

**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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**LIST OF EXHIBITS AND LEGAL AUTHORITY  
TO AMENDED REQUEST BY AFILIAS DOMAINS NO. 3 LIMITED  
FOR INDEPENDENT REVIEW**

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20 March 2019

### LIST OF EXHIBITS

Exhibit No.	Description
C-69	Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC <span style="float: right;">Redacted</span>
C-70	Declaration of the Procedures Officer (29 Feb. 2019)
C-71	Emergency Panelist's Decision on Afiliias' Request for Production of Documents in Support of Its Request for Interim Measures (2 Dec. 2018)
C-72	United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (26 Oct. 2018)
C-73	World Bank, Open Learning Center, <i>Beneficial Ownership Transparency</i> , available at <a href="https://olc.worldbank.org/print/content/beneficial-ownership-transparency">https://olc.worldbank.org/print/content/beneficial-ownership-transparency</a> (last accessed on 17 Mar. 2019)
C-74	ICANN, Contention Set Status, New Generic Top-Level Domains (as of 19 Feb. 2019), available at <a href="https://gtldresult.icann.org/applicationstatus/stringcontentionstatus">https://gtldresult.icann.org/applicationstatus/stringcontentionstatus</a> (last accessed on 15 Mar. 2019)
C-75	<i>Ruby Glen, LLC v. ICANN</i> , 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 <i>Ex Parte</i> Application for Temporary Restraining Order (25 July 2016)
C-76	ICANN New Generic Top-Level Domains, New gTLD Auction Results, available at <a href="https://gtldresult.icann.org/applicationstatus/auctionresults">https://gtldresult.icann.org/applicationstatus/auctionresults</a> (last accessed on 15 Mar. 2019)
C-77	A. Allemann, "It looks like Verisign bought .Web domain for \$135 million (SEC Filing)," <i>Domain Name Wire</i> (28 July 2016), available at <a href="https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/">https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/</a> (last accessed on 15 Mar. 2019)
C-78	Letter from A. Ali (Counsel for Afiliias) to ICANN Board (23 Feb. 2018)
C-79	Letter from A. Ali (Counsel for Afiliias) to ICANN Board of Directors (23 Apr. 2018)
C-80	Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afiliias) (28 Apr. 2018)
C-81	VeriSign (VRSN) CEP Jim Bidzos on Q4 2018 Results – Earnings Call Transcript (7 Feb. 2019), available at <a href="https://seekingalpha.com/article/4239256-verisign-inc-vrsn-ceo-jim-bidzos-q4-2018-results-earnings-call-transcript?part=single">https://seekingalpha.com/article/4239256-verisign-inc-vrsn-ceo-jim-bidzos-q4-2018-results-earnings-call-transcript?part=single</a> (last accessed on 17 Mar. 2019)

### LIST OF LEGAL AUTHORITY

Authority No.	Description
CA-11	<i>Booking.com B.V. v. ICANN</i> , ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015)

**EXHIBIT C-69**

Exhibit Redacted - Third Party Designated Confidential Information

**EXHIBIT C-70**

**INDEPENDENT REVIEW PROCESS**  
**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01 -18 – 0004 -2702

In the matter of an Independent Review

AFILIAS DOMAINS NO. 3 LIMITED

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS  
(ICANN)

Respondent

**DECLARATION OF THE PROCEDURES OFFICER**

28 February 2019

## I. PARTIES AND APPLICANTS

### A. PARTIES TO THE INDEPENDENT REVIEW PROCESS (“IRP”)

#### 1. Afilias Domains No. 3 Ltd.

§1. Afilias, Inc., the parent company of Afilias Domains No. 3 Ltd., is a United States Corporation that operates as a registry in the Internet domain name system. It is the world’s second-largest Internet domain name registry. Afilias acts as the registry for the generic top-level domains (“gTLDs”) *.info*, *.mobi*, and *.pro*. It also is a service provider to the registry operators for the top-level domains *.org*, *.ngo*, *.lgbt*, *.asia*, and *.aero*. Afilias, Inc. is also the registry service provider to various country code top-level domains, including Antigua and Barbuda (*.ag*), Australia (*.au*), Belize (*.bz*), Bermuda (*.bm*), Gibraltar (*.gi*), India (*.in*), Montenegro (*.me*), the Seychelles (*.sc*), and St. Vincent and the Grenadines (*.vc*).

§2. Afilias Domains No. 3 Ltd. (hereinafter, “Afilias”) was one of the bidders that made up the contention set for the operation of the new gTLD *.web*. It initiated the Independent Review Process (“IRP”), asserting that ICANN violated its Bylaws in preparing to award the registry operating rights to Verisign, Inc. (hereinafter “Verisign”). Verisign had acquired the rights to operate as the registry for *.web* pursuant to a pre-award contract that it had entered into with the winning bidder, Nu DotCo LLC (hereinafter “NDC”).

#### 2. Internet Corporation for Assigned Names and Numbers (“ICANN”)

§3. ICANN is a nonprofit public benefit corporation organized under the laws of the State of California incorporated on September 30, 1998. Jon Postel, a

computer scientist at that time at the University of Southern California, and Esther Dyson, an entrepreneur and philanthropist, were the two most prominent organizers and founders. Postel had been involved in the creation of the Advanced Research Projects Agency Network (“ARPANET”), which eventually morphed into the Internet. The ARPANET was a project of the United States Department of Defense and was initially intended to provide a secure means of communication for the chain of command during emergency situations, when normal means of communication were unavailable or deemed insecure.

§4. Prior to ICANN’s creation, there existed seven gTLDs, each of which were intended for specific uses on the Internet:

- a. *.com*, which has become the gTLD with the largest number of domain name registrations, was intended for commercial use;
- b. *.org*, intended for the use of non-commercial organizations;
- c. *.net*, intended for the use of network related entities;
- d. *.edu*, intended for United States higher education institutions;
- e. *.int*, established for international organizations;
- f. *.gov*, intended for domain name registrations for branches of the United States federal government or for state governmental entities, and;
- g. *.mil*, designed for the use of the United States military.

§5. ICANN’s “mission” as set out in its Bylaws, is “to ensure the stable and secure operation of the Internet’s unique identifier systems . . . .” Bylaws, Art. 1,



§1.1. ICANN's "commitments" are to "operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and open entry in Internet-related markets." Bylaws, Art. 1, §1.2(c). ICANN has several "Core Values" which "must be balanced . . . [with] potentially competing Core Value[s and] the result of the balancing must serve a policy developed through the bottom-up multi[-]stakeholder process . . . ." *Id.*

§6. The original ICANN board of Directors was self-selected by those active in the formation and functioning of the fledgling Internet. ICANN's Bylaws provide that its Board of Directors shall have 16 voting members and four non-voting liaisons. Bylaws, Art. 7.1. ICANN has no shareholders. Subsequent Boards of Directors have been selected by a Nominating Committee, as provided in Art. VIII of the Bylaws.

§7. ICANN gradually began to introduce a select number of new gTLDs, such as *.biz* and *.blog*. In 2005, the ICANN board of Directors began to consider an invitation to the general public to operate new gTLDs. The application window for new gTLDs opened in 2012. ICANN received 1,930 applications, which has so far resulted in the introduction of 1,232 new gTLDs. Seven applicants sought the right to create and operate the registry for *.web*.

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## B. APPLICANTS FOR *AMICUS CURIAE* STATUS

### 1. NDC

§8. NDC was formed on 19 March 2012 as a limited liability company pursuant to Delaware law; its purpose was to submit applications to ICANN to acquire the rights to operate certain gTLDs. In June 2012, NDC applied for various gTLDs, including an application to operate as the registry for *.web*. NDC's application to ICANN represented that only two entities held at least a 15% interest in the company at that time: Domain Marketing Holdings, LLC; and NUCO LP, LLC.

§9. NDC had entered into a pre-award Domain Acquisition Agreement with Verisign, Third Party Designated Confidential Information Redacted

Ultimately, NDC was the successful bidder in the auction process.

### 2. Verisign

§10. Verisign is a publicly traded United States-based corporation listed on the NASDAQ; it is one of the companies whose stock is a component of the S&P 500 Index. In 2017, Verisign had revenues of 1.17 billion US dollars. It serves as operator of two of the thirteen Internet root nameservers and is the registry operator of the *.com*, *.net*, and *.name* gTLDs, and of the back-end systems for the *.jobs*, *.gov*, and *.edu* gTLDs. Through its pre-award contract with NDC and the proposed

transfer of the operating rights by ICANN to NDC, Verisign would become the registry operator for the new gTLD .web.

3. The Verisign/NDC Domain Acquisition Agreement

§11. [Redacted] Third Party Designated Confidential Information Redacted [Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

§12. [Redacted] Third Party Designated Confidential Information Redacted [Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]  
[Redacted]

§13. [Redacted] Third Party Designated Confidential Information Redacted [Redacted]  
[Redacted]  
[Redacted]. Upon execution of the Registry Agreement by NDC and ICANN, NDC agreed to notify ICANN promptly of NDC's intent to seek ICANN's consent to, assign the Registry Agreement to Verisign. *Id.*

§14.

Third Party Designated Confidential Information Redacted

## II. PROCEDURAL HISTORY

§15. On 25 October 2018, ICANN adopted a new section 7 to the 2016 Interim IRP Supplementary Procedures. This new section allows the Procedures Officer to permit *amicus curiae* to participate in ICANN proceedings.

§16. On 26 November 2018, Afilias filed a Request for and Notice of the IRP and supporting documents.

§17. On 27 November 2018, Afilias filed a Request for Emergency Panelist and Interim Measure of Protection (“Afilias Interim Request”).

§18. On 28 November 2018, the International Centre for Dispute Resolution (“ICDR”) appointed Kenneth B. Reisenfeld to serve as Emergency Panelist.

§19. On 3 December 2018 the Emergency Panelist issued his Scheduling Order No. 1. Scheduling Order No. 1 summarized the results of a Scheduling Conference held on 30 November 2018.

§20. The Emergency Panelist recorded ICANN's agreement to keep the registration process of the *.web* gTLD “on hold” pending a decision by the Emergency Panelist on the Afilias Interim Request and to file a written undertaking confirming the stay on or before 3 December 2018.

§21. ICANN advised the Emergency Panelist that there was a distinct possibility that third parties would seek participation as *amicus curiae* in the proceeding. Afilias indicated that it would oppose any such participation as creating unnecessary delay in the proceedings.

§22. A procedural order detailing submission dates and schedule for a video conference hearing on the Afilias Interim Request was agreed. These dates and schedule were subsequently abrogated to allow applications for *amicus curiae* status to be heard by a Procedures Officer, as provided in the new in Section 7 of the Interim IRP Supplementary Procedures.

§23. On 11 December 2018, Verisign and NDC each filed a Request to Participate as Amicus Curiae in the Independent Review Process.

§24. On 17 December 2018, ICANN filed an Opposition to Appointment of Emergency Panelist and for Interim Measures of Protection.

§25. On 21 December 2018, the ICDR appointed M. Scott Donahey to serve as the Procedures Officer in this matter.

§26. On 4 January 2019, a conference call was held with the Procedures Officer, counsel for the parties, and counsel for the applicants for *amicus curiae* status. The conference call was recorded, and transcripts of the call were made available to the parties and applicants.

§27. On 5 January 2019, the Procedures Officer prepared and distributed to the parties, the applicants, and the ICDR a Summary of the 4 January 2019 Conference Call No. 1. That summary was placed in the public file of the IRP

Process Documents, which is available online. An online search did not reveal that the position of “Procedures Officer” had ever been used in International Arbitration or in any other comparable legal proceedings. This was the first time that anyone had acted as a Procedures Officer under the newly adopted Interim Supplemental Rule 7, and also the first time that anyone had applied for *amicus curiae* status under that new rule. Consequently, the Procedures Officer specifically requested that the parties brief the legislative history that gave rise to the portion of Section 7 dealing with the Procedures Officer and with *amicus curiae*. A copy of that request is attached to the Summary of the 4 January 2019 conference call as Appendix A and is publicly available online on the Independent Review Process documents for this matter (<https://www.icann.org/resources/pages/accountability/irp.en>).

§28. As reflected in the Summary of that conference call, the parties agreed that they would discuss an appropriate briefing schedule among themselves and notify the Procedures Officer of the agreed schedule.

§29. On 15 January 2019, having heard nothing from the parties, the Procedures Officer requested a status update.

§30. On that date, counsel for ICANN notified the Procedures Officer that he could expect to receive ICANN’s opening brief on 16 January 2019 and that the parties were close to agreement on the remain briefing schedule.

§31. On 16 January 2019, the Procedures Officer received ICANN’s Response to the Procedures Officer’s Questions Concerning Drafting History of the Supplemental Procedures, ICANN’s Submission Regarding the Requests by

Verisign and NDC to Participate as *Amicus Curiae*, and Declaration of Samantha Eisner.

§32. On 22 January 2019, still not having received a complete briefing schedule on this matter, the Procedures Officer again requested this from the parties.

§33. By email of the same date the Procedures Officer received the following schedule: 1) Afilias would submit its brief on 28 January 2019; 2) ICANN and the applicants would submit their reply briefs on 5 February 2019; and 3) Afilias would submit its sur-reply brief on 12 February 2019.

§34. On 28 January 2019, Afilias submitted Afilias's Response to Verisign and NDC's Request to Participate as *Amicus Curiae* and a letter responding to the Procedures Officer's questions regarding the legislative history.

§35. On 30 January 2019, the parties and the Procedures Officer agreed on 19 February 2019 as the date for a conference call on the issues presented to the Procedures Officer, to begin at 10:00 a.m. PST.

§36. On 5 February 2019, the Procedures Officer received the following papers: 1) ICANN's Reply to Afilias' Response to the Requests of Verisign and NDC to Participate as *Amicus Curiae*; 2) Nu Dotco, LLC's Reply in Support of its Request to Participate as *Amicus Curiae* in Independent Review Process; and, 3) Verisign, Inc.'s Reply in Support of Its Request to Participate as *Amicus Curiae* in Independent Review Process, and Declaration of David McAuley in Support of

Verisign, Inc.'s Request to Participate as *Amicus Curiae* in Independent Review Process.

§37. On 12 February 2019, the Procedures Officer received Afilias Domains No. 3 Limited's Sur-Reply to Verisign, Inc.'s and Nu Dotco LLC's Requests to Participate as *Amicus Curiae* in Independent Review Process.

§38. On 19 February 2019, a telephonic hearing was held in which the Procedures Officer, and counsel for the parties and the applicants for *amicus curiae* participated. The telephonic hearing lasted approximately three hours and counsel for both parties and both applicants for *amicus* status made arguments and responded to questions from the Procedures Officer. The hearing conference was recorded, and transcripts of the call were made available to the parties and applicants.

### III. PARTIES' AND APPLICANTS' SUBMISSIONS

#### A. PARTIES' SUBMISSIONS

##### 1. Afilias's Position

§39. ICANN's commitment to accountability is a fundamental safeguard for ensuring that its bottom-up stakeholder model, as established in its Bylaws, remains effective. Bylaws, Art. 4., Sec. 4.3(a)(iii).

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§40. Fundamental principles of good faith and equity, including the principles of unclean hands and abuse of process, require that Verisign should not be allowed to participate in any aspect of Afillas's dispute with ICANN.

§41. The IRP Independent Oversight Team (hereinafter, the "Oversight Committee") meetings were held with only a minimum number of participants present, and the majority of those present were ICANN attorneys or employees.

§42. ICANN failed to submit revised Rule 7 for public comment. ICANN Bylaw, Art. 4, Sec. 4.3(n)(ii). Policies that "substantially affect third parties" are required to be published for 21 days prior to adoption. Ex. 221.

§43. Article 7 as adopted violates general principles of international arbitration norms. In international arbitration, participation of *amicus curiae* is limited.

§44. The manner in which the procedures were adopted violated the written rationales that ICANN staff prepared for the ICANN Board in advance of its meeting on 25 October 2018, during which revised Rule 7 was adopted. Ex. 314.

§45. The Chair of the Oversight Committee was an employee of Verisign and used his position as Chair and member of the Committee to promote the participation of Verisign and NDC in the IRP process.

§46. Verisign has no interest relating to the property or transaction that is the subject of the IRP, since the Terms and Conditions applying to the application for operation of a new gTLD expressly prohibit the reselling, assigning or transferring of any of the rights or obligations in connection with the application to any third party. ICANN *gTLD Applicant Guidebook* (4 June 2012, at p. 6-6).

§47. The position of "Procedures Officer" was created to resolve questions of consolidation, joinder, and intervention, and the 11th hour changes engineered by the Chair of the Oversight Committee should be held by the Procedures Officer to be invalid.

§48. The Procedures Officer has the inherent equitable power to punish bad faith conduct.

## 2. ICANN's Position

§49. ICANN supports the requests of Verisign and NDC to participate as *amicus curiae* in this IRP proceeding.

§50. Rule 7 of the Supplementary Procedures is unambiguous, and by its express terms Verisign and NDC are entitled to participate in this IRP proceeding as *amicus curiae*.

§51. The briefings in the present case significantly refer to actions taken by NDC and Verisign and by the terms of new Rule 7 they are entitled to participate as *amicus*. Interim Supplementary Procedures, Rule 7(iii).

§52. NDC also was "part of the contention set for the string at issue in the IRP." Rule 7(ii).

§53. The Procedures Officer has no discretion to decline to give effect to the newly adopted Interim Supplementary Procedures.

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§54. The role of the Procedures Officer exists solely as a function of Rule 7, and the powers of the Procedures Officer are created defined and circumscribed by Rule 7.

§55. The Procedures Officer has no further powers and thus no authority to decide any matter not expressly reserved under Rule 7.

§56. The draft Updated Supplementary Procedures were published for public comment in November 2016, consistent with ICANN's designated practice for comment periods. The Interim Supplementary Procedures approved by the Board on 25 October 2018 are derived from that November 2016 draft.

## B. APPLICANTS' SUBMISSIONS

### 1. NDC's Position

§57. The Interim Supplementary Procedures which were adopted unequivocally require that the Procedures Officer "**must** permit NDC to participate in the IRP as an *amicus curiae*."

§58. The Procedures Officer has no authority to invalidate or ignore a rule which has been approved by ICANN.

§59. Section 7 of the Interim Supplementary Procedures confers automatic *amicus curiae* standing on all members of the contention set in a proceeding under the IRP.

§60. "The role of a Procedures Officer is solely 'to adjudicate requests for consolidation, intervention and/or participating as an *amicus*' under Section 7.

[Citation omitted]. The IRP Panel in contrast consists of 'three neutral members appointed to decide the relevant DISPUTE,' i.e., whether an action or inaction by ICANN or its Board 'violated ICANN's Articles of Incorporation or Bylaws.'" [Citation omitted].

§61. There is no requirement for additional public comment. "Even if the Procedures Officer concludes that the better practice would have been for ICANN to have solicited additional public comment, that is hardly a reason to deny **NDC** the ability to participate in this case."

§62. The clear intent of the Interim Supplementary Procedures is to insure fairness and due process.

## 2. Verisign's Position

§63. The fact that David McAuley, the Oversight Committee chair and Verisign's employee, had "knowledge of Afilias's CEP or IRP prior to the ICANN Board unanimously approving the Interim Supplementary Procedures is inapposite and should make no difference to the enforceability of the *amici* rule.

§64. The Interim Supplementary Rules at issue "were drafted by ICANN's counsel, Samantha Eisner, together with Sidley Austin and approved without objection by the entire 26 member Oversight Committee and ICANN's Board. The specific language about which Afilias now complains . . . was drafted by Ms. Eisner of ICANN, not [the Verisign employee serving as chair of the Oversight Committee]."

§65. Afiliis fails to identify any rule that required ICANN to submit the Interim Supplementary Rules to another round of public comments prior to their submission to the Board.

§66. “Neither the Procedures Officer nor any other arbitration officer in this proceeding has authority to address the contention that the *amicus* rule should be invalidated based on Afiliis’ unfounded allegations concerning Verisign’s and ICANN’s participation in the enactment of the Interim Supplementary Procedures.”

§67. Under the Interim Supplementary Procedures, the scope of participation by an *amicus* is for the IRP panel to decide, not the Procedures Officer. The only issue for the Procedures Officer to determine is whether the applicants qualify under Rule 7 to act as *amicus*.

#### IV. THE NEW IRP PROCESS: A BRIEF CHRONOLOGY

##### A. THE CROSS COMMUNITY WORKING GROUP ON ENHANCING ICANN ACCOUNTABILITY

§68. The Cross Community Working Group on Enhancing ICANN Accountability (hereinafter the “Accountability Working Group”) issued its Supplemental Final Proposal on Work Stream 1 Recommendations on 23 February 2016 (hereinafter “Final Proposal”).

§69. The Accountability Working Group stated that “[t]he purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the

scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.” Final Report, ¶174.

§70. One of the first significant changes it called for was that “[t]he IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities and/or the community who have been materially affected by ICANN’s action or inaction in violation of the Articles of Incorporation and/or Bylaws.” The panel was to be composed of a minimum of seven panelists from which decision panel of three members would be selected for a specific matter. The panel appointments were to be made for a fixed term of five years with no removal except for specific cause (corruption, misuse of position for personal gain, etc.). The panelists were to have significant legal expertise, particularly in international law, corporate governance, and judicial systems/dispute resolution, and arbitration. Final Report, ¶178.

§71. Detailed rules for the implementation of the IRP were to be created “by the ICANN community through an Accountability Working Group assisted by counsel, appropriate experts, and the Standing Panel when confirmed.” *Id.*

§72. In Annex 7, the Accountability Working Group discussed rule-making more specifically. “The [Accountability Working Group] anticipates that the Standing Panel would draft, issue for comment, and revise procedural rules. The Standing Panel should focus on streamlined, simplified processes with rules that conform with international arbitration norms and are easy to understand and follow.” Final Report, Annex 7, ¶ 52.

§73. “The [Accountability Working Group] proposes that the revised IRP provisions be adopted as Fundamental Bylaws. . . . Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a[n Accountability Working Group] (assisted by counsel, appropriate experts, and the Standing Panel when confirmed) . . . .” Final Report, Annex 7, ¶ 63.

## B. THE NEW BYLAWS

§74. Some three months later, on 27 May 2016, the Board adopted new Bylaws. Article 4 was entitled, “Accountability and Review.” Section 4.3 dealt with “Independent Review Process for Covered Actions.” Among the purposes of the IRP, the Bylaws provided that the IRP was to “[e]nsure that ICANN is accountable to the global Internet community and Claimant, to “secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes,” and to “lead to binding, final resolutions consistent with international arbitration norms, that are enforceable in any court with proper jurisdiction.” Bylaws, Art. 4, Sec. 4.3 (a)(iii)(vii) (viii). The new Bylaws called for the creation of a Standing Panel according to the recommendations set out in the Final Report. Bylaws, Art. 4, Sec. 4.3 (j), (k), (l), and (m). It called for the Oversight Committee (called the “IRP Implementation Oversight Team” in the Bylaws) in consultation with the Standing Panel, to “develop clear published rules for the IRP that conform with international arbitration norms . . . .” “The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP.” Bylaws, Art. 4, Sec. 4.3 (n)(i) and (ii).

## C. THE STANDING PANEL

§75. The Standing Panel has yet to be established. Consequently, there has been no consultation between the Oversight Committee and a Standing Panel to develop rules that conform to International Arbitration norms; none took place with respect to Interim Rule 7.

