

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

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

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

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GLOSSARY OF DEFINED TERMS

Afilias	Afilias Domains No. 3 Ltd., now known as Altanovo Domains Limited
Application	NDC's application for the .WEB gTLD
Auction	The .WEB auction that took place on July 27-28, 2016
Auction Award	The decision in the .WEB Auction determining that NDC submitted the winning bid for .WEB.
Auction Rules	ICANN's Auction Rules for New gTLDs: Indirect Contentions Edition (Feb. 24, 2015) (Afilias Ex. C-4)
BAMC	Board Accountability Mechanisms Committee
Bidder Agreement	ICANN's New gTLD Auctions Bidder Agreement (Apr. 3, 2014) (Afilias Ex. C-5)
Blackout Period	The period of time between the deposit deadline for an auction until the auction provider receives payment in full from the winner of the contention set defined by Clause 68 of the Auction Rules and Section 2.6 of the Bidder Agreement
Blackout Period Rules	Clauses 61 and 68 of the Auction Rules and Sections 2.6 and 2.10 of the Bidder Agreement
Bylaws	ICANN's Bylaws (Afilias Ex. C-1)
Committee	ICANN's Board Accountability Mechanisms Committee
Contention Set	The .WEB contention set comprised of Web.com Group, Inc.; Charleston Road Registry, Inc.; Schlund Technologies GmbH;

	Dot Web Inc.; Ruby Glen, LLC; Afilias Domains No. 3 Ltd.; and Nu Dotco, LLC
DAA	Domain Acquisition Agreement between NDC and Verisign dated August 25, 2015 (Livesay Ex. D)
DAA Supplement	Confirmation of Understandings between NDC and Verisign dated July 26, 2016 (Livesay Ex. H)
Demand Media	Demand Media, Inc.
DNS	Domain Name System
DOJ	United States Department of Justice
Donuts	Donuts Inc.
Dot Web	Dot Web, Inc.
Guidebook	The gTLD Applicant Guidebook prepared by ICANN for the New gTLD Program (June 4, 2012) (Afilias Ex. C-3)
Final Decision	Final Decision of .WEB IRP Panel dated May 20, 2021 (corrected version dated July 15, 2021)
gTLD	Generic top-level domain
ICANN	Internet Corporation for Assigned Names and Numbers
IDN	Internationalized domain name
IRP	Independent review proceeding
IRP Hearing	Hearings conducted from August 3-11, 2020 in the Afilias' IRP
New gTLD Program/Program	ICANN's 2012 initiative to expand the number of top-level domains

NDC	Nu Dotco, LLC
IRP Panel	The panel appointed to resolve Afiliias' IRP
Radix	Radix FZC
Ruby Glen	Ruby Glen, LLC
Rules	Collectively, the Guidebook, Auction Rules and Bidder Agreement
Schlund	Schlund Technologies GmbH
TLD	Top-level domain
Verisign	VeriSign, Inc.

I. PRELIMINARY STATEMENT AND EXECUTIVE SUMMARY

1. Pursuant to the correspondence dated May 19, 2022 from J. Beckwith Burr, Chair, ICANN's BAMC, NDC and Verisign hereby submit a summary of the claims before the BAMC and relevant supporting evidence. The claims asserted in this proceeding consist of (i) Afilias' claims that NDC should be disqualified from the .WEB Contention Set because of the DAA with Verisign; and (ii) NDC's claims that Afilias violated the Blackout Period before the .WEB Auction and therefore should be disqualified from these proceedings.

2. Afilias seeks to divest NDC and, upon an ICANN-approved assignment, Verisign of the right to operate .WEB. NDC placed the winning bid for .WEB and ultimately paid \$135 million for the TLD—a sum that will go to the benefit of the internet community, not the losing bidders—in a fair and competitive public auction. Afilias' claims are based on the DAA between NDC and Verisign. The DAA states Redacted - Third Party Designated Confidential Information

3. The testimony of ICANN's witnesses at the IRP Hearing are dispositive that NDC's and Verisign's conduct fully complies with the Guidebook. Christine Willett, who was the ICANN Vice President responsible for the New gTLD Program at all relevant times, testified unequivocally that pre-auction agreements to finance an applicant's bid to acquire a new gTLD in exchange for a promise to assign a registry agreement do not violate the Guidebook. Ms. Willett's testimony is confirmed by express provisions of the Guidebook, ICANN's implementation of the Guidebook, and industry practice.

A. Afilias' Claims Relating to the DAA

4. Afilias makes four distinct claims based on the DAA: (i) that ICANN's competition mandate requires it to reject NDC's application based on potential operation of .WEB by Verisign; (ii) that the DAA violates Section 10 of the Guidebook, which prohibits the resale, transfer or assignment of a gTLD application; (iii) that NDC violated certain disclosure requirements in the Guidebook; and (iv) that the DAA violates the Auction Rules governing the .WEB Auction.

Contrary to Afilias' claims, the evidence from the IRP Hearing establishes that NDC and Verisign acted in full compliance with the Guidebook and Auction Rules at all times, including as those rules have been applied by ICANN in similar circumstances and consistent with industry practice.

5. **First**, Afilias contends that ICANN is a competition regulator with the power and obligation to prevent Verisign from operating .WEB. Afilias further contends that .WEB will have a significant competitive impact on the TLD market but that Verisign intends to acquire .WEB to shut it down and/or limit its competitive potential. Afilias' competition claim is contradicted by ICANN's Bylaws, which make clear that ICANN is not a competition regulator. The absence of competition criteria in the Guidebook, ICANN's clear testimony in the IRP, and Afilias' admissions in other proceedings, also make clear that ICANN is not a competition regulator. Consistent with ICANN's position during the Hearing, the IRP Panel unequivocally rejected Afilias' claim that ICANN has the authority or expertise to act as a competition regulator. The Panel cited, among other bases for this conclusion, Afilias' admission that "[n]either ICANN nor the GNSO have the authority or expertise to act as antitrust regulators."¹ The Panel's rejection of Afilias' competition claim should not be disturbed by the Board, for the reasons addressed in Section III, *infra*.

6. **Second**, Afilias claims that the DAA violates Section 10 of the Guidebook, which prohibits the transfer, resale, or assignment of a new gTLD *application*. According to Ms. Willett, who was in charge of the Program, the Guidebook prohibits an applicant only from *selling*—or as Ms. Willett explained—its "*total application*."² The Guidebook does not prohibit pre-delegation agreements for a post-delegation assignment of a registry agreement with ICANN's consent. In applying the Guidebook, "what ICANN was looking at was that the applying entity continued to

¹ Final Decision (July 15, 2021), ¶ 352 (emphasis omitted), *available at* <https://www.icann.org/en/system/files/files/irp-afiliias-corrected-final-declaration-redacted-15jul21-en.pdf>. All references to, and citations from, the Panel's Final Decision are to the corrected version dated July 15, 2021.

² Hrg. Tr., Vol. III (Aug. 5, 2020), 568:3–8 [Willett], *available at* <https://www.icann.org/en/system/files/files/irp-afiliias-transcript-day-3-05aug20-en.pdf>.

retain responsibility for the *application*.³ “[T]hey *couldn’t change the applying entity*.”⁴ It is beyond dispute that NDC is the entity that applied for .WEB and remains the applicant today.

