

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

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

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12 October 2020

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## 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; <i>see also id.</i> , 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; <i>see generally id.</i> , 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; <i>see generally id.</i> , ¶ 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; <i>see generally id.</i> , 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 <i>Amici</i> 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.<sup>1</sup> 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,”<sup>2</sup> but rather by its unjustified position that Afilias’ complaints about NDC were motivated by “sour grapes” for having “lost” the auction.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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."<sup>7</sup> Afilias' application status was contemporaneously changed to "will not proceed."<sup>8</sup> 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).]"<sup>9</sup> 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.<sup>10</sup>

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[.]<sup>11</sup>

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.”<sup>12</sup>

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.<sup>13</sup>

## 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.<sup>14</sup> 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."<sup>15</sup> 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.<sup>16</sup> Absent "exceptional circumstances," any application received after the deadline was not to be considered.<sup>17</sup> 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.<sup>18</sup> 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."<sup>19</sup> 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.*"<sup>20</sup> 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.<sup>21</sup> 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."<sup>22</sup>

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.<sup>23</sup> 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."<sup>24</sup> Ms. Burr also testified that the publication and public comment period was "certainly a point of ICANN's transparency commitment."<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup>

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.”<sup>29</sup> ICANN encouraged contention set members to “self-resolve” contention amongst themselves.<sup>30</sup> However, as Ms. Willett testified, only entities that had ***“submitted applicat[i]ons 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.<sup>31</sup> 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)....”<sup>32</sup> Any such “material changes” required “re-evaluation” of the changed application,<sup>33</sup> which, ICANN warned, could delay resolution of the contention set to a later gTLD round.<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup> 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."<sup>37</sup>

(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*."<sup>38</sup>

(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*."<sup>39</sup> 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<sup>40</sup> Taken together with the record-breaking bids for .WEB, this should leave no doubt regarding the competitive significance of the .WEB gTLD.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> Verisign’s singular focus was on .WEB, as Mr. Livesay confirmed:<sup>44</sup>

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.<sup>45</sup>

21. While the DAA’s terms on their face leave no room for doubt on this point,<sup>46</sup> 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.<sup>47</sup> Mr. Livesay testified that he had studied the New gTLD Program Rules “very closely” because he Redacted - Third Party Designated Confidential Information

<sup>48</sup> Redacted - Third Party Designated Confidential Information

<sup>49</sup> 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.”<sup>50</sup> 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.<sup>51</sup>

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

<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup>

**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.<sup>56</sup> 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*.<sup>57</sup>

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.<sup>58</sup> Accordingly, Mr. Nevett asked ICANN to investigate.<sup>59</sup>

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.<sup>60</sup>

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."<sup>61</sup> 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.<sup>62</sup> 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."<sup>63</sup> 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."<sup>64</sup>

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."<sup>65</sup> Mr. Rasco's response was categorical: "***There have been no changes to the Nu Dotco, LLC Application.***"<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

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.”<sup>69</sup> 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.*<sup>70</sup>

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*."<sup>71</sup> 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

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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.<sup>72</sup>

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 ...."<sup>73</sup> 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.

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<sup>74</sup> 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

<sup>75</sup> 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.<sup>76</sup>

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Accordingly, NDC was not, as required by the Auction Rules, bidding on its “own behalf” as a Qualified Applicant.<sup>77</sup> 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***.<sup>78</sup> All of these proceeds went to ICANN.<sup>79</sup>

**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.”<sup>80</sup> 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:

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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.”<sup>82</sup> 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.”<sup>83</sup> 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:

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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."<sup>85</sup> 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.<sup>86</sup>

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.*<sup>87</sup>

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.<sup>88</sup>

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.”<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup> 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.”<sup>92</sup>

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.<sup>93</sup> 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).<sup>94</sup> 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."<sup>95</sup> 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.<sup>96</sup>

50. Ms. Willett testified at hearing that—remarkably—she had never seen the DAA or Mr. Johnston's letter.<sup>97</sup> Nor is there any evidence that the Ombudsman was ever provided with these materials.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> The ICANN community remains unaware of the agreement's details.