## V. CHRONOLOGY OF THE EVOLUTION OF THE SUPPLEMENTARY RULES

§76. In mid-1976 the Oversight Committee went to work on a set of Updated Supplementary Procedures. Under the then-chair, Becky Burr, the Oversight Committee prepared a new set of Updated Supplementary Procedures which were put out for Public Comment. Section 7 of these procedures consisted of three paragraphs:

### **7. Consolidation, Intervention and Joinder:**

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and



efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

§77. On 28 November 2016, the Updated Supplementary Procedures were open for public comment for a three-month period beginning 28 November 2016 and closing on 1 February 2017. During that period, the public made 24 comments, some from individuals and many from organizations. Three of these comments focused on the role of the Procedures Officer.

§78. The Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures, dated February 1, 2017 ("Intellectual Property Constituency Comments") included the following comments related to the Procedures Officer:

- a. "Under Consolidation, Intervention and Joinder: Requests should be determined by the IRP Panel and not by a Procedures Officer."
- b. "[T]he draft merely permits **an existing party** to request the appointment of a Procedures Officer to determine whether other parties should be permitted to intervene or join the proceeding the draft then states that any person or entity qualified to be a Claimant may intervene in an IRP with the permission of the Procedures Officer, but it is not clear what would happen if a party does not

request the appointment of a Procedures Officer in the first place. In our view it is not appropriate for such important decision to be made [by] a Procedures Officer in the first place. In our view it is not appropriate for such important decisions to be made a Procedures Officer [sic] or by the Dispute Resolution Provider; decisions on whether to allow consolidation, joinder or intervention should always be made by the IRP Panel.”

§79. The Registries Stakeholder Group Statement dated 31 January 2017 included the following comment related to the Procedures Officer:

With respect to Sec. 7 (Consolidation, Intervention and Joinder) – The IRP panel should consider whether it (as a panel) or a ‘Procedures’ officer from within the standing panel should make these decisions in particular cases. The IRP Panel will have better judgment as a panel what might be the best approach in any one case.

§80. The DotMusic Public Comments concerning the Updated Procedures for Independent Review Process (IRP) dated January 30, 2017 included the following comment related to the Procedures Officer:

**New Rule 7. Consolidation, Intervention and Joinder:** The appointment of a Procedures Officer from within the Standing Panel to consider issues of joinder, intervention and consolidation is unfair and liable to generate unnecessary costs. These issues should be decided by the duly constituted IRP Panel already hearing a claim, which will be best placed to gauge whether there is sufficient common ground for joinder or intervention.

§81. The Procedures Officer can find no report of any discussion of these comments in any of the Oversight Committee meeting transcripts, other than a brief

passing reference that such comments were made in the slide presentation given by Verisign's David McAuley, the then new chair of the Oversight Committee, at the 23 March 2017 meeting.

§82. In the Declaration of David McAuley in Support of Verisign, Inc.'s Request to Participate as *Amicus Curiae* in Independent Review Process, dated February 5, 2019, attached as Exhibit E is a document Mr. McAuley describes as a "correct copy of the [Oversight Committee]'s memorandum to Sidley." The Document is headed "DRAFT Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN Independent Review Process." The document states:

This report presents conclusions reached by the ICANN Independent Review Process (IRP) Implementation Oversight Team (IRP-IOT) [the Oversight Committee] on public comments submitted regarding draft Updated Supplementary Procedures for the IRP.

In the ***Conclusions of IRP-IOT*** (emphasis in original) section of that document there is a discussion of Updated Supplementary Procedure 7: Consolidation, Intervention, and Joinder. In that section, there is no reference to the public comments quoted above regarding the Procedures Officer, nor any discussion of the role of the Procedures Officer.

§83. The meetings of the Oversight Committee were sparsely attended. According to the chair, a quorum consisted of five telephone participants within five minutes of the designated commencement time. For example, the following is a quote from one Oversight Committee meeting:

DAVID MCAULEY: As has been mentioned in previous calls there is a rough five by five rule, that is we have five participants by five minutes passed [sic] the hour. I believe we are there. Kate [Wallace, partner in the law firm of Jones, Day], with your indulgence you always hear me say this, that for purposes of counting that quorum, we don't consider you, though we are happy to have you here. With that being said I think we have enough to proceed. Aubrey, myself, Kavouss, Malcolm and Liz [Le, ICANN Associate General Counsel].

Meeting Transcript, 4 May 2017.

§84. The transcripts of other meetings reflect that there were rarely more than five attendees, counting ICANN's counsel as part of the five-person quorum. In addition, there are suggestions in some of the transcripts that there may not have been even that number present.

- a. David McAuley: "We are a small group hoping that nonetheless some more of us will gather during this call. And even though we're small, I would like to press on and have a call and have it on the record so we can ensure that those who can't join us today could listen to the record and find out what happened." Besides an ICANN consultant and an ICANN employee, only four people are shown to speak in the transcript of the meeting – David McAuley, Malcolm Huty, Kavouss Arasteh, and Lis Le [ICANN Associate General Counsel]. Meeting Transcript 2 March 2017
- b. David McAuley: "Welcome, all, this is David McAuley speaking, and we have a small group so far, but in the past, a number of people have come in several minutes late, which is fine, so I would like to press on. We're close to the five-person rule, but I think we're in shape that we can roll on right now." Other than

ICANN Counsel and David McAuley's Chairing skills coach, only four people are shown to speak in the Transcript– David McAuley, Kavouss Arasteh, Malcolm Hutton, and Greg Shatan. Meeting Transcript 23 March 2017.

- b. At the 6 April 2017 meeting, if we do not count the three attorneys from ICANN and Jones Day, only three people are shown to speak in the transcript of that meeting: David McAuley, Kavouss Arasteh, and Avri Doria. Meeting Transcript 6 April 2017.
- c. David McAuley: “Very small group. My fond hope is that we don't cancel today. . . . Hi, everyone, it's now two minutes past the hour. I said maybe would wait until three minutes past. I'd like to do that. So I will – oops, never mind. It's three minutes past the hour. We have enough to press on, at least for a while.” Meeting Transcript 27 April 2017.
- d. David McAuley: “It's a small group, unfortunately, but I do think we have a quorum with which we can press ahead.” Only four people are shown to speak in the transcript of the meeting – David McAuley, Kavouss Arasteh, Samantha Eisner [ICANN Deputy General Counsel], and Greg Shatan. Transcript of Meeting of 11 May 2017.
- e. David McAuley: “I'm trying to determine if we have a quorum present so let me count for a minute and just take a look. I see Sam [Samantha Eisner, ICANN Deputy General Counsel] has joined.”  
David McAuley: “Kavouss, you were expressing a concern about a quorum. I believe we are at a quorum now and I think we can proceed. If you feel otherwise Kavouss, could you comment now?”

Kavouss Arasteh: "I have no problems to start the meeting. If we pass the [?] [sic] we need the quorum. I don't think that eight people or nine people are sufficient for quorum." Meeting Transcript 18 May 2017.

- f. David McAuley: "Hello everyone and welcome to the IRP IOT call of the Thursday July 27<sup>th</sup>. It is again a small group. We had to cancel the last call for lack of a quorum." NOTE: If the two ICANN in house counsel on the call are not counted, only three people are shown to speak in the transcript of the meeting: David McAuley, Anna Loup, and Avri Doria. Meeting Transcript 27 July 2017.
- g. David McAuley: "Hello, everyone, this David McAuley. . . . Welcome to those on the call we're again a small group [sic] such as [sic] our lot." NOTE: If the ICANN attorney and the ICANN consultant are not counted, only two people are shown to speak in the transcript of the meeting: David McAuley and Avri Doria. Meeting Transcript 7 September 2017.
- h. Transcript of Meeting of 14 November 2017 – NOTE: excluding two ICANN Board member observers, ICANN counsel, an ICANN Projects and Operations Assistant, and an ICANN consultant, only two people are shown to speak in the transcript of the meeting: David McAuley and "Aubrey." "Aubrey" is assumed to be Aubrey Pennyman, a member of the Governmental Advisory Committee (the "GAC").
- i. David McAuley: "Hello it's three minutes past the top of the hour. If I said we would start at 3 but obviously we are struggling to get a group together." NOTE: excluding two in house ICANN

lawyers, one Jones, Day lawyer representing ICANN, an ICANN consultant, and two ICANN Board members present as observers, only two people are shown to speak in the transcript of the meeting: David McAuley and Malcolm Hutto. Meeting Transcript 7 December 2017

- j. David McAuley: "Hello this is David McAuley speaking. Welcome to the IRP implementation oversight team call. We are probably lacking a quorum. . . . I see that we have several participants and some observers, but probably not enough to make a quorum and that's disappointed [sic]. Meeting Transcript 22 February 2018

§85. There were no meetings of the Oversight Committee between May 2018 and September 2018. Declaration of David McAuley, ¶ 21. McAuley reported that the Oversight Committee was unable to get a quorum for the 6 September 2018 meeting and that "[t]his comes on the heel of difficulties gathering quorums for calls over the past year." Declaration of David McAuley, Exhibit G.

§86. After the four-month absence, Oversight Committee meetings resumed on 9 October 2018. Transcript of the Oversight Committee Meeting of 9 October 2018, McAuley Declaration, Exhibit I. All of the quotes that follow in this section 86 are from that Transcript of that meeting. The Transcript shows that in addition to ICANN in house counsel, a partner of the Jones, Day law firm, and an ICANN consultant, only three people spoke during the meeting: David McAuley, Malcolm Hutto, and Niels Ten Oever.

At the outset, Bernard Turcotte, the ICANN consultant, stated, "David, we have 5 formal members. That's enough to go ahead." David McAuley then

responded, “[A]s you saw from the e-mail I sent yesterday to agenda [sic] the hope is to try to get to interim rules of procedure.” Rule 7 of the proposed interim rules of procedure encompassed eleven paragraphs of some three pages in length.

Following the ICANN consultant’s reading of the rule, Verisign’s David McAuley spoke “as a participant:”

I do have a concern about this and what I believed is that on joinder intervention, whatever we are going to call it it’s essential that a person or entity have a right to join an IRP if they feel that a significant – if they claim that a significant interest they have relates to the subject of the IRP.

And that adjudicating the IRP in their absence would impair or impede their ability to protect that.

\* \* \*

I would be happy to provide specific language with respect to this concept tomorrow on list. And we talk about it on Thursday.

\* \* \*

So what I would do in language that I would put on the list is I would hope I would be would offer to make it more clear.

\* \* \*

I’ll provide language probably by tomorrow that would clarify this and we can discuss it on Thursday.

§87. The next meeting followed in two days. A transcript of that meeting is also available. Transcript of the Oversight Committee Meeting of 11 October 2018, McAuley Declaration, Exhibit K. In addition to an ICANN consultant, an ICANN counsel, a partner of the Jones Day law firm, an ICANN Research Analyst, and an



ICANN Projects & Operations Assistant, only two other people spoke at the meeting: David McAuley and Malcolm Hutty.

§88. Mr. McAuley began the meeting with a description of the attendance on the call. “We are a light group again but I believe we have enough the more forward [sic]. This is two calls in quick succession.”

§89. Later in this October call, Ms. Eisner, ICANN counsel, interjected.

Thanks, David. So I think we have, I know from ICANN side we have some concern, if you go back to some of the principles we put forth in how the IRP the interim rules would work, it was to not make major changes to what was posted to public comment if they were still under significant deliberation by the [Oversight Committee.] And so the – with change that you proposed to caveat that has been proposed [sic] that actually makes a significant change.

While ICANN counsel’s comment was not directed at Section 7, it is addressed to any provision that underwent significant change.

§90. Verisign’s McAuley stressed the urgency of the task at hand.

[O]ne reason why Bernie and I scheduled two calls for this. Get the interim rules out. We recognize that the time has come the [sic] get interim rules out and we have to move to repose [sic], etc. I feel the pressures myself. So what I’d like to do is discussion [sic] on this one ask you Sam to come back with your amicus language.

§91. On 16 October 2018, Ms. Eisner sent Mr. McAuley and ICANN Contractor Bernard Turcotte an email in which she “[a]dded language to the amicus language.” Following Ms. Eisner’s proposed language additions, Ms. Eisner stated,

As we discussed, if we were to give other associated rights for defense of claims or other things that would create a new type of “party” (i.e. not claimant but not amicus) participation in the IRP, I do not think that we have that dictate at this time from the [Oversight Committee]. What I did not mention on the call is that I believe that would be a significant modification from what was posted for comment, and so even if we could build out procedures that allow that to happen in a manner that is consistent with the IRP, we’d still need to take that out for public comment.

McAuley Declaration, Exhibit L.

§92. By email dated October 17, 2018, Mr. McAuley responded to Ms. Eisner’s proposed changes. “I am attaching a few changes to Sam’s suggested language shown in track change format.” ICANN Exhibit 3.

§93. By email dated October 18, 2019, Ms. Eisner responded to Mr. McAuley:

Hi David – Thanks for your language. Attached is a further redline. The first paragraph appears to have a lot of changes, but what it does is: 1) adopt your language of ‘shall participate’; 2) makes that language applicable to all three types of situations; and 3) is reframed in a bulleted list so as to avoid repeating the same participation rights three times.

ICANN Exhibit 4.

§94. By email sent on 19 October 2018, Mr. McAuley responded:

Thanks, Sam. OK – I can accept it if we can make one clarification I suspect it will be ok [sic]. To avoid any doubt that expressing some interests may exclude others, please add introductory language to the second sentence of the intro paragraph as follows: ‘Without limitation to the persons, groups or entities that may have such a material interest . . . .’

ICANN Exhibit 7.

§95. By email sent on 19 October 2018 at 14:53 UTC, David McAuley wrote to the members of the Oversight Committee:

We have an opportunity to have the board accept and approve 'interim rules of procedure at ICANN 63 but we must move quickly to do so. Attached is a draft of the interim rules meant to capture what we have discussed on the phone in the recent calls. . . Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21.

McAuley Declaration, Exhibit M.

§96. By email dated Sunday, October 21, 2018 at 22:23 UTC, the ICANN Consultant sent a letter out to the Oversight Committee members that stated in its entirety:

All,

This is simply to confirm that the deadline is now past and that no responses were received

Tank You [sic]

Bernard Turcotte

ICANN Staff Support to the IOT

McAuley Declaration, Exhibit N.

§97. At the hearing of 19 February 2019, the Procedures Officer specifically asked all counsel present if anyone knew of a vote by the Oversight Committee on the procedures that were promulgated and approved by the ICANN Board in October 2018. No one could identify any Oversight Committee vote on these at any time, although Verisign's February 5, 2019 brief had represented that "the entire 26

member [Oversight Committee]" and the ICANN Board had "approved" the new Interim Supplementary Rules. See Verisign, Inc.'s Reply in Support of its Request to Participate as Amicus Curiae in Independent Review Process, § 1, p.5, ¶ 6.

§98. The final version of Rule 7 as submitted to and approved by the ICANN Board reads as follows:

**7. Consolidation, intervention, and Participation as an *Amicus***

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, requests for consolidation, intervention and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

**Consolidation**

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient

resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

### **Intervention**

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

Any person group or entity who intervenes as a Claimant pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation

after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP Panel shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality personal data, or trade secrets; in which case the IRP Panel shall rule on objection [sic] and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

#### **Participation as an *Amicus Curiae***

Any person group or entity that has a material interest relevant to the Dispute, but does not satisfy the standing requirements for a Claimant set forth in the Bylaws may participate as an *amicus curiae* before an IRP Panel, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons groups or entities shall be deemed to have a material interest relevant to the DISPUTE, and, upon request of person [sic] group or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL: (Emphasis in original)

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP Panel significantly refer to actions taken by a person, group or entity that is external

to the Dispute, such external person, group or entity.  
(Emphasis in original).<sup>1</sup>

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the

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<sup>1</sup> This is a footnote by the Procedures Officer. The Procedures Officer had requested that the parties provide the reasoning for the underscoring emphasis contained in parts of Article 7 of the Interim Supplementary Procedures as adopted.

ICANN responded as follows:

ICANN's investigation of this issue, including its review of the IRP-IOT's meeting transcripts, meeting minutes, and email correspondence, does not indicate that any special meaning should be taken from the underlining beyond the fact that those words were added over the weeks leading up to the 21 October 2018 deadline for final IRP-IOT comment and approval. Indeed, the underlined text tracks directly to the edits that Ms. Eisner drafted between 16 and 19 October 2018, and, as such, it likely is nothing more than a remnant of the drafting process. These edits were not posted for public comment, so no public comments address them.

Afilias responded as follows:

The underscored language of Rule 7 was developed by Samantha Eisner and David McAuley between 16-19 October 2018. It was never published for public comment. The relevant emails, which are annexed to the Eisner Declaration, were first disclosed by ICANN in January 2019 in response to Afilias' Documentary Information Disclosure Policy Request. The underscored language, which created broad mandatory rights for third parties to participate as *amicus curiae* went far beyond the limited Public Comments that had been received in response to the Public Comment Draft. As discussed above, the Public Comments were strictly limited to providing third parties participation rights in IRP's where decision of underlying "process specific expert panels" were being challenged, pursuant to Section 4.3(b)(iii)(A)(3) of ICANN's Bylaws.

DISPUTE or on such discrete questions as the IRP PANEL may request briefing in the discretion of the IRP Panel and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.<sup>2</sup> The IRP Panel shall determine in its discretion what materials related to the Dispute to make available to a person participating as an *amicus curiae*.

## VI. DISCUSSION OF THE ISSUES

§99. The question which must be addressed in an IRP proceeding is whether ICANN is failing to act in compliance with its Bylaws.

### A. IS ICANN ACTING IN COMPLIANCE WITH ITS BYLAWS?

#### 1. ICANN's Expressed Position

§100. Nothing in the Bylaws requires that ICANN submit a version of the Interim Supplemental Procedural Rules for Public Comment. ICANN asserts that Bylaw Sections 3.6(a) and 4.4(a), cited by Afilias for the proposition that ICANN has a designated practice for public comment periods," which practice required an additional round of public comments in respect of the recently adopted interim Supplemental Procedural Rules prior to their submission to and approval by the Board, do not apply to the present situation.

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<sup>2</sup> The following is a footnote that was appended by the draftspersons to the Rule 7 passage cited: The underlining shown below in the footnote is as it is contained in the original footnote as adopted by the Board as part of Rule 7.

During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae*, the IRP Panel shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.



§101. ICANN argues that these provisions only apply to “policy actions” and do not apply to procedural rules which govern IRP proceedings. “The Bylaws’ specific provisions for public comments in two inapposite circumstances do not establish an overarching practice for public comment under all other circumstances.”

## 2. The Advice of ICANN’s Lawyers

§102. As discussed, *supra*, ICANN’s attorneys who were advising the IRP Implementation Oversight Committee counseled that whenever the Oversight Committee were contemplating significant changes to the Interim Supplementary Procedures in the form that had been submitted for public comment in November 2016, those changes would need to be put out for public comment before adoption.

§103. At the Oversight Committee meeting of May 18, 2017, Samantha Eisner, ICANN’s Deputy General Counsel stated during a discussion of proposed rule changes:

This is Sam [Samantha Eisner, ICANN’s Deputy General Counsel]. [I’m here with Liz [Elizabeth Le, ICANN Associate General Counsel], and I think that that is -- we’d want to evaluate the rules across to see where the substantial changes have been and if they’re so substantial that another public comment is warranted and that’s an ICANN internal position, is that removal of our Period of Repose that was previously put out for public comment would be something that would be so significant that would require a further public comment, and there might be other things that we see within the rules changes, too. And then hopefully, we as the IOT would go through and identify some of the areas that we wish to highlight in a communication to help focus the public comments that we would receive on those areas of changes.

David McAuley: Thanks, Sam.

§103. This advice was iterated at the meeting of 11 October 2018, as the Oversight Committee was in the process of formulating the version of Rule 7 that is now before us. See, *supra*, § 89.

§105. This was reiterated in an email from Samantha Eisner to Bernard Turcotte, consultant to ICANN, and David McAuley on 16 October 2018. See, *supra*, §91.

3. Representations Made by the IRP – IOT in the Rules

§104. In the preamble to the Interim Supplementary Procedures which were adopted by the Board and which form a part of the Rules that were promulgated, the Oversight Committee made the following representations:

In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following Principles: 1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016; (2) to the extent public comments received in response to the USP reflected clear movement away from either the current Supplementary Procedures or the USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the [Oversight Committee] has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

§105. The Procedures Officer offers no opinion as to whether these representations by the Oversight Committee as to its drafting processes are

accurate. Doing so would potentially involve the Procedures Officer in a matter that is more appropriately decided by the Standing Panel, which was not been established, although required in the ICANN Bylaws adopted in 2016. In the absence of the Standing Panel, issues related to adoption of Interim Rule 7 and the role of the Procedures Officer with respect to proposed *amicus curiae* should be decided by the IRP Panel. As has been argued by ICANN, NDC, and Verisign, issues of this nature are beyond the mandate given to the Procedures Officer in Interim Rule 7 and are not appropriate for the Procedures Officer to resolve. Nonetheless, these issues are significant to and perhaps determinative of the current dispute.

4. The Role of the Procedures Officer

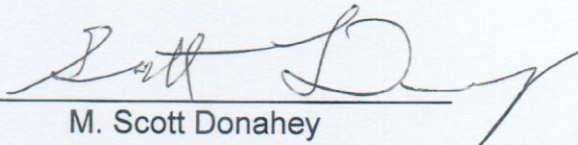
§106. As discussed, *supra*, §§ 77-80, when the draft of the Updated Supplementary Procedures circulated for public comment in 2016-2017, the three comments received rejected the concept of a “Procedures Officer” entirely. In all three instances, the comments called for any decision to be made by the Standing Panel, or, pending its formation, by the IRP Panel. All comments indicated it was inappropriate for a single, individual “Procedures Officer” to decide issues of such importance.

§107. As discussed, *supra*. §§ 81 and 82, there was no consideration or discussion by the Oversight Committee of the public comment objections to the very concept of a “Procedures Officer” or to an individual Procedures Officer acting on matters that were the province of the Standing Panel or the IRP Panel under the Bylaws.

VII. DECLARATION OF THE PROCEDURES OFFICER

As one of the principal purposes of the IRP is to “[e]nsure that ICANN is accountable to the global Internet community and Claimants” (Bylaws, Section 4.3(a)(iii)), the Procedures Officer declares that the issues raised in the present matter are of such importance to the global Internet community and Claimants that they should not be decided by a “Procedures Officer,” and therefore the issues raised are hereby referred to the Standing Panel, and, until such time as the Standing Panel is formed, to the IRP Panel for determination.

28 February 2019

  
\_\_\_\_\_  
M. Scott Donahey  
Procedures Officer

**EXHIBIT C-71**

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
INDEPENDENT REVIEW PANEL

AFILIAS DOMAINS NO. 3 LIMITED	)	
	)	
Claimant,	)	
	)	
v.	)	Case No. 01-18-0004-2702
	)	
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS	)	
	)	
Respondent.	)	
	)	

**EMERGENCY PANELIST’S DECISION ON AFILIAS’ REQUEST FOR PRODUCTION  
OF DOCUMENTS IN SUPPORT OF ITS REQUEST FOR INTERIM MEASURES**

**1. Procedural Background**

- 1.1. Scheduling Order No. 1, dated 3 December 2018, took note of Affilias Domains No. 3 Limited’s (“Affilias”) request for documentary disclosures in support of its Request for Interim Measures (“Interim Request”). The parties had preliminarily addressed the issue of document discovery during a scheduling conference held on 30 November 2018. It appeared that there had been agreement that limited disclosures would be in order. Affilias agreed to submit a narrowly tailored list of document requests on 3 December 2018. The Internet Corporation for Assigned Names and Numbers (“ICANN”) agreed to produce, by 14 December 2018, documents responsive to a narrowly tailored list of documents if they were necessary for Affilias to present its case in this emergency proceeding. Scheduling Order No. 1 at ¶ 6.2.
- 1.2. On 3 December 2018, Affilias submitted a chart identifying eight (8) specific documents or categories of documents. On 5 December 2018, ICANN submitted Responses and Objections to Affilias’ Request. ICANN raised general objections and several specific objections to each document request. ICANN did not agree to produce any of the documents requested.
- 1.3. On 7 December 2018, Affilias filed a Reply to ICANN’s Responses and Objections. Affilias argued that the documents requested are “highly relevant” to the emergency proceeding. Affilias’ Reply to Document Request at 2.
- 1.4. In this Order, the Emergency Panelist will review ICANN’s general objections and then, its objections to each of the eight document categories identified in Affilias’ Request.