7. Transactions in substance identical to the DAA regularly have occurred as part of the New gTLD Program, including with ICANN’s knowledge and approval. New gTLDs have been transferred hundreds of times post-delegation with ICANN’s consent since the Program began, including pursuant to agreements entered prior to the resolution of a contention set.⁵ The evidence developed in the IRP is undisputed that ICANN has *never* refused to consent to an assignment of a registry agreement for a New gTLD so long as the transferee meets ICANN’s technical and financial requirements to operate the TLD. More specifically, ICANN has *never disqualified a New gTLD applicant or denied an assignment* on the grounds that the assignment is requested pursuant to a pre-delegation agreement between the applicant and a third party. Among the reasons that ICANN does not dispute such transactions is that they are expressly acknowledged in the Auction Rules, which were promulgated pursuant to the Guidebook, and common within the industry. As ICANN indicated during these proceedings, the Auction Rules themselves specifically “appear to contemplate the possibility of a ‘post-Auction ownership transfer arrangement’ being in place prior to an auction.”⁶

8. There is no basis upon which to treat NDC differently than the many other applicants who have transferred new gTLDs, with ICANN’s consent, pursuant to pre-auction agreements. Ms. Willett’s testimony regarding the meaning and application by ICANN of the Guidebook, which is discussed in detail in Section V below, should end the debate.

9. **Third**, Afiliias claims that NDC violated the disclosure requirements of Section 1.2.7 of the Applicant Guidebook, which provides that an applicant must notify ICANN

³ Hrg. Tr., Vol. IV (Aug. 6, 2020), 756:23–757:1 [Willett], available at <https://www.icann.org/en/system/files/files/irp-afiliias-transcript-day-4-06aug20-en.pdf>.

⁴ Hrg. Tr., Vol. III (Aug. 5, 2020), 576:17–18 [Willett].

⁵ ICANN’s Opposition to Request for Emergency Panelist (Dec. 17, 2018), ¶¶ 25–30, available at <https://www.icann.org/en/system/files/files/irp-afiliias-icann-opp-emergency-panelist-redacted-17dec18-en.pdf>.

⁶ ICANN’s Rejoinder (June 1, 2020), ¶ 83 (citing Afiliias C-4, Auction Rules for New gTLDs: Indirect Contentions Edition (“Auction Rules for New gTLDs”) (Feb. 24, 2015), at § 68(a)), available at <https://www.icann.org/en/system/files/files/irp-afiliias-icann-response-amended-request-01jun20-en.pdf>.

“[i]f at any time during the evaluation process information *previously submitted* by an applicant *becomes untrue or inaccurate*. . .” (emphasis added). Afilias claims that, upon entering the DAA, NDC should have amended its application to change (i) the name of the “applicant” for .WEB; (ii) the names and positions of the officers and directors, and shareholders, for the applicant entity; and (iii) NDC’s “Mission/Purpose” for .WEB. Contrary to these claims, none of NDC’s statements in its application or otherwise were rendered false or misleading by the DAA. NDC remains the applicant for .WEB and NDC’s ownership and corporate structure did not change because of the DAA. Nor was NDC required to amend the “Mission/Purpose” for .WEB identified in its application. NDC’s plans for .WEB remain the same as set forth in its application. And the “Mission/Purpose” in a gTLD application is—under ICANN’s express rules—irrelevant to evaluation of a new gTLD application. No update of NDC’s application was required as a result of the DAA, as explained in more detail in Section VI.A., below.

10. **Fourth**, Afilias claims that NDC violated the Auction Rules because, according to Afilias, NDC was not a “Qualified Applicant” bidding on its own behalf with its “own money.” As ICANN itself noted in the IRP, the Auction Rules are intended only to provide mechanical rules for the auction process, not substantive qualification requirements, and cannot bear the weight Afilias puts on them.⁷ There is nothing in the ICANN Rules that prohibit third-party financing of a bid, participation by a financier in the auction process, or the post-auction transfer of a gTLD. To the contrary, the Auction Rules explicitly state that applicants within a contention set may negotiate prior to the resolution of a contention set, “settlement agreements *or post-Auction ownership transfer arrangements*” for the domain at issue.⁸ The Auction Rules do not require that an applicant disclose such arrangements, nor do the Rules provide that such an arrangement means that an applicant is no longer a “Qualified Applicant.”

⁷ [ICANN’s Rejoinder](#) (June 1, 2020), ¶ 85

⁸ Afilias C-4 (Auction Rules for New gTLDs), at § 68(a) (as long as those discussions do not take place during a restricted Blackout Period), available at <https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c1-c58-redacted-26nov18-en.pdf>.

B. NDC’s Claims that Afilias Violated the Blackout Period Rules

11. The Auction Rules and Bidder Agreement state that, for each contention set, a “Blackout Period” shall be in effect from the deposit deadline for the auction in question until the auction provider receives payment in full from the winner of the contention set. As set forth in Clause 68 of the Auction Rules, during this Blackout Period, applicants within a contention set are, *inter alia*, “prohibited from cooperating or collaborating with respect to . . . each other’s, or any other competing applicants’ bids or bidding strategies, or discussing or negotiating settlement agreements.”⁹ Clause 61 of the Auction Rules is unequivocal: violation of the Blackout Period is a “serious violation” such that an applicant “*will be subject to*” penalties up to and including forfeiture of its application.¹⁰

12. As discussed in Section IV, Afilias violated the Blackout Period by attempting to obtain NDC’s agreement, during the Blackout Period, to terms for resolving the Contention Set. Specifically, before the Blackout Period, Afilias offered NDC \$17.02 million to proceed to a private auction and lose, which NDC declined. During the Blackout Period, Afilias renewed those negotiations—a clear violation on the prohibition against contention set settlement discussions. Afilias should be penalized for that clear and unambiguous violation of the Blackout Period Rules, including by being disqualified from the .WEB Contention Set.

C. Afilias’ Abuse of ICANN’s Processes Must Be Soundly Rejected

13. There is no basis under the Bylaws or Guidebook to treat NDC and Verisign differently than any of the hundreds of other post-delegation transfers ICANN has approved—many of which were pursuant to pre-delegation agreements and none of which were deemed to violate the Guidebook. ICANN has never disqualified an applicant or denied the assignment of a registry agreement under such circumstances. The only argument Afilias makes for such discriminatory treatment here is the supposed “promotion of competition”—a basis unequivocally rejected by the IRP Panel and wholly without legal or evidentiary support.

⁹ *Id.*

¹⁰ *Id.* at § 61 (emphasis added).

14. The delegation of .WEB has been delayed for six years based on Afilias’ abuse of ICANN’s processes and false claims of misconduct by NDC, Verisign and ICANN. After ICANN scheduled a public auction of .WEB for July 2016, Afilias attempted to coerce NDC to agree to a private auction that would fix its terms in advance, while violating the Blackout Period Rules. When that effort failed, Afilias tried to delay or derail the public auction based on false claims that the ownership or control of NDC had changed—claims properly rejected by ICANN, the Ombudsman and a district court. Afilias then delayed initiating the .WEB IRP itself for two years, in the interim participating in a competition investigation of .WEB by the DOJ. That investigation was *terminated without action* by the DOJ. Months later, Afilias raised the same competition issues again as claims in the IRP, which were expressly rejected by the IRP Panel in its Final Decision.

15. Upon belatedly commencing the IRP in November 2018, Afilias attempted to misuse the IRP process itself to interfere with the Auction Award. Afilias’ IRP sought to obtain remedies directly against NDC and Verisign, including disqualification of NDC and setting-aside the Auction Award, which are clearly unavailable in an IRP¹¹—while at the same time attempting to block NDC and Verisign from any participation in the IRP. Afilias’ motive was obvious: it knew that its claims of Guidebook violations by NDC and Verisign could not withstand balanced scrutiny. The IRP Panel rejected Afilias’ attempt to preclude NDC and Verisign from participation in the IRP, and the Panel dismissed the claims to disqualify NDC and set aside the Auction Award.

16. Afilias delayed resolution of the IRP itself *for over two years*—after Afilias already had delayed filing the IRP *for over two years*—by its cynical plan to use the IRP for a one-sided trial of its claims against NDC and Verisign. More specifically, Rule 7 of ICANN’s Interim Supplementary Procedures provides for *mandatory participation* as *amicus curiae* in an IRP by third parties with a “material interest” in the dispute. Afilias knew it could never dispute that

¹¹ Of course, as the Panel held, an IRP is an ICANN accountability mechanism designed only to determine whether or not ICANN acted consistent with its Bylaws, not to determine rights of third parties. [Final Decision](#) (July 15 2021), ¶¶ 27, 253.

