention Set an email on July 20, 2016 -- two days before Afilias reiterated its offer of guaranteeing money to NDC in a private auction -- expressly reminding them that "the Deposit Deadline for .WEB/.WEBS has passed and ***we are now in the Blackout Period***." (Appendix, Ex. 14.)

48. On July 22, 2016, despite the baseless objections of the Contention Set being rejected by ICANN three times, and contrary to an express covenant not to sue set forth in the Guidebook, Ruby Glen filed a civil action in U.S. District Court (C.D. Cal. No. 16-5505) against ICANN and Doe defendants seeking postponement of the public auction through a temporary restraining order ("TRO"). Ruby Glen's claims were based on the same meritless accusations that ICANN had repeatedly rejected. (Appendix, Ex. 15.)

49. On July 26, 2016, the District Court denied Ruby Glen's TRO. In its Order, the Court noted "the weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN [B]ylaws and Applicant Guidebook" and concluded that Ruby Glen had failed to "establish that it is likely to succeed on the merits" and ***failed to demonstrate that its allegations "raise[d] serious issues."*** (Appendix, Ex. 16, at 4) (emphasis added).

The Public Auction for .Web

50. Despite the repeated and concerted efforts of Afilias, Donuts, and other members of the Contention Set to induce NDC to participate in a private auction, the auction proceeded as scheduled on July 27, 2016. In accordance with its Agreement with NDC, Verisign provided funds to NDC for it to use in its bidding for the .web gTLD in the public auction. (Rasco Decl.

¶ 18.) NDC submitted a final bid of $142 million that ICANN deemed to be and announced as the winning bid. (*Id.*) Having won the auction, pursuant to the Guidebook, NDC has the right and ICANN has the obligation to execute the .web Registry Agreement, and NDC thereafter has the right to operate the .web gTLD (subject to compliance with appropriate conditions).

51. Although additional steps remain to be taken after the Auction before the gTLD is delegated to NDC, pursuant to the Guidebook, these steps are routine and administrative. Generally, ICANN will execute a registry agreement without further Board approval so long as no material changes are made to ICANN's form registry agreement. NDC executed the registry agreement without change. (Appendix, Ex. 4, Guidebook, Module 5, § 5.1(4)).

Post-Auction Efforts by Afilias and Others to Interfere with the Auction Results

52. On August 2, 2016, shortly after the public auction, Donuts/Ruby Glen initiated a "Cooperative Engagement Process" ("CEP") with ICANN with respect to the .web gTLD. (Appendix, Ex. 17.) The CEP was based on the same misrepresentations regarding NDC's application. Under ICANN's procedures, a CEP is a process voluntarily invoked by a complainant prior to the filing of an IRP for the purpose of resolving or narrowing the issues that are contemplated to be raised in the IRP. The CEP was finally closed on January 31, 2018. (Appendix, Ex. 18.) ICANN gave Donuts/Ruby Glen until February 14, 2018 to commence an IRP or it would proceed with the delegation of the .web gTLD. (*Id.*) Donuts/Ruby Glen did not commence an IRP by the February 14 deadline or at any time since that date. Ruby Glen's failure to pursue an IRP after its repeated objections to NDC's participation in the .web auction demonstrates that its baseless accusations were intended only to delay the delegation of .web to NDC.

53. On August 8, 2016, Scott Hemphill, the General Counsel of Afilias and Afilias Domains, wrote to ICANN asserting that NDC should be disqualified from its participation in the .web Contention Set due to purported violations of the Guidebook and demanding that ICANN "proceed to the next highest bidder in the auction to contract for the string, at the price at which the third highest bidder exited the auction." (Appendix, Ex. 19.) Afilias was the second-

highest bidder in the .web auction and stands to gain directly from NDC's disqualification by potentially obtaining the .web gTLD for a windfall price far below the competitive amount paid by NDC. Afilias also requested that ICANN stay any further action with respect to the .web gTLD, including entering into a registry agreement for .web with NDC, or acting on any request from NDC or Verisign to assign the registry agreement to Verisign. Finally, Mr. Hemphill asserted that Afilias was filing a complaint with ICANN's Ombudsman with regard to .web. (*Id.*) Mr. Hemphill made the same allegations on September 9, 2016. (Appendix, Ex. 20.)

54. On October 7, 2016, Afilias wrote to ICANN that NDC should be disqualified from the Contention Set for .web because it purportedly failed to disclose material information to ICANN. (Appendix, Ex. 21.) Afilias further alleged that Verisign funded NDC's bid to "preserve a monopoly," reduce competition, and harm consumers. (*Id.*) Afilias did not cite then—and has never cited—any basis for or evidence in support of Afilias' statements to ICANN.

55. ***Afilias took no steps for over two years following its letters to ICANN to initiate an IRP or pursue any other ICANN accountability mechanism.*** Instead, Afilias sat on its supposed rights, relying on Donut's CEP for a temporary stay of delegation, thereby scheming, along with Donuts, to delay the delegation of .web for as long as it could.

56. Verisign believes that Afilias also undertook a campaign to persuade the Antitrust Division of the Department of Justice ("DOJ") to investigate competition issues related to Verisign becoming the operator of .web. (Appendix, Ex. 22, Excerpts from Verisign Q4 2017 10-K.) On information and belief, Afilias made false allegations and representations to the DOJ regarding Verisign, .web., its own business plans with respect to .web, and the TLD marketplace, all in an effort to persuade the DOJ to open and then prolong an investigation.

57. Verisign believes that Afilias's allegations in the DOJ investigation were, in substance, the same "harm to competition" arguments it advances in this IRP.

58. The DOJ thoroughly investigated Afilias's claims and, on January 9, 2018, the DOJ closed its investigation without taking any action. (*Id.*)

59. On February 23, 2018, Afilias again attempted to delay the execution of the .web registry agreement between NDC and ICANN, following the conclusion of the Ruby Glen's CEP by sending ICANN a request for documentation regarding .web pursuant to ICANN's Document Information Disclosure Policy ("DIDP"). (Appendix, Ex. 23.) Afilias sought a series of documents relating to, among other things, the applications submitted by the .web Contention Set, the various accountability mechanisms initiated by Donuts/Ruby Glen and other members of the .web Contention Set, and documents provided by ICANN to the DOJ in connection with its investigation of the Agreement between Verisign and NDC. (*Id.*) Verisign believes that ICANN viewed Afilias's invocation of the DIDP as an accountability mechanism and, based thereon, delayed execution of a .web registry agreement with NDC for a period of time to assess Afilias's position.

60. On March 24, 2018, ICANN responded to Afilias by stating that it was disclosing some of the requested documents, denying other requests, and lacked documents responsive to the remaining requests. (Appendix, Ex. 24.) On April 23, 2018, Afilias replied to ICANN by modifying its requests for documents. (Appendix, Ex. 25.) Afilias has characterized its requested documents as relating to "the impact on competition if Verisign obtains the .WEB license; whether Verisign and NDC violated, *inter alia*, provisions of the New gTLD Application Guidebook and ICANN's Auction Rules; and whether ICANN's handling of these matters has been consistent with its Bylaws and Articles of Incorporation." (*Id.*)

61. On April 23, 2018, Afilias initiated a Request for Reconsideration of ICANN's partial denial of its DIDP request. (Appendix, Ex. 26.) Afilias alleged that ICANN violated its Bylaws concerning accountability, transparency, and openness by refusing to disclose the requested documents. (*Id.*) Afilias's Request for Reconsideration further alleged that Afilias requires the documents in order to investigate purported anti-competitive conduct by NDC and Verisign, claims it made almost two years earlier. (*Id.*) Afilias asserted falsely that "[i]n order to maintain its monopoly, Verisign entered into a secret arrangement with NDC to obtain the right

to operate the .WEB gTLD and further diminish competition," and "[a]llowing Verisign to carry out this subterfuge and acquire the .WEB license will harm the Internet community . . ." (*Id.*)

62. ICANN's Board Accountability Mechanisms Committee ("BAMC") responded to Afilias's Request for Reconsideration on June 5, 2018. (Appendix, Ex. 27.) The BAMC determined that Afilias did not meet the requirements for bringing a reconsideration request and summarily dismissed the request. (*Id.*)

Afilias's IRP Request

63. On November 14, 2018, Afilias filed its IRP. By way of its IRP, Afilias seeks to set aside the results of the public auction for .web and claim the right to operate .web for itself. It claims that NDC, as the winning bidder, should be disqualified from bidding because of NDC's relationship with Verisign and that Afilias, as the second-highest bidder and direct competitor of NDC and Verisign, should take all. Afilias has couched its allegations as premised on ICANN's alleged violations of its Articles and Bylaws, but the gravamen of Afilias's claim centers on the agreement between NDC and Verisign and conduct by NDC and Verisign.

64. Afilias further claims that a principal purpose of the New gTLD Program was to increase competition by ending Verisign's market power. The Bylaws and Applicant Guidebook do not prohibit Verisign from acquiring any new gTLDs, and indeed, there are no provisions that bar Verisign from participating in the New gTLD Program. To the extent Afilias is using this IRP to raise antitrust allegations before ICANN, those issues have already been thoroughly investigated by the DOJ, which took no action. Indeed, Verisign understands that ICANN's usual approach if there is an alleged competition issue is to refer the matter to the relevant competition authorities. Here, that competition review has already occurred and been resolved.

65. Verisign and NDC—who are referenced over 200 times in Afilias's IRP Request—are real parties in interest and the parties who would suffer serious and irreparable injury if the delegation of .web was further delayed. Afilias's IRP is premised on the alleged market position of Verisign and conduct of NDC and Verisign in connection with the auction.

IV. ALLOWING VERISIGN TO PARTICIPATE AS AN *AMICUS* FURTHERS IMPORTANT GOALS AND POLICIES OF ICANN AND IS NECESSARY TO PROTECT VERISIGN'S RIGHTS

66. Allowing Verisign to participate as an *amicus* in this IRP serves important goals consistent with ICANN's Bylaws.

67. First, Verisign must participate in this IRP, including the emergency stay proceedings, because its rights and interests would be irreparably impacted by the relief requested by Afilias. Fundamental fairness and considerations of due process require Verisign's participation. The IRP seeks to set aside the results of the auction award and directly interfere with Verisign's rights to secure an assignment of the registry agreement for .web, conditional upon NDC's request to assign the registry agreement and consent by ICANN to the assignment.

68. Second, Verisign can provide relevant evidence concerning its agreement to provide funds for the public auction as well as Afilias's false allegations regarding the history of the top level domain market and alleged anticompetitive conduct by Verisign, and the agreement between Verisign and NDC. Verisign is a party that will be materially affected by this IRP and its conduct forms the core of Afilias's allegations in its IRP Request. Thus, Verisign's participation as an *amicus* will lead to a more complete record and provide the Panel with a more informed basis for its decisions on interim relief.

69. Third, ICANN's Bylaws require it to "striv[e] to achieve a reasonable balance between the interests of different stakeholders." (Appendix, Ex. 2, New Bylaws, Section 1.2(b)(vii)). NDC and Verisign are stakeholders in the process that is being *directly*, *materially*, and *imminently* challenged by Afilias, and the Panel will be better positioned to determine whether ICANN and this proceeding achieves the reasonable balance required by the Bylaws only if both Verisign and NDC are allowed to have a voice in this proceeding.

70. Accordingly, for the reasons set forth above, Verisign should be allowed to participate as an *amicus* in this IRP and will comply with any briefing schedule set by the Procedures Officer.

Dated: December 11, 2018

ARNOLD & PORTER

By: */s/ Ronald L. Johnston*
Ronald L. Johnston
Attorneys for Proposed *Amicus Curiae*
VeriSign, Inc.

EXHIBIT Altanovo-34

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED'S RESPONSE TO VERISIGN, INC.'S AND NU DOTCO LLC'S REQUESTS TO PARTICIPATE AS *AMICUS CURIAE* IN INDEPENDENT REVIEW PROCESS

---

28 January 2019

Arif H. Ali
Alexandre de Gramont
Ethan E. Litwin
Rose Marie Wong

DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
ethan.litwin@dechert.com
rosey.wong@dechert.com

Counsel for Claimant

TABLE OF CONTENTS

Page

1. Afilias Domains No. 3 Limited ("**Afilias**") hereby submits this response in opposition to VeriSign, Inc.'s ("**VeriSign**") and Nu Dotco LLC's ("**NDC**") Requests to Participate as *Amicus Curiae* (the "**Requests**") in the Independent Review Process ("**IRP**") or in the proceeding before the Emergency Arbitrator, and ICANN's support for such participation. This Response also supplements the accompanying letter submitted by Afilias which responds to the various questions posed by the Procedures Officer following the 4 January 2019 hearing.

2. As a consequence of VeriSign's manipulation of ICANN's rulemaking processes to advance its own interests, the Procedures Officer should bar VeriSign, as a matter of equity, from participating in the IRP that Afilias filed on 14 November 2018 and the Emergency Arbitrator proceeding that Afilias was forced to file on 27 November 2018 as a result of pressure from ICANN. Third Party Designated Confidential Information Redacted

Finally, because the Interim Supplementary Procedures ("**Interim Procedures**" or **"Rules**") were not properly adopted by the ICANN Board on 25 October 2018, ICANN should be estopped from invoking them against Afilias and in support of the Requests.

3. In the alternative, should the Requests be considered on the merits under the Rules, the Procedures Officer should deny VeriSign and NDC the broad rights of intervention they seek and instead order that their participation in this IRP shall be (i) solely at "the discretion of the IRP Panel" and (ii) limited to the submission of briefs on the dispute and discrete questions posed by the Panel, "subject to such deadlines, page limits, and other procedural rules as the IRP PANEL

may specify in its discretion."[1] Afilias understands that ICANN does not contest Afilias' position in this regard.

1. BACKGROUND

1.1 The Independent Review Process Is an ICANN Accountability Mechanism

4. ICANN's commitment to accountability is a "fundamental safeguard" for ensuring that its bottom-up, multi-stakeholder model remains effective.[2] Its Bylaws establish various accountability mechanisms for review of ICANN actions.[3]

5. The IRP is one such ICANN accountability mechanism.[4] In short, an IRP is an independent third-party review of ICANN actions (or inactions) alleged by an affected party to be inconsistent with ICANN's Articles or Bylaws.[5] Any entity that is "materially affected" by such ICANN's actions or inactions may, pursuant to Article 4.3 of the Bylaws, submit a request for an independent review of those actions or inactions. "Covered Actions" in an IRP are "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."[6] In the context of the New gTLD Program, standing to bring an IRP is thus restricted solely to entities that claim a direct injury as a result of ICANN's

---

1 Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), **[Ex. [VRSN] 1]**, Sec. 7 (at p. 10).

2 Recommendation of the Board Accountability Mechanisms Committee (BAMC), Reconsideration Request 18-8 (28 Aug. 2018), **[Ex. 209]**, p. 12 ("ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders.").

3 *See* ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4.

4 *See* ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**), Art. 4, Sec. 4.3.

5 *See* ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(b).

6 ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4(b)(ii).

breach of its Articles or Bylaws in its administration of the New gTLD Program.[7]

1.2 Relevant Background

6. ICANN's New gTLD Program has been a core element of the organization's workplan since its inception in 1998.[8] The New gTLD Program was painstakingly developed over more than a decade, beginning with two test-bed rounds in 2000 and 2003 and continuing through the development of the Applicant Guidebook ("**AGB**"), which is a compendium of the rules, processes, and policies that govern the New gTLD Program.[9]

7. The New gTLD Program's application window opened in 2012. ICANN received 1,930 applications, resulting in the introduction of 1,232 new gTLDs to date.[10] Seven applicants sought the right to operate the registry for .WEB.[11] Afilias and NDC were among these seven .WEB applicants; *VeriSign was not*. ICANN grouped the seven .WEB applicants into a "contention set" pursuant to the AGB.[12] Under the AGB's rules, members of the contention set were expected to negotiate among themselves to resolve their contention, that is, which of them would be awarded the rights to the registry.[13] If no voluntary resolution was reached, ICANN

---

7 *See* ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(b)(i).

8 ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1998), *available at* https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en (last accessed on 27 Jan. 2019), **[Ex. 210]**, Art. V(C)(9) (requiring that ICANN "[c]ollaborate on the design, development and testing of a plan for creating a process that will consider the possible expansion of the number of gTLDs.").

9 ICANN New gTLDs, *About the Program*, *available at* https://newgtlds.icann.org/en/about/program (last accessed on 28 Jan. 2019), **[Ex. 211]**.

10 ICANN New gTLDs, *Program Statistics*, *available at* https://newgtlds.icann.org/en/program-status/statistics (last accessed on 24 Jan. 2019), **[Ex. 212]**, p. 1.

11 *See* ICANN, *Contention Set: WEB/WEBS* (20 June 2018), *available at* https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233 (last accessed on 24 Jan. 2019), **[Ex. 213]**.

12 *See* ICANN, *Contention Set: WEB/WEBS* (20 June 2018), *available at* https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233 (last accessed on 24 Jan. 2019), **[Ex. 213]**.