## 2. ICANN's General Objections

- 2.1. **Jurisdiction.** ICANN contends that ICANN's Bylaws and relevant procedures do not permit discovery during an interim measures phase of an Independent Review Process ("IRP"). ICANN argues that such discovery is "outside the jurisdiction of the Emergency Panelist." ICANN's Responses and Objections at 1. ICANN does not cite to any specific Bylaws, rules or procedures in support of its objection.
- 2.2. Afilias argues that neither the Interim Supplementary Procedures (*e.g.*, Art. 8) nor the ICDR Rules (*e.g.*, Art. 21) prohibit document exchange during an emergency proceeding. Afilias cites to an order of an Emergency Panelist in an IRP emergency proceeding to support its position that emergency panelists have authority to order discovery. Afilias' Reply at 3 (citing *Donuts, Inc. v. ICANN*, ICDR Case No. 01-14-0000-1579, Procedural Order No. 1 (5 Nov. 2014)). In *Donuts, Inc. v. ICANN*, the Emergency Panelist was appointed under the ICDR Rules. He advised the parties in Procedural Order No. 1 that "[t]he Emergency Arbitrator will also consider [during the hearing] whether any oral or written or oral discovery is needed." *Id.* This suggests that the arbitrator believed that discovery would be appropriate during the interim measures phase of an IRP.
- 2.3. Afilias also relies upon U.K. civil litigation standards and U.S. court norms in copyright litigation for the proposition that written discovery is commonly permitted during interim measures proceedings. Afilias' Reply at 3.
- 2.4. The undersigned Emergency Panelist finds no basis in the Bylaws, ICDR Rules or Interim Supplementary Procedures to limit its authority to resolve Claimant's application for interim measures, including by permitting document discovery as necessary to decide the application. Under ICDR Rules, Art. 6(3), an Emergency Panelist is required to provide "a reasonable opportunity to all parties to be heard." Further, ICDR Rules, Art. 20(4), provides that a tribunal shall have power to order the parties to produce documents "[a]t any time during the proceedings." ICDR Rules, Art. 6(3), clarifies that an emergency arbitrator is vested with the same authorities as that of an arbitral tribunal.
- 2.5. The Emergency Panelist concludes it has jurisdiction to rule on Afilias' document request and authority to order production of documents as necessary to resolve Afilias' Interim Request.
- 2.6. **Standards To Be Applied.** Afilias' Request for Production of Documents seeks documents "relevant and material" to its Interim Request. ICANN contends that discovery during an interim proceeding should only be permitted upon a "showing" that it is "required on an urgent basis to prevent serious imminent harm." ICANN's Response at 1. ICANN appears to conflate the standard for deciding whether an interim measure may be ordered with the lower threshold for deciding whether documentary discovery in support of an application for interim measures is justified.
- 2.7. Under Article 8 of the Interim Supplementary Procedures, an IRP Panel may order production of documents that are: (1) "necessary to further the Purposes of the IRP;" (2) "in the other Party's possession, custody or control;" (3) "reasonably likely to be relevant and material to the resolution of the Claims and/or defenses in the Dispute;" and (4) "are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law." Int. Supp. Proc. at Art. 8.

- 2.8. These standards for disclosure are consistent with ICDR Rules, Art. 21, which provides that an arbitral tribunal (and by the extension of Art. 6(3), the emergency arbitrator):

may... require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case.

ICDR Rules at Art. 21(4).

- 2.9. ICANN does not dispute (a) that the documents requested by Claimant are in its possession and (b) are not otherwise available to Claimant. Therefore, after dealing with ICANN's other general objections, I will turn to whether the documents requested are "necessary," "relevant and material" to Claimant's Interim Request.
- 2.10. **Confidentiality.** ICANN objects to Afiliás' Document Requests Nos. 1, 2 and 8 on grounds that they call for production of "confidential information of non-parties." ICANN's Response at 2, 3, 6 and 8. ICANN does not explain this objection nor cite to authority showing that the requested information is "protected from disclosure by applicable law."
- 2.11. In response to this confidentiality concern, Afiliás offered to enter into a protective order under which ICANN would disclose all responsive documents, but ICANN could designate those documents that reveal confidential information of non-parties. Under Afiliás' proposal, appropriately designated documents would be disclosed only to "outside-counsel" and not to Afiliás itself. Afiliás' Reply at 5.
- 2.12. In considering Afiliás' document request and ICANN's objection to production of documents containing confidential information, the Bylaws, Interim Supplementary Procedures and ICDR Rules must be reviewed.
- 2.12.1. **Bylaws.** The ICANN Bylaws emphasize the transparency of IRP proceedings, including that "documents *filed in* connection with IRP Panel Proceedings shall be posted on the Website." Bylaws at Art. 4, Sec. 4.3(u)(emphasis added). This instruction likely does not apply to document exchanges, but even if it did, an IRP Panel is expressly authorized, "in its discretion," to "grant a party's request to keep certain information confidential, such as trade secrets, but only if such confidentiality does not materially interfere with the transparency of the IRP proceeding." *Id.*
- 2.12.2. **Interim Supplementary Procedures.** The Interim Supplementary Procedures address exchanges of information. The panel "shall be guided by considerations of accessibility, fairness and efficiency ... in its consideration of requests for exchange of information." Int. Supp. Proc. at Art. 8. Subject to determinations of necessity, relevance and materiality, a panel "may order" document production of documents that "are not subject to attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law (including,



without limitation, disclosures to competitors .... of any competition-sensitive information of any kind).” *Id.*<sup>1</sup>

- 2.12.3. **ICDR Rules.** Both the Interim Supplementary Procedures and ICDR Rules anticipate that an exchange of commercial or technical confidential information may be requested during an Independent Review Process or an arbitral proceeding. Consistent with conventional arbitration practice, the ICDR Rules do not limit production of relevant and material documents. The ICDR Rules expressly authorize the tribunal, where appropriate, to “condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.” ICDR Rules at Art. 21(5). Commonly, production of business confidential information of one of the parties may be conditioned on adoption and compliance with a protective order.
- 2.13. **Conclusion.** The Interim Supplementary Procedures do not address the availability of protective orders, nor do they preclude their use to protect competition-sensitive information. The use of such protective measures is permitted under the ICDR Rules and would best achieve the twin goals of “accessibility” and “fairness,” while ensuring that trade secrets are not disclosed to competitors.
- 2.14. For these reasons, to the extent that documents ordered to be exchanged below contain trade secrets or commercial confidential information, they are ordered to be produced subject to an appropriate protective order. The parties are requested to consult and submit a joint request for a protective order by Friday, 14 December 2018.
- 2.15. **ICANN’s General Objection As To Burden and Costs.** ICANN summarily alleges that Afilias’ document requests are “unduly burdensome” and would “increase the cost” of the interim proceedings. ICANN’s Response at 1. ICANN does not explain why the production of Afilias’ restated and narrowed document requests would be unduly burdensome, nor does it object to any particular document request as being unreasonable or overly broad.
- 2.16. ICANN appears to claim that all of Afilias’ requests are unduly burdensome because “ICANN has not *yet* disputed any of Afilias’ factual assertions.” *Id.*(emphasis added). But this statement does not bind ICANN, nor does it serve as a stipulation as to the correctness of facts asserted by Afilias. Without such admissions or stipulations on the record, Afilias would have every reason to try to establish support for its factual assertions.
- 2.17. Given the Emergency Panelist’s mandate to provide each party a fair opportunity to present its case, considerations of “accessibility” and “fairness” outweigh any “increased” costs that may result from the limited document exchange ordered herein.
- 2.18. **ICANN’s Objection As To Inequitable, One-Way Discovery.** ICANN objects to Afilias’ document requests because Afilias purportedly “seeks to obtain one-way discovery from ICANN without permitting ICANN to obtain any discovery from Afilias.” ICANN’s Response at 1. ICANN claims this is inequitable and violates Article

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<sup>1</sup> ICANN did not argue that “applicable law” prevents the production of documents subject to an appropriate protective order.

20(1) of the ICDR Rules requiring “that the parties are treated with equality.” ICANN’s Response at 1.

- 2.19. ICANN’s objection is hard to reconcile with the procedural record. ICANN has not requested any discovery, nor did it request the right to file document requests during the scheduling conference. It would be unfair to reject Afilias’ request solely because ICANN did not similarly invoke its right to request the production of documents during this emergency proceeding.
- 2.20. Moreover, this case presents an unusual circumstance where Afilias’ contentions relate in part to ICANN’s conduct in respect to third parties. It is undisputed that ICANN has possession of documents concerning these transactions that are not in Afilias’ possession, custody or control.

### 3. **Determinations as to Claimant’s Document Requests**

- 3.1. **Document Requests No. 1, 2 and 8.** Afilias’ Reply reorders its document requests. In basket 1, Afilias includes its prior Document Requests Nos. 1, 2 and 8. Afilias argues that these three requests are “vital to understanding the precise nature of NDC’s violations of the New gTLD Program Rules,” and in particular, “whether ICANN’s refusal to disqualify NDC’s bids ... is a violation of ICANN’s Bylaws.” Afilias’ Reply at 4. In Afilias’ view, the documents sought are “relevant and material” to meeting its burden of demonstrating that there is a “sufficiently serious question related to the merits.” *See* Int. Supp. Proc. at Art. 10(ii)(B).
- 3.2. ICANN’s objections to each of Requests Nos. 1, 2 and 8 are identical. They essentially repeat ICANN’s general objections which are reviewed and dismissed above.
- 3.3. In addition, ICANN contends that “Afilias fails to specifically identify how the requested documents are relevant to resolution of Afilias’ Emergency Request.” This objection is unsupported. Afilias alleges that its requests seek production of relevant and material information that will help establish its theories of recovery. Without substantiation, Afilias’ claims might be viewed as mere speculation and thus, not raising sufficiently serious questions related to the merits.
- 3.4. ICANN does not contend that these specific requests are overbroad, unreasonable or would impose an undue burden to produce. Accordingly, these requests are granted and must be complied with, subject to an appropriate protective order.
- 3.5. **Document Requests Nos. 3, 4 and 5.** These requests seek documents relating to negotiation of any registry agreement and pre-delegation testing. Afilias argues that these three requests are necessary for it to carry its burden of establishing “urgency” of the requested stay. ICANN disagrees because it has made a written undertaking that effectively stays any further actions by ICANN with respect to delegation of .WEB gTLD.
- 3.6. While “urgency” is not expressly stated in the Interim Supplementary Procedures as a prerequisite for interim relief, the ICDR Rules clarify that an emergency arbitrator has power to order conservancy measures deemed “necessary.” ICDR Rules at Art. 6(4). Urgency is just one of the factors that could establish the necessity of requested interim relief. Urgency could also be evaluated in the balance of hardships contemplated by

Interim Supplementary Procedures at Article 10(iii). Documents establishing urgency, therefore, are likely to be relevant and material to consideration of Afilias' Interim Request.

- 3.7. ICANN's unilateral decision to keep the delegation of .WEB "on hold" pending completion of this emergency proceeding does not eliminate Afilias' burden of establishing harm, necessity and balance of hardships. ICANN's voluntary "stay" shifts the relevant inquiry to whether the status quo existing as of the date of Afilias' Interim Request should be maintained. Afilias argues that ICANN has not been forthcoming as to the status of its activities to delegate the .WEB contention set. Afilias contends that it needs to know what was the "status quo" before the delegation of .WEB was unilaterally placed on hold. Otherwise, it would be foreclosed from addressing the urgency of maintaining the status quo and the harm that it could experience if the voluntary stay were lifted.
- 3.8. The Emergency Panelist is persuaded by Afilias' argument. On the one hand, assuming arguendo that the registry agreement and pre-delegation testing had advanced to the point that final delegation of .WEB were only days away from a decision on the Interim Request, establishment of the urgency of a stay (if other factors were satisfied) would be more likely. But, on the other hand, if delegation activities would take years to complete, then this lack of urgency might weigh in the balance of whether interim measures are necessary and whether the hardships would tip decidedly toward the party seeking relief.
- 3.9. ICANN does not contend that these specific Requests are overbroad or unreasonable or would create an undue burden to produce.
- 3.10. Accordingly, Document Requests Nos. 3, 4 and 5 are granted and must be complied with, subject to an appropriate protective order.
- 3.11. **Document Request No. 6.** In this Request, Afilias seeks production of correspondence between ICANN and VeriSign and/or NDC concerning the Cooperative Engagement Process ("CEP") that was held between Afilias and ICANN. Afilias argues that these documents are relevant to assessing whether ICANN was pressured and would be harmed if its Interim Request were granted.
- 3.12. ICANN responds with the general objections already reviewed. ICANN does not contend that this request is unreasonable or overly broad or explain why it would be create an undue burden to produce documents in response to this request.
- 3.13. Without clarification or detail, ICANN argues generally that Afilias failed to establish the "relevance" of these documents to its Interim Request. In its general objections, ICANN also argues that Afilias' claims to relevance are "unsupported because ICANN has not *yet* disputed any of Afilias' factual assertions." ICANN's Response at 1 (emphasis added). But the prospect that ICANN might challenge Afilias' factual allegations in this interim proceeding – including whether ICANN might suffer hardship if a stay were ordered – is precisely Afilias' rationale for seeking production of documents that are likely relevant to its Interim Request and might be material to the determination of whether interim measures are necessary and the balance of hardships tips decidedly toward the party seeking relief.


- 3.14. For these reasons, Document Request No. 6 is granted and must be complied with, subject to an appropriate protective order.
- 3.15. **Document Request No. 7.** Afilias seeks production of documents by which ICANN placed the .WEB contention set on hold previously. Afilias argues that these documents are “directly relevant” to its request for an award of costs for this emergency proceeding. Afilias’ Reply at 5.
- 3.16. ICANN challenges the relevance of these requested documents, but again, does not argue that the request is unreasonable, overly broad or would create a specific undue burden if the requested documents were ordered to be produced. ICANN’s Response at 7.
- 3.17. Without making any factual finding in this Decision, it would appear for purposes of this preliminary determination that ICANN’s prior decisions to put “on” and “off” “hold” the .WEB contention set might be relevant and material to Afilias’ request for costs. Accordingly, Document Request No. 7 is granted and must be complied with.

#### 4. Conclusion

- 4.1. For the reasons stated above, the Parties are requested to confer and propose a mutually acceptable protective order. The deadline for submission of a joint proposal for a protective order is 14 December 2018.
- 4.2. ICANN is further ordered to produce documents in accordance with this Decision. In order to provide further time for this production to occur, ICANN’s deadline for producing the documents will be extended to 17 December 2018. The Procedural Timetable set forth in Scheduling Order No. 1 will be modified accordingly. All other deadlines set forth in Scheduling Order No. 1 are continuing.

It is so Ordered.


Dated: 12 December 2018



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Kenneth B. Reisenfeld  
Emergency Panelist

**EXHIBIT C-72**

FORM CD-451 (REV. 12-14)		U.S. DEPARTMENT OF COMMERCE		GRANT <input checked="" type="checkbox"/> COOPERATIVE AGREEMENT	
<b>AMENDMENT TO FINANCIAL ASSISTANCE AWARD</b>				AWARD NUMBER NCR-92-18742	
CFDA NO. AND NAME 11.- National Telecommunications and Information Administration					
PROJECT TITLE					
RECIPIENT NAME VeriSign, Inc.			AMENDMENT NUMBER 35		
STREET ADDRESS Contact Information Received			EFFECTIVE DATE October 26, 2018		
CITY, STATE ZIP Contact Information Received			EXTEND PERIOD OF PERFORMANCE TO (IF APPLICABLE) November 30, 2024		
COSTS ARE REVISED AS FOLLOWS:		PREVIOUS ESTIMATED COST	ADD	DEDUCT	TOTAL ESTIMATED COST
FEDERAL SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00
RECIPIENT SHARE OF COST		\$0.00	\$0.00	\$0.00	\$0.00
TOTAL ESTIMATED COST		\$0.00	\$0.00	\$0.00	\$0.00
REASON(S) FOR AMENDMENT The Department and Verisign have mutually agreed to certain modifications to the Cooperative Agreement as set forth in the Special Award Condition. Except as modified by this Amendment, the terms and conditions of the Cooperative Agreement, as previously amended, remain unchanged.					
This Amendment Document (Form CD-451) signed by the Grants Officer constitutes an Amendment of the above-referenced Award, which may include an obligation of Federal funding. By signing this Form CD-451, the Recipient agrees to comply with the Amendment provisions checked below and attached, as well as previous provisions incorporated into the Award. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may unilaterally withdraw this Amendment offer and de-obligate any associated funds.					
<input checked="" type="checkbox"/> SPECIAL AWARD CONDITIONS  <input type="checkbox"/> LINE ITEM BUDGET  <input type="checkbox"/> OTHER(S)					
SIGNATURE OF DEPARTMENT OF COMMERCE GRANTS OFFICER <b>SCOTT MCNICHOL</b> Digitally signed by SCOTT MCNICHOL Date: 2018.10.26 11:52:09 -06'00'				DATE 10/26/2018	
TYPED NAME, TYPED TITLE, AND SIGNATURE OF AUTHORIZED RECIPIENT OFFICIAL D. James Bidzos, CEO 				DATE 10/26/18	

Award Number: NCR 92-18742  
Federal Program Officer: Vernita Harris  
Employee Identification Number: 943221585  
Dun & Bradstreet No.: 883894040

**Award ACCS Information**

**Award Contact Information**

Contact Name	Contact Type	Email	Phone
Thomas C. Idelicarto	Administrative	Contact Information Received	

**NIST Grants Officer:**  
Dean Iwasaki  
Contact Information Received

**NIST Grants Specialist:**  
Nuria Martinez  
Contact Information Received

**Special Award Conditions NCR-92-18742**

**Amendment Thirty-Five (35)**

**WHEREAS**, pursuant to Amendment 34, the Department has reviewed whether to extend the term of the Cooperative Agreement and has determined that it is in the public interest to extend the Cooperative Agreement on the terms set forth herein;

**WHEREAS**, the parties agree that Verisign shall continue to operate the .com registry in a content neutral manner and will participate in ICANN processes that promote the development of content neutral policies for the operation of the Domain Name System (DNS);

**WHEREAS**, the Department finds that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace;

**WHEREAS**, given the more dynamic DNS marketplace, the Department has determined that it is appropriate to amend the Cooperative Agreement to provide pricing flexibility for the registration and renewal of domain names in the .com registry;

**WHEREAS**, the parties have agreed to clarify that it was, and remains, the intention of the parties that the vertical integration restriction on Verisign's ability to own a registrar apply only to the .com registry and not to the other services offered by Verisign;

**WHEREAS**, the Department has reviewed the regulatory oversight necessary to ensure the security, stability and resiliency of the .com registry and to ensure that .com domain name registrations are offered at reasonable prices, terms and conditions;

**WHEREAS**, given this regulatory review, the Department has determined it is appropriate to remove certain unnecessary and burdensome regulations while still maintaining sufficient oversight by retaining the Department's approval authority for changes to the .com Registry Agreement for the following critical terms of the .com Registry Agreement: pricing; vertical integration; renewal or termination; functional and performance specifications; and the Whois Service;

**THEREFORE**, Verisign and the Department agree as follows:

1. **Content Neutral Operations**. The parties agree that Verisign will operate the .com registry in a content neutral manner and that Verisign will participate in ICANN processes that promote the development of content neutral policies for the operation of the DNS.



2. **Pricing Flexibility.** In recognition that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace, the parties agree that the yearly price for the registration and renewal of domain names in the .com registry may be changed in accordance with the following:
  - a. Without further approval by the Department, at any time following the Effective Date of this Amendment 35, Verisign and ICANN may agree to amend Section 7.3(d)(i) (Maximum Price) of the .com Registry Agreement to permit Verisign in each of the last four years of every six year period, beginning two years from the Effective Date of this Amendment 35 (i.e., on or after the anniversary of the Effective Date of this Amendment 35 in 2020-2023, 2026-2029, and so on) to increase the Maximum Price charged by Verisign for each yearly registration or renewal of a .com domain name up to seven percent over the highest Maximum Price charged in the previous calendar year.
  - b. Section 2 of Amendment 32 which implemented the prior pricing restrictions is hereby deleted.
3. **Vertical Integration.** The parties hereby clarify that the restrictions on Verisign's ownership of any ICANN-accredited registrar(s) were, and remain, intended to apply solely to the .com registry and therefore Verisign and ICANN may agree to amend the .com Registry Agreement to clarify its terms in accordance with the following:
  - a. Without further approval by the Department, at any time following the Effective Date of this Amendment 35, Verisign and ICANN may amend Section 7.1(c) (Restrictions on Acquisition of Ownership or Controlling Interest in Registrar) of the .com Registry Agreement to provide that the ownership restriction therein relates solely to the .com TLD and does not prevent Verisign from owning a registrar except as to .com.
4. **Continued Department Oversight.** The Department has determined it is appropriate to remove certain unnecessary and burdensome regulations while still maintaining sufficient oversight by retaining the Department's approval authority for certain changes to the .com Registry Agreement in accordance with the following:
  - a. Department approval was previously required for changes to certain terms of the .com Registry Agreement defined as "Designated Terms" under Section 1.B.2.A(ii) of Amendment 19, as amended by Section 2 of Amendment 30

which is hereby deleted in its entirety, as well as, all references to “Designated Terms” in Amendment 30.

- b. The parties agree that the following terms are the sole terms in the .com Registry Agreement that require the prior written approval of the Department:
  - i. Removal of the Maximum Price restriction under Section 7.3(d)(i) (Maximum Price) of the .com Registry Agreement, which by way of clarification will continue to be subject to Section 3(a) of Amendment 32 setting forth the standard and process for removal;
  - ii. Any change to Section 7.3(d) of the .com Registry Agreement which sets forth the Maximum Price restrictions (other than as agreed as set forth in Section 2 (Pricing Flexibility) in this Amendment 35);
  - iii. Any change to Section 7.1(b) (Registry Operator Shall Not Act as Own Registrar) and 7.1(c) (Restrictions on Acquisition of Ownership or Controlling Interest in Registrar) of the .com Registry Agreement, which set forth the vertical integration restrictions on Verisign owning or acting as a registrar, respectively (other than as agreed as set forth in Section 3 of this Amendment 35);
  - iv. Any changes to the security, stability and resiliency posture of the .com TLD as reflected in the functional and performance specifications under Section 3.1(d)(ii) or Appendix 7 (Functional and Performance Specifications) of the .com Registry Agreement;
  - v. Any change to the conditions for renewal or termination under Sections 4.2 (Renewal), 4.3 (Failure to Perform in Good Faith) or 6.1 (Termination by ICANN) of the .com Registry Agreement;
  - vi. Any changes to the Whois Service under Sections 3.1(c)(v) (Whois Service) or Appendix 5 (Whois Specification), except as such changes are mandated by ICANN through Temporary or Consensus Policies.
- c. The Department’s approval of any amendment to the .com Registry Agreement, or the renewal, extension, continuation or substitution of the .com Registry Agreement, shall not be required unless Verisign seeks to change a term identified in Section 4(b)(i)-(vi) of this Amendment 35, except as already approved under Sections 2 and 3 of this Amendment 35.
- d. Upon application by Verisign for approval of such change or changes identified in Section 4(b) of this Amendment 35, the Department shall

consult with Verisign in any evaluation of its application. The Department shall issue a written decision explaining its reasons for granting or denying, in whole or in part, such application within ninety (90) days after submission of its application, or within 90 days after receipt of any additional materials requested by the Department to evaluate the application, whichever date is later. If the Department determines that additional time is needed to complete its review, then the parties shall agree to an extension of time for six months or such other reasonable time as the Department and Verisign may agree. After receiving any written notice of failure to approve, Verisign shall be entitled to confer with the Department. After conferring with the Department, Verisign may propose for the Department's approval one or more new or revised proposals. The Department's review of an initial application or new or revised proposals shall: (x) for applications to change pursuant to Section 4(b)(i) above, be in accordance with the standard set forth in Amendment 32, Section 3(a); (y) for applications to make any other changes as set forth in Sections 4(b)(ii)-(vi) above, be made by determining whether such change or changes are reasonably necessary to promote the public interest in consideration with the business necessity of the requested change. Any review and approval by the Department of any request under this Section shall not be unreasonably withheld. The Department's pending approval for any change to the .com Registry Agreement under Section 4 of this Amendment 35 shall not prevent Verisign and ICANN from entering into an amendment to the .com Registry Agreement, for its renewal, extension, continuation or substitution, without such change.