Verisign and NDC had a “material interest” in the attempt to dispossess them of their rights, so Afilias manufactured a frontal assault on Rule 7 itself. Creating a false narrative of the drafting history of the Rule, Afilias claimed that ICANN, the IRP-Implementation Oversight Team, and Verisign had improperly conspired in the adoption of Rule 7’s *amicus* provisions and that those provisions of Rule 7 are thus invalid.¹² While the IRP Panel ultimately granted NDC and Verisign the right to participate as *amicus curiae*, Afilias strategy served its purpose of delaying resolution of the IRP by another two years and causing ICANN, NDC and Verisign to incur millions of dollars in unnecessary legal fees on a collateral issue that never should have been an issue at all.

17. Afilias adopted a scorched-earth litigation strategy throughout the IRP based on these and other false charges of conspiracies among NDC, Verisign and ICANN, ultimately forcing the parties to incur tens of millions of dollars in legal fees and years of delay in the delegation of .WEB.¹³ Afilias never produced a shred of evidence of the alleged conspiracies or wrongful conduct. Indeed, before the IRP Hearing, Afilias withdrew *all* witness statements of its employees—and *never called a single Afilias witness* at the IRP in support of its claims¹⁴—

¹² Afilias’ *Amici* Opposition (Jan. 28, 2019), ¶¶ 50–61, available at <https://www.icann.org/en/system/files/files/irp-afiliias-claimant-response-to-verisign-amicus-curiae-redacted-28jan19-en.pdf>.

¹³ Afilias’ Costs Submission (Oct. 12, 2020), ¶ 31 (requesting more than \$10 million in fees); available at <https://www.icann.org/en/system/files/files/irp-afiliias-claimants-cost-submission-12oct20-en.pdf>; *Amici*’s Submission on Afilias’ Article 33 Application (Aug. 6, 2021), available at <https://www.icann.org/en/system/files/files/irp-afiliias-amicis-submission-claimants-article-33-application-06aug21-en.pdf>; ¶ 20; Appendix Ex. AC-71 (Letter from S. Marenberg (Counsel to NDC) to M. Botterman (ICANN) (July 23, 2021)), at 8–9; Appendix Ex. AC-72 (CircleID “IRP Panel Dismisses Afilias’ Claims to Reverse .WEB Auction and Award .WEB to Afilias” (May 26, 2021)), available at <https://circleid.com/posts/20210526-irp-panel-dismisses-afiliias-claims-to-reverse-dot-web-tld-auction>.

¹⁴ It goes without saying that Afilias should not be permitted now to produce new purported evidence or witnesses, effectively immune to cross-examination, in connection with the Board’s consideration. Afilias already had over six years to produce such evidence. Prior to the IRP Hearing, Afilias withdrew the Witness Statements for all of its company witnesses, including: (1) John L. Kane, Vice President of Corporate Services for Afilias plc., who submitted a **23-page statement and 20 exhibits spanning 577 pages** (Witness Stmt. of John L. Kane (Oct. 15, 2018) (withdrawn), available at <https://www.icann.org/en/system/files/files/irp-afiliias-witness-statement-kane-redacted-26nov18-en.pdf>); Exhibits JLK-1 to JLK-20, available at <https://www.icann.org/en/system/files/files/irp-afiliias-exhibits-jlk1-jlk20-redacted-26nov18-en.pdf>. (2) Ram Mohan, Executive Vice President and Chief Technology Officer of Afilias plc. and former member of ICANN’s Board of Directors, who submitted a **19-page statement and 20 exhibits spanning 1,110 pages** (Witness Stmt. of Ram Mohan (Nov. 1, 2018) (withdrawn), available at <https://www.icann.org/en/system/files/files/irp-afiliias-witness-statement-mohan-redacted-26nov18-en.pdf>); Exhibits RM-1 to RM-20, available at <https://www.icann.org/en/system/files/files/irp-afiliias-exhibits-rm1-rm20-redacted-26nov18-en.pdf>; and (3) Jonathan M. Robinson, Executive Chairman of Afilias plc., who submitted a **21-page statement and 23 exhibits spanning 707 pages** (Witness Stmt. of Jonathan M. Robinson (Sept. 27, 2018) (withdrawn), available at <https://www.icann.org/en/system/files/files/irp-afiliias-witness-statement-robinson->

thereby shielding its employees from examination regarding the true facts.¹⁵ Finally, in its last-ditch effort to misuse the IRP process before this matter came before the Board, Afilias sought to vacate the IRP Panel’s decision by filing a purported motion for “reconsideration”—which the Panel found was without merit and, indeed, *brought by Afilias in bad faith*.¹⁶

18. Afilias repeatedly has demonstrated a flagrant disregard for the truth during these proceedings, directly contradicting positions it has taken elsewhere—where those prior statements undercut its current position; and misrepresenting material facts—where the true facts are contrary to Afilias’ position in these proceedings. In the IRP, for example, Afilias claimed that ICANN’s Bylaws require it to act as an antitrust regulator.¹⁷ In earlier proceedings, when its interests were different, Afilias claimed the *absolute opposite*.¹⁸ Early in the IRP, Afilias sought to deny VeriSign participation by representing that “VeriSign has no rights in NDC’s .WEB application”¹⁹ and “VeriSign’s interest in the VeriSign/NDC Agreement could not give VeriSign any rights in either NDC’s .WEB application . . . or in any future registry agreement that NDC might conclude with

[26nov18-en.pdf](#); Exhibits JMR-1 to JMR-23, available at <https://www.icann.org/en/system/files/files/irp-afili-as-exhibits-jmr1-jmr23-redacted-26nov18-en.pdf>.

¹⁵ It is an established principle of law that a fact-finder may draw adverse inferences when a party fails to produce a witness within its control who was available and could have provided relevant or material testimony. *E.g., Graves v. United States*, 150 U.S. 118, 121 (1893) (AA-88), the U.S. Supreme Court explained, “if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it *creates the presumption that the testimony, if produced, would be unfavorable*.” (emphasis added). In fact, acknowledging this established principle, *Afilias’ counsel* implied at the IRP Hearing that adverse inferences should be drawn based on the fact that ICANN did not call Mr. Akram Atallah, former president of ICANN’s Global Domains Division, as a witness in this IRP. *See* Hrg. Tr., Vol. I (Aug. 3, 2020), 55:16–21 [Afilias Opening Statement], available at <https://www.icann.org/en/system/files/files/irp-afili-as-transcript-day-1-03aug20-en.pdf>. Importantly, however, unlike Afilias’ withdrawn witnesses, Mr. Atallah is not within the control of a party to this IRP, as he now works for Donuts rather than ICANN. Appendix Ex. AC-73 (*Akram Atallah*, ICANN WIKI, https://icannwiki.org/Akram_Atallah (last accessed July 19, 2022)).

¹⁶ Decision on Afilias’ Article 33 Application (Dec. 21, 2021), ¶¶ 179–80, available at <https://www.icann.org/en/system/files/files/irp-afili-as-panel-decision-claimant-article-33-application-21dec21-en.pdf>.

¹⁷ Afilias’ Reply Memorial (May 4, 2020), ¶¶ 122–24, available at <https://www.icann.org/en/system/files/files/irp-afili-as-claimant-reply-support-amended-request-redacted-04may20-en.pdf>.