13 ICANN, *gTLD Applicant Guidebook* (4 June 2012), **[Ex. [VRSN] 4]**, pp. 1-28, 4-6, 4-19.

would "break the tie" by auctioning the registry among the contention set members.[14]

8. Pursuant to the procedures and obligations set forth in the AGB, Afilias and the six other .WEB applicants sought to resolve their contention voluntarily by means of a private auction, the winner of which would have the right to operate the .WEB registry. These attempts failed, only because NDC ultimately refused to participate in the private auction.[15] ICANN was forced to "break the tie" by administering an auction itself. At that auction, NDC submitted the winning bid, which exceeded the previous record bid at an ICANN auction by more than 200%.[16] Shortly after the auction concluded, VeriSign admitted that it had provided the funds to NDC to win the auction and that NDC had agreed to assign .WEB to VeriSign.[17] The details of NDC's deal with VeriSign, however, were not disclosed to Afilias or anyone in the Internet community at the time.

9. Afilias immediately complained to ICANN that VeriSign's participation in the .WEB auction appeared to violate the New gTLD Program rules and demanded that ICANN conduct an investigation. ICANN did so, closing its investigation nearly two years later in June 2018 without disclosing ***any*** of its findings. Through this IRP, however, Afilias has learned the truth of what VeriSign and NDC had agreed to, and what ICANN has known (and not disclosed) for more than two years.

10. Third Party Designated Confidential Information Redacted

---

[14] ICANN, *gTLD Applicant Guidebook* (4 June 2012), **[Ex. [VRSN] 4]**, p. 4-19.

[15] Email from J. Kane (Afilias) to H. Lubsen (7 July 2016), **[Ex. 214]**.

[16] *See* Witness Statement of John L. Kane (15 Oct. 2018), **[Ex. 215]** Annex A (Table of New gTLD Contention Set Resolutions, based on information provided by ICANN, *see* ICANN, *New gTLD Auction Results*, *available at* https://gtldresult.icann.org/applicationstatus/auctionresults (last visited 26 July 2018)).

[17] VeriSign, *Form 10-Q (Quarterly Report)* (28 July 2016), **[Ex. 216]**, Note 11 (at p. 13); VeriSign, *VeriSign Statement Regarding .Web Auction Results* (1 Aug. 2016), **[Ex. 217]**.

Third Party Designated Confidential Information Redacted

11. Third Party Designated Confidential Information Redacted

---

[18] Third Party Designated Confidential Information Redacted

[19] Third Party Designated Confidential Information Redacted

[20] Third Party Designated Confidential Information Redacted

[21] Third Party Designated Confidential Information Redacted

[22] Third Party Designated Confidential Information Redacted

[23] Third Party Designated Confidential Information Redacted

[24] Third Party Designated Confidential Information Redacted

Third Party Designated Confidential Information Redacted

12. When ICANN closed its investigation without action in June 2018, Afilias immediately commenced a Cooperative Engagement Process ("**CEP**")[26] with ICANN. Afilias then filed this IRP on 14 November 2018, one day after ICANN terminated the CEP. Afilias' request for IRP alleges that ICANN's failure to disqualify NDC for its numerous violations of the New gTLD Program rules, and ICANN's willingness to allow VeriSign to acquire .WEB, violate its Bylaws.

2. VERISIGN AND NDC SHOULD BE BARRED FROM PARTICIPATING IN ANY CAPACITY IN THIS IRP

13. Fundamental principles of good faith and equity, including the principles of unclean

---

[25] Third Party Designated Confidential Information Redacted

[26] The CEP is a "non-binding" process "for the purpose of attempting to resolve and/or narrow the Dispute." ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(e)(i).

hands and abuse of process, require that VeriSign be excluded from participating in any aspect of Afilias' dispute with ICANN. For the same reasons, VeriSign should not be allowed participate in the IRP or the Emergency Arbitrator proceeding through NDC. Third Party Designated Confidential Information Redacted

2.1 How VeriSign Subverted ICANN's Rulemaking Process for Its Own Benefit

14. Afilias' review of the drafting history of Rule 7 of the Interim Procedures reveals that, until Afilias' dispute with ICANN concerning .WEB became public in June 2018, the committee that was drafting the Rules had no intention to provide any rights of participation to third parties that lacked standing to proceed as a Claimant,[28] except in limited circumstances where the subject of an IRP concerned a "decision[] of [a] ***process-specific expert panel[]*** that [is] claimed to be inconsistent with the Articles of Incorporation or Bylaws."[29] This carve-out applies specifically to IRPs that relate to expert or arbitral determinations relating to so-called "Legal Rights Objections," "Community Objections," and "String Confusion Objections." This IRP does not arise out of such an underlying process-specific expert panel proceeding.[30]

---

[27] Third Party Designated Confidential Information Redacted

[28] Under ICANN's Bylaws, to have standing as a Claimant, an entity must claim that it was directly harmed by an action or inaction by ICANN's Board or Staff that breached its Articles or Bylaws. ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(b)(i).

[29] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(b)(iii)(A)(3) (emphasis added); Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), **[Ex. [VRSN] 1]**, Sec. 1.

[30] A cover letter providing discrete answers to the Procedures Officer's questions is provided along with this brief.

2.1.1 The IRP-IOT Was Created to Implement the Recommendation of the ICANN Cross-Working Group on Enhancing ICANN Accountability

15. In **December 2014**, a working group of ICANN community members ("**CCWG-Accountability**") began developing a set of proposed enhancements to ICANN's accountability to the global Internet community. This effort was undertaken at a time when stewardship for the IANA functions (*i.e.*, control of the Internet) passed from the U.S. government to ICANN and in response to the consensus that improvements to ICANN's accountability were necessary.[31] As part of this effort, the CCWG-Accountability made several recommendations for strengthening ICANN's Independent Review Process ("**IRP**").[32]

16. The IRP is designed to "ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws."[33] Accordingly, the CCWG-Accountability provided that standing to participate in an IRP be limited to "[a]ny person/group/entity 'materially affected' by an ICANN action or in action in violation of ICANN's Articles of Incorporation and/or Bylaws."[34] It also provided that "[d]etailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG."[35] To that end, this new CCWG was tasked with developing rules "relating to

---

[31] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. 219]**, ¶ 2 (at p. 5).

[32] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. 219]**, pp. 33-36.

[33] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. 219]**, ¶ 174 (at p. 33).

[34] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. 219]**, ¶ 178 (at p. 35).

[35] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. 219]**, ¶ 178 (at p. 36).

joinder and intervention … based on consultation with the community."[36]

17. In **early 2016**, the CCWG-Accountability created the IRP Implementation Oversight Team ("**IRP-IOT**").[37] The IRP-IOT was "tasked with drafting detailed rules of procedures for the [IRP] enhancements described in the CCWG-Accountability Supplemental Final Proposed Work Stream 1 Recommendations…." [38] ICANN's Bylaws (adopted after the formation of the IRP-IOT) specifically recognized the committee and provided that the IRP-IOT "shall develop clear published rules for the IRP … that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties."[39]

18. Although ICANN argues that the workings of the IRP-IOT were transparent, since the IRP-IOT's meetings were public and its internal emails and transcripts of meetings were posted to ICANN's website, no members of the public appear to have participated in any of the IRP-IOT's several dozen meetings. This is likely, to large extent, because the IRP-IOT's "wiki" page was and remains hidden within the bowels of ICANN's website, dial-in information for IRP-IOT meetings were not easily obtained, and the website itself was hard to navigate and not updated in real time. Information about the IRP-IOT was not nearly as "public" as ICANN would pretend. As one member of the IRP-IOT itself complained: "I was not aware of the formation of this IOT until well after it was formed and had begun its work. And I pay pretty close attention to all

---

[36] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 (Recommendation #7) (23 Feb. 2016), **[Ex. 220]**, ¶ 20.

[37] ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), *available at* https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en (last accessed 27 Jan. 2019), **[Ex. 221]**.

[38] Draft IRP Updated Supplementary Procedures: Report of the IRP IOT (31 Oct. 2016), **[Ex. 222]**, p. 1.

[39] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(n)(i).

ICANN missives about accountability."[40]

2.1.2 Drafting History Through the November 2016 Public Consultation: Third Party Participation Rights Limited to Entities with Claimant Standing under the Bylaws

19. On **14 January 2016**, the IRP-IOT was formed and held its first meeting.[41]

20. On **1 June 2016**, the IRP-IOT briefly discussed its obligation to propose rules for consolidation, intervention, and joinder in IRPs.[42] Noting that "intervention … is something we do want to think carefully about," the then-committee chair stated that "[o]bviously, you don't want to allow anyone to intervene in a dispute, but you also do want to make sure that all of the parties and interests are before the panel at the right time."[43] One committee member further floated the idea of providing for "something short of full intervention, such as an amicus brief."[44] ICANN argues that these brief comments prove that the IRP-IOT "always intended" to provide for broad rights for third parties to participate in IRPs, including as *amicus curiae*. This is a gross overstatement. In fact, the drafting history (as set forth below) demonstrates that these suggestions, made in the context of the IRP-IOT's early brainstorming, were rejected: the multiple ensuing drafts provided only for limited third party participation rights for those that had Claimant standing and, further, did not provide for any participation by *amicus curiae*.

21. On **19 July 2016**, counsel to the CCWG-Accountability provided a draft set of Rules to the IRP-IOT, which revised the Supplementary Procedures then in effect as recommended

---

[40] Email from M. Rodenbaugh to Members of the IRP-IOT (6 Dec. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-December/000478.html (last accessed on 28 Jan. 2019), **[Ex. 223]**, p. 1.

[41] *Enhancing ICANN Accountability*, *WP-IOT Meetings* (modified on 11 Jan. 2019), *available at* https://community.icann.org/display/acctcrosscomm/WP-IOT+Meetings (last accessed on 25 Jan. 2019), **[Ex. 224]**.

[42] IRP-IOT Meeting #3 (1 June 2016), Transcript, **[Ex. 225]**, pp. 25-27.

[43] IRP-IOT Meeting #3 (1 June 2016), Transcript, **[Ex. 225]**, p. 26.

[44] IRP-IOT Meeting #3 (1 June 2016), Transcript, **[Ex. 225]**, p. 26.

by the CCWG-Accountability report (the "**July 2016 Draft**"). Rule 7 ("Consolidation, Intervention and Joinder") provided in full:

> At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.
>
> Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. A CLAIMANT may join in a single written statement of a DISPUTE, as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.[45]

22. For present purposes, the July 2016 Draft—the embarkation point for the IRP-IOT's remit—thus reflected that participation in an IRP would only be available on the basis of consolidation, intervention or joinder to those who could satisfy the standing requirements to be a Claimant,[46] and that the determination regarding participation would be in the sole discretion of the Procedures Officer.

23. On **20 July 2016**, the IRP-IOT met to discuss the July 2016 Draft, which was described as "reflect[ing] consensus between ICANN legal and the CCWG Counsel with respect

---

[45] Draft as of 19 July 2016 – Updates to ICDR Supplementary Procedures, **[Ex. 226]**, pp. 6-7.

[46] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(b)(i) ("A 'Claimant' is any legal or natural person, group, or entity … that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation."). The limited categories of Disputes that may give rise to an IRP are defined at Section 4.3(b)(iii) of the Bylaws.

to the supplementary procedures that would need to be put in place to implement … the CCWG recommendations."[47] While the Chair noted that the intent of Rule 7 was to "make sure that all of the relevant parties were at the table,"[48] the IRP-IOT's concept of "relevant parties" was not as broad as ICANN implies: the IRP-IOT made clear that "relevant parties" were expressly limited to "anybody who would be materially affected by the action or inaction of ICANN,"[49] *i.e.*, expressly limited to entities that had Claimant standing. This limited understanding of "relevant parties" reflects the rights of participation set forth in the July 2016 Draft of Rule 7.[50]

24. The 20 July discussion of Rule 7 was long and detailed, yet no one suggested that participation rights should be afforded to third parties that lacked Claimant standing, nor was there any further discussion of providing for participation by *amicus curiae*. Over the next several months, as summarized in the bullets below, the IRP-IOT prepared and circulated several drafts of the rules, but the text of Rule 7 remained unchanged, reflecting a consensus within the IRP-IOT to limit third-party participation rights to those with Claimant standing:

- On **26 July 2016**, a further draft set of Rules was circulated to the IRP-IOT.[51] The 26 July text of Rule 7 was unchanged, save for the addition of a new paragraph providing for briefing limits, which had been agreed during the 20 July meeting.

---

47 IRP-IOT Meeting #5 (20 July 2016), Transcript, **[Ex. 227]**, p. 1.

48 ICANN's Response to Procedures Officer's Questions concerning the Drafting History of the Supplementary Procedures (16 Jan. 2019), ¶ 17; IRP-IOT Meeting #5 (20 July 2016), Transcript, **[Ex. 227]**, p. 28.

49 IRP-IOT Meeting #5 (20 July 2016), Transcript, **[Ex. 227]**, p. 28.

50 To that end, an ICANN lawyer noted that past IRP panels had actually denied participation rights to entities that lacked Claimant standing, not because the rules "didn't have a mechanism for doing it" but rather because IRPs concern ICANN "Board conduct," so the input of affected parties lacking Claimant standing "would not necessarily be relevant." IRP-IOT Meeting #5 (20 July 2016), Transcript, **[Ex. 227]**, pp. 28-29.

51 Draft as of 26 July 2016 – Updates to ICDR Supplementary Procedures, *available at* https://mm.icann.org/pipermail/iot/attachments/20160817/8da70121/ICANNDraftIRPUpdatedSupplementalProceduresv.20-0001.pdf (last accessed on 28 Jan. 2019), **[Ex. 228]**.

- On **17 August 2016**, another draft set of Rules was circulated.[52] Rule 7 was unchanged.

- On **22 August 2016**, yet another draft set of Rules was circulated. Again, Rule 7 was unchanged.[53]

- On **29 August 2016**, another draft set of Rules was circulated, along with a slide deck that noted all open issues.[54] Rule 7 was again unchanged and no issues related to consolidation, intervention or joinder were noted in those slides.

- On **31 October 2016**, another draft set of Rules was circulated.[55] The text of Rule 7 again remained unchanged. A report that accompanied this draft confirmed that Rule 7 was not among the "three issues" where the IRP-IOT "was unable to reach full consensus."[56]

25. On **2 November 2016**, the CCWG-Accountability approved the 31 October 2016

---

[52] Draft as of 12 August 2016 – Updates to ICDR Supplementary Procedures, **[Ex. 229]**; *see* Email from B. Burr (Neustar) to Members of the IRP-IOT (17 Aug. 2016), *available at* https://mm.icann.org/pipermail/iot/2016-August/000049.html (last accessed on 27 Jan. 2019), **[Ex. 230]** (circulating the 12 Aug. 2016 draft of the supplementary procedures).

[53] BB Draft as of 22 August 2016 – Updates to ICDR Supplementary Procedures, **[Ex. 231]**.

[54] *Presentation: IRP IOT, Updated Supplementary Procedures, Open Issues 29 August 2016*, **[Ex. 232]**; BB Draft as of 29 August 2016 – Updates to ICDR Supplementary Procedures, **[Ex. 233]**; Email from B. Burr (Neustar) to Members of the IRP-IOT (29 Aug. 2016), *available at* https://mm.icann.org/pipermail/iot/2016-August/000082.html (last accessed on 26 Jan. 2019), **[Ex. 234]**.

[55] Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, **[Ex. 235]**.

[56] Draft IRP Updated Supplementary Procedures: Report of the IRP IOT (31 Oct. 2016), **[Ex. 222]**, pp. 1-2. The report stated that Rule 7 was drafted to address the CCWG-Accountability's recommendation concerning joinder and intervention, as reflected at Section 4.3(o)(ii) of ICANN's Bylaws. Contrary to ICANN's assertion that this draft of Rule 7 only "permitted *some* of the 'relevant parties' to 'join the table,'" the IRP-IOT's report **did not** state that Rule 7 was incomplete, required further revision, or otherwise did not fully implement the CCWG-Accountability recommendation in this regard. ICANN's Response to Procedures Officer's Questions concerning the Drafting History of the Supplementary Procedures (16 Jan. 2019), ¶ 20. To the extent that a committee member proposed broad participation rights for anyone interested in the subject matter of an IRP during the initial 20 June 2016 meeting, the drafting history of Rule 7 amply demonstrates that this recommendation was soundly rejected: such broad rights do not appear in any of the drafts of Rule 7 and were not discussed by the IRP-IOT at any time following 20 June. The IRP-IOT made abundantly clear that, consistent with the Bylaws, intervention rights would be premised on ***claimant standing*** alone.

draft set of Rules for "publication for community input."[57] It was then subsequently published for public review and comment on 28 November 2016 (the "**Public Comment Draft**").[58]

26. In the Public Consultation, the IRP-IOT stated:

> Following the public comment proceeding, the inputs will be analyzed by the IRP-IOT who will consider amending [the rules] in light of the comments received. ***If there are no significant issues, the final version [of the rules] along with the analysis of the public comments will be presented to the CCWG-Accountability for approval.*** Once approved, the CCWG-Accountability will forward [the rules] to the ICANN Board of Directors for final approval.[59]

27. Thus, by of the **end of 2016**, the IRP-IOT had been working for almost a year and had prepared ***six*** draft sets of Rules, all with identical provisions for third party participation in IRPs. In sum, the IRP-IOT had agreed to limit third party presentation to only those entities who had Claimant standing in the context of an IRP, *i.e.*, only those entities that had been directly harmed by an action or inaction by ICANN that breached its Bylaws or Articles. Moreover, third party participation was further entrusted to the unfettered discretion of the Procedures Officer.