5. **Miscellaneous.** The following provisions are intended to ensure that the parties' intent in this Amendment 35 is reflected consistently throughout the Cooperative Agreement.
  - a. As the parties have agreed to the standard of review for any proposed changes to the .com Registry Agreement requiring the Department's approval in Sections 4(b)(i) and 4(d) of this Amendment 35, the parties hereby delete the last sentence of Section I.B.2.A(iii) of Amendment 19, as amended by Section 2 of Amendment 30 that set forth the conflicting standard of approval being in the Department's sole discretion.
  - b. As the parties have agreed to the timeframe for review of any proposed changes to the .com Registry Agreement in Section 4(b) of this Amendment

35, the parties hereby delete Section 3(b) of Amendment 32, which set forth the timeframes for evaluation of an application to remove pricing restrictions.

- c. As the parties have identified the sole terms in the .com Registry Agreement that require the Department's prior written approval, the parties hereby revise Section 1.B.2.A(iv) of Amendment 19, as amended by Section 2 of Amendment 30, to apply solely to those terms identified in Section 4(b) of this Amendment 35.
- d. As the parties have addressed the renewal of the .com Registry Agreement and because the Department's recognition of ICANN is no longer relevant, Section 1.B.9(ii) and (iii) of Amendment 19, as amended by Section 3 of Amendment 30, are hereby deleted.

**6. Expiration Date.**

- a. Section 1.B.10 of Amendment 19, Expiration Date, as amended by Section 4 of Amendment 32 is amended as follows:

“The current term of the Cooperative Agreement shall continue through November 30, 2024, and shall automatically renew for six-year terms, unless the Department provides Verisign with written notice of non-renewal within one hundred twenty days (120) prior to the end of the then current term (“Expiration Date”). Notwithstanding anything in the Cooperative Agreement to the contrary, the Department and Verisign agree that: (i) upon expiration or termination of the Cooperative Agreement, neither party shall have any further obligation to the other and nothing shall prevent Verisign from operating the .com TLD pursuant to an agreement with ICANN or its successor; and (ii) neither party may amend the Cooperative Agreement without the mutual written agreement of the other.”

- b. Section 2 of Amendment 34 is hereby deleted.

7. **Antitrust Immunity.** The Department's approval of this Amendment 35 is not intended to confer federal antitrust immunity on Verisign with respect to the .com Registry Agreement.

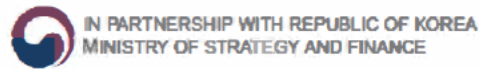
8. **No Other Amendment**. Except as modified by this Amendment 35, the terms and conditions of this Cooperative Agreement, as previously amended, remain unchanged.

**EXHIBIT C-73**



# Open Learning Campus

ACCELERATING SOLUTIONS THROUGH LEARNING



## Beneficial Ownership Transparency



Over a trillion US dollars in estimated illicit financial flows diverting much needed resources from developing countries, tens of billions in corruption proceeds stashed away by former Heads of State and high level officials of Yemen, Ukraine, Arab Spring and countless other countries; and still others perpetrating fraud, tax evasion, money laundering and myriad of other financial crimes. ...view more Over a trillion US dollars in estimated illicit financial flows diverting much needed resources from developing countries, tens of billions in corruption proceeds stashed away by former Heads of State and

high level officials of Yemen, Ukraine, Arab Spring and countless other countries; and still others perpetrating fraud, tax evasion, money laundering and myriad of other financial crimes. Corruption and other criminal assets, complex money trails, strings of shell companies and other legal persons and legal arrangements (such as foundations, trusts and trust-like arrangements). These form the complex web of subterfuge in financial crimes cases, behind which hides the beneficial owner—the puppet master and beneficiary of it all. Linking the beneficial owner to the proceeds of corruption and other crimes is notoriously hard. With sizable wealth and resources on their side, they exploit transnational constructions that are hard to penetrate and stay aggressively ahead of the game and to conceal ownership and control of tainted assets. Transparency of beneficial ownership will help ensure that the puppet masters and their associates and facilitators are not able to operate in secrecy and impede development. The Stolen Asset Recovery Initiative (StAR) and the Financial Market Integrity Unit have been providing targeted technical assistance on beneficial ownership to financial centers, including offshore centers and more developing countries in the context of understanding how the corrupt are able to hide their stolen assets through legal structures. This learning module is based on StAR's leading study in this field: *The Puppet Masters: How the Corrupt Hide Stolen Assets Using Legal Structures and What to Do About It*. [view less](#)

**Learning Mode:** Bite+

**Topics:** Financial Sector Development, Financial Integrity, Illicit Financial Flows

**Regions:** Africa, East Asia and Pacific, Europe and Central Asia, Latin America & Caribbean, Middle East and North Africa, South Asia, Other

**GP:** Financial Sector Oversight and Policy, Governance regulatory policy & management

**Keywords:** Illicit Financial Flows; Corruption; Fraud; Tax Evasion; Money Laundering; Financial Crime; Transparency; Beneficial Ownership

**Language:** English

**Presenter Info**



#### **Emile van der Does de Willebois**

Emile van der Does de Willebois is a Senior Financial Sector Specialist in the Finance and Markets Global Practice of the World Bank and the Stolen Asset Recovery Initiative (StAR), a partnership of the World Bank and United Nations Office on Drugs and Crime. Emile began his career working for the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia in The Hague. Subsequently he worked in private practice specializing in banking and securities law. Emile joined the World Bank's Financial Market Integrity unit in 2004, and plays a vital coordinating role in all aspects of the unit's work, including country assessments, delivery of technical assistance, and contributions to international standard setting bodies, particularly on the issues of abuse of legal entities, beneficial ownership and the use of non-profit entities for terrorist purposes. Emile has also worked with a number of Arab and other countries in their international stolen assets recovery efforts.



#### **Ji Won Park**

Ji Won Park is an attorney with two decades of experience in government, private sector, and civil society organizations in the United States and South Korea. At the Financial Market Integrity Unit of the World Bank and the Stolen Asset Recovery Initiative (StAR) since 2009, her projects include *The Puppet Masters: How the Corrupt Hide Stolen Assets Using Legal Structures* and *What to Do about It*, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, and the StAR Asset Recovery Watch cases database. Ms. Park participated in the Financial Action Task Force study, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* and contributes to StAR's policy advocacy and technical assistance work in the area of transparency of beneficial ownership. Ms. Park is a graduate of Columbia College and Georgetown University Law Center, where she was a Public Interest Law Scholar.



#### **Francisca Fernando**

### **Presenter Resources**

1. **URL** :G20 High-Level Principles on Beneficial Ownership Transparency
2. **URL** :StAR Transparency/ Beneficial Ownership Resource Center
3. **URL** :StAR Corruption Cases Search Center
4. **URL** :Financial Action Task Force (FATF) Guidance on Transparency and Beneficial Ownership
5. **URL** :Global Witness – Anonymous Company Owners

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**EXHIBIT C-74**

CONTENTION SET STATUS

[Download Initial String Contention Results \(PDF\)](#)

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[Auction Results](#)

**Search** **Reset**

You can enter date, eg. 2014-05-21, 21 May 2014 or 05/21/2014

FILTER RESULTS

Contention Set Status ▾

**Apply Filters**

**Reset All**

This page reflects the current string contention sets as of the most recent update (16 February 2018) to this page. String contention sets will be updated from time to time to reflect any changes. Please note that the current status of string contention sets could change due to changes to application status as a result of withdrawals, evaluation results, dispute resolution proceedings, contention resolution processes, or the potential impact of ICANN accountability mechanisms. Except for the application statuses "Withdrawn" and "Delegated", application statuses are not final.

A change in application status or update to a contention set is intended to inform the applicants and the community of an application's current status. A change or update is not a definite indication that an application may proceed to another phase of the program. For more information including definitions of application statuses see the [applicant advisory](#).

▶	Set Name	Set Number	Set Status	Number of Applications	Auction Date
▶	网站 (xn--5tzm5g) <a href="#">View Image</a>	9	Resolved	2	
▶	CAM <a href="#">View Image</a>	24	Resolved	3	
▶	GMBH <a href="#">View Image</a>	30	Resolved	5	
▶	APP <a href="#">View Image</a>	39	Resolved	13	25 February 2015 <small>(Confirmed)</small>
▶	MOVIE <a href="#">View Image</a>	131	Resolved	8	
▶	WEBSITE <a href="#">View Image</a>	133	Resolved	3	
▼	WEB / WEBS <a href="#">View Image</a>	233	On Hold <sup>1</sup>	9	27 July 2016 <small>(Confirmed)</small>
	539 WEBS <a href="#">1-1033-22687 (Withdrawn)</a>	Vistaprint Limited			
	632 WEB <a href="#">1-1298-36138 (In Contracting)</a>	NU DOT CO LLC			
	868 WEB <a href="#">1-1681-58899 (Will Not Proceed)</a>	Charleston Road Registry Inc.			
	946 WEB <a href="#">1-1009-97005 (Withdrawn)</a>	Web.com Group, Inc.			
	986 WEB <a href="#">1-956-28846 (Will Not Proceed)</a>	DotWeb Inc.			
	1218 WEB <a href="#">1-1527-54849 (Will Not Proceed)</a>	Ruby Glen, LLC			
	1360 WEB <a href="#">1-1013-6638 (Will Not Proceed)</a>	Afiliis Domains No. 3 Limited,			
	1717 WEBS <a href="#">1-1033-73917 (In Contracting)</a>	Vistaprint Limited			
	1750 WEB <a href="#">1-1013-77165 (Will Not Proceed)</a>	Schlund Technologies GmbH			

Displaying 1 - 7 of 7

Notes:

1. On Hold: One or more applications in the contention set may have a status of On Hold. Applications in the set cannot proceed to New gTLD Program Auctions until the set is no longer on hold.
2. Winning applicant results are preliminary until the winning price is received in full.
3. Per the 4 February 2013 Board [resolution](#), the Board directed the President and CEO that the applications for .CORP, .HOME, and .MAIL should not proceed in the New gTLD Program. As the applications for the strings .CORP, .HOME, and .MAIL were not approved to proceed in the New gTLD Program, contention no longer exists, and the contention set status has been updated to "Resolved".

**EXHIBIT C-75**

1 Jeffrey A. LeVee (State Bar No. 125863)  
 jlevee@Jonesday.com  
 2 Eric Enson (State Bar No. 204447)  
 eponson@jonesday.com  
 3 Charlotte Wasserstein (State Bar No. 279442)  
 cswasserstein@jonesday.com  
 4 JONES DAY  
 555 South Flower Street  
 5 Fiftieth Floor  
 Los Angeles, CA 90071.2300  
 6 Telephone: +1.213.489.3939  
 Facsimile: +1.213.243.2539  
 7

8 Attorneys for Defendant  
 9 INTERNET CORPORATION FOR  
 ASSIGNED NAMES AND NUMBERS

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

12  
 13 RUBY GLEN, LLC,  
 14 Plaintiff,  
 15 v.  
 16 INTERNET CORPORATION FOR  
 ASSIGNED NAMES AND  
 17 NUMBERS,  
 18 Defendant.

Case No. 2:16-cv-5505 PA (ASx)  
 Assigned for all purposes to the  
 Honorable Percy Anderson

**DECLARATION OF CHRISTINE  
 WILLETT IN SUPPORT OF  
 ICANN'S OPPOSITION TO  
 PLAINTIFF'S *EX PARTE*  
 APPLICATION FOR  
 TEMPORARY RESTRAINING  
 ORDER**

22  
 23  
 24  
 25  
 26  
 27  
 28

# **EXHIBIT D**

Begin forwarded message:

**From:** Chris LaHatte <[chris.lahatte@icann.org](mailto:chris.lahatte@icann.org)>

**Subject:** RE: Dot Web Auction

**Date:** July 10, 2016 at 1:58:48 PM PDT

**To:** Christine Willett <[christine.willett@icann.org](mailto:christine.willett@icann.org)>

**Cc:** Amy Stathos <[amy.stathos@icann.org](mailto:amy.stathos@icann.org)>, Herb Waye <[herb.waye@icann.org](mailto:herb.waye@icann.org)>

Thanks Christine. I have asked Jon Nevitt to comment at this stage

Regards

Chris LaHatte

Ombudsman

Blog <https://omblog.icann.org/>

Webpage <http://www.icann.org/en/help/ombudsman>

Please leave feedback on how I am doing <http://www.icannombudsman.feedback/>

Pronouns used: he, his, him

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a

complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint.

**From:** Christine Willett

**Sent:** Saturday, July 09, 2016 4:02 AM

**To:** Chris LaHatte <[chris.lahatte@icann.org](mailto:chris.lahatte@icann.org)>

**Cc:** Amy Stathos <[amy.stathos@icann.org](mailto:amy.stathos@icann.org)>; Herb Waye <[herb.waye@icann.org](mailto:herb.waye@icann.org)>

**Subject:** Re: Dot Web Auction

Dear Chris,

I hope that this email finds you well. I know that you have been in communication with NU DOT CO LLC, to inquire about the recent complaint filed by Donuts regarding its ownership and potential impact on the .WEB/.WEBS auction.

As you know, my team had reached out to NU DOT CO LLC previously, and we received confirmation that NU DOT's application materials were still true and accurate. In an effort to be extremely cautious, I reached out to Mr. Jose Ignacio Rasco (the application primary contact for NU DOT's .WEB application) again today to ensure that our understanding of his previous response was accurate. During the call, he explained the following:

1. When ICANN previously contacted him about potential application changes, he assumed that the confirmation was part of the standard auction process, and his response was relatively brief. The email from the Ombudsman provided him with more context. Now that he has a better understanding about the complaint and what is going on, he can provide us with more detailed information.
2. NU DOT is structured as an LLC, which does not have "directors," but rather "managers" and "members." Neither the managers nor the members have changed since the application's submission.
3. NU DOT's operating agreement has not changed since the application's submission.
4. He understands that the .WEB/WEBS auction price is expected to be high, and that some of his competitors are upset that he was not willing to resolve contention outside of the ICANN auction.
5. He 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, this decision was in fact his. He does not believe that it is appropriate that this email conversation is being used as evidence.

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. If you have any questions, please let me know.

Best,  
Christine

*Christine A. Willett*

Vice President, GDD Operations  
Global Domains Division  
Internet Corporation for Assigned Names and Numbers (ICANN)  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536



**From:** Chris LaHatte <[chris.lahatte@icann.org](mailto:chris.lahatte@icann.org)>  
**Date:** Wednesday, July 6, 2016 at 2:18 PM  
**To:** Jon Nevett <[REDACTED]>, Christine Willett <[christine.willett@icann.org](mailto:christine.willett@icann.org)>  
**Cc:** Amy Stathos <[amy.stathos@icann.org](mailto:amy.stathos@icann.org)>, Herb Waye <[herb.waye@icann.org](mailto:herb.waye@icann.org)>  
**Subject:** RE: Dot Web Auction

Hi Jon

I have put this to the applicant and the ICANN team will decide once there has been a response.

Regards

Chris LaHatte  
Ombudsman  
Blog <https://omblog.icann.org/>  
Webpage <http://www.icann.org/en/help/ombudsman>  
Please leave feedback on how I am doing <http://www.icannombudsman.feedback/>  
Pronouns used: he, his, him

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**From:** Jon Nevett [mailto: [REDACTED] ]  
**Sent:** Wednesday, July 06, 2016 10:43 PM  
**To:** Christine Willett <[christine.willett@icann.org](mailto:christine.willett@icann.org)>  
**Cc:** Amy Stathos <[amy.stathos@icann.org](mailto:amy.stathos@icann.org)>; Herb Waye <[herb.waye@icann.org](mailto:herb.waye@icann.org)>; Chris LaHatte <[chris.lahatte@icann.org](mailto:chris.lahatte@icann.org)>  
**Subject:** Re: Dot Web Auction

Hi folks. When do you think we will have a decision on this request? Time is really of the essence. Thanks. Jon

Jonathon Nevett  
Co-Founder & EVP, Donuts Inc.  
[REDACTED]

On Jul 3, 2016, at 11:09 AM, Jon Nevett [REDACTED] wrote:

Hi folks. I understand that Chris's paragraph may be sent verbatim to NU Dot Co, so I make the following suggested changes in redline form below. We would like to renew our request for an immediate postponement of the auction scheduled in just over three weeks time for the following reasons:

1. The auction is in about 3 weeks and there is credible evidence that one of the applicants has a material change to its application and hasn't gone through the ICANN change process. The material change includes a change to the Board of Directors and a potential change of control and/or ownership. Such a change may be in violation of Module 1, Section 1.2.7 and Module 6, Section 10 of the AGB.
2. It is unfair for the other applicants to be preparing for an auction against a party that has had non-public changes to its application and hasn't gone through the ICANN change process. We just have the transparency in the process to know with whom we are participating in an auction.
3. Most of the .web applicants already asked for a voluntary extension of the auction.
4. There is a pending ICANN accountability mechanism being utilized to investigate potential violations of the AGB and precedent dictates that ICANN should postpone the auction pending the result of the accountability mechanism.
5. .WEB likely will be one of the larger auctions and it is better that it be

conducted cleanly and not with a pending ICANN accountability mechanism or a cloud surrounding the TLD based on a potential change of control in violation of the AGB.

6. Even if the other applicant denies that any changes have been made, we have credible evidence that needs to be investigated and all the other applicants deserve at least 30 days from the end of the investigation to prepare for the auction.

Because of upcoming triggers and financial preparations necessary before this auction, please announce the postponement as soon as possible. It doesn't make sense to even wait to hear back from the other applicant before a postponement is announced because regardless of what they say, an extension is the appropriate action considering the time period before the auction. What they say and the result of the investigation should just go to when the auction is rescheduled.

Please let me know if you have any questions.

Thanks again for your help and consideration.

Best,

Jon

-----  
~~A visitor, who is a~~ **One or more** applicants for dot web, ~~has~~ made a complaint to the Ombudsman about changes to the dot web application by one of the applicants, being NU DOT CO LLC. ~~He says that t~~ There is evidence from them (which I have seen) which reveals that **there have been changes to the composition of NU DOT CO LLC's Board that require it to go through an ICANN change process.** ~~one of the board members of this applicant company, is no longer taking an active part in the running of the company, and that there are several other directors, not specifically specified or named.~~ The complaint is that because there has been a failure to disclose material changes, that it is unfair to the other applicants until the disclosure has been made and that accordingly, the auction ought to be postponed until disclosure has been made. So I have opened an ombudsman complaint file about this matter. It may be an issue where the enquiry ought to be directed to this applicant or they could contact this office if they wish to discuss the matter. I am not sure of their appropriate contact details, and it may be useful to pass this on to them. When I have this information, I can investigate the facts of this matter and be able to make a recommendation.

Jonathon Nevett  
Co-Founder & EVP, Donuts Inc.  
[REDACTED]



On Jun 30, 2016, at 9:49 AM, Chris LaHatte <[chris.lahatte@icann.org](mailto:chris.lahatte@icann.org)> wrote:

Hi

A visitor, who is an applicant for dot web, has made a complaint to the Ombudsman about changes to the dot web application by one of the applicants, being NU DOT CO LLC. He says that there is evidence from them (which I have seen) which reveals that one of the board members of this applicant company, is no longer taking an active part in the running of the company, and that there are several other directors, not specifically specified or named. His complaint is that because there has been a failure to disclose material changes, that it is unfair to the other applicants until the disclosure has been made and that accordingly, the auction ought to be postponed until disclosure has been made. So I have opened an ombudsman complaint file about this matter. It may be an issue where the enquiry ought to be directed to this applicant or they could contact this office if they wish to discuss the matter. I am not sure of their appropriate contact details, and it may be useful to pass this on to them. When I have this information, I can investigate the facts of this matter and be able to make a recommendation

Regards

Chris LaHatte  
Ombudsman

Blog <https://omblog.icann.org/>

Webpage <http://www.icann.org/en/help/ombudsman>

Please leave feedback on how I am doing <http://www.icannombudsman.feedback/>

Pronouns used: he, his, him

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complaint.

**EXHIBIT C-76**



# New Generic Top-Level Domains

[About](#) [Applicants](#) [Program Status](#) [News & Media](#)

## NEW GTLD AUCTION RESULTS

Search Auction Results

Search

Reset

You can enter date, eg. 2014 05 21, 21 May 2014 or 05/21/2014

Auction results are listed below. Only contention sets that resolved through Auction are included. This page will be periodically updated within seven (7) days after an Auction or update in status.

Information about the Auction process, Auction proceeds or additional contention set status' can be found on the [Auctions](#) page, [Auction proceeds](#) page or [Contention Set Status](#) page, respectively.

String	Contention Set Number	Auction Date	Application ID	Winning Applicant	Winning Price
WEBS	233	27 July 2016	1-1033-73917	Vistaprint Limited	\$1
WEB	233	27 July 2016	1-1296-36138	NU DOT CO LLC	\$135,000,000
SHOP	229	27 January 2016	1-890-65213	GMO Registry, Inc.	\$41,501,000
HOTELS	82	18 November 2015	1-1016-75482	Booking.com B.V.	\$2,200,000
SRL	226	25 March 2015	1-1013-93642	mySRL GmbH	\$400,000
PING	214	25 March 2015	1-1833-90242	Ping Registry Provider, Inc.	\$1,501,000
APP	39	25 February 2015	1-1138-33325	Charleston Road Registry Inc.	\$25,001,000

MLS	144	17 December 2014	<a href="#">1-1828- 26452</a>	The Canadian Real Estate Association	\$3,359,000
BABY	67	17 December 2014	<a href="#">1-1156- 50969</a>	Johnson & Johnson Services, Inc.	\$3,088,888
DOT	52	19 November 2014	<a href="#">1-2005- 70840</a>	Dish DBS Corporation	\$700,000
REALTY	112	22 October 2014	<a href="#">1-1913- 14988</a>	Fegistry, LLC	\$5,588,888
SPOT	109	22 October 2014	<a href="#">1-1317- 50025</a>	Amazon EU S.à r.l.	\$2,200,000
SALON	28	22 October 2014	<a href="#">1-1618- 18834</a>	Outer Orchard, LLC	\$5,100,575
BUY	16	17 September 2014	<a href="#">1-1315- 53217</a>	Amazon EU S.à r.l.	\$4,588,888
VIP	41	17 September 2014	<a href="#">1-1037- 88001</a>	Minds + Machines Group Limited	\$3,000,888
TECH	20	17 September 2014	<a href="#">1-1670- 76346</a>	Dot Tech LLC	\$6,760,000
信息	6	04 June 2014	<a href="#">1-995- 44061</a>	Beijing Tele-info Network Technology Co., Ltd.	\$600,000

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Displaying 1 of 17

Notes:

\* Winning applicant results are preliminary until the winning price is received in full. All prices are displayed in United States Dollars (USD) with a comma denoting the thousands separator.