¹⁸ The scope of Afilias’ contrary claims here is *staggering*. Afilias’ counsel falsely claimed during his IRP opening statement that the U.S. Government “transferred virtually all regulatory authority over DNS to ICANN.” *Hrg. Tr., Vol. I* (Aug. 3, 2020), 14:4–5 [Afilias Opening Statement]. The U.S. Government did nothing of the sort, and Afilias introduced no evidence to support this sweeping assertion. *See id.* ICANN possesses no regulatory powers. Section III, *infra*. ICANN’s Bylaws are clear that ICANN may only exercise authority within the scope of its mission. “ICANN shall not act outside its Mission.” *Ex. C-1 (Bylaws)*, at § 1.1(b). ICANN’s mission “is to ensure the stable and secure operation of the Internet’s unique identifier systems,” *not* to supplant existing competition authorities. *Id.* at § 1.1(a).

¹⁹ *Afilias’ Amici Opposition* (Jan. 28, 2019), ¶ 83.

ICANN.”²⁰ Now, having realized its grievous admission, undercutting its claim that NDC’s .WEB application was assigned to Verisign, Afilias has reversed itself, claiming that the application was transferred to Verisign and that Verisign in fact owns the application—*another absolute contradiction*.²¹ In the IRP Hearing and before the Board, Afilias has claimed that the DAA’s pre-delegation agreement to assign .WEB (upon ICANN’s consent) is novel and unique, misrepresenting to the Panel and ICANN’s Board²² that similar agreements between Donuts and Demand Media (as well as others) were disclosed in their new gTLD applications. Contrary to these representations, the only reference to Demand Media in Donuts’ applications is to a garden-variety backend services arrangement, not a relationship as financier, partner or future assignee.²³ Indeed, Afilias’ willingness to take inconsistent positions and mislead regarding the facts speak volumes regarding the weakness of Afilias’ claims and Afilias’ lack of credibility.

19. Both in these proceedings and in the community, Afilias has held itself out as a victim for six years, while it has attacked ICANN, NDC, Verisign and even the IRP Panel, all because Afilias was outbid in a fair and competitive public auction. During that time, Afilias has interfered with NDC’s and Verisign’s businesses, ICANN’s proper processes, and consumer access to a .WEB domain name, solely to serve Afilias’ narrow pecuniary interests. It is long past time to bring Afilias’ interference with the delegation of .WEB to an end by affirming the Auction Award and delegation of .WEB to NDC, and directing the execution of the registry agreement between ICANN and NDC. The sound rejection of Afilias’ claims is important not only to the parties to this proceeding but to the ICANN community and the very integrity of ICANN’s processes and future new gTLD programs.²⁴

²⁰ *Id.*, ¶ 85.

²¹ See ¶¶ 85, 108, *infra*.

²² Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 11–12.

²³ Verisign’s Pre-Hearing Brief (Phase II) (June 26, 2020), ¶ 41, *available at*

<https://www.icann.org/en/system/files/files/irp-afili-as-amicus-curiae-brief-verisign-redacted-26jun20-en.pdf>.

²⁴ There should be no question that NDC and Verisign are permitted to produce evidence for consideration by the Board, not having had that opportunity during the IRP, at Afilias’ insistence. By contrast to Afilias, as *Amici* in the IRP, NDC and Verisign were permitted to make only a limited appearance at the IRP Hearing pursuant to Rule 7 of the Interim Supplementary Procedures governing IRPs. IRP Panel Decision on Phase I (Feb. 12, 2020), ¶ 205(b), *available at* <https://www.icann.org/en/system/files/files/irp-afili-as-panel-decision-phase-1-redacted-12feb20-en.pdf>.

II. PROCEDURAL AND FACTUAL BACKGROUND²⁵

A. The Parties to this Dispute

20. NDC was founded in March 2012 by Jose Rasco, Juan Diego Calle, and Nicolai Bezsonoff for the purpose of participating in ICANN’s New gTLD Program.²⁶ Messrs. Rasco, Calle, and Bezsonoff were experienced members of the TLD industry, having previously cofounded, in 2009, a company that acquired, developed, and operated the .CO TLD.²⁷

21. Verisign is the registry operator and/or backend registry services provider for multiple TLDs, including .COM and .NET.²⁸ For more than 25 years, Verisign has maintained 100% operational accuracy and stability for .COM and .NET, including managing and protecting the DNS infrastructure for over 174.7 million domain names²⁹ and processing over 220 billion queries daily.³⁰

22. When this matter began, Afilias was a wholly-owned subsidiary of Afilias Inc., the registry operator of multiple TLDs.³¹ Afilias Inc. claimed to be the world’s second largest registry operator, with over 20 million domain names under management,³² and evidently created Afilias (now Altanovo) for the sole purpose of applying for the rights to operate the .WEB gTLD.

23. On December 29, 2020, after the IRP Hearing concluded but before the Panel issued its Final Decision, registry operator Donuts acquired Afilias, Inc., making it a wholly owned

Procedural Order No. 5 on Phase II (July 14, 2020), ¶ 24, *available at* <https://www.icann.org/en/system/files/files/irp-afili-as-procedural-order-5-phase-ii-14jul20-en.pdf>. Pursuant to the Panel’s orders, NDC and Verisign could only submit evidence through ICANN that ICANN itself had endorsed in support of its position and not produce witnesses and evidence of NDC’s or Verisign’s choosing in defense of the claims by Afilias directly against NDC and Verisign. Further, NDC and Verisign were unable to require the attendance of, or cross-examine, Afilias employees/witnesses, including those whose Witness Statements were withdrawn by Afilias. Afilias objected even to this level of participation by NDC and Verisign.

²⁵ This brief largely summarizes and relies on evidence developed during the IRP and therefore may not reflect the business metrics for the parties’ businesses as of today.

²⁶ Witness Statement of Jose I. Rasco (“Rasco Stmt.”) (June 1, 2020), ¶ 5, *available at* <https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-rasco-iii-redacted-01jun20-en.pdf>.

²⁷ *Id.* ¶ 3.

²⁸ Appendix Ex. AC-75 (The Domain Name Industry Brief, Vol. 19, Issue 2 (June 2022)) at 2, *available at* <https://www.verisign.com/assets/domain-name-report-Q12022.pdf>.

²⁹ *Id.*

³⁰ Appendix Ex. AC-76 (Verisign, “Verisign as a Domain Registry,”) *available at* https://www.verisign.com/en_US/domain-names/domain-registry/index.xhtml.

³¹ ICANN RE-16 (Afilias, “About Us”), *available at* <https://afili-as.info/about-us>.

³² *Id.*

subsidiary of Donuts.³³ This combination created one of ICANN’s largest TLD registries.³⁴ As part of that transaction, certain Afilias companies were spun out from Afilias, Inc., including Afilias Domains No. 3 Limited, the applicant for the .WEB TLD, which was renamed Altanovo Domains Limited (“Altanovo”).³⁵ Altanovo has not served as a registry operator since the Donuts acquisition.³⁶ While Altanovo is now ostensibly separate from Donuts and Afilias, NDC and Verisign are not aware of any commitments by Altanovo that it will not re-join Donuts after this proceeding has concluded, or request ICANN’s consent to assign the .WEB registry agreement to Donuts, should Altanovo be awarded rights to .WEB.

B. The New gTLD Program and Application

24. In 2011, ICANN announced the New gTLD Program, a part of its efforts to enhance consumer choice and competition within the DNS.³⁷ The Program is widely regarded as successful in accomplishing these goals. To govern the Program, ICANN published the Applicant Guidebook,³⁸ which prescribes the criteria on which new gTLD applications are evaluated and the requirements for approval, and the Auction Rules for New gTLDs (“Auction Rules”)³⁹ which sets forth the rules governing ICANN-administered new gTLD public auctions.