2.1.3 The Public Comments Requested Additional Rights for Parties to Underlying "Process-Specific Expert Panel" Proceedings Conducted Pursuant to Bylaws Section 4.3(b)(iii)(A)(3)

28. On **1 February 2017,** the Public Comment period closed. While ICANN is correct that three sets of comments proposed broadening participation rights under Rule 7, ICANN misstates the scope and breadth of these proposals. In short, the Public Comments requested a

---

[57] ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), *available at* https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en (last accessed 27 Jan. 2019), **[Ex. 221]**, p. 2.

[58] ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), *available at* https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en (last accessed 27 Jan. 2019), **[Ex. 221]**.

[59] ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), *available at* https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en (last accessed 27 Jan. 2019), **[Ex. 221]**, p. 2 (emphasis added).

very limited expansion of third party participation rights in the context of "IRP actions that may be taken pursuant to 'decisions of ***process-specific expert panels***'"[60] as provided by ICANN Bylaws Section 4.3(b)(iii)(A)(3).[61] Prior to October 2016, such decisions of expert panels could not be challenged in an IRP and the CCWG-Accountability was clear in its report that, pursuant to this new Bylaws provision, "[a]n IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN's Bylaws."[62] Given this reference in the CCWG-Accountability report, the IRP-IOT agreed that it could amend Rule 7 in this regard to reflect the Public Comments.

29. The underlying proceedings that the Public Comments referred to were limited to arbitration proceedings in which a panel had rendered a decision based upon arguments made by the parties. Specifically, the Fletcher law firm noted that ICANN had created three such specific "process-specific expert panels" for the New gTLD Program:

i. Panels constituted by the World Intellectual Property Organization (WIPO), for new gTLD Legal Rights Objections;

ii. Panels constituted by the International Chamber of Commerce (ICC), for Community Objections; and,

iii. Panels constituted by the International Center for Dispute Resolution (ICDR), for String Confusion Objections.[63]

---

[60] CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, p. 47. The term "process-specific expert panels" is referenced both at Bylaws Section 4.3(b)(iii)(A)(3) and in the definition of Disputes in the Interim Procedures at Section 1.

[61] CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, pp. 47-56. The Fletcher firm also proposed intervention rights for IRPs that result from actions taken in response to advice by an Advisory Committee or Supporting Organization pursuant to Section 4.3(b)(iii)(A)(2) of the Bylaws. This part of the Fletcher comments is irrelevant to the discussion here but is referenced for completeness. Other than these "two specific circumstances" the Fletcher firm did not propose any other rights of participation.

[62] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. 219]**, ¶ 179 (at p. 36). *See also* ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, 4.3(b)(iii)(A)(3).

[63] CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, p. 47.

Each of these categories—Legal Rights Objections, Community Objections, and String Confusion Objections—has a specific meaning and purpose in the New gTLD Program. As previously mentioned, none are relevant to .WEB, to the .WEB auction, or to this dispute.

30. The concern identified by the Fletcher firm regarding these new kinds of IRPs that challenged the decisions of these "process-specific expert panels" was straightforward and clear:

> The Applicant Guidebook expressly rejected any avenue of appeal from the ***decisions of these arbitration tribunals***. Upon losing the dispute, the rules required an applicant to withdraw their New gTLD Applications. A few applicants nonetheless were permitted to use the IRP to challenge the decisions – but without the Winning Parties' who had prevailed in the original dispute being present! As a matter of fundamental fairness and due process, winning parties must be given notice of, and be allowed to participate in, such challenges.[64]

Recognizing that some of these "winning parties" to the arbitration below may not want to incur the expense of full participation in an IRP, Fletcher proposed allowing them to have the option of participating by submission of a "friend of the IRP brief" where an IRP was brought challenging the panel's decision.[65]

31. The other two sets of comments received on Rule 7 made narrow recommendations along the same lines. The Noncommercial Stakeholders Group also recommended broadening Rule 7 for the limited purpose of allowing "***all parties*** to the ***underlying proceeding***" the right to intervene.[66] The NCSG took a similarly narrow view of the scope of an "underlying proceeding," stating that "those who los[t] ***arbitration decisions***, *e.g.*, Community Objections at the

---

64 CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, p. 47 (emphasis added).

65 CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, p. 50.

66 CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, pp. 35-36 (emphasis added).

International Chamber of Commerce" may challenge those decisions in an IRP that does not include the winning party below.[67] The NCSG's comments clearly only referred to challenges to "arbitration decisions" and not to other procedures (such as auctions):

> It only makes sense as ICANN was not a party to the underlying proceeding and does not know ***the arguments made***. Working with ICANN, a winning party or Community must have the right to represent its own interests.
>
> Should the winning party not have the time or resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant the proceeding and of which the winning party may be in sole possession.[68]

32. Finally, the only other comments submitted on Rule 7, by the Intellectual Property Constituency of the GNSO, were of a similar vein:

> In particular, ***where the IRP is being brought effectively to challenge the decision of an ICANN-appointed panel, such as in the case of a Legal Rights Objection (LRO)***, the IRP would be brought by the losing party. The LRO itself, however, would have been an action between two or more parties and the winning party or parties have a direct interest in the outcome of the IRP and it is inequitable to deny them the opportunity to request permission to intervene.
>
> ***To rectify these concerns, the IPC suggests that any third party directly involved in the underlying action which is the subject of the IRP*** should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).[69]

33. These comments (and in particular, the Fletcher Comments) were discussed at

---

[67] CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, p. 34 (emphasis added).

[68] CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, p. 36 (emphasis added).

[69] CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, **[Ex. 236]**, p. 30 (emphasis added).

length during subsequent meetings of the IRP-IOT, which was now being led by David McAuley, a VeriSign employee. In his summary of the comments to Rule 7, McAuley acknowledged that the Public Comments were limited to situations where an IRP had been brought to challenge a decision rendered by a "process-specific expert panel:"

> Getting back to the joinder issue, let me just speak to it. We really don't need to put it on the screen right now. I'm using Fletcher as a catalyst – they're certainly not the only part that talked about joinder and parties – for instance, the Non-Commercial Stakeholders Group made a similar comment. But Fletcher basically pointed to the fact that the Applicant Guidebook from the 2012 round of new gTLDs basically did not provide an appeal to people who lost before an expert panel. ***Those were the panels that heard legal rights objections, string confusion objections, and community objections. But now the Bylaw explicitly says that expert panel decisions can be brought to IRP.***
>
> ***And so Fletcher is making the point that we in the rules need to be clearer and explicit about parties who won before the expert panel***, therefore they're not likely to bring a claim. Parties that lost are likely to bring a claim. And in doing that, Fletcher's question is – what about the parties that won? How are they going to be heard?
>
> …
>
> ***So Fletcher suggested three safeguards***: 1) that we should have a rule that provides actual notice to all the original parties before the expert panel, 2) that we should provide a mandatory right to intervene to all the parties – they can decline it but they would have a right to do it, and 3) require the IRP panel to hear from everybody that was involved below before they give any interim relief.
>
> Frankly, I think these are sensible provisions.[70]

34. A few weeks later, McAuley repeated his view that the Public Comments were limited to proposing rights for third parties to participate in IRPs that challenged decisions rendered by underlying process-specific expert panels:

> We have join[d]er issues raised in the context of parties that were involved in other ***panel decisions below***. For instance, ***we're talking***

[70] IRP-IOT Meeting #15 (2 Mar. 2017), Transcript, **[Ex. 201]**, pp. 30-31 (emphasis added).

> ***here about expert panel decisions*** which are now subject to IRP review. These are things like string confusion and legal rights objections, those kind of things. And so there is a request of ***people who effectively won their cases below***, are not ignored, if a claimant is unsatisfied with that panel's decision, goes to IRP, and c[an] have a right to join.
>
> …
>
> One is, they would like actual notice to go to all the original parties in the expert panel decision that's being challenged. Two, they ask for a mandatory right of intervention, that is for people to be able to join, to ***people who were parties in the panel***. That doesn't mean they have to intervene, that means they have a right to intervene.
>
> And then three, there would be a right for parties to be heard prior to an IRP panel making an award of some intermediate remedy, like putting an action on hold, intermediate relief. Those are the things that motivated them and they thought that these rules [should] address. The IPC said, and by the way, the non-commercial stakeholder group followed very much along those lines.
>
> The IPC did, as well, using the words, ***"directly involved" in the action below***, it should have a right to intervene, and I believe it was the IPC that said anybody that comes in as a party should have the ability to file equally detailed statements, whatever the limit is, I think it's 25 pages.
>
> So, there are ways that we can approach this. I think it's a fair request that ***[those] involved below who won at the expert panel, and now see their win being challenged***, should be able to be parties, and should have a right to be parties, I can see that. We can also consider whether there are ***ancillary parties that might have a right to file an amicus brief***, a friend of the court kind of brief.[71]

Thus, the **state of play as of March 2017**, when the IRP-IOT began to amend the text of Rule 7 in light of the public comments, was as follows:

- The IRP-IOT had published for public comment a rule that allowed for third-party intervention in IRPs, but only if the intervenor could establish Claimant

[71] IR-IOT Meeting #16 (23 Mar. 2017), Transcript, **[Ex. 237]**, pp. 27-29 (emphasis added). The official transcript for this, and other, meetings of the IRP-IOT contain numerous typographical and other errors. We have corrected these transcripts as set forth in the various block quotes in this brief, by reference to the audio recordings of same, and reflect the corrected language in brackets.

standing, *i.e.*, by making a claim against ICANN for injuries suffered as a result of ICANN's action or inaction which breached its Articles or Bylaws.

- The Public Comments requested additional third-party rights of participation, but only where an IRP had been brought to challenge the decision of an underlying "process-specific expert panel," as set forth in the Bylaws.

- The IRP-IOT was also considering suggestions made in the Public Comments that "ancillary parties" to the underlying "process specific expert panel proceeding" should have a right to file an *amicus* brief with the IRP Panel.

- The IRP-IOT discussed these Public Comments and agreed to so modify Rule 7 along these lines.

2.1.4 The Post-Public Comment Drafting History: New Joinder Language Provides for Third Party Participation Rights Where IRPs Challenge Decisions of Underlying "Process-Specific Expert Panels"

2.1.4.1 The IRP-IOT Proposed and Agreed to Joinder Language Narrowly Tailored to Address the Public Comments

35. ICANN cites selective excerpts from the IRP-IOT meeting transcripts to give the false impression that the scope of *amicus* participation was a central point of discussion in the committee's deliberations.[72] The actual language that the IRP-IOT drafted and agreed to, however, reflected the limited request set forth in the Public Comments.

36. On **3 May 2017**, McAuley circulated a first draft of the proposed joinder language.[73] McAuley's proposed language responded directly to the three suggestions made in the Fletcher Comments discussed above:

> 1. That all ***those who participated in the underlying proceeding as a "party"*** receive notice from a claimant (in IRPs under ***Bylaw section 4.3(b)(iii)(A)(3)***) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents)

---

[72] ICANN's Response to Procedures Officer's Questions concerning the Drafting History of the Supplementary Procedures (16 Jan. 2019), ¶¶ 23-27.

[73] *Presentation: Suggestions for disparate Joinder comments* (3 May 2017), *available at* http://mm.icann.org/pipermail/iot/attachments/20170503/5c99d640/IRPdisparatejoindercomments-0001.pptx (last accessed on 26 Jan. 2019), **[Ex. 238]**; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (3 May 2017), *available at* https://mm.icann.org/pipermail/iot/2017-May/000209.html (last accessed on 26 Jan. 2019), **[Ex. 239]** (attaching "Suggestions for disparate Joinder comments").

> contemporaneously with the claimant serving those documents on ICANN.
>
> 2. That ***all such parties*** have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.
>
> 3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.
>
> 4. Persons/entities participating in IRPs as amici shall each, for the purposes of bylaws section 4.3(r) only, be considered "parties" to the IRP.[74]

37. The 3 May joinder language thus provided for a modest expansion of third-party rights of participation, in line with the limited concern raised in the Public Comments:

- Parties who participated in an underlying "process-specific expert panel" proceeding would receive notice if an IRP were commenced challenging the decision of that panel.
- "All such parties" would have the right to intervene in that IRP.
- The Procedures Officer would have the sole discretion to determine whether "such parties" could intervene as a party or as an *amicus curiae*.

In sum, no third-party rights of participation were provided for any IRP other than those where a decision of an underlying "process-specific expert panel" was being challenged.

38. On **4 May 2017**, McAuley led a brief discussion of his proposed joinder language. No substantive comments on the draft language were made. As summarized below, over the

[74] *Presentation: Suggestions for disparate Joinder comments* (3 May 2017), *available at* http://mm.icann.org/pipermail/iot/attachments/20170503/5c99d640/IRPdisparatejoindercomments-0001.pptx (last accessed on 26 Jan. 2019), **[Ex. 238]**, pp. 1-2 (emphasis added). In his proposed text, McAuley provided that *amicus curiae* do not enjoy the rights or obligations of parties to an IRP, save for liability for costs pursuant to Section 4.3(r) of the Bylaws.

following several weeks, McAuley's further comments reveal that he and the committee were in agreement that there would be only limited rights of participation in IRPs that challenged decisions of "process specific expert panels," as provided for by Section 4.3(b)(iii)(A)(3) of ICANN's Bylaws:

> **11 May 2017**: "Where I think we are on joinder, and it's as follows: I think we've agreed that ***anybody that has participated in the underlying expert panel proceedings***, and with respect to a certain section of the bylaw, that they would get – if they participated as a party there and another person challenges that, then those participants below would get full notice of the IRP and the request for IRP …. And all of ***those parties would have a right*** – a right – to intervene in the IRP."[75]
>
> * * * *
>
> **18 May 2017**: "And, on the joinder issue, you've seen the slides that I sent before, and basically ***where we have come down on joinder is that anybody that participated in an underlying expert panel proceeding as a party*** would receive notice from an IRP claimant, and they would receive a copy of the notice and a request for an IRP, two separate things, but together they constitute the body of the request for IRP.
>
> And, they would be to get the documents, that they would have ***such people that participated below would have a right to intervene in the IRP, but the [procedures] officer of the panel would have the final say on how that is executed, whether as a party or as an amicus brief***, and the [procedures] officer would be exhorted to do their best to stick within the timeframes that the bylaws call for in handling IRPs."[76]
>
> * * * *
>
> **5 June 2017**: "Our agreed approach at first reading deals with joinder issues concerning ***entities that participated in an underlying proceeding (process-specific panel) as contemplated in Bylaw Section 4.3(b)(iii)(A)(3)***.
>
> Our approach was agreed at first reading following consideration of

[75] IRP-IOT Meeting #21 (11 May 2017), Transcript, **[Ex. 206]**, p. 6 (emphasis added).

[76] IRP-IOT Meeting #22 (18 May 2017), Transcript, **[Ex. 240]**, p. 8 (emphasis added).

> various public comments received from the first draft public comment period."[77]
>
> * * * *
>
> **21 July 2017**: "***The intent is to allow all 'parties' at the underlying proceeding to have a right of intervention***, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. ***It is not envisioned to allow non-parties from below (or others) to join under these provisions - noting that these provisions just deal with parties below***. We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules … that went out for comment."[78]

2.1.4.2 ICANN Proposes Minor Tweaks to the Joinder Provisions

39. On **7 September 2017**, the IRP-IOT again discussed the joinder provisions of Rule 7. McAuley opened that discussion recalling that joinder rights were limited to participants in IRPs that challenged the decisions of underlying process-specific expert panels:

> [W]hat I'm doing is suggesting ***only those persons or entit[ies] participating in the under lying proceedings*** receive notice from a claimant, this is the expert panel challenge instance, of the full notice of IRP and the request for IRP …. The second point I'm suggesting ***all such part[ies] have a right to intervene in the IRP***. … The manner [of intervention] should be up to the procedure officer who may allow such intervention through granting IRP party status or by allowing such parties to file amicus [] briefs.[79]

During the discussion of the joinder provisions, however, ICANN Legal raised a concern that providing all parties to the underlying proceeding with a right to intervene ***as a party in the IRP***

---

[77] Email from D. McAuley to Members of the IRP-IOT (5 June 2017), *available at* https://mm.icann.org/pipermail/iot/2017-June/000251.html (last accessed on 17 Dec. 2018), **[Ex. 241]**, p. 1 (emphasis added).

[78] Email from D. McAuley to Members of the IRP-IOT (21 July 2017), *available at* https://mm.icann.org/pipermail/iot/2017-July/000279.html (last accessed on 26 Jan. 2019), **[Ex. 207]**, p. 2 (emphasis added).