51. As explained in our prior submissions—and as the hearing evidence further demonstrates<sup>101</sup>—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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

Mr. Hemphill further requested "a response from ICANN by no later than 16 September 2016."<sup>106</sup>

54. And, indeed, on 16 September 2016, Afilias received a letter from Ms. Willett;<sup>107</sup> 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.*<sup>108</sup>

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.<sup>109</sup> 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<sup>110</sup>) 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.<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup> 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, Afiliias' counsel asked Ms. Willett why the questionnaire asked Afiliias to identify any evidence “regarding whether ownership or control of NDC changed after NDC applied for the .WEB gTLD,” when ICANN (but not Afiliias) 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 Afiliias, not having seen the DAA, had no idea what had happened, right?

A: Again, I don't know what Afiliias 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 Afiliias to present evidence of that?

MR. LeVEE: I do think that invades the privilege. I object on that basis.<sup>116</sup>

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.<sup>117</sup>

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*.<sup>118</sup>

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.<sup>119</sup> 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.<sup>120</sup> She simply passed them on to ICANN's lawyers and was “not exactly sure what counsel did with them.”<sup>121</sup> 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.<sup>122</sup>

#### **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.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup> Mr. Disspain conceded at hearing that he “cannot say” that the Board “proactively decided, proactively agreed [or] proactively chose” to defer addressing Afiliias’ concerns.<sup>127</sup> 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.”<sup>128</sup> 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 Afiliias’ 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.<sup>129</sup>

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 matters and to get information to assist in the CEP, that's -- we were trying to gather information. So communications continued.<sup>130</sup>

63. Mr. Disspain acknowledged that ICANN disclosed nothing to Afilias concerning its discussions about .WEB at the 3 November workshop.<sup>131</sup> 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.<sup>132</sup> A year later, in January 2018, DOJ closed the investigation.<sup>133</sup>

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.<sup>134</sup> In December 2017, Mr. Rasco organized a meeting with ICANN Staff regarding the .WEB gTLD.<sup>135</sup> 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.”<sup>136</sup> 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.<sup>137</sup> As Verisign's Mr. Bidzos disclosed on several analyst calls,<sup>138</sup> the company was “engaged in ICANN's process to move the delegation of .web forward.”<sup>139</sup>

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.<sup>140</sup> 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.”<sup>141</sup>

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 ....”<sup>142</sup> 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.”<sup>143</sup> 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.<sup>144</sup> Afilias sought reconsideration of the denial of its DIDP request on 23 April 2018,<sup>145</sup> 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.<sup>146</sup> 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.<sup>147</sup>

68. Immediately thereafter, ICANN Staff, led by Ms. Willett and other senior staff members, moved forward toward contracting with NDC for .WEB.<sup>148</sup> 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.<sup>149</sup> 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.<sup>150</sup> 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 until the issue of the matter was resolved** and the hold was taken off.<sup>151</sup>

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.<sup>152</sup>

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."<sup>153</sup> 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.

**Case Information**

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.<sup>154</sup>

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."<sup>155</sup>

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



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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:

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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'."<sup>158</sup> But the earlier communication sent to Afilias had not included this critical language,<sup>159</sup> 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.<sup>160</sup>

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.<sup>161</sup> 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.<sup>162</sup> 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.<sup>163</sup>

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,<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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,<sup>168</sup> 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."<sup>169</sup>

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.<sup>170</sup> Later in the day on 11 October, the IRP-IOT met to discuss Mr. McAuley's proposal.<sup>171</sup> 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[.]"<sup>172</sup> 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.<sup>173</sup>

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.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

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.<sup>179</sup> *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.<sup>180</sup>

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.<sup>181</sup> 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.”<sup>182</sup>

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*.<sup>183</sup> These categories were extremely narrowly drawn and did not replicate any rule of procedure known to Ms. Eisner.<sup>184</sup> Indeed, other than a claimed privileged conversation within ICANN legal,<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup> 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,”<sup>189</sup> 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.”<sup>190</sup> 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.<sup>191</sup>

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].”<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> 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.”<sup>195</sup> For this reason, the drafting principles “require[d] further public consultation prior to changing the supplemental rules to reflect those expansions or changes.”<sup>196</sup> 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.<sup>197</sup> 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.<sup>198</sup> 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.<sup>199</sup>

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,”<sup>200</sup> 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.<sup>201</sup> 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.<sup>202</sup>

**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*[.]”<sup>203</sup> 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*.”<sup>204</sup>



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.<sup>205</sup> 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<sup>206</sup>) are categorical: “Applicant may *not* resell, assign, or transfer *any of applicant’s rights or obligations in connection with the application.*”<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup>