25. The Guidebook provides a step-by-step procedure for new gTLD applicants. Applicants must submit responses to questions that primarily concern the applicant’s technical and

³³ Appendix Ex. AC-77, PR Newswire, “Donuts Acquires Afilias,” (Dec. 29, 2021), *available at* <https://www.prnewswire.com/news-releases/donuts-acquires-afili-as-301199019.html>. The combined Donuts and Afilias entity recently rebranded as “Identity Digital.”; Appendix Ex. AC-78, PR Newswire, “Donuts Inc. and Afilias, Inc. Rebrand to Identity Digital” (June 22, 2022), *available at* <https://www.prnewswire.com/news-releases/donuts-inc-and-afili-as-inc-rebrand-to-identity-digital-301572401.html>.

³⁴ Appendix Ex. AC-78, PR Newswire (“[Donuts Inc. and Afilias, Inc. Rebrand to Identity Digital](#)”) (June 22, 2022).

³⁵ According to Afilias, the ultimate owners of Altanovo are comprised of a sub-set of the shareholders of Afilias, Inc. immediately prior to Donuts’ acquisition. Appendix Ex. AC-79 (Update to Altanovo .WEB application, V.4 (Sept. 10, 2021), at Question 18(a)), *available at* <https://gtldresult.icann.org/applicationstatus/applicationchangehistory/292>.

³⁶ Subsequent to the acquisition, Altanovo entered into an agreement with Afilias Limited (now a Donuts company) to provide back-end registry services in the event that Altanovo becomes the registry operator for .WEB. Appendix Ex. AC-79 ([Update to Altanovo .WEB application, V. 4](#) (Sept. 10, 2021)), at Question 18(a).

³⁷ Zittrain Ex. JZ-45 (ICANN, *ICANN Board Rationales for the Approval of the Launch of the New gTLD Program* (June 20, 2011)) at 27, *available at* <https://www.icann.org/en/system/files/files/irp-afili-as-exhibits-c1-c58-redacted-26nov18-en.pdf>.

³⁸ Afilias C-3 (*gTLD Applicant Guidebook* (“Guidebook”)), *available at* <https://www.icann.org/en/system/files/files/irp-afili-as-exhibits-c1-c58-redacted-26nov18-en.pdf>.

³⁹ [Afilias C-4](#) (Auction Rules for New gTLDs).

financial ability to operate a new gTLD.⁴⁰ Contrary to Afilias’ claims, the Guidebook does *not* include any evaluation criteria based on competition concerns.⁴¹

26. Applicants also are required to provide responses to questions regarding the “mission” and “purpose” envisioned by the applicant for the proposed new gTLD.⁴² The new gTLD application makes clear that this information is “intended to inform the post-launch review of the New gTLD Program . . . This information is not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored.”⁴³

C. Factual Background of this Dispute

1. NDC’s Application for .WEB

27. On June 13, 2012, NDC submitted an application to ICANN to acquire the right to operate .WEB.⁴⁴ Six other entities also applied for .WEB: (1) Web.com Group, Inc.; (2) Charleston Road Registry Inc. (a subsidiary of Google LLC); (3) Schlund; (4) Dot Web, a subsidiary of Radix; (5) Ruby Glen, a subsidiary of Donuts; and (6) Afilias.⁴⁵

28. Per ICANN’s requirements, in its application NDC listed three people as its officers: Mr. Rasco (CFO); Mr. Calle (CEO); and Mr. Bezsonoff (COO).⁴⁶ NDC listed Mr. Rasco as its “Primary Contact” and Mr. Bezsonoff as its “Secondary Contact,”⁴⁷ and identified two owners having at least 15% interests: Domain Marking Holdings, LLC, and Nuco LP, LLC.⁴⁸

29. The Guidebook provides that, “[i]f at any time during the evaluation process information previously submitted by an applicant *becomes untrue or inaccurate*, the applicant

⁴⁰ [Afilias C-3](#) (Guidebook), at Attachment to Module 2.

⁴¹ The only reference to competition is in Module 1, Section 1.2.1, which provides that ICANN reserves the right to refer concerns regarding registrar-registry cross-ownership to an appropriate competition authority for review. *Id.* at Module 1, § 1.2.1.

⁴² *Id.* at Attachment to Module 2, Question 18.

⁴³ *Id.* (emphasis added); *see* ¶ 162, *infra*.

⁴⁴ [Rasco Stmt.](#) (June 1, 2020), ¶ 9; *see also* [Rasco Ex. A](#) (NDC Application (.WEB) (June 13, 2012)).

⁴⁵ [Rasco Stmt.](#) (June 1, 2020), ¶ 26.

⁴⁶ *Id.*, ¶ 11.

⁴⁷ *Id.*

⁴⁸ *Id.*, ¶ 12.

must promptly notify ICANN.”⁴⁹ As set forth in Mr. Rasco’s Witness Statement and IRP testimony, the management and ownership information NDC provided in its .WEB application remains accurate to this day.⁵⁰ Accordingly, NDC has never notified—nor been obligated to notify—ICANN of any change in management or ownership.⁵¹

2. The Domain Acquisition Agreement Between NDC and Verisign

30. The time to file an application for a new string as part of the New gTLD Program expired in June 2012. Verisign Redacted - Third Party Designated Confidential Information

⁵² In 2014, Redacted - Third Party Designated Confidential Information

⁵³ By that time, an active secondary market for new gTLDs had developed. Hundreds of new gTLDs ultimately were transferred to third parties through the secondary market.⁵⁴

31. Employing his expertise as a lawyer and businessman, Mr. Livesay

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.⁵⁵

⁴⁹ [Afilias C-3](#) (Guidebook), at Module 1, § 1.2.7 (emphasis added).

⁵⁰ [Rasco Stmt.](#) (June 1, 2020), ¶ 7; Hrg. Tr., Vol. V (Aug. 7, 2020), 862:2–24, 863:19–20 [Rasco] (Appendix Ex. AC-80).

⁵¹ [Rasco Stmt.](#) (June 1, 2020), ¶ 78. Likewise, no changes in circumstances occurred that rendered untrue or inaccurate any other information in NDC’s Application. *Id.*

⁵² Witness Statement of Paul Livesay (“Livesay Stmt.”) (June 1, 2020), ¶ 4 (Appendix Ex. AC-81). Hrg. Tr., Vol. VII (Aug. 11, 2020), 1264:7–11 [Livesay] (Appendix Ex. AC-83); *see also* Appendix Ex. AC-82 <https://gtldresult.icann.org/> (filter by “Verisign”).

⁵³ *Id.*

⁵⁴ *Supra* ¶ 7 and note 5.

⁵⁵ Hrg. Tr., Vol. VII (Aug. 11, 2020), 1191:7–1192:5 [Livesay] (Appendix Ex. AC-83). Livesay Stmt. (June 1, 2020), ¶¶ 12–14, (Appendix Ex. AC-81). Although repeatedly mischaracterized by Afilias, Mr. Livesay testified that a concern he had with a premature disclosure of Verisign’s interest in acquiring a new TLD was that competitors would manufacture claims to interfere with or delay Verisign’s plans—which is precisely what happened. Hrg. Tr. Vol. VII (Aug. 11, 2020), 1279:18–1280:5 [Livesay], *available at* <https://www.icann.org/en/system/files/files/irp-afiliatranscript-day-7-11aug20-en.pdf>.

32. Applicants entered into many varied transactions to monetize new gTLDs, including agreements that included financing auction bids in exchange for a future assignment of the registry agreement (Section V.D., *infra*). The evidence submitted in the IRP establishes that ICANN was aware of at least some of these arrangements and considered them proper under the Guidebook.⁵⁶ As Ms. Willett explained, “there were so many hundreds or thousands of those potential relationships, we didn’t deem it to fall within the scope. It wasn’t part of the evaluation criteria that we applied within the guidebook.”⁵⁷

33. Verisign and NDC entered into the DAA on August 25, 2015.⁵⁸ The DAA was modeled on other agreements with which they (Verisign and NDC) were familiar.