[79] IRP-IOT Meeting #28 (7 Sep. 2017), Transcript, **[Ex. 204]**, pp. 3-4 (emphasis added).

could significantly expand the scope of IRPs generally:[80]

> SAMANTHA EISNER: … [O]ne [of the] things [that] I reflect on when I read [this] is that I [would] anticipate [that] for someone to achieve party status [in the IRP that] someone must [actually] have appropriate standing to assert a claim in an IRP and so I'm wondering if we have that reflected anywhere because otherwise it's [–] it seems to expand the IRP if we allow people to join as party without having a requirement of standing....
>
> DAVID McAULEY: I guess where I'm coming from Sam is [] that the [rule is] with respect to people who were parties at the expert panel decision. And the bylaw[] provides for appeals from those decisions. And so.
>
> SAMANTHA EISNER: Well, the bylaw[] allows for those that believe that there was a [--] that ICANN violated its bylaws and article[s] in accepting the expert opinion to take that ma[tt]er to IRP [--] it's not necessarily an appeal.[81]

40. Later that day, Eisner "proposed language to address the concern raised about making sure that only those who satisfy the definition of 'claimant' and would otherwise have standing under the IRP are given 'party' status. Otherwise, allowing persons or entities to achieve 'party' status could risk the expansion of the IRP to issues not tethered to the violations of ICANN's articles or bylaws."[82] Eisner proposed to insert the following in the joinder language: "A person or entity seeking to intervene in an IRP can only be granted party status if that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at

---

[80] Under the Bylaws, IRPs may only be brought for specific types of claims, *e.g.*, that an ICANN Board or Staff action or inaction breached ICANN's Articles or Bylaws. ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(b). ICANN Legal repeatedly raised concerns within the IRP-IOT that efforts to provide entities with "party" or "Claimant" rights, based only on a showing of a "material interest" in the subject matter of the IRP, could greatly expand the scope of IRPs to include, for example, claims that that ICANN actions or inactions injured the Claimant, even if those actions or inactions did not breach ICANN's Articles or Bylaws.

[81] IRP-IOT Meeting #28 (7 Sep. 2017), Transcript, **[Ex. 204]**, pp. 3-4 (corrected pursuant to audio transcript of the meeting); IRP-IOT Meeting #28 (7 Sep. 2017), Audio Recording, *available at* http://audio.icann.org/mssi/irp-iot-07sep17-en.mp3 (last accessed on 26 Jan. 2019), **[Ex. 242]**.

[82] Email from S. Eisner (ICANN) to D. McAuley (VeriSign) (7 Sep. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-September/000306.html (last accessed on 26 Jan. 2019), **[Ex. 243]**, p. 1.

Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures."[83]

41. On **3 October 2017**, Eisner's edit was incorporated into the draft of Rule 7.[84] In response to this new language, a member of the IRP-IOT noted that winning parties in the underlying proceeding would not have Claimant standing, since they would take the position that ICANN had not breached its Bylaws or Articles, and asked that the rule be broadened to ensure that those that had prevailed in the underlying proceeding could also participate, in accordance with the requests made in the Public Comments.[85]

42. On **10 October 2017**, McAuley circulated what he deemed to "final" joinder language:

> SUGGESTED JOINDER LANGUAGE:
>
> 1. That ***only those persons/entities who participated in the underlying proceeding as a "party" receive notice*** from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
>
> 2. That, subject to the following sentence, ***all such parties have a right to intervene in the IRP***. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP ***can only be granted "party" status if*** (1) that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, or (2) that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute.

---

[83] Email from S. Eisner (ICANN) to D. McAuley (VeriSign) (7 Sep. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-September/000306.html (last accessed on 26 Jan. 2019), **[Ex. 243]**, p. 1.

[84] Email from D. McAuley (VeriSign) to Members of the IRP-IOT (3 Oct. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-October/000315.html (last accessed on 27 Jan. 2019), **[Ex. 244]**. ICANN's language amounts to only a tweak, further limiting participation rights by clarifying that participants in underlying proceedings may intervene as "parties" in an IRP only to the extent that they have standing as a Claimant under ICANN's Bylaws.

[85] Email from M. Hutty (Linx) to D. McAuley (VeriSign) (4 Oct. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-October/000316.html (last accessed on 26 Jan. 2019), **[Ex. 245]**, p. 1.

> The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this ***limited intervention right*** shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.
>
> 3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.
>
> 4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.[86]

43. The 10 October draft language did not expand third party participation rights, but rather further limited them. Consistent with all prior drafts, the 10 October joinder provisions:

i. Applied only where an IRP had been brought to challenge a decision of an underlying "process specific expert panel;"

ii. Provided that parties to that underlying proceeding would receive notice; and,

iii. Provided that "all such parties" (to the underlying proceeding) would have a right to intervene.

In response to ICANN's concerns about expanding the scope of IRPs generally, a new provision was added to limit the "right to intervene" as a "party:"

iv. "Such parties" could only intervene as parties to the IRP where they had Claimant standing or otherwise had a material injury related to the violation

[86] Email from D. McAuley (VeriSign) to Members of the IRP-IOT (10 Oct. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-October/000321.html (last accessed on 26 Jan. 2019), **[Ex. 246]**, pp. 1-2 (emphasis added).

identified by the Claimant.

44. On **23 October 2017**, hearing no objections to the 10 October draft, McAuley circulated the same language again for a second reading.[87]

2.1.4.3 The May 2018 Draft Reflects the Limited Joinder Language Agreed in 2017

45. On **8 May 2018**, the first full set of draft Rules since the Public Comment Draft were circulated within the IRP-IOT (the "**May 2018 Draft**"), along with a redline against the Public Comment Draft.[88] The May 2018 Draft was consistent with the provisions of the Public Comment Draft, as modified to reflect the limited concern raised in the Public Comments received on Rule 7. First, the May 2018 Draft provided for a general right of intervention, retaining the exact language of the Public Comment Draft:

> Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER.[89]

46. A new section ("Intervention and Joinder") was inserted to directly respond to the Public Comments by providing for specific rights of intervention in IRPs that were brought to challenge the decisions of underlying "***process-specific expert panels***" under the new Bylaws provision:

> If a person, group, or entity ***participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3))***, (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. ***Such a person, group, or entity*** shall have a right to intervene in the IRP as a CLAIMANT or as an *amicus*, as per the following:
>
> i. (S)he/it/they may only intervene as a party if they satisfy

---

87 Email from D. McAuley (VeriSign) to Members of the IRP-IOT (23 Oct. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-October/000325.html (last accessed on 26 Jan. 2019), **[Ex. 247]**.

88 Email from S. Eisner (ICANN) to Members of the IRP-IOT (8 May 2018), *available at* https://mm.icann.org/pipermail/iot/2018-May/000390.html (accessed on 26 Jan. 2019), **[Ex. 248]** (attaching 1 May 2018 draft set of supplementary procedures); Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, **[Ex. 1]**.

89 Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, **[Ex. 1]**, p. 8.

> the standing requirement to be a CLAIMANT as set forth in the Bylaws.
>
> ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an *amicus*.
>
> Any person, group, or ***entity that did not participate in <u>the</u> underlying proceeding*** may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an *amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed *amicus* has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.
>
> In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.
>
> In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.[90]

47. Given the general right for entities with Claimant standing to intervene in IRPs, this new "Intervention and Joinder" section makes sense only when read as providing specific rules in the limited situations where IRPs were brought to challenge decisions rendered by underlying "process-specific expert panels" pursuant to the new Section 4.3(b)(iii)(A)(3) of ICANN's Bylaws. This is the only interpretation that is consistent with the requests made in the three Public Comments on Rule 7, the discussions within the IRP-IOT over the preceding 15 months, and,

[90] Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, **[Ex. 1]**, pp. 8-9 (emphasis added).

importantly, the text[91] of the May 2018 Draft of Rule 7 itself.[92] Reflecting the long-held consensus within the IRP-IOT on the limited changes to the Public Comment Draft's version of Rule 7 that were needed to respond to the Public Comments, an ICANN lawyer noted during the 7 June 2018 IRP-IOT meeting:

> I THINK THE [JOINDER] LANGUAGE THAT WE HAVE IN THE DRAFT INTERIM RULES THAT SAM CIRCULATED IS PRETTY MUCH THE LANGUAGE THAT[,] BASED UPON OUR VARIOUS DISCUSSIONS, ***[WE] SEEMED TO HAVE AGREED UPON. I DON'T RECALL THERE BEING ANY OPPOSITIONS OR DISCUSSIONS TO THE CONTRARY ON THE CURRENT LANGUAGE***.[93]

48. Following the meeting on 7 June 2018, the IRP-IOT adjourned for the summer and did not meet again until 9 October 2018. No meetings were held over the summer, and the IRP-IOT's email archive is devoid of any substantive correspondence for the entirety of July, August, and most of September.

---

[91] Rules of English grammar may guide the interpretation of rules. *See Wronke v. Marsh*, 787 F.2d 1569, 1574-76 (Fed. Cir. 1986), **[Ex. 249]** (interpreting statutory language "[o]n the basis of English grammar"); *ConocoPhillips Co. v. U.S. E.P.A.*, 612 F.3d 822, 839 (5th Cir. 2010), **[Ex. 250]** (interpreting statute based on "the rules of English grammar").

[92] The drafter refers to "an underlying proceeding" in the first reference by using the indefinite article "**an**." In other words, notice of an IRP will not be provided, unless there was "an underlying proceeding" and, if so, only to entities that participated in that proceeding. The second reference, however, uses the definite article "**the**." Had the drafter intended to provide for participation rights, regardless of whether there was an underlying proceeding or not, the drafter would have used indefinite article "an" in the second reference as well. The drafter did not do so, consistent with the drafting history and the understanding of the joinder language that had accrued over the prior 15 months, namely that third party participation rights in an IRP were conditioned on the existence of an underlying "process-specific expert panel." A drafter's choice between the definite and indefinite article therefore affects the meaning of the text. *See, e.g.*, *Reid v. Angelone*, 369 F.3d 363, 367 (4th Cir. 2004), **[Ex. 251]** ("[B]ecause Congress used the definite article 'the,' we conclude that ... there is only one order subject to the requirements…."); *Warner-Lambert Co. v. Apotex Corp*., 316 F.3d 1348, 1356 (Fed. Cir. 2003), **[Ex. 252]** (reference to "the" use of a drug is a reference to an FDA-approved use, not to "a" use or "any" use).

The definite article ("the") is used before a noun to indicate that **the identity of the noun is known to the reader**. *Chicago Manual of Style Online*, ¶ 5.71 (Definite article), *available at* https://www.chicagomanualofstyle.org/book/ed17/part2/ch05/psec071.html (last accessed 26 Jan. 2019), **[Ex. 253]**. The indefinite article ("an") is used before **a noun that is general or when its identity is not known**. *Chicago Manual of Style Online*, ¶ 5.72 (Indefinite article), *available at* https://www.chicagomanualofstyle.org/book/ed17/part2/ch05/psec072.html (last accessed on 26 Jan. 2019), **[Ex. 254]**.

[93] IRP-IOT Meeting #41 (7 June 2018), Transcript, **[Ex. 255]**, p. 12 (emphasis added).

49. As of 7 June, therefore, the status of Rule 7's joinder language was as follows:

- On **28 November 2016,** the IRP-IOT had agreed upon and published for Public Comment rules that would only permit intervention in an IRP if the intervenor possessed Claimant standing.

- By **1 February 2017**, three Public Comments had been received on Rule 7, each requesting that the rules on intervention be broadened for IRPs that challenged decisions of underlying "process-specific expert panels" as provided for by ICANN's Bylaws at Section 4.3(b)(iii)(A)(3). In such IRPs, the commentators requested that those entities that had participated below be granted rights of participation in the IRP. The Public Comments also raised the possibility of "ancillary parties" to the underlying proceeding having a right to submit *amicus* briefs.

- Between **March and October 2017**, the IRP-IOT produced several drafts of joinder rules designed to provide for the limited rights of participation requested in the Public Comments.

- On **8 May 2018**, a full set of rules was circulated and which provided for third party participation rights in IRPs brought to challenge the decisions of underlying process-specific expert panels, as had been requested by the Public Comments and reflecting the consensus within the IRP-IOT that had been reached over the course of 2017.

- On **7 June 2018**, the IRP-IOT described the joinder language as "agreed upon."

2.1.5 After Afilias' Invocation of CEP Was Publicly Disclosed, VeriSign Manipulated the IRP-IOT Process to Ensure that It (and NDC) Could Participate in this IRP

50. On **20 June 2018,** ICANN publicly disclosed Afilias' request for CEP concerning .WEB that had been made two days earlier.

51. On **5 October 2018**,[94] McAuley circulated a new draft set of rules within the IRP-IOT (the "**5 October Draft**"). The 5 October Draft, in relevant part, contained a new section addressing "Participation as an *Amicus Curiae*," reflecting participation rights that had never been discussed by the committee:[95]

---

[94] Although the draft was circulated on 5 October, the draft itself bears a date of 25 September 2018.

[95] Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 25 September to 8 May 2018 versions), **[Ex. 256]**.

> ***Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL***, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) ***shall be deemed to have a material interest relevant to the DISPUTE*** and may participate as an *amicus* before the IRP PANEL.
>
> All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae,* and must be accompanied by the appropriate filing fee.
>
> If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.[96]

52. The May 2018 Draft, consistent with the Public Comments, had provided that *amicus curiae* could only participate in IRPs where decisions made by underlying "process-specific expert panels" were being challenged (and even then, only with the consent of the Procedures Officer). The 5 October Draft, however, provided that ***any entity*** that has a material interest related to ***any*** Dispute that was the subject of an IRP may intervene as an *amicus curiae*. In other words, the right to participate as an *amicus curiae* was no longer restricted to IRPs where decisions rendered by underlying "process-specific expert panels" were being challenged. This change did not reflect the limited intervention rights set forth in the Public Comment Draft, nor

[96] Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 25 September to 8 May 2018 versions), **[Ex. 256]**, p. 10 (emphasis added).

was this change requested by any of the Public Comments received on Rule 7.

53. On **9 October 2018**, the IRP-IOT met to discuss the 5 October Draft, with a view to finalizing the rules for Board approval at the end of the month.[97] Despite the importance of this meeting, which ICANN describes in its brief as "intensive,"[98] very few IRP-IOT members attended and a quorum was only established by counting ICANN Legal and Jones Day lawyers who were participating in that meeting.[99] Consistent with the October 5 Draft that he had circulated, McAuley sought to push the language of the already substantially revised Rule 7[100] even further beyond the limited Public Comments that had been received on Rule 7 and which had only concerned third-party rights of participation in IRPs that challenged decisions of underlying process-specific expert panels:

> I had my hand up because ***I want to speak as a participant here***.
>
> And I do have [a] concern about this and what I believe is that on joinder, intervention, whatever we are going the call it[,] ***it's essential that a person or [an] entity have a right to join an IRP if they feel that a significant – if they claim that a significant interest [that] they have relates to the subject of the IRP***.
>
> ***And that adjudicating the IRP in their absence would impair or***

---

97 IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, **[Ex. 202]**, p. 1.

98 ICANN's Response to Procedures Officer's Questions concerning the Drafting History of the Supplementary Procedures (16 Jan. 2019), ¶ 50.

99 As discussed below, members of the IRP-IOT have stated that the participation of ICANN Legal and Jones Day as full participants of the IRP-IOT presents serious conflicts of interest. Those conflicts were most apparent in the October 2018 meetings, where ICANN's lawyers *outnumbered* those participants who were independent of ICANN and VeriSign. ICANN's CEO and President confirmed at the 25 October 2018 Board Meeting that ICANN in-house and external lawyers "should not be regarded as members of the community for the purpose of participation in community processes…." Email from M. Hutty (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-December/000472.html (last accessed on 27 Jan. 2019), **[Ex. 257]**, p. 2. Minus ICANN's lawyers, the IRP-IOT would have lacked a quorum for each of the 9 and 11 October "intensive" meetings that resulted in the substantial and material expansion of the *amicus curiae* provisions of Rule 7 that was sought by VeriSign's David McAuley.

100 The breadth and scope of the edits to Rule 7's joinder provisions is evident from the redline against the May 2018 version. *See* Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 25 September to 8 May 2018 versions), **[Ex. 256]**.

> ***impede their ability to protect that [interest]***.
>
> And [additionally] when there's a question of law or fact that the IRP is going [to] decide that is common to all that [ ] are similarly situated.
>
> And especially given the finality of these kinds of proceedings it's my view that intervention, whatever term we are using[,] needs to capture that.
>
> So I'm putting that on, I would be happy to provide specific language with respect to this concept tomorrow on list. And we [could] talk about it on Thursday. ***But that's what I wanted to mention as a participant with respect to this particular rule***.[101]

This was a significant departure from McAuley's repeated insistence that the joinder language concerned ***only*** those entities that had participated in underlying proceedings. He provided no explanation for his changed position,[102] or for that matter as to his position as "a participant" as opposed to as the Chair of the IRP-IOT. His comments a few days later, however, are revealing in this regard:

> But if it was moved to an amicus thing I would like to look at the language you [came] up with. You can tell between this and rule 8, ***where I'm coming from is a [competitive] situation***. Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that [are] effected by ICANN have to be able to [protect] their interest in ***competitive situations***. [So I] use[d] language [that] largely followed U.S. federal rules of [procedure]. But these rules are fairly -- I think, a least I common law countries -- fairly routinely accepted that someone has an interest can defend themselves [because] they can't look [for] the defendant to make [their] argument for them.[103]

---

[101] IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, **[Ex. 202]**, p. 15 (emphasis added).

[102] An exhibit comparing McAuley's views on joinder rights both before and after Afilias' invocation of CEP was publicly disclosed is attached hereto as Annex A.

[103] IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, **[Ex. 205]**, p. 14. The transcripts of IRP-IOT meetings contain multiple typographical and other errors of translation. Where important, we have corrected these quotes by reference to the audio recordings and reflect those corrections in brackets.