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.<sup>210</sup> 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."<sup>211</sup> 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."<sup>212</sup> 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.<sup>213</sup>

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[.]"<sup>214</sup> 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.***<sup>215</sup>

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:

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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.<sup>217</sup> The DAA explicitly provided for Redacted - Third Party Designated Confidential Information

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."<sup>219</sup> 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.<sup>220</sup>

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

<sup>221</sup> In particular,

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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.”<sup>228</sup> 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.”<sup>229</sup>

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

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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

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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.<sup>233</sup> 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.<sup>234</sup> 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.<sup>235</sup> 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.<sup>236</sup> 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 Afiliac 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.<sup>237</sup>

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."<sup>238</sup> The DAA violates several "aspects of the Auction Rules," including:

- "Participation in an Auction is limited to Bidders."<sup>239</sup>
- 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).<sup>240</sup>
- "A bid represents a price, which a *Bidder is willing to pay* to resolve string contention within a Contention Set in favor of its Application."<sup>241</sup>
- "Before each Auction, each Bidder shall nominate up to two people ... *to bid on its behalf* in the Auction."<sup>242</sup>

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."<sup>243</sup> 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.<sup>247</sup> This was a clear reference to Verisign, since the DAA provides that

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

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<sup>252</sup>),

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.<sup>253</sup>

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.**<sup>254</sup>

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.**<sup>255</sup>

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."<sup>256</sup> 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."<sup>257</sup>

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,<sup>258</sup> something that was no longer true following the execution of the DAA.<sup>259</sup> 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."<sup>260</sup> 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.<sup>261</sup> 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.<sup>262</sup>

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.*"<sup>263</sup>

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.*"<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> The relevant focus of the criteria is to assess whether "the change [would] affect *string contention*."<sup>267</sup> 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*["<sup>268</sup>

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."<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup> 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.<sup>272</sup>

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.<sup>273</sup> 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[.]”<sup>274</sup> To the contrary, ICANN's decision-making with respect to NDC can only be described as arbitrary and capricious.<sup>275</sup>

**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.<sup>276</sup> 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)*].”<sup>277</sup> 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.<sup>278</sup>

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.<sup>279</sup> 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<sup>280</sup>—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,<sup>281</sup> 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.<sup>282</sup>

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.<sup>283</sup> 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.<sup>284</sup> 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.<sup>285</sup>

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.<sup>286</sup> 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.<sup>287</sup> 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.<sup>288</sup> 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.<sup>289</sup> 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.<sup>290</sup> 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.<sup>291</sup> 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.<sup>292</sup> 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).<sup>293</sup> 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.”<sup>294</sup> Yet—at the same time—ICANN was in discussions with Verisign—a non-applicant—concerning the delegation of .WEB.

134. *Fifth*, as demonstrated elsewhere,<sup>295</sup> 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,<sup>296</sup> 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.<sup>297</sup> 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.<sup>298</sup>

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 Afiliias' expense and to Afiliias' 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.<sup>299</sup>

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 Afiliias' complaints were mere "sour grapes,"<sup>300</sup> that Afiliias' application "will not proceed"<sup>301</sup> and that NDC would thus be "in contracting."<sup>302</sup> 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.<sup>303</sup> Subsequently, ICANN Staff approved countersigning the .WEB registry agreement, which NDC had returned on 14 2018.<sup>304</sup> 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.<sup>305</sup> 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.<sup>306</sup> 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.<sup>307</sup> Yet the Board, ICANN legal and Mr. Atallah were willing to let Ms. Willett and her team proceed to execute the registry agreement,<sup>308</sup> 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.<sup>309</sup>

**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,<sup>310</sup> and, (b) several days later that this had happened and that NDC had returned a signed registry agreement for ICANN to countersign.<sup>311</sup> 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,<sup>312</sup> “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.”<sup>313</sup>

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,<sup>314</sup> 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.”<sup>315</sup> 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.”<sup>316</sup> 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[.]”<sup>317</sup>

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[.]”<sup>318</sup> 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,<sup>319</sup> 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.<sup>320</sup> 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.<sup>321</sup> 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[.]”<sup>322</sup> 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.***”<sup>323</sup> 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]...."<sup>324</sup>

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 ...."<sup>325</sup> 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* ...."<sup>326</sup> 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.*"<sup>327</sup>

## 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").<sup>328</sup> 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.”<sup>329</sup> 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 ...”*<sup>330</sup> 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.”<sup>331</sup>