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⁵⁹ The terms of the DAA are set forth in detail in Section V, *infra*.

34. Contrary to Afiliias’ claims, the DAA did not transfer ownership, management, or control of NDC to Verisign; Verisign has never had any ownership or other interest in NDC; and Verisign has not been assigned rights or obligations in NDC’s .WEB application.⁶⁰

3. The Secondary Market Supporting the Application Process and Post-Delegation Transfers of New gTLDs

35. A substantial industry has built up around the new gTLD application process and transfers of new gTLDs. Third-party companies provide applicants with services addressing every

⁵⁶ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 708:12–20 [Willett].

⁵⁷ *Id.* at 775:21–24 [Willett] (there were “hundreds or thousands” of varying relationships among applicants and third parties). In terms of assigning the applicant’s rights to a third party, ICANN advised multiple applicants that “they could request such an assignment after” execution of the registry agreement. *Id.* at 775:17.

⁵⁸ Livesay Ex. D (DAA) (Aug. 25, 2015)) (Appendix Ex. AC-84).

⁵⁹ *See id.*

⁶⁰ Rasco Stmt. (June 1, 2020), ¶ 52 (Appendix Ex. AC-85); Livesay Stmt. (June 1, 2020), ¶ 22 (Appendix Ex. 81). Moreover, on or about July 26, 2016, in light of false accusations by other members of the Contention Set that there had been a change of management or control of NDC (*see* Section IV.A., *infra*) Verisign and NDC entered into a “Confirmation of Understanding.” Redacted - Third Party Designated Confidential Information (the “DAA Supplement”). *See* Livesay Ex. H (DAA Supplement) (July 26, 2016) (Appendix Ex. AC-86). The DAA Supplement confirmed that: Redacted - Third Party Designated Confidential Information

Id., ¶¶ A–D; Livesay Stmt. (June 1, 2020), ¶ 28.

step in the process, including filling out the initial application, liaising with ICANN, providing financing for the gTLD, and handling the auction process itself.⁶¹

36. Afilias has been particularly aggressive in establishing its position in the secondary market. It broadly advertised services “to help [applicants] with the application and technology”;⁶² aggressively sought to buy “new gTLDs at bargain basement prices;”⁶³ and compared its strategy of securing assignments of new gTLDs “to the ‘We Buy Any Car’ business model.”⁶⁴ Afilias’ claim that there is something inherently wrong with non-applicants participating in the application, financing or auction processes, or agreeing to post-delegation assignments of registry agreements for new gTLDs, was fabricated for these proceedings.

37. Consistent with ICANN’s interpretation of the Guidebook, a myriad of third-party contractual relationships developed with respect to new gTLDs, including those providing for the assignment of new gTLDs after ICANN’s delegation to a particular applicant.⁶⁵ The terms of agreements governing these assignments vary widely, and have included the funding of a contention set resolution, through auction or otherwise, in exchange for post-delegation transfers of rights to a new gTLD. ICANN acknowledged that it was aware of these agreements.⁶⁶

⁶¹ AC-63 (Kevin Murphy, Domain Incite, “You might be surprised how many new gTLDs have changed hands already” (July 1, 2015)), available at <http://domainincite.com/18849-you-might-be-surprised-how-many-new-gtlds-have-changed-hands-already>; AC-64 (“Afilias Wants to Buy Your Failed gTLD,” (July 7, 2015)), available at <http://domainincite.com/18898-afili-as-wants-to-buy-your-failed-gtld>; AC-56 (CentralNic, “A Different Take on New TLDs from the CEO of a Well Established Company With a Big Footprint in Both .Com AND New TLD Camps” (May–June 2012)), available at <https://www.centralnic.com/company/news/2012/a-different-take-on-new-tlds-from-a-company-with-a-big-footprint-in-both-dotcom-and-new-tld-camps>; AC-55 (Valideus, “New gTLD Application Management”); AC-54 (Fairwinds Partners, “Services”), available at <https://www.fairwindspartners.com/services/>.

⁶² AC-44 (Afilias, “New TLDs: Top Level Domain Registry Services”), available at <https://afili-as.info/global-registry-services/new-tlds>.

⁶³ AC-64 (Kevin Murphy, Domain Incite, “Afilias Wants to Buy Your Failed gTLD” (July 7, 2015)), available at <http://domainincite.com/18898-afili-as-wants-to-buy-your-failed-gtld>.

⁶⁴ *Id.* (“There are entrants in the market who . . . for whatever other reason they’re coming to the conclusion this isn’t the business they should be in and they’re looking for options,” [Afilias Chief Marketing Officer] LaPlante said.”). Afilias’ trading in the secondary market for new gTLDs was advertised in industry journals and promoted in ICANN meeting halls. Examples of Afilias’ advertisements are Exhibits AC-45, AC-46, and AC-47, available at <https://www.icann.org/en/system/files/files/irp-afili-as-amicus-curiae-exhibits-ac-1-70-redacted-01jun20-en.pdf>.

⁶⁵ *Willett Stmt.* (May 31, 2019), ¶ 37.

⁶⁶ Section V.D., *infra*.

38. ICANN has *never* disqualified an applicant based on a pre-delegation agreement for a post-delegation assignment of the new gTLD.⁶⁷ To the contrary, sometimes ICANN has suggested to applicants that they defer effecting an actual TLD assignment until *after* delegation on the grounds that such agreements are compliant with the Guidebook. Ms. Willett acknowledged:⁶⁸

[W]e became aware of a variety of plans, future plans for their operation, what they wanted to do with the TLD . . . [I]n some cases *we became aware of intention to assign a TLD to a third party*.

Applicants asked us to do that before contracting with some frequency, and we reminded them of the rule that wasn't possible, that *they could request such an assignment after contracting*.

. . . [T]here were so many hundreds or thousands of those potential relationships, *we didn't deem it to fall within the scope. It wasn't part of the evaluation criteria that we applied within the Guidebook*.⁶⁹

39. ICANN has approved numerous post-delegation assignments of registry agreements pursuant to pre-delegation agreements.⁷⁰ Representative examples of these transactions, are described in Section V.D., below. Importantly, and as discussed above, the Auction Rules expressly acknowledge that applicants may enter into “post-Auction transfer arrangements” while an application is pending.⁷¹

4. Attempts to Interfere with a Public Action and Violation of the Blackout Period

40. On April 27, 2016, ICANN scheduled a public auction for .WEB. Although certain

⁶⁷ [Willett Stmt.](#) (May 31, 2019), ¶¶ 37–39; *See* Section V.D., *infra*.

⁶⁸ Because NDC's and Verisign's status in the IRP was limited to that of *amicus curiae*, they were not afforded the opportunity to cross-examine Ms. Willett. All of Ms. Willett's testimony cited herein, which demonstrates unequivocally that the New gTLD Program does not prohibit pre-delegation agreements to post-delegation assignments, *was elicited by Afilias' cross-examination*.

⁶⁹ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 774:25–775:24 [Willett]. Ms. Willett also explained: “I have the experience of having *managed 1,930 applications and many different scenarios* between applicants and third parties and consultants. So my answers are informed not just based on these applicants for .WEB, but I am informed by – in regards to how many applicants behaved and *how ICANN interacted with them and conducted the program* as a result.” *Id.* at 773:24–774:6 [Willett].

⁷⁰ [Willett Stmt.](#) (May 31, 2019), ¶¶ 37–39; [ICANN's Rejoinder Memorial](#) (June 1, 2020), ¶ 83 .