54. On **11 October 2018**, McAuley, as he promised, proposed alternative language:[104]

> In addition, any person, group or entity shall have a right to ***intervene as a CLAIMANT*** where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group or entity's absence might impair or impede that person, group or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.[105]

McAuley's proposal yet again expanded Claimant standing significantly.[106]

55. On **Friday 19 October 2018**, following an offline consultation with Samantha Eisner of ICANN Legal,[107] McAuley emailed a full new set of the Rules to members of the IRP-IOT (the "**October 19 Draft**").[108] The October 19 Draft contained yet even more expansive third-party participation rights, and removed any discretion from the Procedures Officer insofar as applications for participation were made by certain categories of applicant:

Public Comment Draft	May 2018 Draft	October 19 Draft
Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the	***Any person or entity qualified to be a CLAIMANT*** may intervene in an IRP with the permission of	***Any person or entity qualified to be a CLAIMANT*** pursuant to the standing requirement set forth in

[104] Email from D. McAuley (VeriSign) to Members of the IRP-IOT (11 Oct. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-October/000449.html (last accessed on 25 Jan. 2019), **[Ex. 258]** (attaching new joinder language).

[105] New Joinder language from D. McAuley (VeriSign) to Members of the IRP-IOT (11 Oct. 2018), **[Ex. 259]**, p. 2.

[106] IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, **[Ex. 205]**, pp. 12-15. Again, a quorum at the 11 October meeting was achieved only by including members of ICANN's legal team. Other than VeriSign's McAuley, only two other participants independent of ICANN attended.

[107] The several emails appended to the Declaration of Samantha Eisner were not publicly disclosed until 19 January 2019, when they were finally posted to ICANN's website as a result of Afilias' DIDP Request. *See* Letter from A. Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), **[Ex. 260]**; *Independent Review Process – Implementation Oversight Team (IRP-IOT), Off-List Correspondences* (modified on 19 Jan. 2019), *available at* https://community.icann.org/display/IRPIOTI/Off-list+Correspondences (last accessed on 26 Jan. 2019), **[Ex. 261]**.

[108] Email from B. Turcotte (on behalf of D. McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-October/000451.html (last accessed on 26 Jan. 2019), **[Ex. 262]**; Draft as of 19 October 2018 – Interim IRP Supplementary Procedures, **[Ex. 263]**.

permission of the PROCEDURES OFFICER.[109]	the PROCEDURES OFFICER. … If a person, group, or ***entity participated in an underlying proceeding*** (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)), (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. ***Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an*** **amicus**, as per the following: i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws. ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an *amicus*. Any person, group, or ***entity that did not participate in the underlying proceeding*** may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an *amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed *amicus* has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.[110]	the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. ***This applies whether or not the person, group or entity participated in an underlying proceeding*** (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)). … Any person, group, or ***entity that has a material interest relevant to the DISPUTE*** but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws ***may participate as an*** **amicus curiae** before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or ***entities shall be deemed to have a material interest relevant to the DISPUTE*** and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL: i. A person, group or entity that ***participated in an underlying proceeding*** (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)); ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or ***entity that was part of a contention set*** for the string at issue in the IRP; and iii. If the ***briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity*** that

[109] Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, **[Ex. 235]**, p. 8.

[110] Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, **[Ex. 1]**, pp. 8-9.

		is external to the DISPUTE, such external person, group or entity.[111]

56. The October 19 Draft is strikingly dissimilar to the prior drafts of Rule 7. Not only could *amicus curiae* now participate in IRPs upon a showing of a material interest in the Dispute, the Procedures Officer's discretion to allow such participation was greatly restricted. Two additional categories of mandatory participants had been added, which specifically covered NDC's and VeriSign's situation with respect to Afilias' IRP against ICANN. Indeed, NDC and VeriSign subsequently invoked those very provisions to argue that they have a mandatory right to participate in the IRP and Emergency Arbitrator proceedings. In light of Afilias' filing of its IRP, the inclusion of two new categories of mandatory *amicus* participation, at VeriSign's insistence, cannot be considered coincidental or a natural evolution of the joinder text.

57. Late in the evening on Friday 19 October 2018, McAuley asked the IRP-IOT to comment on the substantial new revisions to Rule 7 in 48 hours, by midnight on ***Sunday 21 October 2018***:

> ***[T]he [joinder] language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity.*** I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list – a way to try to take advantage of board action at next week's meeting.
>
> Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21.[112]

[111] Draft as of 19 October 2018 – Interim IRP Supplementary Procedures, **[Ex. 263]**, pp. 9-10.

[112] Email from B. Turcotte (on behalf of D. McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-October/000451.html (last accessed on 26 Jan. 2019), **[Ex. 262]**, p. 2 (emphasis added).

58. Unsurprisingly, no one submitted comments.[113] McAuley, who while "wearing his participant hat" had been the driving force behind these new edits, deemed the October 19 Draft to have been approved by the IRP-IOT while "wearing his leader hat," even though this new joinder language had substantially and materially revised the May 2018 text, which had been "approved" after discussion within the IRP-IOT and which bore no resemblance to the solitary sentence on this subject from the Public Comment Draft. Thus, without any discussion or debate, McAuley submitted the draft to the Board for approval the next day on 22 October 2018. The October 19 Draft was not sent to CCWG-Accountability for review and approval prior to its submission to the Board.

2.2 VeriSign Should Not Be Allowed to Benefit from Its Malfeasance

59. The Procedures Officer has the inherent equitable power to punish bad faith conduct.[114] In short, equity "require[s] that [litigants] shall have acted fairly and without fraud or deceit as to the controversy at issue."[115]

60. Having manipulated ICANN's rulemaking processes to serve its own ends, VeriSign does not come before this Panel with clean hands. The Procedures Officer has the equitable power to deny VeriSign's Request, and should do so because VeriSign "is guilty of

---

[113] Given the admitted lack of interest in the IRP-IOT (aside from McAuley, ICANN Legal, and one or two others), it was fanciful to believe that any committee members would review the draft in sufficient detail to respond over the weekend.

[114] *Aptix Corp. v. Quickturn Design Sys. Inc.*, 269 F.3d 1369, 1378 (Fed. Cir. 2001), **[Ex. 264]** (invoking unclean hands doctrine to dismiss claims based on court's inherent power to punish bad faith conduct); *Precision Instr. Mfg. Co. v. Auto Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945), **[Ex. 265]** (equity "necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.'"); *Aris-Isotoner Gloves Inc. v. Berkshire Fashions, Inc.*, 792 F.Supp. 969, 969-70 (S.D.N.Y. 1992), **[Ex. 266]** (same).

[115] *Precision*, 324 U.S. at 815 **[Ex. 265]**; *see also Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC*, 149 F.3d 85, 90 (2d Cir. 1998), **[Ex. 267]**.

conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party."[116]

61. ICANN is an organization in which participants from the Internet community are expected to act in the public's benefit.[117] McAuley, especially in his role as a leader, therefore had a duty to participate in the IRP-IOT for the public's benefit, not for the benefit of his employer. At a minimum, therefore, McAuley had a duty to disclose to the other members of the IRP-IOT that his proposed revisions to Rule 7 would immediately benefit his employer, VeriSign, allowing it to participate in the .WEB IRP.[118]

2.3 As NDC Lacks Any Independence from VeriSign in this IRP, NDC Must Also Be Barred from Participating in this IRP

62. Third Party Designated Confidential Information Redacted

---

116 *Estate of Lennon v. Screen Creations, Ltd.*, 939 F.Supp. 287, 293 (S.D.N.Y. 1996), **[Ex. 268]**.

117 ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 1, Sec. 1.2(a) ("ICANN … must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole….").

118 In this regard, VeriSign's participation in the IRP-IOT resembles the participation of private actors in a standard-setting organization. As courts have ruled, such participants have a duty to disclose relevant patents where adoption of a standard may trigger one or more of that parties' patents. *See Multimedia Patent Trust v. Apple Inc.*, 2012 WL 6863471, *21 (S.D. Cal. 2012), **[Ex. 269]** (citing *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1348 (Fed. Cir. 2011), **[Ex. 270]**).

119 Third Party Designated Confidential Information Redacted

Third Party Designated Confidential Information Redacted

63. Third Party Designated Confidential Information Redacted

64. Third Party Designated Confidential Information Redacted

[120] *See, e.g.*, Restatement (Third) Of Agency § 1.01 (2006), **[Ex. 271]**.

[121] Third Party Designated Confidential Information Redacted

[122] Third Party Designated Confidential Information Redacted

[123] Third Party Designated Confidential Information Redacted

[124] Third Party Designated Confidential Information Redacted

[125] Third Party Designated Confidential Information Redacted

Third Party Designated Confidential Information Redacted

65. Third Party Designated Confidential Information Redacted

3. BECAUSE THE INTERIM PROCEDURES WERE IMPROPERLY ADOPTED, ICANN MAY NOT RELY UPON THEM

66. The ICANN Board adopted the Interim Procedures despite significant deviations from ICANN's custom and practice regarding its rule-making activities. *First*, the IRP-IOT ignored its mission statement by presenting the draft set of Interim Procedures to the Board without first reporting back to the CCWG-Accountability. *Second*, contrary to ICANN's practice, the material and significant changes to Rule 7 were not properly published for public comment prior to its adoption. *Third*, members of the IRP-IOT itself have called into question the validity of the Interim Procedures, as, in their view, the wrongful participation of multiple representatives from ICANN's Legal Department and Jones Day, its external counsel, in the IRP-IOT gave rise to an serious conflict of interest.

67. For these reasons, ICANN should not be allowed to rely on the Interim Procedures to support VeriSign's and NDC's Requests.

3.1 The IRP-IOT Presented the Draft Interim Procedures Directly to the Board Without First Reporting Back to the CCWG-Accountability

68. The IRP-IOT's brief mission statement provides: "The IOT will review the outcome produced by our legal counsel ***and report back to CCWG-Accountability***."[126] This was, in fact, how the IRP-IOT proceeded in the months leading up to the Public Consultation in November 2016. Counsel to the CCWG-Accountability prepared a draft set of Rules (the 19 July 2016 Draft), which was debated and revised by the IRP-IOT over several months, culminating in the 31 October 2016 Draft. The 31 October 2016 Draft was dutifully presented, along with a report, to the CCWG-Accountability, which subsequently voted on 2 November 2016 to publish that draft for public comment. The IRP-IOT thereupon commenced the Public Consultation on 28 November 2016.

69. In the Public Consultation, the IRP-IOT stated:

> Following the public comment proceeding, the inputs will be analyzed by the IRP-IOT who will consider amending [the rules] in light of the comments received. ***If there are no significant issues, the final version of the Updated Supplementary Procedures for Independent Review Process along with the analysis of the public comments will be presented to the CCWG-Accountability for approval.*** Once approved, the CCWG-Accountability will forward the Updated Supplementary Procedures to the ICANN Board of Directors for final approval.[127]

This was not, however, how the IRP-IOT ultimately proceeded. After the closure of the Public Consultation on 1 February 2017, the IRP-IOT revised the Rules to account for the various Public Comments it had received. Following that drafting process, however, the IRP-IOT choice not to

---

[126] *Independent Review Process - Implementation Oversight Team (IRP-IOT) Home* (modified on 19 Jan. 2019), *available at* https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home (last accessed on 25 Jan. 2019), **[Ex. 272]**, p. 1.

[127] ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), *available at* https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en (last accessed 27 Jan. 2019), **[Ex. 221]**, p. 2 (emphasis added).

present a "final version" of the rules to the CCWG-Accountability "for approval." Instead, McAuley, of his own accord, unilaterally deemed the 19 October Draft to have been "approved" by the IRP-IOT and directly sent to the revised Rules to the Board for adoption on 22 October 2018.[128] This was not how the IRP-IOT was intended to proceed, as per its mission statement, nor how the public reasonably expected the IRP-IOT to proceed, given the representations made by the IRP-IOT in its November 2016 Public Consultation.

70. By failing to report back to the CCWG-Accountability as per its mission statement and public representations, the IRP-IOT hadremoved one avenue that would have provided much needed transparency into its workings. Reflecting the obscurity in which the IRP-IOT worked, McAuley's suggested revisions to the joinder language, which were circulated to the IRP-IOT on 11 and 19 October, were not publicly disclosed until after the Board vote less than a week later. Moreover, McAuley's correspondence with Eisner between 16 and 19 October, which are appended to the Eisner Declaration and upon which ICANN places much emphasis, were only publicly disclosed in January 2019 in response to Afilias' DIDP request.

71. In sum, the IRP-IOT's failure to report back to the CCWG-Accountability on these significant and material changes to Rule 7 violated its mission statement and its commitment to do so in the November 2016 Public Consultation. This failure compromises the legitimacy of the Interim Procedures.

3.2 The IRP-IOT Was Obligated to Seek a Further Public Comment on Rule 7

72. The entire set of Interim Procedures had been published for public comment in

[128] As noted below, by this time, other than ICANN's lawyers, active participation in the IRP-IOT had dwindled to McAuley and two or three others. The rules for the conduct of IRPs are intended to reflect the views of the Internet community. In reality, as regards Rule 7, they reflected only the views of VeriSign and ICANN Legal.

November 2016, as described above. Despite the many significant and material changes from the Public Comment Draft, however, the IRP-IOT sought a second public comment on Rule 4 only.[129] No public comment was sought on any other provision of the draft Rules, including Rule 7.

73. Contrary to ICANN's position, the IRP-IOT absolutely had an obligation to seek further public comments on Rule 7, which by October 2018 bore no resemblance to the Public Comment Draft version.[130] When the IRP-IOT was formed, the CCWG-Accountability specifically tasked the committee with developing Rule 7 "***based on consultation with the community***."[131] As regards Rule 7, the IRP-IOT followed this mandate in only the most superficial sense. In sum:

- A version of Rule 7 was published for public comment in November 2016. This version did not provide for *amicus curiae* representation and conditioned all third-party participation rights on having Claimant standing under the Bylaws.

- The Public Comments proposed that Rule 7 be broadened for the limited purpose of providing participation rights for entities that had participated in a "process-specific expert panel proceedings," even if those entities lacked Claimant standing under the Bylaws. The Public Comments further suggested that "ancillary parties" to these underlying proceedings should have the opportunity to submit an *amicus* brief.

- The IRP-IOT spent the next 15 months discussing and drafting language to provide for such limited third-party participation.

- The text of the Rule 7, as of 7 June 2018, remained consistent with the Public Comment Draft version, but also included a new section ("Intervention and Joinder") that provided that third-parties could participate in the limited circumstances where IRPs challenged decisions of underlying "process-specific expert panels" as suggested by the Public Comments. Accordingly, the IRP-IOT determined that the new version of Rule 7 did not need to be published for

---

[129] *See* ICANN, *The Independent Review Process Implementation Oversight Team (IRP-IOT) Draft Recommendations* (22 June 2018), *available at* https://www.icann.org/public-comments/irp-iot-recs-2018-06-22-en (last accessed on 26 Jan. 2019), **[Ex. 273]**.

[130] *See* Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 31 October 2017 to 25 September 2018 versions), **[Ex. 274]**, pp. 8-10.

[131] *See* CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 (Recommendation #7) (23 Feb. 2016), **[Ex. 220]**, ¶ 20 (emphasis added).

public comment a second time.

- In October 2018, after the second public comment period had ended (and which did not include Rule 7), McAuley engaged in an aggressive campaign to radically expand third-party participation rights in IRPs far beyond anything suggested in the Public Comments.

- The October 19 Draft of Rule 7 was a material and substantial departure from both the Public Comment Draft and the May 2018 Draft, but was never published for public comment, contrary to ICANN's practices.

- Compounding the problem, the IRP-IOT was not given a meaningful opportunity to discuss the October 19 Draft. As a result, McAuley, acting as the "leader" of the IRP-IOT, simply deemed to be approved the language that he had pushed for as a "participant" without any discussion within the IRP-IOT whatsoever.

- Contrary to its mission statement and its prior practice, the October 19 Draft was not submitted to the CCWG-Accountability before being submitted to the Board for adoption.

- The October 19 Draft itself was not posted to the IRP-IOT website until after the Board had adopted it on 25 October 2018.

74. Specifically, the IRP-IOT was inconsistent in seeking further public comments on language that had been significantly and materially changed since the Public Comment Draft. Regarding approval of the Interim Procedures specifically, ICANN's Bylaws provide:

> The Rules of Procedure shall be published and ***subject to a period of public comment that complies with the designated practice for public comment periods within ICANN*** …, and take effect upon approval by the Board, such approval not to be unreasonably withheld.[132]

Regarding ICANN's "designated practice for public comment periods," the Bylaws themselves provide some guidance in other contexts:

> With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges,

[132] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(n)(ii) (emphasis added).

> ICANN … shall: (i) ***provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board***[.][133]
>
> ***The results of such reviews*** shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been ***posted for 30 days***.[134]

The IRP-IOT did not follow these practices: it relied solely on the publication of a very early draft of Rule 7 for public comment, which nearly two years later had been significantly and materially revised.

75. Moreover, the IRP-IOT ignored ICANN's practice of seeking public consultations regarding all "significant changes" to the Rules themselves, which had been specifically referenced by the IRP-IOT in its first public consultation in November 2016: "Given the IRP IOT is recommending ***significant changes*** to the Rules of Procedures it is publishing these for public comments."[135]

76. Indeed, members of the IRP-IOT repeatedly raised the likelihood that the IRP-IOT would need to seek a second public comment on rules that had been significantly changed since the Public Comment Draft. For example, as an ICANN lawyer opined: "I think … we'd want to evaluate the rules across to see where the substantial changes have been and if they're so

---

[133] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 3, Sec. 3.6(a) (emphasis added).