**EXHIBIT C-77**

Search  F G R T Y



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undeveloped Finding the right domain has never been this easy, fast & secure
1 Choose from over 4 Million domains
2 Interest-free monthly installments available
3 Fast, free & secure escrow included

Top Stories

ICANN shuts down Alpnames domain name registrar

POSTED UNDER Domain Registrars

On Privacy and Information

POSTED UNDER Policy & Law

Domain Name Wire turns 14

POSTED UNDER Uncategorized

It looks like Verisign bought .Web domain for \$135 million (SEC Filing)

BY ANDREW ALLEMANN — JULY 28, 2016 30 COMMENTS

Company paying \$130 million for “contractual rights”.

The company that runs .com might soon be adding .web to its stable.

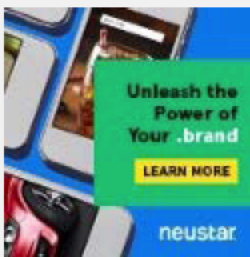
Based on an SEC filing this afternoon, it looks like Nu Dot Co was the winner of today’s .web auction and Verisign is behind the bid. (Update: ICANN has posted official auction results showing Nu Dot Co as the winner.)

Verisign (NYSE:VRSN) just filed its quarterly report with the SEC today. Under “Subsequent Event” it says:

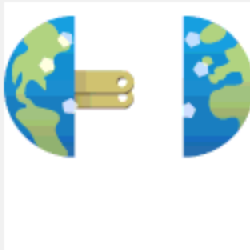
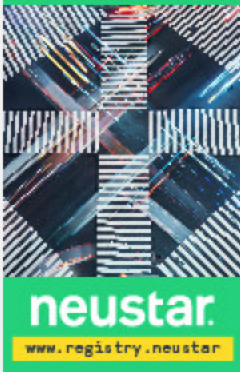
“ Subsequent to June 30, 2016, the Company incurred a



## Domain Name Financing



Enabling platforms for possibility in a connected world



*commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.*

I'd be willing to bet big money that this is the .web auction.

Verisign was rumored to be backing Nu Dot Co's bid for the domain name.

My sources tell me that the auction ended for \$135 million this morning. It's possible that Nu Dot Co retains some ownership in the domain, hence the discrepancy in price. (Keep in mind, also, that the winner pays the second highest bid).

The payment for this auction will be due in Q3.

Verisign didn't mention .web on its conference call today and no analysts asked about it.

63

3

3

### Learn More...

1. [VeriSign: Google Slowing Domain Name Registration Growth](#)
2. [VeriSign Plans to Release 1 and 2 Character .Net Domains](#)
3. [A New VeriSign Slogan?](#)

[30 Comments](#)

Tags: [.web](#), [nyse:vrns](#), [VeriSign](#)

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**EXHIBIT C-78**

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ARIF HYDER ALI

Contact Information Received

February 23, 2018

**VIA E-MAIL**

ICANN Board  
c/o Cherine Chalaby, Chairman  
Göran Marby, President and CEO  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: Request for Update on ICANN's Investigation of .WEB Contention Set and Request for Documents under ICANN's Documentary Information Disclosure Policy**

Dear ICANN:

We write on behalf of our client, Afilias Domains No. 3 Ltd. ("Afilias"), regarding the .WEB contention set. As stated in past correspondence, Afilias has several concerns with the 27-28 July 2016 auction for .WEB, including (1) Nu Dot Co LLC's ("NDC") apparent change in financial position, ownership, or control after submitting its application to ICANN but prior to the auction for .WEB; (2) NDC's assignment of rights in its application for .WEB to Verisign, Inc. ("Verisign") prior to the auction in breach of the gTLD Applicant Guidebook ("AGB"); and (3) the serious competition issues raised by Verisign's acquisition of .WEB in violation of ICANN's Bylaws and the AGB.<sup>1</sup> As discussed below, we are writing to: (1) request an update on ICANN's investigation of the .WEB contention set; and (2) request documents under ICANN's Documentary Information Disclosure Policy ("DIDP").

---

<sup>1</sup> See Letter from M. Scott Hemphill to Akram Atallah (8 Aug. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf>; Letter from M. Scott Hemphill to Akram Atallah (9 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf>; Letter from John Kane to Christine A. Willett (7 Oct. 2016).

## I. Request for Update on ICANN's Investigation of .WEB Contention Set

Pursuant to Afilias' concerns in late 2016, ICANN requested "additional information"<sup>2</sup> regarding the .WEB auction from Afilias, Ruby Glen LLC ("Ruby Glen"), NDC, and Verisign on 16 September 2016.<sup>3</sup> Afilias promptly responded to ICANN's request on 7 October 2016.<sup>4</sup> Since Afilias submitted its response to ICANN over sixteen months ago, it has received no further communications from ICANN in regards to the .WEB contention set. ICANN has failed to update Afilias regarding its investigations relating to .WEB.

ICANN is obligated by its Bylaws to maintain "open and transparent processes."<sup>5</sup> The principle of "[t]ransparency is one of the essential principles in ICANN's creation documents, and its name reverberates through its Articles [of Incorporation] and Bylaws."<sup>6</sup> Pursuant to its Bylaws, ICANN is required to (1) "[e]mploy open, transparent and bottom-up, multistakeholder transparent public development processes"<sup>7</sup> and (2) to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."<sup>8</sup>

Therefore, pursuant to ICANN's transparency obligations,<sup>9</sup> we respectfully request that ICANN provide an update on the status of ICANN's investigation of the .WEB contention set, including: (1) the steps (if any) taken by ICANN to disqualify NDC's bid on the basis that NDC violated the rules applicable to its application; and (2) the steps (if any) taken by ICANN to assess competition issues arising out of delegation of .WEB to Verisign.

We further request that ICANN take no action in regards to .WEB until Afilias can review and respond to the documents provided as a result of the below DIDP request; and that ICANN confirm that it has not, and will not, enter into a registry agreement for .WEB with

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<sup>2</sup> Letter from Christine A. Willett to John Kane (16 Sep. 2016), p.1.

<sup>3</sup> See Letter from Christine A. Willett to John Kane (16 Sep. 2016).

<sup>4</sup> See Letter from John Kane to Christine A. Willett (7 Oct. 2016).

<sup>5</sup> ICANN Bylaws, Article 1, Section 1.2(a).

<sup>6</sup> *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), ¶ 101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>7</sup> ICANN Bylaws, Article 1, Section 1.2(a)(iv).

<sup>8</sup> ICANN Bylaws, Article 3, Section 3.1.

<sup>9</sup> See ICANN Articles of Incorporation, Art. 2(III); ICANN Bylaws (22 Jul. 2017), Art. 1(1.2)(a), Art. 3(3.1), Art. 4(4.1).

NDC until, to the extent Afilias seeks review of any decisions relating to .WEB through ICANN's accountability mechanisms, such mechanisms are completed. We nonetheless emphasize that Afilias reserves all of its rights to pursue any and all rights or remedies available to it in any forum against ICANN, NDC, or Verisign in connection with the delegation of the .WEB gTLD.

## II. Request for Documents Pursuant to the DIDP

Afilias further submits this letter to request documents from ICANN, pursuant to ICANN's DIDP, related to (1) ICANN's 30 September 2016 request for additional information sent to Ruby Glen, Afilias, NDC, and Verisign; and (2) any investigation by ICANN of NDC and Verisign in relation to .WEB.<sup>10</sup> The DIDP is "intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality."<sup>11</sup> Pursuant to the DIDP, Afilias requests that ICANN provide the following documents:

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;<sup>12</sup>
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;<sup>13</sup>
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;<sup>14</sup>
4. All applications, and all documents submitted with the applications, for the rights to .WEB;

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<sup>10</sup> See Letter from Christine A. Willett to John Kane (16 Sep. 2016).

<sup>11</sup> See ICANN DIDP, <https://icann.org/resources/pages/didp-2012-02-25-en>. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN's Documentary Information Disclosure Policy (DIDP) Requests*.

<sup>12</sup> Letter from Christine A. Willett to John Kane (16 Sep. 2016), p.1.

<sup>13</sup> Complaint, *Ruby Glen, LLC v. ICANN*, 2:16-cv-05505, ¶ 53 (C.D. Ca. July 22, 2016).

<sup>14</sup> Complaint, *Ruby Glen, LLC v. ICANN*, 2:16-cv-05505, ¶ 53 (C.D. Ca. July 22, 2016).

5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
  - a. the .WEB contention set,
  - b. NDC's application for the .WEB gTLD,
  - c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
  - d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;
8. Documents sufficient to show the current status of the delegation of .WEB;
9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
  - a. document productions to the DOJ;
  - b. communications with the DOJ;
  - c. submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions;
  - d. communications with Verisign or NDC relating to the investigation; and
  - e. internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and



10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ Investigation.

We reserve the right to request additional documents based on the provision of the above documents. Please promptly disclose the requested documents pursuant to the DIDP.

Sincerely,



Arif Hyder Ali

Partner

**EXHIBIT C-79**

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ARIF HYDER ALI

Contact Information Received

April 23, 2018

**VIA E-MAIL**

ICANN Board of Directors  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: ICANN's Response to DIDP Request No. 20180223-1**

Dear Members of the ICANN Board:

We write on behalf of our client, Afilias Domains No. 3 Limited (“**Afilias**”), regarding ICANN’s 24 March 2018 response (the “**DIDP Response**”) to Afilias’ Request No. 20180223-1 (the “**DIDP Request**”) pursuant to ICANN’s Documentary Information Disclosure Policy (“**DIDP**”).<sup>1</sup> Afilias objects to the DIDP Response as detailed below.

However, in order to achieve an efficient and mutually acceptable resolution of this dispute, Afilias writes to offer a proposed solution.<sup>2</sup> In part, ICANN refuses to produce certain information pursuant to Afilias’ DIDP Request because ICANN deems such materials to be confidential. While Afilias has no means to verify ICANN’s position, in the interests of resolving this issue, Afilias will agree to limit disclosure of any such material identified by ICANN to its outside counsel for review. In addition, to further facilitate documentary disclosure, Afilias amends several of its document requests, as set forth in **Section 02** below, in response to the articulated concerns in ICANN’s DIDP Response.

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<sup>1</sup> See DIDP Request 20180223-1 (23 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf> (hereinafter, “DIDP Request”); see also Response to DIDP Request 20180223-1 (24 Mar. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf> (hereinafter, “DIDP Response”).

<sup>2</sup> See ICANN Bylaws (22 Jul. 2017), Art. 4, <https://www.icann.org/resources/pages/governance/bylaws-en> (hereinafter, “ICANN Bylaws”).

**01. The Proposed Confidentiality Agreement Governing Requests 01, 04, 06, and 09(a-c, e)**

ICANN has asserted that several of Afilias' document requests—specifically Requests 01,<sup>3</sup> 04,<sup>4</sup> 06,<sup>5</sup> and 09(a-c, e)<sup>6</sup>—seek documents that cannot be publically disclosed because they are subject to the DIDP's Nondisclosure Conditions.<sup>7</sup> Afilias agrees to limiting the disclosure of any material produced by ICANN pursuant to these requests, and identified by ICANN as “highly confidential,” to Afilias' outside counsel. This agreement will protect the documents from public disclosure while permitting Afilias' attorneys to review documents relevant to Afilias' participation in the .WEB contention set.

Should ICANN find this proposal amenable, Afilias is willing to negotiate the specific terms of such a confidentiality agreement with ICANN's counsel in order to reach a speedy resolution of this matter.

**02. The Amendments to Requests 01, 04, 05, 06(a-b), and 09(a) Pursuant to the DIDP Response**

Afilias has further amended certain document requests—specifically Requests 01, 04, 05, 06(a-b), and 09(a)—in order to facilitate further documentary disclosure from ICANN. These amendments take into account ICANN's stated concerns regarding the scope and clarity of these requests, as articulated in the DIDP Response.<sup>8</sup> In making these amendments, Afilias reserves its right to ask for additional information, should the materials produced by ICANN pursuant to these amended requests prove inadequate or insufficient.

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<sup>3</sup> Request 01 seeks “[a]ll documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information.” DIDP Request, p. 3.

<sup>4</sup> Request 04 seeks “[a]ll applications, and all documents submitted with the applications, for the rights to .WEB.” *Id.*

<sup>5</sup> Request 06 seeks “[a]ll documents concerning any investigation or discussion related to: (a) the .WEB contention set, [and] (b) NDC's application for the .WEB gTLD, (c) Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and (d) Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign.” *Id.*, p. 4.

<sup>6</sup> Request 09 seeks “[a]ll documents relating to the Department of Justice, Antitrust Division's ('DOJ') investigation into Verisign becoming the registry operator for .WEB ('DOJ Investigation'), including: (a) document productions to the DOJ; (b) communications with the DOJ; (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions; ... and (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board.” *Id.*

<sup>7</sup> DIDP Response, pp. 5, 7-15.

<sup>8</sup> *See id.* at pp. 8-9; Email to John Kane from Christine Willett (31 Mar. 2018).

### 02.01 Request 01: Documents Responsive to the 16 September 2016 Letter

The DIDP Response, and ICANN's subsequent actions, warrant an amendment to Request 01. The request seeks "[a]ll documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information."<sup>9</sup> In its DIDP Response, ICANN refused to disclose the documents received from Ruby Glen, LLC ("**Ruby Glen**"), Nu Dot Co LLC ("**NDC**"), and Verisign, Inc. ("**Verisign**") in response to ICANN's 16 September 2016 letter requesting information from the aforementioned parties.<sup>10</sup> ICANN asserted that the documents are subject to the DIDP's Nondisclosure Conditions.<sup>11</sup>

However, ICANN also committed itself to "continue to review potentially responsive materials and consult with relevant third parties, as needed, to determine if additional documentary information is appropriate for disclosure under the DIDP."<sup>12</sup> In accordance with this commitment, on 31 March 2018, ICANN requested permission from Afilias to disclose its response to the 16 September 2016 letter.<sup>13</sup> ICANN's request indicated that it also asked Ruby Glen, NDC, and Verisign for permission to disclose their responses to the 16 September 2016 letter as well.<sup>14</sup>

Therefore, Afilias now requests the responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN's 16 September 2016 request for information. Afilias further reiterates its request for the prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter.<sup>15</sup>

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<sup>9</sup> DIDP Request, p. 3.

<sup>10</sup> Letter to John Kane from Christine Willett (16 Sep. 2016).

<sup>11</sup> DIDP Response, p. 5.

<sup>12</sup> *Id.*

<sup>13</sup> Email to John Kane from Christine Willett (31 Mar. 2018). Afilias has given ICANN permission to disclose its own response to the 16 September 2016 letter.

<sup>14</sup> *Id.*

<sup>15</sup> As stated below, Afilias reserves its rights to contest any decision regarding the disclosure of these documents pursuant to the DIDP once it receives ICANN's response to this letter.

## **02.02 Request 04: Documents Related to the .WEB Applications**

Given ICANN's stated concerns regarding the disclosure of documents related to the .WEB applications, Afiliat is willing to further narrow Request 04, subject to its right to request additional information at a later date. The initial request sought "[a]ll applications, and all documents submitted with the applications, for the rights to .WEB."<sup>16</sup> Afiliat's amended Request 04 narrows the scope of the request, and seeks only NDC's responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items.

## **02.03 Request 05: Documents on the Importance of .WEB to Competition**

Afiliat's Request 05 seeks "[a]ll documents discussing the importance of .WEB to bringing competition to the provision of registry services."<sup>17</sup> Despite this straightforward language, ICANN asserts that Request 05 is "unclear," "overbroad," and "vague."<sup>18</sup> To assist ICANN, the request seeks any documents, analyses, or studies that contain information regarding potential competition, substitution, and interchangeability between or among .WEB and .COM, .NET, or other gTLDs.

## **02.04 Request 06(a-b): Documents Related to the .WEB Investigation**

Afiliat is willing to narrow Request 6(a-b), subject to Afiliat's right to request additional information at a later date.<sup>19</sup> The initial request sought "[a]ll documents concerning any investigation or discussion related to: (a) the .WEB contention set, [and] (b) NDC's application for the .WEB gTLD."<sup>20</sup> The amended Request 6(a-b) now seeks the following documents:

1. all documents reflecting NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012;<sup>21</sup>

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<sup>16</sup> DIDP Request, p. 3.

<sup>17</sup> *Id.*, p. 4.

<sup>18</sup> DIDP Response, p. 8.

<sup>19</sup> ICANN determined that "these requests are exceedingly overbroad and vague." *Id.*

<sup>20</sup> DIDP Request, p. 4. ICANN determined that "these requests are exceedingly overbroad and vague." *Id.*

<sup>21</sup> See "New gTLD Application Submitted to ICANN by: NU DOT CO LLC," ICANN (13 June 2012), <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1053?t:ac=1053>.

2. all documents concerning any investigation or discussion related to NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012;
3. documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC's bids for the .WEB gTLD at the 28-28 July 2016 auction; and
4. documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.

**02.05 Request 09(a): Documents related to the Department of Justice Investigation**

Moreover, in its DIDP Response, ICANN stated that several documents responsive to Request 09(a)<sup>22</sup> were “in the Requestor’s possession, custody, or control.”<sup>23</sup> In order to further ease any burden on ICANN in responding to Afilias’ document requests, Afilias amends Request 09(a) to exclude those documents that ICANN has reasonably identified as already being in Afilias’ possession.

Afilias further reserves all of its rights and remedies in all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali  
Partner

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<sup>22</sup> Request 09(a) includes “[a]ll documents relating to the Department of Justice, Antitrust’s Division’s (‘DOJ’) investigation into Verisign becoming the registry operator for .WEB (‘DOJ Investigation’), including: (a) document productions to the DOJ.” DIDP Response, p. 11.

<sup>23</sup> *Id.*, pp. 11-12.

**EXHIBIT C-80**



555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071.2300  
TELEPHONE: +1.213.489.3939 • FACSIMILE: +1.213.243.2539

Contact Information Redacted

April 28, 2018

VIA EMAIL

Arif Hyder Ali, Esq.  
Dechert LLP  
1900 K. Street NW  
Washington, DC. 20006

Re: .WEB

Dear Arif:

On behalf of ICANN, I am responding to your letter dated April 16, 2018 regarding .WEB.

I am going to ignore most of the rhetoric in your letter because it is so self-serving and beyond the point. Many of your letters to ICANN have made sensational accusations, but just writing the words do not make them true, and ICANN vehemently disputes your characterizations. Indeed, in this particular matter, ICANN has been quite transparent, including in papers publicly filed in the federal district court action that Ruby Glen initiated.

As to your specific requests, your letter asks for: (i) an update on the status of the .WEB contention set; (ii) an update on the status of ICANN's investigation; and (iii) sixty days' prior notification if ICANN proceeds toward delegation of .WEB to NDC.

As to the status of the .WEB contention set, first you state that you understand the .WEB contention set to be "on hold." Then, you ask for various additional rights to which you are not entitled, just in case the contention set is *not* "on hold." To be clear, and as you already well know, the .WEB contention set is on hold. When 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.

As to an update on the status of ICANN's investigation, in your letter of February 23, 2018, you asked for various information, and ICANN accepted the letter as a request for documentary information under the ICANN Documentary Information Disclosure Policy (DIDP) and furnished information to you. (See <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.) In that regard, ICANN notified you that there are applicable conditions for non-disclosure for some of the information that you have requested, and that we would inquire of the third parties whether they wished to permit disclosure. (See *id.*)

Arif Hyder Ali, Esq.  
April 28, 2018  
Page 2

ICANN has now received responses from the third parties and will provide an update on this matter through the DIDP Process.

As to your request for 60 days prior notice of a change to the “on hold” status of the .WEB contention set, ICANN will continue to follow its processes. Providing 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. ICANN will not violate its Bylaws by providing such a notice period merely because you would prefer to have a notice that I suspect you would challenge if your client were one of the other .WEB applicants.

Very truly yours,

/s/

Jeffrey A. LeVee

cc: John Jeffrey, Esq.  
Amy Stathos, Esq.

NAI-1503660213v1

**EXHIBIT C-81**

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## VeriSign, Inc. (VRSN) CEO Jim Bidzos on Q4 2018 Results - Earnings Call Transcript

Feb. 7, 2019 9:03 PM ET | 1 Like

by: SA Transcripts

Q4: 02-07-19 Earnings Summary



Press Release



10-K



Slides

EPS of \$1.58 beats by \$0.37 | Revenue of \$307.45M (4.04% Y/Y) misses by \$-1.18M

### Earning Call Audio



Subscribers Only

0:00 / 28:58

VeriSign, Inc. (NASDAQ:VRSN) Q4 2018 Earnings Conference Call February 7, 2019  
4:30 PM ET

### Company Participants

David Atchley - Vice President of Investor Relations & Corporate Treasurer

Jim Bidzos - Executive Chairman, President & Chief Executive Officer

Todd Strubbe - Executive Vice President & Chief Operating officer

George Kilguss - Executive Vice President and Chief Financial Officer

### Conference Call Participants

Sterling Auty - JPMorgan

Matt Lemenager - Baird

### Operator

Good day everyone. Welcome to VeriSign's Fourth Quarter and Full Year 2018 Earnings Call. Today's conference is being recorded and unauthorized recording of this call is not permitted.

At this time, I would like to turn the conference over to Mr. David Atchley, Vice President of Investor Relations and Corporate Treasurer. Please go ahead sir.

**David Atchley**

Thank you, operator, and good afternoon, everyone. Welcome to VeriSign's fourth quarter and full year 2018 earnings call. With me are Jim Bidzos, Executive Chairman, President and CEO; Todd Strubbe, Executive Vice President and COO; and George Kilguss, Executive Vice President and CFO.

This call and our presentation are being webcast from our Investor Relations website, which is available under About VeriSign on verisign.com. There you will also find our fourth quarter and full year 2018 earnings release. At the end of this call, the presentation will be available on that site. And within a few hours, the replay of the call will be posted.

Financial results in our earnings release are unaudited and our remarks include forward-looking statements that are subject to the risks and uncertainties that we discuss in detail in our documents filed with the SEC, specifically the most recent reports on Forms 10-K and 10-Q, which identify risk factors that could cause actual results to differ materially from those contained in the forward-looking statements. VeriSign retains its longstanding policy not to comment on financial performance or guidance during the quarter unless it is done through a public disclosure.

The financial results in today's call and the matters we will be discussing today include GAAP and non-GAAP measures used by VeriSign. GAAP to non-GAAP reconciliation information is appended to our earnings release and slide presentation as applicable, each of which can be found in the Investor Relations section of our website. In a moment, Jim and George will provide some prepared remarks, and afterwards we will open the call for your questions.

With that, I would like to turn the call over to Jim.

**Jim Bidzos**

Thanks, David, and good afternoon, everyone. I am pleased to report another solid year for VeriSign. Fourth quarter and full year 2018 results were in line with our objectives of offering security and stability to our customers, while generating profitable growth and providing long-term value to our shareholders. 2018 was marked by strong financial performance during, which we generated revenues of \$1,215 million, \$661 million in free cash flow and 2018 full year non-GAAP operating margin of 67.5%.

2018 was a strong year for the .com and .net domain name base as the company processed 38.2 million registrations and finished the year with 153 million names. During the year, we marked more than 21 years of uninterrupted availability of the VeriSign DNS for .com and .net.