⁷¹ *See* [Afilias C-4](#) (Auction Rules for New gTLDs), at § 68(a). Only during the Blackout Period are applicants prohibited from “negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction” (*id.*); [Afilias C-3](#) (Guidebook), at Module 4, § 4.1.3 (“It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention.”)).

members of the Contention Set sought a private resolution, NDC informed the other applicants that it wished to proceed with a public auction, which is every applicant's right under the Guidebook.⁷² ICANN set the public auction date for July 27, 2016.⁷³

41. On June 23, 2016, Donuts and Ruby Glen tried to interfere with the public auction by falsely representing to ICANN that NDC had changed its ownership and/or management structure without reporting that change to ICANN.⁷⁴ Donuts and Ruby Glen requested that ICANN delay the public auction as a result.⁷⁵ These same misrepresentations were repeated by Afilias and continue to be repeated by Afilias to this day (Section II.C.(4) and IV.A., *infra*). ICANN contacted NDC on June 27, 2016 to investigate the complaint.⁷⁶ Mr. Rasco responded that same day and confirmed that there had been no changes to NDC's ownership and/or management.⁷⁷ On July 13, 2016, ICANN denied the postponement requests, finding no basis for Donuts' and Afilias' claims.⁷⁸

42. On July 17, 2016, Donuts, Ruby Glen and Radix jointly filed a request for reconsideration ("RFR") of ICANN's determination that the auction proceed as planned.⁷⁹ On July 21, 2016, ICANN denied the RFR.⁸⁰

43. On July 22, 2016, despite ICANN's repeated rejections of the Contention Set's objections, Ruby Glen filed a civil action against ICANN in the United States District Court for the Central District of California seeking delay of the public auction through a temporary

⁷² [Rasco Stmt.](#) (June 1, 2020), ¶¶ 68, 73, 74.

⁷³ *Id.*, ¶ 27.

⁷⁴ *Id.*, ¶ 75; Rasco Ex. L (Email from J. Nevett (Donuts/Ruby Glen, LLC) to ICANN (June 23, 2016)), available at <https://www.icann.org/en/system/files/files/irp-afiliias-witness-statement-rasco-iii-exhibits-a-t-redacted-01jun20-en.pdf>.

⁷⁵ *Id.*

⁷⁶ [Rasco Stmt.](#) (June 1, 2020), ¶¶ 77–78; Rasco Ex. M (Emails between J. Erwin (ICANN) and J. Rasco (NDC) (June 27, 2016)) (Appendix Ex. AC-87).

⁷⁷ *Id.* On July 11, 2016, Mr. Rasco reiterated to Ms. Willett, in writing, that there were no changes in the ownership or control of NDC and that NDC had made it clear to the other Contention Set members that NDC had no desire to participate in a private auction. Rasco Ex. O (Email from J. Rasco (NDC) to C. Willett (ICANN) (July 11, 2016)) (Appendix Ex. AC-88).

⁷⁸ Rasco Ex. P (Letter from C. Willett (ICANN) to .WEB Contention Set (July 13, 2016)) (Appendix Ex. AC-89).

⁷⁹ Verisign VRSN-11 ("Reconsideration Request by Ruby Glen, LLC and Radix FZC" (July 17, 2016)), at 1–2, available at <https://www.icann.org/en/system/files/files/irp-afiliias-appx-evidence-1-27-redacted-11dec18-en.pdf>.

⁸⁰ [Verisign VRSN-12](#) ("Determination of the Board Governance Committee (BGC) Reconsideration Request," (July 21, 2016)), at 11–12.

restraining order (“TRO”).⁸¹ Ruby Glen’s claims were based on the same false allegations they had made to ICANN and that have been repeated by Afilias. The District Court denied Ruby Glen’s TRO on July 26, 2016. In its order, the Court noted “the weakness of Plaintiff’s efforts to enforce vague terms contained in the ICANN bylaws” and Guidebook and held that Ruby Glen had “failed to establish that it is likely to succeed on the merits [or] raise serious issues.”⁸² Ruby Glen’s complaint subsequently was dismissed with prejudice,⁸³ a determination affirmed on appeal by the Court of Appeals for the Ninth Circuit.⁸⁴

44. On the eve of the July 27, 2016 public auction, and during the Blackout Period, Afilias and other Contention Set members made a last ditch effort to get NDC to agree to a private resolution of the Contention Set so that the payment for .WEB would go to the losing bidders rather than be invested by ICANN for the benefit of the internet community. Specifically, as described more fully in Section IV.A., below, Afilias contacted NDC to ask again whether NDC would agree to a private auction, an unmistakable reference to its prior offer to “guarantee” NDC a payment of \$17.02 Million “*if you go into the private auction and lose.*”⁸⁵

5. The Public Auction for .WEB

45. Despite the collusive efforts by Afilias and other members of the .WEB Contention Set to force NDC into a private auction, the public auction proceeded as scheduled on July 27, 2016.⁸⁶ In accordance with the DAA, Redacted - Third Party Designated Confidential Information

⁸⁷ Shortly after the Auction, NDC paid ICANN \$135 million (the amount of the

⁸¹ [Verisign VRSN-15](#) (*Ruby Glen, LLC v. ICANN*, Complaint (Case No. 16-5505) (July 22, 2016)).

⁸² [Verisign VRSN-16](#) (*Ruby Glen, LLC v. ICANN*, Court Order Denying Ex Parte Application (July 26, 2016)).

⁸³ ICANN’s Response to Amended IRP Request (May 31, 2019), ¶ 48, available at <https://www.icann.org/en/system/files/files/irp-afili-as-icann-response-amended-request-31may19-en.pdf> (citing *Ruby Glen, LLC v. ICANN*, Memorandum (Nov. 28, 2016)), available at <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf>.

⁸⁴ ICANN R-14 (*Ruby Glen, LLC v. ICANN*, Memorandum (Oct. 15, 2018) (9th Cir. 2018)), available at <https://www.icann.org/en/system/files/files/irp-afili-as-exhibits-r1-r16-redacted-31may19-en.pdf>.

⁸⁵ [Rasco Stmt.](#) (June 1, 2020), ¶ 73; Rasco Ex. J (Text message from S. Heflin (Afilias) to J. Calle (NDC) (June 7, 2016)) (Appendix Ex. AC-90).

⁸⁶ [Rasco Stmt.](#) (June 1, 2020), ¶ 98 (Appendix Ex. AC-85).

⁸⁷ *Id.*, ¶ 101.

second-highest bid which, under the ICANN rules, becomes the payment amount) for .WEB.⁸⁸

46. Having won the auction, NDC has the right and ICANN has the obligation to execute the .WEB Registry Agreement (subject to compliance with appropriate conditions).⁸⁹

6. Continuing Efforts by Afilias to Interfere with the Auction Award

47. On August 2, 2016, shortly after the public auction, Donuts and Ruby Glen initiated a CEP with ICANN with respect to .WEB.⁹⁰ The CEP was based on the same misrepresentations regarding NDC's application that ICANN and the District Court already had rejected. The CEP was closed in early 2018.⁹¹

48. On August 8, 2016, Scott Hemphill, Afilias' General Counsel, wrote to ICANN asserting that NDC should be disqualified from its participation in the .WEB Contention Set due to purported violations of the Guidebook. Mr. Hemphill demanded that ICANN "proceed to the next highest bidder in the auction to contract for the string, at the price at which the third highest bidder exited the auction."⁹² Under Mr. Hemphill's demand, Afilias, as the second-highest bidder in the .WEB Auction,⁹³ stood to benefit from NDC's disqualification by obtaining .WEB for a windfall price far below the competitive amount paid by NDC. Mr. Hemphill repeated his allegations in a second letter to ICANN dated September 9, 2016.⁹⁴

49. Nonetheless, Afilias did not file an accountability mechanism with respect to .WEB for another *two years*, until November 2018, long after its objections to ICANN and long after the conclusion of the Donuts and Ruby Glen CEP.⁹⁵

⁸⁸ *Id.*

⁸⁹ [Afilias C-3](#) (Guidebook), at Module 5, § 5.1(4).

⁹⁰ [Verisign VRSN-17](#) ("Cooperative Engagement and Independent Review Processes Status Update" (Sept. 22, 2017)).