[134] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.4(a) (emphasis added).

[135] ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), *available at* https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en (last accessed 27 Jan. 2019), **[Ex. 221]**, p. 3 (emphasis added). The November 2016 public comment, as drafted by the IRP-IOT itself, also provided that the final set of rules, along with all of the public comments, "will be presented to the CCWG-Accountability for approval. Once approved, the CCWG-Accountability will forward the [final set of rules] to the ICANN Board of Directors for final approval." *Id.*, p. 2. This is not the procedure that was followed. To the contrary, following the 11th hour revision of Rule 7, McAuley sent the rules directly to the Board for approval days later.

substantial that another public comment is warranted and that's a typical process from ICANN."[136]

Other ICANN representatives opined more specifically on ICANN's practice in this regard:

> So just as a quick reminder, no recommendations can be approved without having gone to public comment at least once. ***If there are significant changes that are brought as a result of the first comment, meaning material changes, it is usually the practice to go back out for a second round of public comments to see what is there.*** Also, though in such cases, it's acceptable to say that we are not throwing the whole thing open. Meaning, we don't necessarily, we can say we don't want comments on things that have not been commented on and we may not [accept] comments on things where there were no material changes and the group has come to a change. So that we don't get caught in an endless cycle. And this may actually be the best approach in this case. As to focus on places where may be there's not a 100% agreement ***or where there have been material changes and go back out for a second public comment as specifically on those points***.[137]

An independent committee member advocated an even more rigorous standard for seeking a second public comment:

> Some of the changes that we have made, perhaps arising from individual comments, may not have [been] foreseeable: if we picked up an idea raised in one response to the last comment round, nobody else would have had reason to address that. ***We don't know what people might think about an issue we didn't consult on last time.***
>
> ...
>
> ***To my mind, a big part of the point of a consultation is to give people a chance to raise a point we have not properly considered.*** That would suggest we focus on the new ideas we've adopted, rather than those have already attracted the most attention.[138]

77. By 22 October 2018, it was undeniable that Rule 7 had been redrafted in its entirety

---

136 IRP-IOT Meeting #22 (18 May 2017), Transcript, **[Ex. 240]**, p. 7.

137 IRP-IOT Meeting #31 (7 Dec. 2017), Transcript, **[Ex. 275]**, p. 8 (emphasis added).

138 Email from M. Hutty (Linx) to D. McAuley (7 Dec. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-December/000346.html (last accessed on 26 Jan. 2019), **[Ex. 276]**, pp. 1-22 (emphasis added).

from what had been presented to the public in November 2016.[139] The changes to Rule 7 were certainly "significant" or "substantial" by any definition, as evidenced not only by the scope and breadth of changes made to the text itself, but also by how hard McAuley fought for them. Yet, contrary to ICANN's practice, no second public consultation was sought.

3.3 Members of the IRP-IOT Questioned the Validity of the Interim Procedures

78. At ICANN|63, a member of the IRP-IOT raised concerns about the participation of members of the ICANN Legal Department and Jones Day, ICANN's external counsel, in the IRP-IOT as full members of the committee.[140] This IRP-IOT member argued that the degree to which ICANN's lawyers had participated in and had directed the drafting of rules that govern an accountability mechanism designed to hold ICANN accountable to the Internet community raises obvious conflicts of interest:

> An IRP case can only be brought on the basis that ICANN has acted inconsistently with the Bylaws. Usually, ICANN will have taken the advice of its lawyers before acting in a manner that might give rise to such a claim. Accordingly, an IRP case will quite commonly be a direct challenge to the advice that Samantha, Elizabeth and the team have previously given, personally. It is quite wrong to involve them in directly in the decision-making as to how such a challenge can be brought. This is not to impugn their professional integrity: any lawyer would recognise this as an irreconcilable conflict of interests and obligations. ***Your decision places them in an impossible and untenable position, that fundamentally compromises the legitimacy of this group's output***.[141]

79. Another committee member agreed with this assessment:

---

[139] A redline comparing the final version of Rule 7 against the Public Comment Draft version is attached hereto as Annex B.

[140] Email from M. Hutty (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-December/000472.html (last accessed on 27 Jan. 2019), **[Ex. 257]**, pp. 1, 2.

[141] Email from M. Hutty (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-December/000472.html (last accessed on 27 Jan. 2019), **[Ex. 257]**, pp. 1-2 (emphasis added).

> I wholeheartedly agree that ICANN Legal has had far too much input and 'weight' in this group, and that should never have been allowed to have happened. ***Frankly it calls into question all of the 'interim' conclusions that have been adopted by the Board already***, which should be revisited by a broader team from the community.[142]

80. As these IRP-IOT members noted, ICANN's lawyers tended to be the most active members of the committee and, in fact, the IRP-IOT had satisfied its quorum requirements (five participants) on several occasions only because of the presence of ICANN's lawyers. These IRP-IOT members noted that the IRP-IOT was supposed to be comprised of "members of the Internet community" and that ICANN was not part of that community:

> It seems to me that 'comprised of members of the Internet community' ought to exclude ICANN Staff and Board Members, and include literally everyone else in the world.[143]

Göran Marby, President and CEO of ICANN, agreed when these concerns were brought to his attention at ICANN|63, and confirmed that ICANN's lawyers should not be considered to be members of the Internet community.[144]

81. Following ICANN|63, concerned members of the IRP-IOT sought to limit the participation of ICANN's lawyers in the IRP-IOT, arguing that they should not participate as full members of the IRP-IOT and that their attendance at meetings should not be included in quorum counts.[145] If that procedure had been followed, the IRP-IOT would have failed to reach a quorum

---

[142] Email from M. Rodenbaugh to M. Hutty (Linx) (6 Dec. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-December/000474.html (last accessed on 27 Jan. 2019), **[Ex. 277]**, p. 1 (emphasis added).

[143] Email from M. Rodenbaugh to Members of the IRP-IOT (6 Dec. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-December/000478.html (last accessed on 28 Jan. 2019), **[Ex. 223]**, p. 1.

[144] Email from M. Hutty (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-December/000472.html (last accessed on 27 Jan. 2019), **[Ex. 257]**, p. 2.

[145] Email from M. Rodenbaugh to M. Hutty (Linx) (6 Dec. 2018), *available at* https://mm.icann.org/pipermail/iot/2018-December/000474.html (last accessed on 27 Jan. 2019), **[Ex. 277]**, p. 1.

for each of the "intensive" meetings of 9 and 11 October 2018, where ICANN lawyers comprised three out of seven and three out of six participants, respectively.[146]

4. VERISIGN AND NDC MAY NOT INTERVENE IN THE EMERGENCY PROCEEDING

82. Despite re-writing the procedural rules governing this IRP to serve its own interests, VeriSign baldly claims a right to participate in the Emergency Arbitrator proceeding on Afilias' request for interim measures when, in fact, VeriSign (1) lacks any protectable interest in .WEB, the subject of this IRP and (2) the plain text of Rule 10 restricts participation in emergency proceedings to ***parties***.

4.1 VeriSign Lacks Any Material Interest in the Subject of this IRP

83. Contrary to its arguments, VeriSign lacks any "interest relating to the property or transaction that is the subject of the action," namely the .WEB registry.[147] VeriSign cannot have any interest in a .WEB registry agreement, as no such agreement presently exists. Further, 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.[148]

84. Third Party Designated Confidential Information Redacted

---

146 *See* IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, **[Ex. 202]**; IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, **[Ex. 205]**.

147 *See* Fed. R. Civ. Pro. 24(a)(2) (2019), *available at* https://www.federalrulesofcivilprocedure.org/frcp/title-iv-parties/rule-24-intervention/ (last accessed on 26 Jan. 2019), **[Ex. 278]**; Request by Verisign, Inc. to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶ 4 (citing U.S. law). Rule 7 of the Interim Procedures is based on U.S. law governing rights of intervention. IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, **[Ex. 202]**, p. 16. Under U.S. law, third parties may intervene in a lawsuit where they can establish "an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2) **[Ex. 278]**.

148 ICANN, *gTLD Applicant Guidebook* (4 June 2012), **[Ex. [VRSN] 4]**, p. 6-6.

Third Party Designated Confidential Information Redacted

85. Third Party Designated Confidential Information Redacted

86. Third Party Designated Confidential Information Redacted

[149] Fed. R. Civ. Pro. 24(a)(2) (2019), *available at* https://www.federalrulesofcivilprocedure.org/frcp/title-iv-parties/rule-24-intervention/ (last accessed on 26 Jan. 2019), **[Ex. 278]**.

[150] *See W. Broad Chiropractic v. Am. Family Ins.*, 122 Ohio St.3d 497, 497-98 (2009), **[Ex. 279]** (assignment of future rights held to be invalid where those rights have not vested in the transferor and where there is only a possibility that those future rights will arise); *see also UBU/Elements, Inc. v. Elements Pers. Care, Inc.*, No. 16-2559, 2016 U.S. Dist. LEXIS 80946, at *6 (E.D. Pa. June 22, 2016), **[Ex. 280]** ("[A]n agreement to assign a mark in the future is not a present assignment and does not vest legal title at the time of the agreement.") (citation omitted).

[151] Request by Verisign, Inc. to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶ 25.

4.2 *Amici Curiae* May Not Participate in Emergency Proceedings

87. Separate and apart from the foregoing, the plain text of the Interim Procedures does not provide for *amicus curiae* participation in matters pending before an Emergency Panelist. In the first instance, looking to Rule 7 ("Consolidation, Intervention and Participation as an *Amicus*") specifically, the text clearly states that *amici*, to the extent they are permitted to participate in an IRP, may do so "before an IRP PANEL."[152] Rule 7 does not, therefore, expressly provide for *amicus* participation before an Emergency Panelist.

88. Rule 10 ("Interim Measures of Protection") sets forth the rules specifically governing procedures before an Emergency Panelist. In relevant part, Rule 10 provides:

> Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any ***Party*** whose arguments were not considered prior to the granting of such interim relief ***may submit any opposition*** to such interim relief, ***and the EMERGENCY PANELIST must consider*** such arguments, as soon as reasonably practicable.[153]

89. Only ***parties***, pursuant to the express language of Rule 10, may submit an opposition to a request for interim measures that had been granted *ex parte*. No provision is made for *amicus* participation under such circumstances. VeriSign's untenable position, therefore, appears to be that while only parties have a right to be heard by an Emergency Panelist where relief has been granted *ex parte*, both parties and *amici* have the right to be heard if relief will not be granted *ex parte*. Such an interpretation is nonsensical.

---

[152] Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), **[Ex. [VRSN] 1]**, p. 10. The "IRP Panel" is defined at Rule 1 of the Interim Procedures as "the panel of three neutral members appointed to decide the relevant DISPUTE." *Id.*, p. 3. The "Emergency Panelist" is defined at Rule 1 as "the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief." *Id.*

[153] Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), **[Ex. [VRSN] 1]**, Sec. 10 (emphasis added).

90. This interpretation of Rule 10 is consistent with the drafting history of the Interim Procedures. McAuley's first draft of the joinder language, which he circulated on 3 May 2017, provided:

> ***No interim relief*** or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.[154]

Subsequent drafts of the joinder language repeated this provision in sum and substance.[155] The IRP-IOT, however, never reached agreement on this provision and it was dropped from subsequent drafts and does not appear in the Interim Procedures as adopted on 25 October 2018. VeriSign and NDC, by demanding participation rights on Afilias' motion for interim relief, wrongly demand that the Procedures Officer give effect to language that had been deleted from the text.[156]

---

[154] *Presentation: Joinder Recommendations* (12 May 2017), *available at* http://mm.icann.org/pipermail/iot/attachments/20170512/bd2af51b/CertainIRPCommentstreamtmentforfirstreading-0001.pptx, **[Ex. 281]**, p. 1 (emphasis added).

[155] Email from D. McAuley (VeriSign) to Members of the IRP-IOT (12 May 2017), *available at* https://mm.icann.org/pipermail/iot/2017-May/000224.html (last accessed on 27 Jan. 2019), **[Ex. 282]** (attaching revised joinder language in the "Certain IRP Comments Treatment for First Reading"); *Presentation: Joinder Recommendations* (12 May 2017), *available at* http://mm.icann.org/pipermail/iot/attachments/20170512/bd2af51b/CertainIRPCommentstreamtmentforfirstreading-0001.pptx, **[Ex. 281]**; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (19 May 2017), *available at* https://mm.icann.org/pipermail/iot/2017-May/000241.html (last accessed on 27 Jan. 2019), **[Ex. 283]** (attaching revised joinder language as "IRP-IOT Joinder Issue First Reading Complete"); *Presentation: Joinder – First Reading Complete* (19 May 2017), *available at* http://mm.icann.org/pipermail/iot/attachments/20170519/b0b0ad76/IRPIOTJoinderissueFirstReadingcomplete-0001.pptx (last accessed on 27 Jan. 2019), **[Ex. 284]**; Email from D. McAuley to Members of the IRP-IOT (21 July 2017), *available at* https://mm.icann.org/pipermail/iot/2017-July/000279.html (last accessed on 26 Jan. 2019), **[Ex. 207]**; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (25 Aug. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-August/000298.html (last accessed on 27 Jan. 2019), **[Ex. 285]**; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (3 Oct. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-October/000315.html (last accessed on 27 Jan. 2019), **[Ex. 244]**; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (10 Oct. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-October/000321.html (last accessed on 26 Jan. 2019), **[Ex. 246]**; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (23 Oct. 2017), *available at* https://mm.icann.org/pipermail/iot/2017-October/000325.html (last accessed on 26 Jan. 2019), **[Ex. 247]**.

[156] The removal of the provision indicates that the IRP-IOT did not intend to impose such limitations on interim relief or settlement proceedings in the Interim Procedures. *See, e.g.*¸ *Stevens v. Nat'l Life Assur. Co. of Canada*, 20 Wash. App. 20, 25, 29-30, 32 (1978), **[Ex. 286]** (holding that deletion of words "in advance" from insurance policy previously requiring "semi-annual payments in advance" changes policy to only require "semi-annual premium payments"); *In re City of Cent. Falls, R I.*, 468 B.R. 36, 77-78 (2012), **[Ex. 287]** (holding that deletion

91. Accordingly, VeriSign and NDC, which have requested to participate only as *amicus curiae*, may not participate in hearings before the Emergency Panelist concerning Afilias' request for interim relief.

5. VERISIGN'S AND NDC'S PARTICIPATION IN THIS IRP, IF ALLOWED, SHOULD BE LIMITED

92. The Interim Procedures do not define the scope of participation by an *amicus curiae* in an IRP. In their Requests, VeriSign and NDC demand the right to (i) submit briefs on all substantive issues, (ii) submit case-specific evidence, (iii) access all filings and evidence submitted in this IRP, and (iv) participate fully in all hearings. Although VeriSign's and NDC's Requests are styled as applications to participate in this IRP as an *amicus curiae*, the substance of their arguments makes clear that what they want is the right to participate on equal footing with Afilias and ICANN, repeatedly referring to themselves as "a real party in interest" or the "indispensable party" to this IRP.[157] The Interim Rules, however, are clear: VeriSign and NDC may not intervene as parties because they lack Claimant standing under the Bylaws.

93. VeriSign's and NDC's Requests are inconsistent with the limited role of *amicus curiae* as set forth in Rule 7 of the Interim Procedures and must, except as set forth below, should be denied.

5.1 The Traditional Role of *Amicus Curiae*

94. The Bylaws required the IRP-IOT to draft rules of procedure (*i.e.*, these Interim

---

of the words "school committee" from city charter "disestablished the school committee" because "there [was] nothing ambiguous about the deletion").

[157] Request by Verisign, Inc. to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶¶ 1, 4; Request by Nu Dotco, LLC to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶ 14.

Procedures) that "conform with international arbitration norms…."[158] Where procedures provide for *amicus curiae* participation in international arbitration, the norm is that such participation is limited.

95. Traditionally, *amici curiae* in international arbitrations are considered to be "a volunteer, a friend of the court, not a party."[159] *Amici* are not permitted to "consider themselves as simply in the same position as either party's lawyers" or suggest "how issues of fact or law as presented by the parties ought to be determined (which is the sole mandate of the Arbitral Tribunal itself)."[160] Therefore, while *amici* can provide written submissions to the tribunal, they are not allowed to participate in hearings.[161] Nor are *amici* permitted to introduce evidence as part of their submission.[162] Tribunals are also cautious in allowing *amici* to obtain materials from the proceedings in order to draft their written submissions because *amicus curiae* participation "is not intended to be a mechanism for enabling [*amici*] to obtain information from the Parties."[163]

---

158 ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), **[Ex. [VRSN] 2]**, Art. 4, Sec. 4.3(n)(i).

159 *Aguas Argetinas, S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005), **[Ex. 288]**, ¶ 13.

160 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), **[Ex. 289]**, ¶ 64.

161 *Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (15 Jan. 2001), **[Ex. 290]**, ¶ 47 ("The Tribunal also concluded that it has no power to accept the [*Amici*'s] requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration."); *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from Eloïse M. Obadiah (Secretary of the Tribunal) to Parties (5 Oct. 2009), **[Ex. 291]**, p. 2 ("The Tribunal does not at this stage envisage that the [*amici*] will be permitted to attend or to make oral submissions at the hearing."); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), **[Ex. 289]**, ¶ 71.