As we announced on November 1, last year VeriSign and the Department of Commerce entered into Amendment 35 to the Cooperative Agreement. The amendment among other things permits VeriSign without further approval of the DOC to engage with ICANN to change the .com Registry Agreement to increase wholesale prices for .com domain name registrations and renewals by up to 7% in each of the last four years of each six-year period.

Amendment 35 also clarifies that the vertical integration restrictions in the .com Registry Agreement on VeriSign's ability to own an ICANN-accredited registrar apply only as to the .com TLD and not to other services offered by VeriSign. Additionally, Amendment 35 also removes certain unnecessary and burdensome regulations, so that any future renewal of the .com Registry Agreement can occur without DOC approval unless VeriSign were to seek changes to certain key provisions such as further changes to pricing.

Any change to the Cooperative Agreement can only be made by mutual agreement of VeriSign and the DOC except that the DOC can terminate the Cooperative Agreement at any time with 120 days' notice prior to the expiration of the term.

As another update, the company completed the sale of the Verisign Security Services customer contracts on December 5, 2018. These contracts are related primarily to our DDoS and Managed DNS customers.

As discussed last quarter, the sale of these non-core customer contracts will enable us to focus solely on supporting our core mission ensuring the security, stability and resiliency of our core infrastructure. Of course, the sale of these customer contracts will be a slight

drag on revenue in 2019, but our continued organic revenue growth from our core domain name business is expected to offset this decrease.

At the end of December, the domain name base in .com and .net totaled 153 million consisting of 139 million names for .com and 14 million names for .net with a year-over-year growth rate of 4.5%. During the fourth quarter, we processed 9.5 million new registrations and the domain name base increased by 1.29 million names.

Although, the renewal rates are not fully measurable until 45 days after the end of the quarter, we believe that the renewal rate for the fourth quarter of 2018 will be 74.2%. This preliminary rate compares to 72.2% achieved in the fourth quarter of 2017.

Looking forward to 2019, we expect the domain name base growth rate to be between 2.25% and 4.25% for full year 2019. During the fourth quarter, we continued our share repurchase program by repurchasing 1.2 million shares of common stock for \$175 million. During the full year 2018, we repurchased 4.4 million shares for \$600 million.

Effective today, the Board of Directors increased the amount of VeriSign common stock authorized for share repurchase by approximately \$603 million to a total of 1 billion authorized and available under the share repurchase program, which has no expiration.

Our financial position remains strong with \$1.27 billion in cash, cash equivalents and marketable securities at the end of the quarter. We continually evaluate the overall cash and investing needs of the business and consider the best uses for our cash including potential share repurchases.

And now, I'd like to turn the call over to George.

### **George Kilguss**

Thanks, Jim, and good afternoon everyone. For the year ended December 31, 2018, the company generated revenue of \$1.215 billion, up 4.3% from 2017 and delivered GAAP operating income of \$767 million, up 8.4% from \$708 million in 2017. Revenue for the fourth quarter of 2018 totaled \$307 million, up 4% year-over-year and up by 5.5% sequentially.

As it relates to fourth quarter GAAP results, operating income totaled \$194 million compared with \$176 million in the fourth quarter of 2017. The operating margin in the quarter came to 63.1% compared to 59.7% in the same quarter a year ago.

Net income totaled \$182 million compared to \$103 million a year earlier, which produced dilutive earnings per share of \$1.50 in the fourth quarter this year compared to \$0.83 for

the same quarter last year.

In the quarter, we recorded a \$54.8 million pre-tax gain related to the sale of Verisign Security Services customer contracts. This gain increased GAAP net income by \$52 million and GAAP earnings per share by \$0.43.

As of December 31, 2018, the company maintained total assets of \$1.9 billion and total liabilities of \$3.3 billion. Assets included \$1.3 billion of cash, cash equivalents and marketable securities of \$504 million were held domestically with the remainder held abroad.

I'll now review some additional fourth quarter financial metrics, which include non-GAAP operating margin non-GAAP earnings per share, operating cash flow and free cash flow. I will then provide our 2019 full year guidance.

As it relates to non-GAAP metrics, fourth quarter operating expense, which excludes \$11 million of stock-based compensation, totaled \$102 million compared to \$96 million last quarter and \$106 million in the fourth quarter a year ago.

Non-GAAP operating margin for the fourth quarter was 66.7% compared to 68.7% last quarter and 64.1% in the same quarter of 2017. During the fourth quarter, our sales and marketing expense increased sequentially as we had additional spend on programs in the market.

Non-GAAP net income for the fourth quarter was \$191 million resulting in non-GAAP diluted earnings per share of \$1.58 based on a weighted average diluted share count of 121.3 million shares. This compares to \$1.23 last quarter and \$0.96 in the fourth quarter of 2017.

The gain related to the sale of our Security Services customer contracts increased non-GAAP net income by \$42.8 million and non-GAAP earnings per share by \$0.36 during the fourth quarter. Operating cash flow for the fourth quarter was \$219 million and free cash flow was \$211 million, compared with \$199 million and \$190 million respectively for the fourth quarter last year.

Now I'd like to provide our full year 2019 guidance. Revenue is expected to be in the range of \$1.215 billion to \$1.235 billion. Our 2019 revenue range is based on our expectation for continued growth of our domain name base for the full year 2019 of between 2.25% and 4.25%, being partially offset by the loss of our revenue associated with the sale of our Security Service customer contracts.



Non-GAAP operating margin is expected to be between 67.5% to 68.5% and will continue to include certain non-material operating costs associated with providing transition services for Security Service customers. Our interest expense and non-operating income net is expected to be an expense of between \$42 million and \$49 million and consist primarily of net interest expense, partially offset by payments collected as part of the aforementioned Transition Services Agreement.

Capital expenditures in 2019 are expected to be between \$45 million and \$55 million. And finally, cash taxes are expected to be between \$95 million and \$115 million. In summary, the company continued to demonstrate solid financial performance in 2018 during the fourth quarter and for the full year.

Now I'll turn the call back to Jim for his closing remarks.

### **Jim Bidzos**

Thank you, George. 2018 was another solid year for VeriSign. There was further expansion of the domain name base and revenues. We generated and efficiently returned value to shareholders. We entered into Amendment 35 to the Cooperative Agreement, allowing VeriSign to engage with ICANN to amend the COM Agreement to increase the price for com domain name registrations and renewals without further approval from the Department of Commerce.

We concluded the sale of our Security Services customer contracts, further increasing our focus and efforts to protect, grow and manage this unique business. The success in our core business benefits our customers employees and shareholders.

We'll now take your questions. Operator, we're ready for the first question.

### **Question-and-Answer Session**

#### **Operator**

Thank you, sir. [Operator Instructions] And first we'll hear from Sterling Auty with JPMorgan.

#### **Sterling Auty**

Yes, thanks. Hi guys. So, ICANN 35 certainly is beneficial for you guys. But given all the moving parts, can you just simply explain what is different?

moving parts, can you just simply explain what is different?

### **Jim Bidzos**

Sure Sterling. I think most are aware that the main points I just mentioned in Amendment 35 are that we're allowed to increase prices for .com. We have more flexibility on vertical integration for services that are not .com services and there is reduced regulatory burden for both VeriSign and the government.

I think your question is in practice what will be different for us VeriSign. So, I'll contrast a process before and after Amendment 35. But let me just -- let me start with what will not change. Every six years, we engage with ICANN on a .com Registry Agreement renewal for which there's a presumptive Right of Renewal. That is not changed and the next renewal of the .com Registry Agreement with ICANN will occur in November of 2024. Some parts of the agreement may be changed in that process through negotiation. However, I'd note that ICANN has not historically negotiated pricing with us deferring to DOC on pricing in prior renewals.

That process -- that ICANN process is unchanged. Prior -- to pick up there, prior to Amendment 35, the process that followed that renewal with ICANN was that we would present the .com Registry Agreement as negotiated by us, VeriSign and ICANN to the DOC. DOC would then review it based on a two-pronged test of one, our performance on security and stability and two, a review of whether we were "providing registry services on reasonable prices terms and conditions."

And a standard applied for these tests was called the public interest standard and then DOC's consent to the COM Registry Agreement renewal following this review was required. So, they have to consent to what we had done with ICANN.

Amendment 35 founded in the public interest to allow the following; first one for us to raise .com registration and renewal prices 7% in the back four years of each six-year period; two, that the restriction on vertical integration was only intended to apply to .com; three, that the review process is now streamlined such that any NTIA review any DOC review and consent is no longer required provided that the COM Registry Agreement has not changed pricing from what's now allowed, specifically, the 7% noted -- I noted a minute ago. Also that the performance specs or SLAs in the COM Registry Agreement that we have to perform to have not been changed and also that we've not changed the vertical integration restriction on COM and that we have not changed the renewal or termination terms of the COM Registry Agreement; and five, that there's been no changes to the WHOIS services.

Given all of those then consent from the NTIA or DOC to the renewal of the COM Registry Agreement is not required if these terms are not changed. So, further in such a case and absent any VeriSign and DOC mutually agreed changes, the Cooperative Agreement will automatically renew, again, without reviewing consent as is for another six-year term.

So, one could see the Cooperative Agreement will automatically renew again without reviewing consent as is for another 6-year term. So one could see the Cooperative Agreement now as evergreen without further review, given the terms stay the same. NTIA has also a right to terminate the Cooperative Agreement on 120 days' notice before the end of the term.

So there is one other change which is that VeriSign agrees to quote, continue to operate the .com registry in a content-neutral manner, which of course we've always done. So that's basically Amendment 35 and what will be different for us although of course parts of the Cooperative Agreement including earlier amendments that had to be modified or deleted to make Amendment 35 work were also changed. But essentially that's it. Long answer sorry about that but...

### **Sterling Auty**

That's okay. But two -- I know these calls are relatively short typically so I'm going to take the opportunity to ask a couple of questions to follow up on it. The first one is, so the Cooperative Agreement has changed, but I haven't seen any news. Do you have to go back and actually refresh or change the .com Registry Agreement to now incorporate the same pricing parameters that's there in Item 35? Or is that kind of already de facto happened because of what you did with Item 35?

### **Jim Bidzos**

Well historically and in this case as well there is a process for that. There's a process for moving changes from the DOC to the Cooperative Agreement into the .com Registry Agreement. ICANN has historically as I mentioned deferred to the U.S. government on matters relating to com pricing.

But ICANN and VeriSign have an agreement to cooperate and negotiate -- there's a written agreement to operate -- cooperate and negotiate in good faith to amend the com registry as may be necessary for consistency with changes to the Cooperative Agreement.

So we have begun that process with ICANN to amend the agreement to make these changes including pricing. And I don't think I can comment further to process. We've been through it a few times. It may take a number of months to work through it, but we'll update you as appropriate.

### **Sterling Auty**

All right, great. And then on the vertical integration, the way that I read that if we look back through the history of Network Solutions to VeriSign to where you are today once upon a time you were both registry and registrar. This appears to open up the ability for you to be a registrar as long as it's not for .com. Is this indicating that you would be interested in entering and becoming a registrar again, perhaps for the .web?

### **Jim Bidzos**

Well first of all it was -- as I mentioned earlier this is a clarification that, that restriction only applies to .com. So .web or any other services that we offer technically are no longer covered with this modification.

How that language would apply to our business, how we would use it, how it stands today? I think it's too early to say how that flexibility might be applied, if it's applied. But that clarification is now made and the vertical integration restriction only applies to .com.

And you're right, we did have both when we acquired Network Solutions in June of 2000. And then I think it was in 2003 or early 2004 we sold off the registrar. But I think at that time the agreement read that VeriSign couldn't be vertically integrated. And I think at that time VeriSign and .com were entirely synonymous, so this clarifies that and it applies -- the restriction only applies to .com, and as I said, too early to say how or if we'll use that flexibility.

### **Sterling Auty**

All right, great. Let me turn it over. And I will hop back in queue. Thank you.

### **Jim Bidzos**

I am sorry.

### **Sterling Auty**

I was saying, thank you I will turn the call over to next question.

## **Operator**

And it looks like our last question will come from Rob Oliver with Baird.

## **Matt Lemenager**

Thanks. It's Matt Lemenager on for Rob tonight. Guys, is there any update on .web kind of what are the remaining steps there? I know that's a process. Could you kind of help us understand what the remaining steps would be there? And then secondly on .web, what type of factors are you using to evaluate potential pricing there and what that might look like? Because I think we understand, it can be unlimited or I guess unrestricted and you can charge premium pricing like you've talked about in the past. So are there any examples of what you're using to evaluate what that premium pricing might look like?

## **Jim Bidzos**

Thanks for the questions. So, first of all, the update that I can offer since we last spoke on the process towards delegation of .web is that one of the losing bidders in the .web auction a company named Afilias who is one of our competitors has filed an arbitration against ICANN trying to continue to delay the process. We are not parties to that arbitration yet, but we are actively seeking to join and participate in it. About your question, about pricing and what we might do two parts to that answer.

Number one is, yes .web is not a regulated TLD like .com is or even like .net is. It's a TLD that would be operating under the new form the new so-called New gTLD Registry Agreement. And those agreements do not limit pricing similar to our IDNs, which are also signed up to the same form of agreement. They only require 6-month notice for any price change, but they provide complete pricing flexibility. As to what we would do, how we would do premium pricing, how we would price .web, how we're thinking about it, I think it's very premature at this stage really to say anything.

And it just occurs to me too that back to Sterling's second question, he asked about, how we would use vertical integration, just to be complete. That ICANN process of incorporating all the Amendment 35 changes into the .com Registry Agreement pricing et cetera also applies to these other changes the clarification of what vertical integration restriction actually exists et cetera, so all that is subject to completing this process with ICANN that I described earlier.

And I apologize I'd like to tell you more about .web, but it's just premature to talk about what we would do or how we're thinking about that at this point. But your assumptions about the flexibility that .web would offer based on the agreement, it would operate under are correct. It would not be restricted and we'd have flexibility to price premiums or whichever way we chose.

**Matt Lemenager**

Okay. That's helpful color. And then on the -- the next one's kind of high level. But so the domain name base for growth for 2019 the 2.25% to 4.25%, what could you tell us about what geographies are North America or international? Not looking for specific numbers or anything, but what kind of pockets of strength are you expecting there? Or which parts might be more of a headwind? Anything just directionally, no specific numbers, but what markets kind of look like they might be driving that?

**George Kilguss**

Well what I can tell you Matt is that in 2018 as we've been talking about all year, we've seen good growth from registrars in both the U.S. registrars, in both registrars located over in the China market. So those at least in 2018 have been good markets for us for growth. As you talk about 2019, obviously we're a global business. We factor a lot of things going on into our range. But we still expect as you -- as we talked about the domain name base to grow between 2.25% up to 4.25%. So just exactly where that growth is, I mean we're not giving a specific guidance there but we do see that there's been a good growth this year and we're looking for growth in the range that we outlined in our guidance.

**Matt Lemenager**

Okay. Sounds good. Thanks guys. I'll turn it back over to Sterling

**Operator**

And it looks like we will be taking our final questions a follow-up from Sterling with JPMorgan.

**Sterling Auty**

Thanks. We could just do this as an open forum and go back and forth. Just a couple

more. I wanted to ask, I get a number of questions actually on the cash taxes and the cash tax rate. So if I just do the simplistic and look at the cash taxes here for 2019, how should we think about -- actually maybe I'll just leave it to you, how should we think about the cash tax rate both in 2019 and going forward? Is this structural and it can maintain this rate? Or should it elevate to some other level? And what would be the driving factors to that?

### **George Kilguss**

Yeah, thanks for that Sterling. So as you know in 2018, cash taxes were about \$85 million and that translates to about 12% effective cash tax rate and that's compared to our GAAP taxes of about \$147 million, which if you do that math that translated into an effective tax rate of about in the low-20% range.

So for 2019 as you know we've guided cash taxes to be between \$95 million to \$115 million. And if you do that math that still would be below our GAAP effective tax rate. And that's the result because we're still using up some foreign tax credits and state NOLs. And while we don't provide a long-term cash tax rate, we do expect our cash tax effective rate to accrete closer up to our GAAP effective rate over the next few years as we fully utilize those remaining attributes.

### **Sterling Auty**

Excellent. And then the last one for me. You increased the share repurchase. I missed what you said. How much was left at the end of the quarter for repurchase before you went to the -- to \$1 billion? And what was the thought in terms of the timing of now to expand? Because a lot of people wonder if you would lever up again and maybe get even more aggressive on the repurchase front?

### **George Kilguss**

So, before we went back for authorization, we were just under \$400 million remaining under that program before we went to the board and had it reauthorized up to \$1 billion.

### **Sterling Auty**

All right. Great. And then just that last part of it. Maybe an update on what your thought is around optimal capital structure the potential to maybe add debt and be a little bit more aggressive this year within that buyback.

### **George Kilguss**

Yeah. As you know, Sterling we constantly review the needs of the business and we try to make our decisions that are in the best interest of the company. And as we've talked about many times that's a pretty active process we go through each quarter. Jim and I sit down and look at the specific needs. We don't have a specific leverage target that we manage to. We try to use our protect grow and manage framework to make sure that we're maintaining the optimal level of liquidity.

At present, we're looking ahead to what investment opportunities we need to make the business grow and then we're thinking about what the appropriate return of capital is to shareholders. And so, I don't really have anything to report at this time. We continue to look at the marketplace and then what the needs of the business are and we'll continue to do that in a very active fashion.

### **Jim Bidzos**

Yes and Sterling, Jim here. I would just add too that Amendment 35 was a significant event for us and in 2018 and it does afford us additional flexibility in a number of different areas, and I think we've certainly talked about that enough. But just fully understanding it, and factoring it into our strategic thinking. I think is just something that we do need to consider. And so that's a process that's underway too. So, as George said there's just really nothing specific to say about at this point.

### **Sterling Auty**

All right. Sounds good. Thank you, guys.

### **Jim Bidzos**

Thanks.

### **Operator**

And ladies and gentlemen, with no further questions. I'd like to turn the call back over to David Atchley for any final remarks.

### **David Atchley**

Thank you, operator. Please call the Investor Relations department with any follow-up questions from this call. Thank you for your participation. This concludes our call. Have a good evening.



good evening.

**Operator**

And once again, ladies and gentlemen, that concludes our call for today. Thank you for joining us. You may now disconnect.

JOIN THE CONVERSATION

**LEGAL AUTHORITY CA-11**

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

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In the Matter of an Independent Review Process

Between:

Booking.com B.V.

*Applicant*

-and-

ICDR Case No: 50-20-1400-0247

Internet Corporation for Assigned Names  
and Numbers (ICANN)

*Respondent*

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FINAL DECLARATION

The Panel:

Hon. A. Howard Matz

David H. Bernstein, Esq.

Stephen L. Drymer (Chair)

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## DECLARATION

WE, THE UNDERSIGNED PANELISTS, members of the Independent Review Process Panel (“**IRP Panel**” or “**Panel**”), having been designated in accordance with ICANN Bylaws dated 11 April 2013, hereby issue the following Final Declaration (“**Declaration**”):<sup>1</sup>

### I. INTRODUCTION

1. This Declaration is issued in the context of an Independent Review Process (“**IRP**”) as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“**ICANN**”; “**ICANN Bylaws**” or “**Bylaws**”). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 (“**ICDR**”; “**ICDR Rules**”) as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (“**Supplementary Procedures**”).
2. The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains (“**gTLDs**”, also known as gTLD “**strings**”) are applied for, reviewed and delegated into the Internet’s domain name system (“**DNS**”) root zone.
3. As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com’s applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN’s Articles of Incorporation, Bylaws and gTLD Applicant Guidebook (“**Guidebook**”).
4. Reading between the lines of the parties’ submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN’s guiding principles – transparency and fairness – as applied to one of ICANN’s most essential activities – the delegation of new gTLDs<sup>2</sup> – in circumstances in which various members of the Internet community, including certain members of the ICANN Board’s New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

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<sup>1</sup> As requested by the ICDR, the Declaration was provided to the ICDR in draft form on 26 January 2015 for non-substantive comments on the text (if any). It was returned to the Panel on 2 March 2015.

<sup>2</sup> As stated in the very first sentence of the Guidebook: “New gTLDs have been in the forefront of ICANN’s agenda since its creation.”

present Declaration, in accordance with, and within the constraints of the Bylaws, the ICDR Rules and the Supplementary Procedures.

## II. THE PARTIES

### A. The Applicant: Booking.com

5. The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as “the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations.”<sup>3</sup> Booking.com’s primary focus is on the U.S. and other English-language markets.
6. Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

### B. The Respondent: ICANN

7. The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN’s mission is “to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN describes itself as “a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants.”<sup>4</sup>
8. ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

## III. FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

9. We recount here certain uncontested elements of the factual and procedural background to the present IRP. Other facts are addressed in subsequent parts of the Declaration, where the parties’ respective claims and the Panel’s analysis are discussed.

### A. ICANN’s Adoption of the New gTLD Program and the Applicant Guidebook

10. Even before the introduction of ICANN’s New gTLD Program (“**Program**”), in 2011, ICANN had, over time, gradually expanded the DNS from the original six gTLDs (.com; .edu; .gov; .mil; .net; .org) to 22 gTLDs and over 250 two-letter country-code TLDs.<sup>5</sup> Indeed, as noted above, the introduction of new gTLDs has been “in the forefront of ICANN’s agenda” for as long as ICANN has existed.

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<sup>3</sup> Request, ¶ 10.

<sup>4</sup> Response, ¶ 11-12.

<sup>5</sup> Request, ¶ 12; see also Guidebook, *Preamble*.

11. The Program has its origins in what the Guidebook refers to as “carefully deliberated policy development work” by the ICANN community.<sup>6</sup>
12. In 2005, ICANN's Generic Names Supporting Organization (“GNSO”), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.<sup>7</sup> As noted in the Guidebook:
 

*Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.*
13. In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.
14. In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.<sup>8</sup> As explained in the Guidebook, ICANN's work next focused on implementation of these recommendations, which it saw as “creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”<sup>9</sup>
15. This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.<sup>10</sup>
16. As described by ICANN in these proceedings, the Program “constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include

<sup>6</sup> Guidebook, *Preamble*

<sup>7</sup> Request, ¶ 13, Reference Material 7, “Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), <http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR>; Reference Material 8, “GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005) at pp. 3-4. See also Guidebook, *Preamble*. Booking.com refers to the GNSO as “ICANN's main policy-making body for generic top-level domains”. Article X of ICANN's Articles of Incorporation provides: “There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains” (Section 1); the GNSO shall consist of “a number of Constituencies” and “four Stakeholder Groups” (Section 2).

<sup>8</sup> Guidebook, *Preamble*. A review of this policy process can be found at <http://gns0.icann.org/issues/new-gtlds> (last accessed on January 15, 2015).

<sup>9</sup> Guidebook, *Preamble*: “This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook.”

<sup>10</sup> RM 10 (ICANN resolution). The Guidebook (in its 30 May 2011 version) is one of seven “elements” of the Program implemented in 2011. The other elements were: a draft communications plan; “operational readiness activities”; a program to ensure support for applicants from developing countries; “a process for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the [Program]”; budgeted expenditures; and a timetable.

enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ...”<sup>11</sup>

17. The Guidebook is “continuously iterated and revised”, and “provides details to gTLD applicants and forms the basis for ICANN’s evaluation of new gTLD applications.”<sup>12</sup> As noted by Booking.com, the Guidebook “is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”<sup>13</sup>

#### **B. Booking.com’s Application for .hotels, and the Outcome**

18. In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.
19. At the same time, Despegar Online SRL (“Despegar”), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.
20. “Hoteis” is the Portuguese word for “hotels”.
21. According to Booking.com, Despegar is “a competitor of Booking.com”.<sup>14</sup> Booking.com claims that it intends “to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,”<sup>15</sup> while Despegar similarly intends .hoteis to be dedicated primarily to “individuals that are interested in, and businesses that offer, hotel- and travel-related content.”<sup>16</sup> That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD “on the U.S. (with its strongly Anglo-Saxon traditions) and other English-language markets,”<sup>17</sup> whereas Despegar intends to target “Portuguese-speaking” markets.”<sup>18</sup>
22. As part of the Initial Evaluation to which all applied-for gTLDs were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

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<sup>11</sup> Response, ¶ 14.