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,”<sup>332</sup> 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.<sup>333</sup> 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.<sup>334</sup> 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[.]”<sup>335</sup> DOJ’s recommendations were forwarded to ICANN.<sup>336</sup> 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.<sup>337</sup> Accordingly, ICANN's Board decided to adopt the reasoning of its economists and to reject the specific recommendations made by DOJ.<sup>338</sup>

### 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.<sup>339</sup> As explained more fully in Affiliates' Response to the *Amici* Submissions,<sup>340</sup> 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.*"<sup>341</sup>

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.<sup>342</sup> Moreover, the DOJ's investigation concerned whether Verisign's potential acquisition of .WEB would *substantially lessen* competition in the DNS.<sup>343</sup> 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.<sup>344</sup> 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,<sup>345</sup> 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 ...."<sup>346</sup> ICANN's Commitments in Section 1.2(a) of the Bylaws reiterates that "ICANN must operate ... through open and transparent processes ...."<sup>347</sup> 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 ...."<sup>348</sup>

156. ICANN did not "operate to the maximum extent feasible in an open and transparent manner"<sup>349</sup> 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.<sup>350</sup> 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.<sup>351</sup>
- 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,<sup>352</sup> 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.<sup>353</sup>
- 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.<sup>354</sup> 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.<sup>355</sup> 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.<sup>356</sup> ICANN further helped Verisign's employees understand the assignment process for the .WEB gTLD in January 2018,<sup>357</sup> and allowed Verisign to participate in ICANN's discussions with NDC over the delegation of the .WEB gTLD.<sup>358</sup> 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.<sup>359</sup>
- ICANN refused to produce all of the documents that Afilias requested concerning the enactment of Rule 7 of the Interim Supplementary Procedures<sup>360</sup> until after the hearing before the Procedures Officer—to which these documents were directly relevant.<sup>361</sup> 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.<sup>362</sup>

#### **F. Staff Improperly Coordinated with Verisign in Drafting Rule 7<sup>363</sup>**

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 ...."<sup>364</sup> 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.'"<sup>365</sup> 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."<sup>366</sup> 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.<sup>367</sup> 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."<sup>368</sup> 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,<sup>369</sup> 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<sup>370</sup>—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,<sup>371</sup> 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**.”<sup>372</sup> 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.”<sup>373</sup> 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.<sup>374</sup> There was no such written consent here. As Ms. Burr testified under cross-examination, workshops are not regular, special, or annual meetings.<sup>375</sup> Instead, Ms. Burr testified that Board workshops are informal<sup>376</sup> “working sessions”<sup>377</sup> where the Board can discuss issues, but no minutes are taken<sup>378</sup> and no resolutions are passed.<sup>379</sup> 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.”<sup>380</sup> 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,<sup>381</sup> and **the Board does not vote because “[i]t can only adopt a resolution at a formal meeting.**”<sup>382</sup> 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.<sup>383</sup>

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<sup>384</sup>—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.<sup>385</sup>

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.***<sup>386</sup>

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.<sup>387</sup>

...

[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.<sup>388</sup>

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.<sup>389</sup>

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."<sup>390</sup>

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.”<sup>391</sup> 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.”<sup>392</sup> 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.<sup>393</sup>

**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.<sup>394</sup> 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.<sup>395</sup> 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.<sup>396</sup> 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.<sup>397</sup> 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.<sup>398</sup>

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.”<sup>399</sup> There is no evidence that the ICANN Board undertook any reasonable inquiry prior to making its supposed decision to defer consideration of .WEB.<sup>400</sup> 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.”<sup>401</sup> 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.<sup>402</sup> Mr. Disspain could not even recall whether the Board members present at the workshop asked any questions to ICANN counsel.<sup>403</sup> 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 Afiliias’ 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.<sup>404</sup> 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.”<sup>405</sup>

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.<sup>406</sup>

**B. ICANN's Statute of Limitations and Statute of Repose Defense<sup>407</sup>**

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.<sup>408</sup> 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.<sup>409</sup> 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.<sup>410</sup> 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 SOL 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<sup>411</sup> to 13 November 2018.<sup>412</sup> 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.<sup>413</sup> 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.<sup>414</sup> 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"<sup>415</sup> and "consider this matter."<sup>416</sup> 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,<sup>417</sup> 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.<sup>418</sup> 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."<sup>419</sup> 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.<sup>420</sup> 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.<sup>421</sup> 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.<sup>422</sup>

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.<sup>423</sup> 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<sup>424</sup>

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 Afiliias' claims.