162 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), **[Ex. 289]**, ¶ 60 ("[*Amici*'s] submission should not attach any evidence or documentation, but may identify any such material that the [*Amici*] may wish to introduce at a later stage. If the Arbitral Tribunal considers that it needs to be provided with such documentation, it will request it from the [*Amici*] on its own initiative.").

163 *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from Eloïse M. Obadiah (Secretary of the Tribunal) to Parties (5 Oct. 2009), **[Ex. 291]**, p. 1; *Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as

96. *Amici curiae* have a similarly limited role in litigation, where *amicus* participation is routinely confined to the submission of legal briefs on discrete issues.[164] *Amici* have "never been recognized, elevated to, or accorded the full litigating status of a named party or a real party in interest."[165] As non-parties, *amici* are denied any degree of control over a litigation and are barred from participating in a "totally adversarial fashion."[166] To this end, "[a]n *amicus curiae* is not a party and may not assume the functions of a party … he must accept the case before the court with the issues made by the parties."[167]

97. Courts therefore routinely strike *amicus* briefs that advance new issues beyond those raised by the parties or [168] that present new case-specific evidence.[169] In sum, the role of an *amicus curiae* is to help the court decide the issues and interpret the evidence already before it, not to raise new issues beyond those made by the parties or otherwise use their briefs as a vehicle to present additional or new case-specific evidence, *i.e.*, evidence about what the parties and other witnesses did, when and how.[170]

"Amici Curiae" (15 Jan. 2001), **[Ex. 290]**, ¶ 47 ("The Tribunal also concluded that it has no power to accept the [*Amici*'s] requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration."); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), **[Ex. 289]**, ¶¶ 66-68 ("[F]or the time being only, and pending a further ruling after the … hearing, the Arbitral Tribunal denies the [*Amici*'s] application for access to the documents filed by the parties in the arbitration.").

164 IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, **[Ex. 202]**, p. 16.

165 *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991), **[Ex. 292]** (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982), **[Ex. 293]**).

166 *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991), **[Ex. 292]**.

167 *Commonwealth v. Cotto*, 708 A.2d 806, 808 n. 2 (Pa. Super. Ct. 1998), aff'd, 562 Pa. 32, 753 A.2d 217 (2000), **[Ex. 294]**.

168 *Wiggins Bros., Inc. v. Dep't of Energy*, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981), **[Ex. 295]** (citing *Nat'l Comm'n On Egg Nutrition v. F.T.C.*, 570 F.2d 157, 160 n. 3 (7th Cir. 1977), **[Ex. 296]**).

169 *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So.2d 522, 523 (Fla. Dist. Ct. App. 1996), **[Ex. 297]**.

170 *See, e.g.*, *Ciba-Geigy*, 683 So. 2d at 523 **[Ex. 297]** (rejecting an *amicus* brief that "appear[ed] to be nothing more than an attempt to present a fact specific argument of the same type as is contained in the appellants' 50 page brief").

98. These limitations on *amici*, as recognized in both the international arbitration and U.S. federal court context, are necessary to ensure that the conduct of a legal proceeding is not disrupted by *amicus*-driven tangents.

5.2 *Amicus Curiae* Participation Under the Interim Procedures

99. Even accepting, *arguendo*, that the Interim Procedures should apply here, *amicus curiae* participation in IRPs should be limited in accordance with "norms of international arbitration." Pursuant to Rule 7, prospective *amici* are granted the right to submit a request to participate and, if granted, may not participate further in the IRP unless or until invited to do so, at the Panel's discretion.[171] Pursuant to norms of international arbitration, as discussed above, such participation should be limited to the submission of legal briefs, which may not include evidence outside the record developed by the parties to the IRP, as only entities that intervene in an IRP as a claimant enjoy such rights.[172]

100. The bar on *amici* presentation of evidence is logical. Due process demands that evidence introduced against a party be susceptible to testing and verification, both through discovery and cross-examination of witnesses.[173] Yet only parties to an IRP are subject to discovery pursuant to Rule 8 and only party witnesses are subject to cross-examination at hearings

---

[171] Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), **[Ex. [VRSN] 1]**, Sec. 7 (at p. 10) ("Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, ***in the discretion of the IRP Panel***….") (emphasis added). A footnote in the Interim Procedures counsels that the Panel should favor "*broad participation of an amicus curiae*." *Id.*, note 4 (at p. 10). This footnote references the Panel's discretion in allowing further briefing and should not be deemed to allow for broader rights reserved for parties in the Interim Procedures or otherwise expand the traditionally limited role of *amicus curiae* in the context of international arbitrations.

[172] Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), **[Ex. [VRSN] 1]**, Sec. 6 (at p. 7) ("All necessary and available evidence in support of the CLAIMANT'S claim(s) should be part of the initial written submission.").

[173] *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), **[Ex. 298]** ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

before the Panel pursuant to Rule 5A. VeriSign's demands therefore raise serious due process concerns and should be denied on that basis alone.

5.3 A Clear Order Is Needed, As VeriSign and NDC Are Already Impermissibly Acting as Parties

101. Afilias' concerns are not hypothetical as VeriSign's and NDC's Requests themselves violate all the foregoing precepts that govern *amicus curiae* participation, raising serious due process issues. As noted above, an IRP is an ICANN accountability mechanism in which the ***only*** issue to be determined is whether ICANN has breached its Bylaws. Afilias has raised several claims to that end. Yet VeriSign and NDC raise several novel issues, based solely on evidence that they alone have submitted and which serve only to distract from the issue of ICANN's accountability under its Bylaws to the Internet community.[174]

102. *First*, VeriSign and NDC baldly allege that Afilias "colluded" with other members of the .WEB contention set to coerce NDC into a private auction. This naked allegation is simply false: VeriSign and NDC have not cited nor can they cite any evidence of any such agreement between Afilias and any other member of the .WEB contention set. To the contrary, Afilias has always acted unilaterally in this matter, consistent with its own interests. VeriSign's and NDC's inferences of collusion are wrongfully drawn from evidence of parallel unilateral conduct.[175]

---

[174] To support their Requests, VeriSign and NDC rely on copious case-specific evidence not submitted by the parties. For example, VeriSign and NDC rely on the Declaration of Jose Ignacio Rasco III of NDC in which Mr. Rasco testifies as to what action Afilias took and when, as well as to authenticate documents for the record. Rasco, himself a key witness, testifies as to what actions he took, when he took them and why he took them. The Rasco Declaration is therefore replete with case-specific evidence and, as it has not been submitted by a party, it should be stricken in its entirety. As Mr. Rasco's evidence was not submitted by ICANN, Afilias lacks the ability to test the veracity of his statements through discovery and Mr. Rasco will not be available to cross-examine at any hearing. Further, VeriSign also improperly submits a nearly 1,000-page Appendix of "evidence", much of which exceeds the evidence submitted by the parties. This Appendix and Mr. Rasco's Declaration should be stricken in their entirety. To the extent VeriSign and NDC seek to reference evidence, they may refer to materials included within party submissions.

[175] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564-65 (2007), **[Ex. 299]**; *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 322-23 (3d Cir. 2010), **[Ex. 300]**; *In re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186, 1193-94 (9th Cir. 2015), **[Ex. 301]**.

Afilias has the right to demand the production of all relevant evidence concerning this unwarranted and false allegation.

103. *Second*, VeriSign and NDC falsely allege that Afilias attempted to rig the auction by offering a bribe to NDC. This allegation is based solely on Mr. Rasco's deliberate misreading of texts sent to him by an Afilias employee. Afilias has the right to cross-examine Mr. Rasco under oath on this topic, following a production of all of his relevant documents.

104. *Third*, VeriSign and NDC falsely allege that Afilias violated the Blackout Period associated with the .WEB Auction. As VeriSign and NDC concede, contention set members are not prohibited from speaking with each other during the Blackout Period. The Auction Rules only forbid contention set members from discussing (1) the substance of a bid, (2) bidding strategies, or (3) negotiating settlement agreements during the Blackout Period. Afilias' simple question to NDC ("If ICANN delays the auction next week would you again consider a private auction? Y/N") is not such a violation of the Blackout Period. Afilias' communication did not discuss or disclose any information about a bid or a bidding strategy. Nor was it an attempt to negotiate a settlement. The sole intent of Afilias' communication was to assess whether, if ICANN delayed the .WEB auction (a request that Afilias did not request or support), NDC would consider participating in an alternative auction. No terms for that auction were discussed and no bidding strategies were communicated. Any statement to the contrary lacks all basis in fact. Afilias has the right to cross-examine Mr. Rasco, and others, under oath, following a production of their relevant documents.

105. VeriSign's and NDC's Requests reveal their true intent in this IRP. Rather than assist the Panel in its assessment of ICANN's conduct, VeriSign and NDC seek to muddy the waters by defaming Afilias, casting baseless aspersions that are intended to draw attention from ICANN's failure to appropriately sanction NDC for its plain violations of the New gTLD Program

Rules. VeriSign's and NDC's efforts to complicate this IRP by, in effect, presenting counterclaims against Afilias run contrary to the purpose of the IRP—an ICANN accountability mechanism—and should not be tolerated.

106. For the foregoing reasons, to the extent that VeriSign's and NDC's Requests are granted, the Procedures Officer should limit their further participation in this IRP as *amici curiae* to the discretion of the Panel, in accordance with Rule 7 of the Interim Procedures. The Procedures Officer should further order that VeriSign and NDC refrain, at all times, from introducing and relying on new case-specific evidence in presenting any arguments ordered by the Panel, and strike those portions of the Requests that do so.[176]

Respectfully submitted,

Arif H. Ali
Alexandre de Gramont
Ethan E. Litwin
Rose Marie Wong

DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
ethan.litwin@dechert.com
rosey.wong@dechert.com

Counsel for Claimant

[176] Paragraphs 21-62 of VeriSign's Request and paragraphs 11-2 of NDC's Request should be stricken for improperly introducing and relying on new case-specific evidence.

ANNEX A

David McAuley's Comments on Joinder Rights

Prior to December 2017	After June 2018
"Fletcher basically pointed to the fact that the Applicant Guidebook from the 2012 round of new gTLDs basically did not provide an appeal to people who lost before an expert panel. Those were the panels that heard legal rights objections, string confusion objections, and community objections. But now the Bylaw explicitly says that expert panel decisions can be brought to IRP. ***And so Fletcher is making the point that we in the rules need to be clearer and explicit about parties who won before the expert panel***, therefore they're not likely to bring a claim. Parties that lost are likely to bring a claim. And in doing that, Fletcher's question is – what about the parties that won? How are they going to be heard…? … So ***Fletcher suggested three safeguards***: 1) that we should have a rule that provides ***actual notice to all the original parties before the expert panel***, 2) that we should provide a ***mandatory right to intervene to all the parties*** – they can decline it but they would have a right to do it, and 3) ***require the IRP panel to hear from everybody that was involved below*** before they give any interim relief. Frankly, I think these are sensible provisions." - 2 March 2017[1]	"I had my hand up because I want to speak as a participant here. And I do have concern[s] about this and what I believe is that on joinder intervention, whatever we are going the call it ***it's essential that a person or entity have a right to join an IRP if they feel that a significant -- if they claim that a significant interest they have relates to the subject of the IRP***. ***And that adjudicating the IRP in their absence would impair or impede their ability to protect that.*** And in addition when there's a question of law or fact that the IRP is going [to] decide that is common to all that is are similarly situated. And especially given the finality of these kinds of proceedings it's my view that intervention, whatever term we are using needs to capture that. So I'm putting that on, I would be happy to provide specific language with respect to this concept tomorrow on list. And we talk about it on Thursday. But that's what I wanted to mention as a participant with respect to this particular rule." -9 October 2018[2]

[1] IRP-IOT Meeting #15 (2 Mar. 2017), Transcript, **[Ex. 201]**, pp. 30-31 (emphasis added).

[2] IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, **[Ex. 202]**, p. 15 (emphasis added).

"The suggestions that I made are that we come up with rules that allow ***everybody that was a party at the underlying proceeding – the Expert Panel*** basically such as a string confusion objection. Those kind of panels – everybody that was a party there would get notice and an opportunity to be a party at the IRP if the loser below brings an IRP, that ***all parties have a right to intervene or file an amicus brief***, and that if they become parties, they have the rights of a party under this kind of conflict, that all parties have a right to be heard in any petition for interim relief." -6 April 2017[3] "So what I'm doing is suggesting ***only those persons or entity participating in the [underlying] proceedings*** receive notice from a claimant, this is the expert panel challenge instance, of the full notice of IRP and the request for IRP including copies of all related file documents. And they receive that contemporaneous with the climate [*sic*] serving the document on ICANN. ***The second point I'm suggesting [is that] all such part[ies] have a right to intervene in the IRP.*** The timing and aspect intervention shall be managed pursuant to the applicable rule of ICDR except otherwise indicated here. ***The manner should be up to the procedure officer who may allow such intervention through granting IRP party status or by allowing such partying to file amicus by briefs***." -7 September 2017[4]	"What I added [was] the following[:] [I]n addition any person[,] group [or] entity [shall have a right to intervene as a claimant where (1)] that person[,] group [or] entity [claims a] ***significant interest to subjects of independent review process and adjudicating [the independent review process in that person,] group or [entity's] absence might impair the person[,] group [or entity's] and ability to protect such interests*** [and/]or [(2)] [where] any question of law or fact [that is common to all who are] similar[ly] situated as [that person,] group or entity is likely to arise in the independent review process." -11 October 2018[5]

[3] IRP-IOT Meeting #18 (6 Apr. 2017), Transcript, **[Ex. 203]**, p. 22 (emphasis added).

[4] IRP-IOT Meeting #28 (7 Sep. 2017), Transcript, **[Ex. 204]**, pp. 3-4 (emphasis added).

[5] IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, **[Ex. 205]**, p. 12 (emphasis added) (corrections based on audio recording).

"I think we've agreed that ***anybody that has participated in the underlying expert panel proceedings, and with respect to a certain section of the bylaw***, that they would get -- if they participated as a party there and another person challenges that, then those participants below would get full notice of the IRP and the request for IRP, those two things together sort of create the statement of the IRP, at the same time that the complaint is filed. And all of these parties would have a right -- a right -- to intervene in the IRP. ***But how that right is exercised would be within the discretion of the procedures officer. And you can see from the text, you know, that that might be as a full party, it might be as an amicus***, whatever is decided." -11 May 2017[6]	"But if it were moved to an amicus thing I would like to take a look at the language you came up with. You can tell between this and rule 8, where I'm coming from is a [competitive] situation. ***Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that are affected by ICANN have to be able to [protect] their interest in competitive situations.*** [So I] use[d] language [that] largely followed U.S. federal rules of procedure. But these rules are fairly—I think, a least I common law countries—fairly routinely accepted that someone has an interest can defend themselves [because] they can't look [for] the defendant to make [their] argument for them." -11 October 2018[7]
"The intent is to allow ***all 'parties' at the underlying proceeding*** to have a right of intervention, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. ***It is not envisioned to allow non-parties from below (or others) to join under these provisions*** - noting that these provisions just deal with parties below. ***We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules that went out for comment.***" -21 July 2017[8]	"And I will also make a comment as a participant, Sam, I think that I can live with what Malcolm has just said. I think he's right in what he's saying and ***I think it's quite possible that we could crack this nut with amicus status as long as it's not discretionary it is a matter of right*** and as long as amicus can protect the language in did [*sic*]." -11 October 2018[10]

6 IRP-IOT Meeting #21 (11 May 2017), Transcript, **[Ex. 206]**, p. 6 (emphasis added).

7 IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, **[Ex. 205]**, p. 14 (emphasis added) (corrections based on audio recording).

8 Email from D. McAuley to Members of the IRP-IOT (21 July 2017), *available at* https://mm.icann.org/pipermail/iot/2017-July/000279.html (last accessed on 26 Jan. 2019), **[Ex. 207]** (emphasis added).

10 IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, **[Ex. 205]**, p. 15 (emphasis added).

"There needs to be rules and criteria established as to who can join intervene by right as who may be properly allowed to join, allowed to intervene at the discretion of the panels. My suggestion was intended to allow ***all parties at the underlying proceeding*** to have a right of intervention but that the IRP panel through the procedures officer could limit such intervention to being that of an amicus. Not in division to allow nonparties from below or others to join under these provisions. Noting that these provisions deal with parties below. Basically an expert panel hearings. ***We're not displacing rule number 7 will consolidation, intervention joinder from the draft supplementary rules [that] were up for comment.***" -27 July 2017[9]	

[9] IRP-IOT Meeting #26 (27 July 2017), Transcript, **[Ex. 208]**, p. 21 (emphasis added).

~~DRAFT as of 31 October 2016 – Updates to ICDR Supplementary Procedures~~

7. Consolidation, Intervention~~,~~ and ~~Joinder~~[24] Participation as an Amicus

~~At the request of a party, a~~A PROCEDURES OFFICER ~~may~~shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Except as otherwise expressly stated herein, requests for consolidation, intervention, and ~~joinder. Requests for consolidation, intervention, and joinder~~/or participation as an amicus are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for ~~interim relief~~consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER~~. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.~~[25], as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

~~[24] There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issue be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07 – Recommendation #7, at § 20.~~

~~[25] See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).~~

~~In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.~~

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMAINT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an Amicus Curiae

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an amicus before the IRP PANEL:

i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));

ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and

iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an amicus must contain the same information as the Written Statement (set out at Section 6), specify the interest of the amicus curiae, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an amicus curiae.