<sup>12</sup> Response, ¶ 14. The resolution (RM 10) adopting the Guidebook explicitly “authorizes staff to make further updates and changes to the Applicant Guidebook as necessary and appropriate, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process, and to prominently publish notice of such changes.”

<sup>13</sup> Request, ¶ 13. See also Guidebook, Module 1-2: “This Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

<sup>14</sup> Request, ¶ 17.

<sup>15</sup> Request, ¶ 5.

<sup>16</sup> Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

<sup>17</sup> Request, ¶ 16.

<sup>18</sup> Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2 ), § 18(a).



String Similarity Panel (“**SSP**”) selected and engaged by ICANN for this purpose. (Extracts of the relevant provisions of the Guidebook can be found below, at Part IV of this Declaration.) ICANN engaged InterConnect Communications Ltd. (“**ICC**”), a company registered under the law of England and Wales, specializing in communications sector strategy, policy and associated regulatory frameworks,<sup>19</sup> in cooperation with University College London, to act as the SSP.

23. On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two “non-exact match” contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.<sup>20</sup> Booking.com’s applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.
24. The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

*After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.*

*Due to this finding, the ... two strings have been placed in a contention set.*<sup>21</sup>

25. The impact of being put into a contention set is that the proposed strings in the set will not be delegated in the root zone unless and until the applicants reach agreement on which single string should proceed (with the other proposed string therefore rejected), or until after an auction is conducted, with the highest bidder being given the right to proceed to the next step in the review process.

### **C. DIDP Request and Request for Reconsideration**

26. On 28 March 2013 Booking.com submitted a request for information under ICANN’s Documentary Information Disclosure Policy (“**DIDP Request**”) asking for “all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar.”<sup>22</sup>
27. On the same date, Booking.com also filed a formal Request for Reconsideration (“**Request for Reconsideration**”). The “specific action(s)” that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

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<sup>19</sup> See <http://www.icc-uk.com/>

<sup>20</sup> Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a “non-exact match” connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another 752 applied-for gTLDs were put into 230 identical contention sets.

<sup>21</sup> Request, Annex 3, ICANN letter dated 26 February 2013.

<sup>22</sup> Request, ¶ 30 and Annex 3.

provide a “detailed analysis or a reasoned basis” for the decision to place .hotels in contention.<sup>23</sup>

28. ICANN responded to the DIDP Request on 27 April 2013. Although ICANN provided certain information regarding the review process, in its response to the DIDP Request, ICANN also noted:

*The SSP is responsible for the development of its own process documentation and methodology for performing the string similarity review, and is also responsible for the maintenance of its own work papers. Many of the items that are sought from ICANN within the [DIDP] Request are therefore not in existence within ICANN and cannot be provided in response to the DIDP Request. ICANN will, however, shortly be posting the SSP's String Similarity Process and Workflow on the New gTLD microsite ...*<sup>24</sup>

29. By letter dated 9 May 2013 Booking.com replied to ICANN, writing that “ICANN's response fails to provide any additional information or address any of Booking.com's concerns as conveyed in its DIDP Request or Request for Reconsideration.”<sup>25</sup> On 14 May 2013, ICANN answered that it “intends to post the string similarity process documentation on or before ... 17 May 2013.”<sup>26</sup> ICANN further informed Booking.com that “ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration.”<sup>27</sup>
30. On 7 June 2013, ICANN published the “String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description” (“**SSP Process Description**”).<sup>28</sup>
31. On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that “the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration.” The letter concluded by stating: “Considering ICANN's obligations of transparency and accountability, there cannot be any ‘compelling reason for confidentiality’.

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<sup>23</sup> Request, Annex 12, §3. The Request for Reconsideration (which appears to be in the form of a template) expressly states at §2 that it is a “Request for Reconsideration of ... Staff [vs. Board] action/inaction.” The cover letter attaching the Request states that, “[d]espite the fact that the origin of the decisions is unclear, this Reconsideration Request is being submitted as a reconsideration of a ‘Staff action’. In the event that the decisions referenced above are determined to be a ‘Board action’, this request may be amended.” As explained below, the Request for Reconsideration was amended on 7 July 2013. That amendment did not alter the stated nature of the request in §2 or the description of the specific actions that Booking.com sought to have reconsidered (§3). Unless otherwise indicated, all further references in this Declaration to the Request for Reconsideration are understood to be the *amended* Request for Reconsideration.

<sup>24</sup> Request, Annex 5.

<sup>25</sup> Request, Annex 6.

<sup>26</sup> Request, Annex 7.

<sup>27</sup> Request, Annex 7.

<sup>28</sup> Request, Annex 8.

And ... there are numerous compelling reasons for publication of [the information requested by Booking.com].<sup>29</sup>

32. ICANN responded on 25 July 2013, explaining among other things that “the evaluation of the .hotels string by the SSP panel was performed according to the [SSP Process Description] ...” and “[t]he SSP’s work was subjected to quality review, as has been publicly discussed.”<sup>30</sup> Approximately six months later, on 9 January 2014, ICANN posted a letter dated 18 December 2013 addressed to ICANN by the SSP Manager at ICC (Mr. Mark McFadden) providing a further “summary of the process, quality control mechanisms and some considerations surrounding the non-exact contention sets for the string similarity evaluation ...” (“**SSP Manager’s Letter**”).<sup>31</sup> According to that Letter:

*When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:*

- *Strings of similar visual length on the page;*
- *Strings within +/- 1 character of each other;*
- *Strings where the majority of characters are the same and in the same position in each string; and*
- *The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*

*o For example m~m & l~i*

33. Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: “Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013.”<sup>32</sup>
34. By virtue of Article IV, Section 3 of the Bylaws, ICANN’s Board Governance Committee (“**BGC**”) is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board’s New gTLD Program Committee (“**NGPC**”) receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com’s Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC “conclude[d] that Booking.com has not

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<sup>29</sup> Request, Annex 9.

<sup>30</sup> Request, Annex 10.

<sup>31</sup> Request, Annex 11.

<sup>32</sup> Request, Annex 13.

stated proper grounds for reconsideration and we therefor recommend that Booking.com's request be denied" ("**BGC Recommendation**").<sup>33</sup>

35. At a telephone meeting held on 10 September 2013 the NGPC, "bestowed with the powers of the Board", considered, discussed and accepted the BGC Recommendation. Booking.com's Request for Reconsideration was denied.<sup>34</sup>

#### **D. The Cooperative Engagement Process**

36. Booking.com thereafter filed a request for a Cooperative Engagement Process ("**CEP**") on 25 September 2013, with a view to attempting to reach an amicable resolution of its dispute with ICANN. In its CEP request, Booking.com wrote:

*Booking.com is of the opinion that Resolution 2013.09.10.NG02 [the Board resolution denying its Request for Reconsideration] violates various provisions of ICANN's Bylaws and Articles of Incorporation. In particular Booking.com considers that ICANN's adoption of [the Resolution] is in violation of Articles I, II(3), II and IV of the ICANN Bylaws as well as Article 4 of ICANN's Articles of Incorporation. In addition, Booking.com considers that ICANN has acted in violation of Articles 3, 5, 7 and 9 of ICANN's Affirmation of Commitment ...*<sup>35</sup>

37. The CEP ultimately did not result in a resolution, and Booking.com duly commenced the present IRP.
38. One further point should be made, here, prior to describing the commencement and conduct of the present IRP proceedings: The determination by the SSP that .hotels and .hoteis are so visually similar as to give rise to the probability of user confusion, and the resulting placement of those applied-for strings into a contention set, does *not* mean that Booking.com's application for .hotels has been denied or that .hotels will not proceed to delegation to the root zone. Rather, as noted above and explained in the extracts from the Guidebook reproduced below, the Guidebook establishes a process for resolving such contention, under which the applicants for the contending strings in the set – here, Booking.com and Despegar – may resolve the contention by negotiation, failing which the matter will proceed to auction. Ultimately, no matter the outcome of these IRP proceedings, Booking.com may yet be successful and .hotels may yet be delegated into the Internet root zone. However, the fact that .hotels has been put into a contention set does raise the risk that .hotels may never be delegated into the root zone, or that it may be more costly for Booking.com to obtain approval of its proposed string. It also has caused a significant delay in the potential delegation of the string into the root zone (which could prove to be detrimental to the ultimate success of Booking.com's proposed string if other applicants

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<sup>33</sup> Request, Annex 14, BGC Recommendation dated 1 August 2013, p.9. See also Request, Annex 15, NGPC Resolution dated 10 September 2013. As noted in footnote 1 to the BGC Recommendation, the Recommendation was ultimately finalized and submitted for posting on 21 August 2013.

<sup>34</sup> Request, Annex 15, NGPC Resolution dated 10 September 2013.

<sup>35</sup> Request, Annex 17.

whose strings were not put into a contention set are able to establish themselves as pioneer providers of hotel- and travel-related services under a different new gTLD).

#### **E. The IRP Proceedings**

39. On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process (“**Request**”) accompanied by numerous supporting documents and reference materials.
40. In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.
41. On 25 April 2014, ICANN submitted a Response to ICANN’s Request with supporting documents (“**Response**”).
42. The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.
43. On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer’s appointment became effective and the Panel was duly constituted as of 1 August 2014.
44. On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.
45. On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.<sup>36</sup>
46. In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN’s Response, accompanied by additional documents (“**Reply**”).

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<sup>36</sup> Paragraph 6 of Procedural Order No. 1 provided that, in its forthcoming Reply to ICANN’s Response, “Booking.com shall only address two issues raised in Respondent’s Response: (1) the nature and scope of the IRP requested; (2) the nature of the relief sought by Claimant.” Paragraph 7 of Procedural Order No. 1 provided that “Respondent’s Sur-Reply ... shall address only the issues raised in the Reply.”

47. In accordance with the Procedural Timetable, ICANN submitted a Sur-Reply on 20 November 2014 (“**Sur-Reply**”).

#### **F. The Hearing**

48. As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.
49. In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties’ extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists’ questions.
50. Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.
51. As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

### **IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS**

52. We set out here the key elements of ICANN’s Articles of Association, Bylaws and policies on which the parties rely in their submissions and to which the Panel will refer later in this Declaration.

#### **A. Articles of Association**

*4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.*

*[Underlining added]*

#### **B. Bylaws**

##### **ARTICLE I: MISSION AND CORE VALUES**

###### *Section 1. MISSION*

*The mission of The Internet Corporation for Assigned Names and Numbers (“ICANN”) is to coordinate, at the overall level, the global Internet’s systems of unique identifiers,*

*and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.*

*[...]*

## *Section 2. CORE VALUES*

*In performing its mission, the following core values should guide the decisions and actions of ICANN:*

- 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
- 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
- 5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
- 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

*These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN*

body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[...]

### **ARTICLE III: TRANSPARENCY**

#### Section 1. PURPOSE

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.

[...]

### **ARTICLE IV: ACCOUNTABILITY AND REVIEW**

#### Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

#### Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

a. one or more staff actions or inactions that contradict established ICANN policy(ies); or

b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

a. evaluate requests for review or reconsideration;



- b. summarily dismiss insufficient requests;
- c. evaluate requests for urgent consideration;
- d. conduct whatever factual investigation is deemed appropriate;
- e. request additional written submissions from the affected party, or from other parties;
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

[...]

### Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?

[...]

11. The IRP Panel shall have the authority to:

- a. *summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;*
- b. *request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;*
- c. *declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and*
- d. *recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;*
- e. *consolidate requests for independent review if the facts and circumstances are sufficiently similar; and*
- f. *determine the timing for each proceeding.*

[...]

14. *Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. [...]*

15. *Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. [...]*

16. *Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.*

[...]

18. *The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.*

[Underlining added]

53. Lest there be any misunderstanding as regards the proper subject matter of IRP proceedings or the role of the Panel, we note that, as was clearly established during the hearing, it is common ground between the parties that the term “action” (or “actions”) as used in Article IV, Section 3 of the Bylaws is to be understood as action(s) or inaction(s) by the ICANN Board. The Panel observes that this understanding comports not only with the provisions of Article

IV, Section 2 of the Bylaws concerning “Reconsideration”, which expressly refer to “actions or inactions of the ICANN Board”, but with the clear intent of Section 3 itself, which stipulates at sub-section 11 that “[t]he IRP Panel shall have the authority to: ... (c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.”

### C. The gTLD Applicant Guidebook

54. As noted above and as understood by all, the Guidebook is (to borrow Booking.com’s phrase) “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”<sup>37</sup>
55. The Guidebook is divided into “Modules”, each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled “Introduction to the gTLD Application Process,” provides an “overview of the process for applying for a new generic top-level domains.”<sup>38</sup> Module 2, titled “Evaluation Procedures,” describes the “evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation.”<sup>39</sup> Module 4, titled “String Contention Procedures,” concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.”

#### (i) *Initial Evaluation*

56. As explained in Module 1, “[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness.”<sup>40</sup> Initial Evaluation begins “immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation.”<sup>41</sup>
57. Initial Evaluation is comprised of two main elements or types of review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

#### (ii) *String Review, including String Similarity Review*

58. String review is itself comprised of several components, each of which constitutes a separate assessment or review of the applied-for gTLD string, conducted by a separate reviewing body or panel. As explained in Module 2:

*The following assessments are performed in the Initial Evaluation:*

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<sup>37</sup> Request, ¶ 13.

<sup>38</sup> Module 1-2. Each Module of the Guidebook is paginated separately. “Module 1-2” refers to Guidebook Module 1, page 2.

<sup>39</sup> Module 2-2.

<sup>40</sup> Guidebook, §1.1.2.2: “Administrative Completeness Check”, Module 1-5.

<sup>41</sup> Guidebook, §1.1.2.5: “Initial Evaluation”, Module 1-8 (underlining added).

- *String Reviews*
  - *String similarity*
  - *Reserved names*
  - *DNS stability*
  - *Geographic names*

[...]

*An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.*<sup>42</sup>

59. As indicated, all complete applications are subject to Initial Evaluation, which means that all applied-for gTLD strings are subject to string review. String review is further described in Module 2 as follows:

*[String review] focuses on the applied-for gTLD string to test:*

- *Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;*
- *Whether the applied-for gTLD string might adversely affect DNS security or stability; and*
- *Whether evidence of requisite government approval is provided in the case of certain geographic names.*<sup>43</sup>

60. The various assessments or reviews (i.e., string similarity, reserved names, DNS stability, etc.) that comprise string review are elaborated at Section 2.2.1 of Module 2. As mentioned, the most relevant of these reviews for our purposes is *string similarity review*, which is described in detail at Section 2.2.1.1. Because of the central importance of the string similarity review process in the context of the present dispute, this section of the Guidebook is reproduced here at some length:

#### **2.2.1.1 String Similarity Review**

*This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.*

*Note: In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.*

<sup>42</sup> Module 2-2. The same is true of applicant review, which is also comprised of various assessments concerning the applicant entity.

<sup>43</sup> Guidebook, §2.2: “Initial Evaluation”, Module 2-4 (underlining added). See also Module 1-9: “String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS ...”

The visual similarity check that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review will be conducted by an independent String Similarity Panel.

#### **2.2.1.1.1 Reviews Performed**

The String Similarity Panel's task is to identify visual string similarities that would create a probability of user confusion.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

[...]

- Applied-for gTLD strings against other applied-for gTLD strings;

[...]

**Similarity to Other Applied-for gTLD Strings (String Contention Sets)** – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, the String Similarity Panel will create contention sets that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or similar to one another. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

[...]

#### **2.2.1.1.2 Review Methodology**

The String Similarity Panel is informed in part by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score will provide one objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review. However, it should be noted that the score is only indicative and that the final determination of similarity is entirely up to the Panel's judgment.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes. [footnote in the original: See <http://icann.sword-group.com/algorithm/>] Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

[...]

The panel will examine all the algorithm data and perform its own review of similarities between strings and whether they rise to the level of string confusion. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a common standard to test for whether string confusion exists, as follows:

**Standard for String Confusion** – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

#### **2.2.1.1.3 Outcomes of the String Similarity Review**

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation, and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.<sup>44</sup>

[Underlining added]

61. Module 4 of the Guidebook, as mentioned, concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.” As explained in Module 4:

#### **4.1 String Contention**

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called *contending strings*. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

<sup>44</sup> Module 2-5 to 2-9. As regards the concept of string contention, see also Guidebook, §1.1.2.10: “String Contention”, Module 1-13: “String contention applies only when there is more than one qualified application for the same or similar gTLD strings. String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.”

*(In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)*

#### **4.1.1 Identification of Contention Sets**

*Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.*

*Applications for identical gTLD strings will be automatically assigned to a contention set.*

*[...]*

*The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets ...*

*[...]*

*As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation [NB: community priority evaluation applies only to so-called “community” applications; it is not relevant here] or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.*

*[...]*

62. As provided in Module 4, the two methods relevant to resolving a contention such as between .hotels and .hoteis are *self-resolution* (i.e., an agreement between the two applicants for the contending strings) and *auction*:

#### **4.1.3 Self-Resolution of String Contention**

*Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.*

*Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications.*

*[...]*

#### **4.3 Auction: Mechanism of Last Resort**

*It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.*

63. Module 5 of the Guidebook, titled *Transition to Delegation*, describes “the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.”<sup>45</sup> Section 5.1 states:

*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>46</sup>

[Underlining added]

## V. SUMMARY OF THE PARTIES' POSITIONS

64. The following brief summary of the parties' respective positions is provided with a view solely to assisting the reader to understand the present Declaration. It is *not* intended to recapitulate – and it does not recapitulate – the entirety of the parties' allegations and arguments. Additional references to the parties' positions, including submissions made by them in the course of the proceedings, are contained in the discussion at Part VI below.

### A. Booking.com's position

#### *(i) The Panel's Authority*

65. Booking.com submits that the mandate of the Panel is “to determine whether the contested actions of the ICANN Board are consistent with applicable rules”.<sup>47</sup> According to Booking.com:

*The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN's Affirmation of Commitments, and both of which require compliance with inter alia International law and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.*<sup>48</sup>

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<sup>45</sup> Module 5-2.

<sup>46</sup> Module 5-4.

<sup>47</sup> Reply, ¶ 3.

<sup>48</sup> Reply, ¶ 3.



66. Booking.com submits that IRP panels have broad authority to evaluate actions of the ICANN Board. An overly restrictive interpretation of the standard of review, such as proposed by ICANN in these proceedings, would, says Booking.com, “fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability, as required by Article 9.1 of ICANN’s Affirmation of Commitments and ICANN’s core values.”<sup>49</sup>

**(ii) Booking.com’s Claims**

67. The purpose of the IRP initiated by Booking.com is, in its own words, “to challenge the ICANN Board’s handling of Booking.com’s application for the new gTLD .hotels.”<sup>50</sup> This includes the determination of the SSP to place .hotels and .hoteis in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up, implementation, supervision and review* of the entire of string similarity review process, and the Board’s alleged failure “to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination” throughout.<sup>51</sup>
68. In effect, Booking.com’s specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.
69. Booking.com professes that this case “is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]”; it is about “ICANN’s failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review.”<sup>52</sup>
70. Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook*. Rather, as indicated, it contests “the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board.”<sup>53</sup> Equally crucial, as will be seen, is Booking.com’s acknowledgment that *the established process was followed* in the case of the review of .hotels.

**a. The string similarity review process**

71. According to Booking.com, the problem began when the ICANN Board failed to “provide transparency in the SSP selection process,” in particular by failing “to make clear how

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<sup>49</sup> Reply, ¶ 6.

<sup>50</sup> Reply, ¶ 7.

<sup>51</sup> Reply, ¶ 15.

<sup>52</sup> Reply, ¶ 14.

<sup>53</sup> Reply, ¶ 17.

[ICANN] would evaluate candidate responses or how it ultimately did so.”<sup>54</sup> The problem was compounded by the selection of ICC/University College London to perform string similarity reviews as the independent SSP. In Booking.com’s words:

*[T]he identities of the unsuccessful candidates (if any) to perform the String Similarity Review remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ... There is no indication that any other candidate expressed an interest in performing the String Similarity Review. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the String Similarity Review? How did this impact on the discussions with InterConnect Communications? What are the terms of ICANN’s contract with InterConnect Communications?*<sup>55</sup>

72. Booking.com also faults ICANN for “allowing the appointed SSP to develop and perform an unfair and arbitrary review process”, specifically, by allowing the SSP “to perform the String Similarity Review (i) without any (documented) plan or methodology ... (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning ...”.<sup>56</sup>
73. Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager’s Letter (see Part III.C above) only long after the string similarity review process had ended.<sup>57</sup>
74. It also alleges that the factors identified in the SSP Manager’s Letter are “arbitrary and baseless ... not supported by any methodology capable of producing compelling and defensible conclusions ... [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data ... – to proceed while singling out .hotels/.hoteis.”<sup>58</sup> According to Booking.com: “The failure to take actual human performance into account is at odds with the standard for assessment, *i.e.*, the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN’s own policy.”<sup>59</sup>
75. Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.<sup>60</sup>
76. Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a “well-documented rationale” for each

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<sup>54</sup> Reply, ¶ 20.

<sup>55</sup> Reply, ¶ 20.

<sup>56</sup> Reply, ¶ 23.

<sup>57</sup> Reply, ¶ 24.

<sup>58</sup> Reply, ¶ 25.

<sup>59</sup> Reply, ¶ 25.

<sup>60</sup> Reply, ¶ 26-27.

SSP determination. In the absence of reasons for each string similarity determination, says Booking.com, “there is no basis on which decisions can be evaluated and, where appropriate, challenged.”<sup>61</sup>

77. Another ground for Booking.com’s challenge is the alleged failure by the ICANN Board to providing “effective supervision or quality control” of the SSP: “If nobody but the evaluator has any insight into how the evaluation was carried out, no effective quality control can be performed.”<sup>62</sup> Nor, according to Booking.com, does the quality review of the SSP’s work supposedly performed by JAS Advisers (the independent consultant engaged by ICANN for this purpose) overcome the problem of a lack of transparency:

*Booking.com is not aware that any selection process was put in place in relation to the appointment of JAS Advisors to perform the String Similarity Review quality control. No criteria for performing the quality control were published. When ICANN was looking for evaluators, no call for expressions of interest or similar document was issued for the selection of quality controllers.*<sup>63</sup>

78. In any case, says Booking.com, the “quality control review over a random sampling of applications to, among other things, test whether the process [set out in the Guidebook] was followed,” which ICANN claims was performed on the SSP’s work,<sup>64</sup> could not provide adequate quality control of the string similarity review process.<sup>65</sup> Finally, Booking.com argues that the arbitrary and unfair result of the string similarity review concerning .hotels – *i.e.*, the decision to place .hotels and .hoteis in contention – demonstrates that, “whatever quality control review ICANN may have engaged in ... must therefore have been deficient.”<sup>66</sup>

*b. The case of .hotels*

79. Booking.com argues, in part on the basis of expert evidence which it adduces in this IRP proceeding,<sup>67</sup> that “[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone ... The SSP could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings.”<sup>68</sup> It continues:

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<sup>61</sup> Reply, ¶ 28-29.

<sup>62</sup> Reply, ¶ 30.

<sup>63</sup> Reply, ¶ 31. Booking.com states that it “doubts” that any quality review was in fact performed, whether by JAS Advisers or any other entity.