(i) ***The Facts Show that ICANN Enacted Rule 4 to Retroactively Time Bar Afiliias' 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 Afiliias filed its IRP.<sup>425</sup> ***Before that, Afiliias' 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.<sup>426</sup> 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.<sup>427</sup> However, Afiliias' 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, Afiliias 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.<sup>428</sup> 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, Afiliias 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[.]”<sup>429</sup> 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.<sup>430</sup> 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<sup>431</sup> 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"<sup>432</sup> as well as the mandate that the "[t]he Rules of Procedure are intended to ensure fundamental fairness and due process."<sup>433</sup> 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.<sup>434</sup>

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."<sup>435</sup> 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."<sup>436</sup> 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.<sup>437</sup>

### 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.<sup>438</sup> 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*”<sup>439</sup> 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.<sup>440</sup> (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.<sup>441</sup> 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.<sup>442</sup>

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.<sup>443</sup>

**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.<sup>444</sup> 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.<sup>445</sup>

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"<sup>446</sup> 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.<sup>447</sup>

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[,]”<sup>448</sup> 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<sup>449</sup> to remove the sentence “The .WEB/.WEBS contention set is no longer “On-Hold” from the final notice,<sup>450</sup> 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.”<sup>451</sup> Having failed to take up this issue in a timely manner—when the Board knew 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.<sup>452</sup> This is the first IRP under both ICANN's revised Bylaws<sup>453</sup> and the Interim Supplementary Procedures.<sup>454</sup> It is also the first IRP to involve an accountability review of ICANN Staff's actions and inactions pursuant to the new Bylaws.<sup>455</sup> 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)).<sup>456</sup> 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<sup>457</sup>

206. The ICANN Bylaws set out the scope of the IRP Panel's jurisdiction. The IRP is "a final, binding arbitration process."<sup>458</sup> As part of that process, this IRP Panel (1) is "charged with hearing *and resolving* the Dispute" between ICANN and the claimant;<sup>459</sup> (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;"<sup>460</sup> and (3) ensure that "[a]ll Disputes shall *be decided* in compliance with the Articles of Incorporation and Bylaws."<sup>461</sup> 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.<sup>462</sup>

207. In the course of its pleadings,<sup>463</sup> Afilias has established that the jurisdiction of the Panel is broad and consistent with the IRP's status as "a final, binding arbitration process."<sup>464</sup> 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.<sup>465</sup> 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."<sup>466</sup> 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,<sup>467</sup> 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.<sup>468</sup> 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.<sup>469</sup> 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<sup>470</sup> 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.”<sup>471</sup> 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.”<sup>472</sup> 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."<sup>473</sup>

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."<sup>474</sup> 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."<sup>475</sup> 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.<sup>476</sup> 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*."<sup>477</sup> 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."<sup>478</sup> 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*."<sup>479</sup>

214. Question 2 from the Panel asks about the legal effect of the CCWG Report.<sup>480</sup> 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.<sup>481</sup> While ICANN quibbles with the relevance of the Report,<sup>482</sup> 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.”<sup>483</sup> 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.”<sup>484</sup> 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.<sup>485</sup> 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.”<sup>486</sup> 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”<sup>487</sup>—testified in response to Chairman Bienvendu’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.*<sup>488</sup>

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.<sup>489</sup> 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."<sup>490</sup> 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."<sup>491</sup> 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.*"<sup>492</sup> 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,<sup>493</sup> 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,<sup>494</sup> 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.<sup>495</sup> 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.<sup>496</sup>

...

[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.<sup>497</sup>

...

[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.<sup>498</sup>

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.<sup>499</sup> 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.<sup>500</sup>

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.<sup>501</sup>

...

***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.<sup>502</sup>

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.*<sup>503</sup>

...