[4] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of amicus curiae and in then considering the scope of participation from amicus curiae, the IRP PANEL shall lean in favor of allowing broad participation of an amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

Summary report: Litera® Change-Pro for Word 10.2.0.10 Document comparison done on 12/18/2018 8:57:17 PM
Changes:
Add
~~Delete~~
~~Move From~~
Move To

EXHIBIT Altanovo-35

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED'S RESPONSE TO THE *AMICUS CURIAE* BRIEFS

---

24 July 2020

Arif H. Ali
Alexandre de Gramont
Rose Marie Wong
DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
rosey.wong@dechert.com

Ethan E. Litwin
Rosa Morales
CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
Tel. 212-350-2737
elitwin@constantinecannon.com
rmorales@constantinecannon.com

Counsel for Claimant

TABLE OF CONTENTS

Page

I. INTRODUCTION

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

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

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

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

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

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

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

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

---

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

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

3 See Section IX below.

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

13

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

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

Redacted - Third Party Designated Confidential Information

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

---

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

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

15 Livesay WS, ¶ 4.

16 Livesay WS, ¶ 4 (emphasis added).

17 Livesay WS, ¶ 4 (emphasis added).

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

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

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

> Redacted - Third Party Designated Confidential Information
>
> [19]

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

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

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

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

---

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

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

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

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

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

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

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

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

.[24] Redacted - Third Party Designated Confidential Information

."[25]

---

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

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

[24] Livesay WS, ¶ 12.

[25] Livesay WS, ¶ 12.

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

.[27]

19. Redacted - Third Party Designated Confidential Information

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

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

[29]

---

[26] Rasco Decl., ¶ 24.

[27] Rasco Decl., ¶ 40.

[28] Rasco Decl., ¶ 41.

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

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

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

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

[30] Rasco Decl., ¶ 41.

[31] Redacted - Third Party Designated Confidential Information

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

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

C. Verisign's Post-DAA Inquiry to ICANN

23. Redacted - Third Party Designated Confidential Information

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

Redacted - Third Party Designated Confidential Information

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

[33] Livesay WS, ¶ 8.

[34] *See* Section IV below.

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

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

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

---

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

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

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

Redacted - Third Party Designated Confidential Information

?[38]

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

- Redacted - Third Party Designated Confidential Information

2

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

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

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

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

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

- Redacted - Third Party Designated Confidential Information

[44]

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

28. Redacted - Third Party Designated Confidential Information

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

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

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

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

Redacted - Third Party Designated Confidential Information

47

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

D. Verisign/NDC's Pre-Auction Conduct

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

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

---

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

48 Afilias' Amended IRP Request, ¶ 21.

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

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

51 Afilias' Reply Memorial, ¶ 48.

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

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

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

[54]

33. Redacted - Third Party Designated Confidential Information

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

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

---

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

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

[55] Livesay WS, ¶ 16.

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

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

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

Mr. Rasco wrote in response:

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

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

---

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

57 Rasco Decl., ¶ 87.

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

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

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

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

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

60 Rasco Decl., ¶ 78.

61 Rasco Decl., ¶ 78.

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

63 Rasco Decl., ¶ 27.

64 Livesay WS, ¶ 27.

65 Livesay WS, ¶ 27.

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

39. Redacted - Third Party Designated Confidential Information

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

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

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

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

---

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

67 Livesay WS, ¶ 27.

68 Rasco Decl., ¶ 103.

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

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

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

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

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

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

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

---

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

73 Livesay WS, ¶ 38.

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

[81] Afilias' Reply Memorial, ¶ 114.

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

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

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

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

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

---

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

83 *See* Section VI below.

84 ICANN's Rejoinder Memorial, ¶ 4.

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

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

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

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

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

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

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

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

54. In her 16 September 2016 letter forwarding the questionnaire, Ms. Willett asserted that "[i]n various fora, [Ruby Glen] and [Afilias] have raised questions regarding, among other things, whether [NDC] should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC's application for the .WEB gTLD should be rejected."[89] Ms. Willett stated further that the "additional information" sought by ICANN would "help facilitate ***informed resolution of these questions*** …."[90] Thus, Ms. Willett was also apparently unfamiliar with ICANN's "well-known practice" that required ICANN to take no action on .WEB while the Ruby Glen CEP was pending.

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

93 Rasco Decl., ¶ 104.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

66. In sum, as stated at the outset, the Panel's task with respect to Afilias' principal claim is straightforward: by reviewing the terms of the DAA against the New gTLD Program Rules, applied in accordance with ICANN's Articles and Bylaws, the Panel should conclude that ICANN violated its Articles and Bylaws by failing to disqualify NDC's application and bid, and by failing to award .WEB to Afilias as the

---

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

[110] Disspain WS, ¶ 11.

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

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

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

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

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

Redacted - Third Party Designated Confidential Information

This is a gross misstatement.

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

---

[112] NDC Br., ¶ 28.

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

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

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

114 Redacted - Third Party Designated Confidential Information

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

136 Livesay WS, ¶ 19 (emphasis added).

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

- Obligation to Timely Amend Application:

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

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

Redacted - Third Party Designated Confidential Information

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

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

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

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

Redacted - Third Party Designated Confidential Information

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

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

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

Redacted - Third Party Designated Confidential Information

This prefatory clause required

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

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

148 Rasco Decl., ¶ 48.

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

- Right to Resolve String Contention.

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

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

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

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

151 Livesay WS, ¶¶ 6-7.

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

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

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

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

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

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

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

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

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

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

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

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

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

Redacted - Third Party Designated Confidential Information

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

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

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

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

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

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

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

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

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

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

- Right to Operate the .WEB Registry.

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

94. Redacted - Third Party Designated Confidential Information

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

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

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

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

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

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

---

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

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

171 Livesay WS, ¶ 33.

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

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

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

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

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

1. The New gTLD Program Rules Regarding Updating Applications

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

185 *See* Section IV(A) above.

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

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

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

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

---

186 NDC Br., ¶ 25.

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

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

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

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

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

---

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

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

191 Rasco Decl., ¶ 20.

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

206 Livesay WS, ¶ 37 (emphasis added).

207 Livesay WS, ¶ 37 (emphasis added).

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

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

120. Redacted - Third Party Designated Confidential Information

---

[208] Verisign Br., ¶ 60.

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

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

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

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

1. Donuts and Demand Media

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

2. .BLOG

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

---

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

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

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

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

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

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

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

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

---

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

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

3. Radix and .TECH

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

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

---

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

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

220 Livesay WS, ¶ 14.

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

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

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

4. Other Examples

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

---

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

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

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

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

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

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

Redacted - Third Party Designated Confidential Information

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

---

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

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

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

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

227 Rasco Decl., ¶ 61.

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

Redacted - Third Party Designated Confidential Information

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

144. The guiding substantive and procedural rules in ICANN's Articles and Bylaws—including the rules involving procedural fairness, transparency, and non-discrimination—are so fundamental that they appear in some form in virtually every legal system in the world, and, as discussed below, are given definition by numerous sources of international law. They arise from the general principle of good faith, which is considered to be "the foundation of all law and all conventions."[248] As the International Court of Justice has stated, the principle of good faith is "[o]ne of the basic principles governing the creation and performance of

---

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

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

ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), **[**Ex. CA-1**]**, ¶¶ 140, 152 (emphasis added). The obligation for ICANN to operate in good faith—and, indeed, to go beyond mere good faith in adhering to its Articles and Bylaws—is also reflected in the CCWG-Accountability's recommendations regarding the strengthening of ICANN's Independent Review Process: "A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith." CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[**Ex. C-91**]**, ¶ 175 (at p. 33).

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

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

A. ICANN Must Provide Procedural Fairness and Due Process

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

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

---

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

250 ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), [Ex. CA-1], ¶ 141.

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

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

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

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

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

---

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

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

256 *See* Section VI below.

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

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

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

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

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

B. ICANN Must Afford Impartial and Non-Discriminatory Treatment

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

> ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

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

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

---

261 Disspain WS, ¶ 11.

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

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

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

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

---

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

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

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

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

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

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

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

C. ICANN Must Act Openly and Transparently

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

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

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

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

153. The Commitments also require ICANN to:

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

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

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

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

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

154. Similarly, ICANN's Bylaws state that:

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

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

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

---

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

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

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

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

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

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

with such underhanded tactics, did ***nothing***. It did not investigate NDC's conduct; it did not investigate the DAA; and it did not investigate claims related to the *Amici*'s secrecy.[279] Instead, ICANN simply proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the .WEB Auction. A good faith application of the New gTLD Program Rules to NDC's conduct—carried out consistent with ICANN's Articles and Bylaws—required ICANN to disqualify NDC's application and bid.[280]

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

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

---

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

280 *See* Section IV above.

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

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

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

D. ICANN Must Respect Legitimate Expectations

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

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

---

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

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

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

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

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

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

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

161. Afilias, as a participant in ICANN's New gTLD Program, legitimately expected ICANN to comply with its own rules, policies, and procedures in its Bylaws, the Guidebook and the New gTLD Program Rules. ICANN did not. The plain text of the DAA is in violation of the New gTLD Program Rules when interpreted honestly, fairly, and loyally—*i.e.*, in good faith.[291] Had ICANN actually followed the New gTLD Program Rules, it would have disqualified NDC from the application and bidding process.[292] By allowing Verisign to use NDC as a stalking horse to obtain .WEB for itself, ICANN frustrated Afilias' legitimate expectations.

E. ICANN Must Act to Promote Competition

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

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

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

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

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

---

291 *See* Section IV above.

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

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

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

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

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

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

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

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

---

296 Afilias' Amended IRP Request, ¶ 82.

297 Afilias' Amended IRP Request, ¶ 80.

298 Verisign Br., p. 1.

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

321 NDC Br., ¶ 70.

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

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

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

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

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

[323] Disspain WS, ¶¶ 10-11.

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

VII. AFILIAS DID NOT VIOLATE THE BLACKOUT PERIOD

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

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

---

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

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

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

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

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

---

326 Rasco Decl., ¶ 97.

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

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

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

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

> The Corporation ***shall operate*** in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that ***enable competition*** and open entry in Internet-related markets.[329]

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

> ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment ***unless justified by substantial and reasonable cause, such as the promotion of effective competition***.[330]

---

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

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

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

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

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

A. The New gTLD Program Was Designed to Promote Competition

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

377 Livesay WS, ¶ 4.

378 Verisign Br., ¶ 36.

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

IX. SCOPE OF THE PANEL'S REMEDIAL AUTHORITY

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

419 Section 4.3(g) states that "[the] IRP Panel shall be charged with ***hearing and resolving the Dispute***, considering the Claim and ICANN's written response ("Response") in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law. Bylaws, [Ex. C-1], Sec. 4.3(g).

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

421 Bylaws, [Ex. C-1], Sec. 4.3(b)(ii).

227. Section 4.3(a)(i): In resolving the Disputes, the Panel's mandate is to determine not only whether ICANN "exceed[ed] the scope of its Mission," but more broadly also to ensure that ICANN has "otherwise complie[d] with its Articles of Incorporation and Bylaws."[422] This is a broad mandate, and one that cannot simply be satisfied through the issuance of the type limited declaration advocated by ICANN and the *Amici*.

228. Section 4.3(a)(ii): In resolving the Disputes, an IRP panel is required to issue a remedy that would allow a "Claimant[] to ***enforce compliance*** with the Articles of Incorporation and Bylaws…."[423] A simple thumbs-up or thumbs-down declaration, as ICANN and the *Amici* suggest is all that an IRP panel can do, would not be sufficient to allow a Claimant to "enforce" ICANN's compliance in respect of the Dispute that has been put before the Panel.

229. Section 4.3(a)(iii): In resolving the Disputes, the Panel must "ensure" that its decision reflects ICANN's accountability to the global Internet community and the claimant.[424] As mentioned above, accountability requires that the Panel's decision serve as a check and balance on ICANN, and also provides for review and redress.

230. Section 4.3(a)(viii): In resolving the Disputes, the Panel is directed to issue a decision that "[l]ead[s] to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction."[425] This instruction would hardly be achieved if the Panel were to simply issue a declaration instructing ICANN to assess whether NDC's .WEB application should be disqualified—an outcome that ICANN appears to have already decided should not happen, given its June 2018 decision to enter in to a registry agreement with NDC.

---

422 Bylaws, [Ex. C-1], Sec. 4.3(a)(i).

423 Bylaws, [Ex. C-1], Sec. 4.3(a)(ii).

424 Bylaws, [Ex. C-1], Sec. 4.3(a)(iii).

425 Bylaws, [Ex. C-1], Sec. 4.3(a)(viii).

231. Section 4.3(g): "Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written response … in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law."[426]

232. Section 4.3(i): In resolving the Disputes, an IRP panel is directed to "conduct an objective, de novo examination of the Dispute."[427] Insofar as this requirement is concerned, CCWG-Accountability provided guidance:

> Standard of Review:[] The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of ICANN's Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's Mission and/or violates ICANN's Articles of Incorporation and/or Bylaws and prior IRP decisions. Decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.[428]

233. Section 4.3(i)(i): Where the claim is based on actions or failures to act by or within the Board or Staff (*i.e.*, a Covered Action), the IRP panel is directed ("shall") to "make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws." It is firmly established in international law that such findings of fact and conclusions of law, embodied in the form of a declaratory judgment by an international court or tribunal, are legally binding on the parties. As stated by the Permanent Court of International Justice in the *Chorzów Factory* case:

> the intention of [a declaratory judgment] is to ensure recognition of a situation at law, once and for all, and with *binding force as between the*

---

426 Bylaws, [Ex. C-1], Sec. 4.3(g).

427 Bylaws, [Ex. C-1], Sec. 4.3(i).

428 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶¶ 33-34.

> *parties*; so that the legal position thus established cannot again be called in question in so far as the legal facts ensuring therefrom are concerned.[429]

234. Section 4.3(v): The Bylaws also provide, again taking in to account all of the requirements and directions set out in Section 4.3 as a whole ("Subject to this Section 4.3"), that an IRP panel's decision "reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law."

235. Section 4.3(x): Finally, the Bylaws provide that "[t]he IRP is intended as a final, binding arbitration process," including in that "IRP Panel decisions are binding final decisions to the extent allowed by law" and in that "ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration." As Gary Born reports in his leading treatise on international arbitration, "under most national arbitration regimes, it is well-settled that arbitrators have broad discretion in fashioning relief," and indeed may have broader discretion than do the domestic courts.[430] This is true, in particular, under the English Arbitration Act, which provide the *lex arbitri* for this arbitration seated in London.[431] Thus, the Bylaws' commitment to IRPs as a binding arbitration process carries with it the consequence that IRP panels have broad remedial authority.

236. In sum, in order to comply with its accountability mandate under the Articles and Bylaws, the Panel must:

---

429 *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, Judgment (Dec. 16), 1927 P.C.I.J. (Ser. A) No. 13, [Ex. CA-122], p. 20 (emphasis added).

430 Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], pp. 3069-3070.

431 Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], p. 3069, n. 363. It is also worth noting that uniquely, the English Arbitration Act 1996 explicitly empowers an arbitral tribunal to provide remedies in the form of declarations, monetary payment, and several types of specific performance absent party agreement to the contrary. Arbitration Act 1996 (Eng.), [Ex. CA-124], c. 23, § 48. Although it is Afilias' position that ICANN's Bylaws provide agreement that the Panel is empowered to issue any appropriate remedy, the Arbitration Act 1996 would so empower the Panel if it were to decide that the Bylaws themselves are silent on this issue.

- Base its decision on an objective and de novo review of ICANN's actions and inactions;
- Include in its decision findings of fact as to whether the Covered Actions complained of constituted an action or inaction that violated the Articles of Incorporation or Bylaws
- Issue a decision that actually resolves the Disputes that have been put before it;
- Issue a decision that reflects a well-reasoned application of the how the Disputes submitted to it were resolved;
- Declare that ICANN must take certain steps to remedy the breaches by ICANN of its Articles and Bylaws;
- Direct ICANN Staff to take appropriate action to remedy the breaches determined by the Panel; and
- Include in its decision a declaration as to whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

X. CONCLUSION

237. For the foregoing reasons, and those stated in Afilias' other submissions, the Tribunal should grant Afilias the relief requested in its Amended Request.

Respectfully submitted,

Arif H. Ali
Alexandre de Gramont
Rose Marie Wong
DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300

Ethan E. Litwin
Rosa Morales
CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
Tel. 212-350-2737

Counsel for Claimant

Annex A

RELEVANT PROVISIONS OF THE DAA

Redacted - Third Party Designated Confidential Information

Annex B

TABLE OF GTLD ALTERNATIVE FOR .WEB

Domains Identified by *Amici*	Three-Letters	Completely Generic	Associated with the Internet	Memorable
.com	X	X	X	X
.net	X	X	X	X
.web	X	X	X	X
.online		X	X	X
.website		X	X	X
.site		X	X	X
.link		X	X	X
.click		X		X
.xyz	X	X		X
.top	X			X
.loan				X
.club				X
.vip	X			X
.shop				X
.ltd	X			X
.work				X