<sup>64</sup> Response, ¶ 30.

<sup>65</sup> Reply, ¶ 34.

<sup>66</sup> Reply, ¶ 38.

<sup>67</sup> Request, Annex 20, Expert Report of Prof. Dr. Piet Desmet of the Faculty of Arts, Department of Linguistics of Leuven University, dated 10 March 2014. Portions of the work underlying Prof. Desmet’s report were performed by Dr. Emmanuel Keuleers, Research Fellow in the Department of Experimental Psychology at Ghent University.

<sup>68</sup> Request, ¶ 58.

*Since .hotels and .hoteis are not confusingly similar, the determination that they are is contradictory to ICANN policy as established in the Applicant Guidebook. Acceptance of the determination, and repeated failure to remedy the wrongful determination, is a failure to act with due diligence and independent judgment, and a failure to neutrally and fairly apply established policies as required by Bylaws and Articles of Incorporation.<sup>69</sup>*

80. According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to “individually consider a gTLD application”.<sup>70</sup>
81. Booking.com claims that its DIDP Request alerted the Board to the need to intervene to “correct the errors in the process” related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP’s review of .hotels, “giving the Board ample opportunity to correct those errors.”<sup>71</sup> Booking.com claims that the Board’s failure, when responding to the DIDP Request, “to offer any insight into the SSP’s reasoning”, its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that “the Reconsideration process ‘is not available as a mechanism to re-try the decisions of evaluation panels’”, and its failure to investigate Booking.com’s complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN’s governing rules regarding string similarity review.<sup>72</sup>
82. According to Booking.com, among the most compelling evidence of ICANN’s failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com’s Request for Reconsideration was denied.<sup>73</sup> Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.
83. In its written submissions Booking.com asks the Panel to grant the following relief:

*Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;*

*Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;*

*Awarding Booking.com its costs in this proceeding; and*

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<sup>69</sup> Request, ¶ 59.

<sup>70</sup> Reply, ¶ 39.

<sup>71</sup> Reply, ¶ 41.

<sup>72</sup> Reply, ¶ 41. In the passage of Booking.com’s submissions referred to here (as elsewhere), Booking.com speaks of violations of ICANN’s obligations of “due process”, which, it says, comprise concepts such as the right to be heard, the right to receive reasons for decisions, publicity, etc. For reasons explained in Part VI, below, the Panel prefers to use the terms *fairness* and *transparency* to connote the essence of ICANN’s obligations under review in this IRP.

<sup>73</sup> See Part II.C, above.

*Awarding such other relief as the Panel may find appropriate or Booking.com may request.*

84. At the hearing Booking.com *further* requested that the Panel not only require ICANN to disregard the SSP determination regarding .hotels/.hoteis, but also order ICANN to “delegate both .hotels and .hoteis.”

#### **B. ICANN’s position**

85. ICANN’s position is best summed up by ICANN itself:

*Booking.com’s IRP Request is really about Booking.com’s disagreement with the merits of the String Similarity Panel’s conclusion that .hotels and .hoteis are confusingly similar. But the Panel’s determination does not constitute Board action, and the Independent Review Process is not available as a mechanism to re-try the decisions of an independent evaluation panel. The IRP Panel is tasked only with comparing contested actions of the ICANN Board to ICANN’s Bylaws and Articles of Incorporation; it is not within the IRP Panel’s mandate to evaluate whether the String Similarity Panel’s conclusion that .hotels and .hoteis are confusingly similar was wrong.<sup>74</sup>*

86. According to ICANN, the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook.”<sup>75</sup>

##### ***(i) The Panel’s Authority***

87. Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.
88. As provided in Article IV, Section 3(4) of ICANN’s Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”<sup>76</sup>
89. ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific “standard of review” set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: “did the Board act without conflict of interest in taking its decision?”; “did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?”; and “did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?”<sup>77</sup>

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<sup>74</sup> Response, ¶ 9.

<sup>75</sup> Response, ¶ 8. Both parties agree that, as submitted by Booking.com, the “rules” at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook.

<sup>76</sup> See for example Response, ¶2, ¶ 9.

<sup>77</sup> Response, ¶ 2.

90. ICANN further asserts that the IRP process “is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,”<sup>78</sup> such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an “appeal mechanism” by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.<sup>79</sup>
91. In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN “reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set” and (as requested at the hearing) that ICANN “delegate both .hotels and .hoteis” – exceeds the authority of the Panel.<sup>80</sup>

***(ii) ICANN’s Response to Booking.com’s Claims***

***a. The string similarity review process***

92. According to ICANN, “[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for visual confusion;” and “[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook.”<sup>81</sup>
93. According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, “[t]his similarity review will be conducted by an independent String Similarity Panel,” not by ICANN itself. ICC was duly selected to perform the string similarity review further to “an open and public request for proposals,” pursuant to which, as the successful bidder, “ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook.”<sup>82</sup> ICANN emphasizes that “the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC’s results.”<sup>83</sup>
94. In ICANN’s submission, the alternative proposed by Booking.com, that “the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted,” is “untenable and is not supported by ICANN’s Bylaws or Articles.”<sup>84</sup> As noted by ICANN, the Guidebook defines six distinct

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<sup>78</sup> Response, ¶ 3.

<sup>79</sup> Response, ¶ 49.

<sup>80</sup> Response, ¶ 55.

<sup>81</sup> Response, ¶ 15 (underlining in original).

<sup>82</sup> Response, ¶ 16.

<sup>83</sup> Response, ¶ 17.

<sup>84</sup> Sur-Reply, ¶ 7.

review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.

95. ICANN submits that “there simply is no requirement – under ICANN’s governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes.”<sup>85</sup> It asserts that, consistent with well-settled legal principles, “neither ICANN’s Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity.”<sup>86</sup>
96. Moreover, ICANN asserts that “[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage.”<sup>87</sup>
97. ICANN claims that that Booking.com’s repeated invocation of the Board’s so-called obligation to ensure “due process” in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook “specifically affords any gTLD applicant a right to procedural ‘due process’ similar to that which is afforded in courts of law.”<sup>88</sup> Second, because ICANN conducts its activities in the public interest it nevertheless provides “more opportunity for parties to be heard and to dispute actions taken”<sup>89</sup> than most private corporate entities. Third, the “decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others.”<sup>90</sup> Fourth, and perhaps most importantly, “ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN’s stakeholders and the broader Internet community.”<sup>91</sup>
98. ICANN’s response to Booking.com’s various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP’s methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

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<sup>85</sup> Sur-Reply, ¶ 10.

<sup>86</sup> Sur-Reply, ¶ 10.

<sup>87</sup> Sur-Reply, ¶ 11. It was established during the hearing that the several references to this discretionary authority in ICANN’s written and oral submissions refer specifically to the authority conferred by Section 5.1 (Module 5-4) of the Guidebook.

<sup>88</sup> Sur-Reply, ¶ 18.

<sup>89</sup> Sur-Reply, ¶ 18.

<sup>90</sup> Sur-Reply, ¶ 18, fn 18.

<sup>91</sup> Sur-Reply, ¶ 18, fn 18.

be challenged by means of IRP proceedings; second, in any case, Booking.com's claims are *factually incorrect*, and there has been no violation of the Bylaws, Articles of Incorporation or Guidebook; third, Booking.com's claims are *time-barred* given that Article IV, Section 3(3) of the Bylaws requires that IRP requests "must be filed within thirty days of the posting of the minutes of the Board meeting ... that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."<sup>92</sup>

*b. The case of .hotels*

99. ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.
100. In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;<sup>93</sup> the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.<sup>94</sup>
101. According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar."<sup>95</sup>
102. In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.
103. ICANN asks the Panel to deny Booking.com's IRP Request.

## VI. ANALYSIS

### A. The Panel's Authority

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<sup>92</sup> Sur-Reply, ¶ 20-42.

<sup>93</sup> A number of these applications were subsequently withdrawn.

<sup>94</sup> Identical pairs, of course, received a score of 100% for visual similarity under the SWORD algorithm.

<sup>95</sup> Response, ¶ 53.



104. The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws. To recap, Article IV, Section 3 of the Bylaws provides:

*4. [The IRP Panel] shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

- a. did the Board act without conflict of interest in taking its decision?;*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?*

*[...]*

- 11. The IRP Panel shall have the authority to:*

*[...]*

- c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and*
- d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;*

*[...]*

- 18. [...] The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties [...]*

*[Underlining added]*

105. Similarly, Article 8 of the Supplementary Procedures reads:

**8. Standard of Review**

*The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

*If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.*

106. There is no dispute as regards the Panel's duty to compare the actions of the Board to ICANN's Articles of Incorporation and Bylaws (and, in this case, Guidebook) with a view to

declaring whether those actions are inconsistent with applicable policies. Where the parties disagree is with respect to the standard of review to be applied by the Panel in assessing Board conduct.

107. ICANN submits that its Bylaws “specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board ... the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”<sup>96</sup> Booking.com argues that this “is simply wrong. No such specification is made in ICANN’s Bylaws or elsewhere, and a restrictive interpretation of the standard of review would ... fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability.”<sup>97</sup>
108. In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed “[a]ny ICANN body making a recommendation or decision”) shall itself “determine which core values are most relevant and how they apply to the specific circumstances of the case at hand.”
109. In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.
110. There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN’s actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.
111. Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with “objectively” determining whether

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<sup>96</sup> Response, ¶ 24.

<sup>97</sup> Reply, ¶ 6.

or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness.

112. In the only other IRP of which the Panel is aware in which such questions were addressed in a published decision, the distinguished members of the IRP panel had this to say about the role of an IRP panel, and the applicable standard of review, in appraising Board action:

*The Internet Corporation for Assigned Names and Numbers is a not-for profit corporation established under the law of the State of California. That law embodies the 'business judgment rule'. Section 309 of the California Corporations Code provides that a director must act 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...' and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In 'recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization' – including ICANN – ICANN is charged with 'promoting the global public interest in the operational stability of the Internet...' ICANN 'shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...' Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International [sic] Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.<sup>98</sup>*

[Underlining added.]

113. While on no way bound by that decision, we agree with its conclusions in this respect.
114. At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

<sup>98</sup> ICDR Case No. 50 117 T 00224 08, *ICM Registry, LLC v. ICANN*, Declaration dated 19 February 2010 ("*ICM Registry*"), ¶ 136.

the *ICM Registry* matter called an “objective” appraisal of Board conduct as measured against the policies and rules set out in those instruments; all agree that it is the Articles, Bylaws and Guidebook which are determinative.

115. That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an “IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.” In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves<sup>99</sup>), but merely to apply them to the facts.
116. With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

#### **B. The String Similarity Review Process**

117. The Panel is not unsympathetic to Booking.com’s complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully “heard” on the substantive question of the similarity of their applied-for gTLD strings to others.
118. Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board’s New gTLD Program Committee which voted to accept the BGC’s Recommendation to deny Booking.com’s Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC’s 10 September 2013 meeting:<sup>100</sup>

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<sup>99</sup> As discussed in more detail in the following section (at para. 117 and following) and again at Part IV of this Declaration, the important questions that Booking.com highlights in its pleadings, as to whether the string similarity review process is consistent with ICANN’s guiding principles of transparency and fairness, and regarding the published views of various members of ICANN’s NGPC in this respect, are matters which the ICANN Board, in its discretion, may wish to consider on its own motion in the context of the present case, in accordance with its authority under Section 5.1 (Module 5-4) of the Guidebook, or when it issues the Guidebook for round two of the New gTLD Program. Those questions include a lack of clarity surrounding the way in which the string similarity review is conducted by the SSP, and the absence of any means for applicants to be heard in the string similarity review process where they may have evidence to adduce or arguments to make (such as the evidence and arguments presented by Booking.com to this Panel), which could in fact be relevant to the SSP’s determination.

<sup>100</sup> Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although “he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN’s ... and the user’s best interests.”
  - Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation “because there was not sufficient rationale provided for why the string similarity review panel made its determination.”
  - In response to a comment by the Chair that the Request for Reconsideration deserved to be denied “[b]ecause the process was followed,” Mr. Ray Plzak “agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don’t agree with the outcome to make an objection, other than using a Reconsideration Request.”
  - Mr. Plzak “recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits.”
  - Ms. Madruga-Forti agreed and “recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted.”
  - Mr. Bill Graham also agreed with Mr. Plzak’s suggestion, and noted that “generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members.”
  - The Chair “agreed with [Mr. Graham’s] sentiment.”
  - The General Counsel and Secretary noted that ICANN ... “has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns.”
119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC’s Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:
- Mr. Plzak stated that he abstained from voting “because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process.”
  - Ms. Madruga-Forti stated that:

*[T]he BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to*

*establish a better record of the rationale of the string similarity review panel in circumstances such as this.*

- Mr. Kuo-Wei Wu agreed with Ms. Madruga-Forti's and Mr. Plzak's voting statements.
- Mr. Sadowsky provided the following detailed statement:

*I have a strong concern regarding the ratification of the BGC recommendation to deny the reconsideration request regarding string contention between .hoteis and .hotels, and I therefore have therefore abstained when the vote on this issue was taken.*

*The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the ... community and/or Internet users in general.*

*The rationale underlying the rejection of the reconsideration claim is essentially that the string similarity process found that there was likely to be substantial confusion between the two, and that therefore they belonged in a contention set. Furthermore, no process has been identified as having been violated and therefore there is nothing to reconsider. As a Board member who is aware of ICANN's ... Bylaws, I cannot vote against the motion to deny reconsideration. The motion appears to be correct based upon the criteria in the Bylaws that define the reconsideration process and the facts in this particular case. However, I am increasingly disturbed by the growing sequence of decisions that are based upon a criterion for user confusion that, in my opinion, is not only both incomplete and flawed, but appears to work directly against the concept that users should not be confused. I am persuaded by the argument made by the proponents of reconsideration in this case that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate.*

*Confusion is a perceptual issue. String similarity is only one consideration in thinking about perceptual confusion and in fact it is not always an issue. In my opinion, much more perceptual confusion will arise between .hotel and .hotels than between .hotels and .hoteis. Yet if we adhere strictly to the Guidebook and whatever instructions have or have not been given to string similarity experts, it is my position that we work against implementing decisions that assist in avoiding user confusion, and we work in favor of decisions that are based upon an incorrect, incomplete and flawed ex ante analysis of the ICANN Network real issues with respect to user confusion.*

*The goal of the string similarity process is the minimization of user confusion and ensuring user trust in using the DNS ... The string similarity exercise is one of the means in the new gTLD ... process to minimize such confusion and to strengthen user trust. In placing our emphasis, and in fact our decisions, on string similarity only, we are unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.*

*I cannot and will not vote in favor of a motion that reflects, directly or indirectly, an unwillingness to depart from what I see as such a flawed position and which does not reflect in my opinion an understanding of the current reality of the situation.*

120. These statements reflect to an important degree the Panel's own analysis.
121. The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.<sup>101</sup>
122. The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"<sup>102</sup>. The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of the average, reasonable Internet user."<sup>103</sup>
123. The Guidebook explains that string similarity review comprises merely a "visual similarity check",<sup>104</sup> with a view to identifying only "visual string similarities that would create a probability of user confusion."<sup>105</sup>
124. The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.
125. Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed in part by an algorithmic score for ... visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform its own review of similarities between strings and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is entirely up to the [SSP's] judgment." (Underlining added)
126. In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

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<sup>101</sup> Request, ¶ 13.

<sup>102</sup> Guidebook, §2.2 (Module 2-4).

<sup>103</sup> Guidebook, §2.2.1.1.2. (Underlining added)

<sup>104</sup> Guidebook, §2.2.1.1. (Underlining added)

<sup>105</sup> Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of “visual similarity”, nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of “confusion,” nor any definition or description of an “average, reasonable Internet user.” As Mr. Sadowski of the NGPC put it: “Confusion is a perceptual issue.” (Mr. Sadowski further noted: “String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply “its own review” of visual similarity and “whether similarities rise to the level of user confusion”, in addition to SWORD algorithm, which is intended to be merely “indicative”, yet provides no substantive guidelines in this respect.
128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP’s review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowski referred to as “the minimization of user confusion and ensuring user trust in using the DNS”. However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.
129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.
130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board’s actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board’s adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

### **C. The Case of .hotels**

131. In the light of the preceding analysis of Booking.com’s challenge concerning the ICANN Board’s actions in relation to the string similarity review process generally, the Panel is not



persuaded by its challenge concerning the Board's conduct in relation to the review of .hotels specifically.

132. There are two principal elements to this part of Booking.com's case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board's handling of Booking.com's Request for Reconsideration of the SSP's determination. However, the fundamental obstacle to Booking.com's case is that *the established process was followed in all respects*.
133. Booking.com itself acknowledges that "the process was followed" by the SSP, which determined that .hotels and .hoteis were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that "the process was followed" – for all their stated misgivings concerning the outcome of the process.
134. The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC's consideration of the issue, certain aspects of which are discussed above, but of the BGC's detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com's Request for Reconsideration was denied. Contrary to Booking.com's allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com's claims of lack of "due process".
135. Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:

▪ *These standing requirements [for Requests for Reconsideration] are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff [for the Board] acted in contravention of established policies.*<sup>106</sup>

▪ *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*<sup>107</sup>

▪ *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

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<sup>106</sup> BGC Recommendation, p. 2.

<sup>107</sup> BGC Recommendation, p. 4. The BGC explains that "Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change."

*methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of [SSP] decisions. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.<sup>108</sup>*

▪ *Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that “it is contrary to ICANN policy to put them in a contention set.” (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the [SSP]. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.<sup>109</sup>*

▪ *Booking.com argues that the contention set decision was taken without material information, including Booking.com’s linguistic expert’s opinion, or other “information that would refute the mistaken contention that there is likely to be consumer confusion between ‘.hotels’ and ‘.hoteis.’” (Request, page 7.) However, there is no process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).)<sup>110</sup>*

▪ *Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com’s call for further information on the decision to place .hotels and .hoteis in a contention set ... is similarly not rooted in any established ICANN process at issue.[...] While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.<sup>111</sup>*

▪ *[W]hile we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the [SSP’s] decision, no such narrative is called for in the process.<sup>112</sup>*

▪ *The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the [SSP] in applying the methodology*

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<sup>108</sup> BGC Recommendation, p. 5.

<sup>109</sup> BGC Recommendation, p. 6.

<sup>110</sup> BGC Recommendation, p. 6.

<sup>111</sup> BGC Recommendation, pp. 6-7.

<sup>112</sup> BGC Recommendation, p. 7.

set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).<sup>113</sup>

▪ The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.<sup>114</sup>

▪ As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.<sup>115</sup>

136. These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.
137. It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.
138. Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:
- The Board's adoption of certain provisions of the Guidebook, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

<sup>113</sup> BGC Recommendation, p. 7.

<sup>114</sup> BGC Recommendation, p. 8.

<sup>115</sup> BGC Recommendation, p. 10.

- The Board's acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP's determination. The Guidebook provides that applied-for strings "will be placed in contention set" where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP's determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.
  - The Board's denial of Booking.com's Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN's conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGCP undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com's Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com's request.
  - The Board's refusal to "step in" and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to "individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community." As pointed out by ICANN during the hearing, the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board's inaction in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).
139. The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com's dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

140. Finally, the panel notes that Booking.com’s claim – largely muted during the hearing – regarding alleged “discrimination” as regards the treatment of its application for .hotels also founders on the same ground. Booking.com acknowledges that the established string similarity review process was followed; and there is absolutely no evidence whatsoever that .hotels was treated any differently than any other applied-for gTLD string in this respect. The mere fact that the *result* of the string similarity review of .hotels differed from the results of the reviews of the vast majority of other applied-for strings does not suggest discriminatory treatment. In any event, the Panel cannot but note the obvious, which is that .hotels is not alone in having been placed in contention by the SSP. So too was .hoteis; and so too were .unicom and .unicorn. Moreover, and once again, it is recalled that Booking.com does not claim to challenge the merits of the string similarity review, that is, the determination that .hotels and .hoteis are so visually similar as to warrant placement in a contention set.

#### **D. Conclusion**

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN’s Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.
142. Booking.com purports to challenge “the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board”; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook*. It asks the Panel to overturn the SSP’s determination in this case and to substitute an alternate result, in part on the basis of its own “expert evidence” regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of the SSP determination and it acknowledges that the process set out in the Guidebook was duly followed* in the case of its application for .hotels.
143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.
144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN’s Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.
145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the “applicable rules” as set out in the Guidebook.
146. To the extent that the Board’s adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

potentially be said to be inconsistent with the principles of transparency or fairness that underlie ICANN's Articles and Incorporation and Bylaws (which the Panel does not say is the case), the time to challenge such action has long since passed.

147. Booking.com's IRP Request must be denied.

## VII. THE PREVAILING PARTY; COSTS

148. Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."
149. The same provision of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."
150. Similarly, the Supplementary Procedures state, at Article 11:

*The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.*

*In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.*


151. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "**IRP costs**").
152. ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.
153. The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

or are not inconsistent with ICANN's Articles of Incorporation and Bylaws. We have found that the actions in question are not inconsistent with those instruments. The process established by ICANN under its Articles of Incorporation and Bylaws and set out in the Guidebook was followed, and the time to challenge that process (which Booking.com asserts is not its intention in these proceedings in any event) has long passed.

154. However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

FOR THE FOREGOING REASONS, the Panel hereby declares:

- (1) Booking.com's IRP Request is denied;
- (2) ICANN is the prevailing party;
- (3) In view of the circumstances, each party shall bear one-half of the costs of the IRP Provider, including the fees and expenses of the Panel members and the fees and expenses of the ICDR. As a result, the administrative fees and expenses of the ICDR, totaling US\$4,600.00, as well as the compensation and expenses of the Panelists totaling US\$163,010.05 are to be borne equally. Therefore, ICANN shall pay to Booking.com the amount of US\$2,300.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Booking.com
- (4) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

  
\_\_\_\_\_  
Hon. A. Howard Matz  
Date: March 2, 2015

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David H. Bernstein  
Date:

\_\_\_\_\_  
Stephen L. Drymer,  
Chair of the IRP Panel  
Date:

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

March 2, 2015  
Date

  
Hon. A. Howard Matz

I, David H, Bernstein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

\_\_\_\_\_  
Date

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David H, Bernstein

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\_\_\_\_\_  
Date

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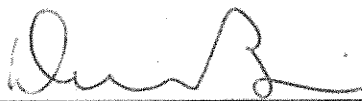
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Hon. A. Howard Matz  
Date:



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David H. Bernstein  
Date: March 2, 2015

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Stephen L. Drymer,  
*Chair of the IRP Panel*  
Date:

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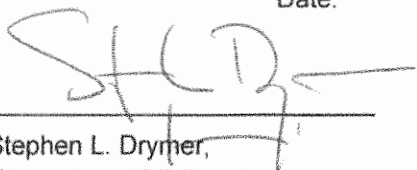
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\_\_\_\_\_  
Hon. A. Howard Matz  
Date:

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David H. Bernstein  
Date:

  
\_\_\_\_\_  
Stephen L. Drymer,  
Chair of the IRP Panel

Date: 3 March 2015

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

\_\_\_\_\_  
Date

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Hon. A. Howard Matz

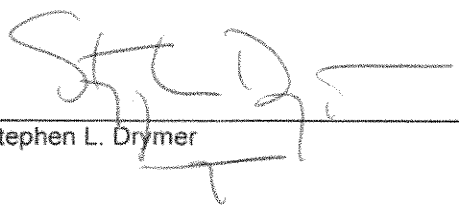
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\_\_\_\_\_  
Date

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David H, Bernstein

I, Stephen L. Drymer, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

3 March 2015  
Date

  
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Stephen L. Drymer