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.*<sup>504</sup>

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.*<sup>505</sup>

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."<sup>506</sup>

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."<sup>507</sup>

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.”<sup>508</sup> 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.”<sup>509</sup> 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.”<sup>510</sup> 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.<sup>511</sup>

##### **1. The Panel’s Remedial Authority**

230. As Afilias has set forth in its pre-hearing submissions,<sup>512</sup> 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”<sup>513</sup> and to “[p]rovide a mechanism for the **resolution** of Disputes.”<sup>514</sup> Furthermore, Section 4.3(x) of the ICANN Bylaws provides that the IRP is a “binding arbitration”<sup>515</sup> with the consequence that the Panel has broad inherent discretion to fashion relief.<sup>516</sup> Afilias has explained its position at length in its Response to the *Amici* Briefs;<sup>517</sup> 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.<sup>518</sup> 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.**"<sup>519</sup> And, further, the CCWG Report affirms that claimants have a right to "**seek redress**" against ICANN through an IRP.<sup>520</sup> Indeed, as ICANN argued before the Ninth Circuit, the IRP provides applicants "**with valuable redress.**"<sup>521</sup> 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.<sup>522</sup>

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,<sup>523</sup> would not secure the just resolution of disputes,<sup>524</sup> would not lead to resolutions consistent with international arbitration norms,<sup>525</sup> and would not provide a dispute resolution mechanism that is an alternative to legal action in the civil courts.<sup>526</sup> The IRP would also not hold ICANN accountable for complying with its Articles and Bylaws were the Panel deprived of remedial authority.<sup>527</sup>

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."<sup>528</sup> 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.<sup>529</sup> ICANN has repeatedly argued that, "as listed in 4.3(o) regarding the Panel's remedial authorities, that's exclusive."<sup>530</sup> 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:<sup>531</sup>

- **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.<sup>532</sup>
- **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,<sup>533</sup> 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,<sup>534</sup> 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."<sup>535</sup> 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."<sup>536</sup>

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 Afiliias for the .WEB gTLD at USD 71.9 million;
- Pay Afiliias' fees and costs as set out in Afiliias' accompanying costs submission.

**(ii) Findings of Fact**

241. Afiliias also requests that the Panel make such findings of fact as it considers appropriate based on Afiliias' presentation of the facts in Section II, and in Afiliias' 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."<sup>537</sup> 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."<sup>538</sup> 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."<sup>539</sup> 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."<sup>540</sup>

**(iii) Price to be Paid for .WEB by Afiliias**

243. With respect to the price that Afiliias 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.<sup>541</sup> 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.<sup>542</sup> 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.<sup>543</sup> 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.<sup>544</sup> 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.<sup>545</sup>

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.

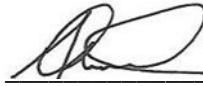
246. The AGB further supports this conclusion. Section 4.3.2 of the AGB identifies two ways for a winning bidder of an ICANN-administered auction to be declared in default: (1) failure to pay the winning bid price within the applicable time period, and (2) failure to execute a Registry Agreement with ICANN within 90 days of the auction.<sup>546</sup> 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."<sup>547</sup> 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."<sup>548</sup> 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,



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## 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

DAA, [Ex. C-69], Exhibit A, ¶ 1(i).

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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 Afiliias’ position (as supported *inter alia* by its experts, Dr. Sadowsky and Prof. Zittrain) on the competitive significance of .WEB. In the words of Dr. Sadowsky, 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

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- 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 heavily 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 2018), [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 Afiliias 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 Afiliias) (28 Apr. 2018), [Ex. C-80], p. 1.
- 154 Email from ICANN Global Support to John Kane (Afiliias) (7 June 2018), [Ex. C-62], p. 1. Mr. Kane was in Australia at the time (which is why the date on the Afiliias' 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 Afiliias) (20 June 2018), [Ex. C-53].
- 159 Email from ICANN Global Support to John Kane (Afiliias) (7 June 2018), [Ex. C-62].
- 160 Letter from Arif Ali (Counsel for Afiliias) 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 Afiliias' Response (28 Jan. 2019), ¶¶ 15-18; Afiliias Sur-Reply (12 Feb. 2019), ¶ 5.
- 165 Afiliias' 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 Afiliias' 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 Afiliias’ Amended IRP Request, Secs. 4-6; Afiliias’ 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 Afiliias’ 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 Afiliias’ Response to the *Amici* Briefs, Sec. V.
- 200 Bylaws, [Ex. C-1], Sec. 1.2(a)(v).
- 201 Afiliias’ Amended IRP Request, Secs. 4-6; Afiliias’ 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 Afiliias’ Amended IRP Request, ¶ 10; Afiliias’ Reply Memorial, ¶ 123; Afiliias’ 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 Afiliias’ Reply Memorial, n. 57.
- 208 See Afiliias’ 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* Afiliias’ Response to the *Amici* Briefs, Sec. IV(D)(3).
- 211 AGB, [Ex. C-3], Module 6, Sec. 10 (at p. 6-6) (emphasis added). Afiliias’ Amended IRP Request, Sec. 2.3.3; Afiliias’ Reply Memorial, Sec. III(A)(1)(i); Afiliias’ Response to the *Amici* Briefs, Sec. IV (A)(1).
- 212 AGB, [Ex. C-3], Module 6, Sec. 10 (at p. 6-6).
- 213 Afiliias’ 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 Afiliias’ Response to the *Amici* Briefs, Sec. V(A)(2). *See also* Afiliias’ 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 Afiliias 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, Afiliias alleges that NDC transferred “rights and obligations in connection with the [.WEB] application” to Verisign—including **rights of control**. *See, e.g.*, Afiliias’ 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 *Affilias’ Response to the Amici Briefs*, ¶¶ 93-95.
- 234 See, e.g., *Affilias’ Reply Memorial*, ¶ 27.
- 235 See, e.g., *Affilias’ Reply Memorial*, ¶ 32.
- 236 *Affilias’ Reply Memorial*, Sec. III; *Affilias’ Response to the Amici Briefs*, Sec. IV.
- 237 *Affilias’ 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—DAA,  
Redacted - Third Party Designated Confidential Information  
[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(l).
- 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 Afiliias' Amended IRP Request, Sec. 5; Afiliias' Reply Memorial, Sec. IV; Afiliias' 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 Afiliias' Response to the *Amici* Briefs, ¶ 208.
- 320 See Afiliias' Amended IRP Request, Sec. 5; Afiliias' Reply Memorial, Sec. IV; Afiliias' 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, 112<sup>th</sup> 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 Afiliias' 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 Afiliias' Amended IRP Request, , Sec. 2.2.1; Afiliias' Reply Memorial, Sec. III(A)(iii)(b); Afiliias' 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 Afiliias' Request for Production of Documents (12 Dec. 2018).
- 352 Letter from Arif Ali (Counsel for Afiliias) to ICANN Board (23 Feb. 2018), [Ex. C-78], p. 3. See also Letter from Arif Ali (Counsel for Afiliias) to ICANN Board (23 Apr. 2018), [Ex. C-79]; Letter from Arif Ali (Counsel for Afiliias) to ICANN Board (21 Dec. 2018), [Ex. C-111].
- 353 ICANN's Rejoinder Memorial, ¶ 91.
- 354 Letter from Arif Ali (Counsel for Afiliias) to ICANN Board (23 Feb. 2018), [Ex. C-78]; Letter from Arif Ali (Counsel for Afiliias) to ICANN Board (16 Apr. 2018), [Ex. C-113]; Letter from Arif Ali (Counsel for Afiliias) to Jeffrey LeVee (Counsel for ICANN) (1 May 20018), [Ex. C-114].
- 355 ICANN's Response to Afiliias' DIDP, Request No. 20180223-1 (24 Mar. 2018), [Ex. R-30]; ICANN's Response to Afiliias' 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 Afiliac’s 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 Afiliac 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 Afiliac 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.] [I]n 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 Affilias 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 Affilias’ 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 Afiliias's complaints. Were the responses to those questionnaires that were received from Afiliias 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 Afiliias' 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 Afiliias' 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 Afiliias' claims are time barred and ICANN's position that it has not yet addressed the fundamental issue that Afiliias 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 Afiliias' Reply Memorial, ¶ 137.

409 Afiliias' Reply Memorial, ¶¶ 137-146 (addressing ICANN's incorrect claim that "Afiliias' 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 Afiliias) to ICANN (18 June 2018), [Ex. C-52].

412 Email from ICANN Independent Review to Arif Ali and Rosey Wong (Counsel for Afiliias) (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 (Afiliias) (16 Sep. 2016), [Ex. C-50], p. 1.

416 Letter from Akram Atallah (ICANN) to Scott Hemphill (Afiliias) (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 Afiliias) 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 Wayne (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 Afiliás’ Reply Memorial, ¶¶ 147-55) and Afiliás’ 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., Afiliás’ 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 Afiliás’ claims against ICANN and thereby leaving Afiliás 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 Afiliias’ Amended IRP Request, ¶ 89.

512 Afiliias’ Reply Memorial, ¶¶ 147-55; Afiliias’ 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 Afiliias’ 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 Afiliias’ 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; Afiliias’ 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-round 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).