⁹¹ [Verisign VRSN-18](#) ("Cooperative Engagement and Independent Review Processes Status Update" (Mar. 29, 2018)). ICANN announced that it would proceed with the delegation of .WEB to NDC if an IRP was not commenced by February 14, 2018. No party commenced an IRP by the February 14 deadline. *Id.*

⁹² [Verisign VRSN-19](#) (Letter from M. Scott Hemphill (Afilias) to A. Atallah (ICANN) (Aug. 8, 2016)).

⁹³ Afilias' Amended IRP Request (Mar. 21, 2019), ¶ 4 (Appendix Ex. AC-91).

⁹⁴ [Verisign VRSN-20](#) (Letter from M. Scott Hemphill (Afilias) to A. Atallah (ICANN) (Sept. 9, 2016)).

⁹⁵ Afilias' IRP Request (Nov. 14, 2018), available at <https://www.icann.org/en/system/files/files/irp-afilias-request-redacted-26nov18-en.pdf>.

7. The DOJ Investigation Concerning .WEB

50. In January 2017, the DOJ commenced an investigation into competition issues related to Verisign’s operation of .WEB.⁹⁶ NDC and Verisign fully cooperated in the DOJ’s investigation, including in response to Civil Investigative Demands (“CID”) each received from the DOJ.⁹⁷ In January 2018, the investigation was *closed without any action*.⁹⁸

8. The IRP and the Panel’s Final Decision

51. Afilias filed its IRP regarding .WEB on November 14, 2018, seeking a ruling from the Panel on its claims against NDC and Verisign; Afilias requested not only that the Panel determine whether ICANN’s action or inaction violated ICANN’s Bylaws, but also that the Panel disqualify NDC’s bid and reverse the Auction Award.⁹⁹ On May 20, 2021, the IRP Panel issued its Final Decision. Consistent with NDC’s, Verisign’s and ICANN’s positions in the IRP, the Final Decision dismisses “the Claimant’s [Afilias’] request that Respondent [ICANN] be ordered by the Panel to disqualify NDC’s bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant.”¹⁰⁰ As urged by NDC and Verisign and opposed by Afilias, the Panel held that it is for ICANN to determine whether NDC violated the Guidebook and to determine what, if any, consequences should flow from such a violation, if any took place.¹⁰¹

52. Notwithstanding the lengthy written filings and IRP Hearing, and the 128-page Final Decision, Afilias refused to accept the Panel’s Final Decision. Instead, following issuance of the Final Decision, Afilias filed an application seeking reconsideration of the decision on the false pretext that the Panel had failed to rule on all of the issues put before it and that the Panel’s

⁹⁶ AC-31 (Letter from Kent Brown, U.S. Department of Justice, Antitrust Division, to Thomas Indelicarto, Executive Vice President, Verisign, “Civil Investigative Demand No. 28931,” (Jan. 18, 2017)) (Appendix Ex. AC-92).

⁹⁷ *See id.*

⁹⁸ *See* AC-67 (Andrew Allemann, Domain Wire, “DOJ closes investigation on Verisign running .web” (January 11, 2018)), available at <https://domainnamewire.com/2018/01/11/departement-justice-closes-investigation-verisign-running-web/>.

⁹⁹ [Afilias’ IRP Request](#) (Nov. 14, 2018), ¶ 69.

¹⁰⁰ [Final Decision](#) (July 15, 2021), ¶ 413(7).

¹⁰¹ *Id.*, ¶ 413.

decision somehow was ambiguous.¹⁰² On December 21, 2021, the Panel rejected Afiliás’ application in its entirety, finding that “the Panel cannot escape the conclusion that the Application is ‘*frivolous*’ in the sense of it ‘*having no sound basis (as in fact or law)*.’”¹⁰³ The Panel further *awarded ICANN* \$236,884.39 in legal fees incurred responding to Afiliás’ frivolous application.¹⁰⁴

III. AFILIÁS’ COMPETITION CLAIMS WERE REJECTED BY THE PANEL AND ARE CONTRARY TO ICANN’S BYLAWS AND THE IRP EVIDENCE

53. The fundamental animating principle underlying Afiliás’ complaints against NDC and Verisign has been the baseless claim that ICANN’s Core Values regarding competition mandated that ICANN block Verisign’s potential operation of .WEB as “the last, best hope of creating a competitive environment at the wholesale registry level of the DNS and ending VeriSign’s market power.”¹⁰⁵ This was the primary argument Afiliás made in its 2016 letters to ICANN demanding that NDC be disqualified,¹⁰⁶ repeated in Afiliás’ original and amended Requests for IRP,¹⁰⁷ and repeated in Afiliás’ briefing and argument in the IRP Hearing.¹⁰⁸

54. As set forth in its pre-hearing Reply Memorial, Afiliás asserted that ICANN is a competition regulator with the power and obligation to prevent Verisign from operating .WEB.¹⁰⁹ This contention is contradicted by ICANN’s Bylaws.¹¹⁰ Afiliás further alleged that Verisign intends to acquire .WEB to shut it down and/or limit its competitive potential in order to preserve Verisign’s purported monopoly, requiring ICANN to prevent Verisign from operating .WEB.¹¹¹

¹⁰² Afiliás’ Article 33 Application (June 21, 2021), available at <https://www.icann.org/en/system/files/files/irp-afiliás-claimants-rule-33-application-additional-decision-interpretation-21jun21-en.pdf>.

¹⁰³ [Decision on Afiliás’ Article 33 Application](#) (Dec. 21, 2021), ¶ 180 (emphasis added).

¹⁰⁴ *Id.*, ¶ 181.

¹⁰⁵ Afiliás’ Amended IRP Request (Mar. 21, 2019), ¶ 83, available at <https://www.icann.org/en/system/files/files/irp-afiliás-amended-request-redacted-21mar19-en.pdf>

¹⁰⁶ [Verisign VRSN-19](#) (Letter from M. Scott Hemphill (Afiliás) to A. Atallah (ICANN) (Aug. 8, 2016)); [Verisign VRSN-20](#) (Letter from M. Scott Hemphill (Afiliás) to A. Atallah (ICANN) (Sept. 9, 2016)).

¹⁰⁷ [Afiliás’ IRP Request](#) (Nov. 14, 2018), ¶¶ 64–68; [Afiliás’ Amended IRP Request](#) (Mar. 21, 2019), ¶¶ 79–83.

¹⁰⁸ Afiliás’ Response to *Amicus Curiae* Briefs (July 24, 2020), ¶¶ 9, 45, 199–213, available at <https://www.icann.org/en/system/files/files/irp-afiliás-claimant-response-to-amicus-curiae-redacted-24jul20-en.pdf>. Afiliás’ Post-Hearing Brief (Oct. 12, 2020), ¶ 146, available at <https://www.icann.org/en/system/files/files/irp-afiliás-claimants-post-hearing-brief-12oct20-en.pdf>; see [Hrg. Tr., Vol. I](#) (Aug. 3, 2020), 14:4–5 [Afiliás Opening Statement].

¹⁰⁹ [Afiliás’ Reply Memorial](#) (May 4, 2020), ¶¶ 125–136.

¹¹⁰ ¶ 58, *infra*.

¹¹¹ [Afiliás’ Reply Memorial](#) (May 4, 2020), ¶¶ 122–24, 136.

This allegation is false and contrary to all of the evidence.¹¹²

55. By the time the IRP Hearing began, Afilias knew that it could not support its competition claim through competent expert testimony or legal authority. The DOJ had closed its investigation without action; ICANN’s Bylaws and pre-hearing witness statements established what Afilias already knew, namely, that ICANN is not a competition regulator; and the expert economist witness statements submitted by ICANN established that there is no economic data or other evidence to support Afilias’ claim.¹¹³ As a result, Afilias effectively abandoned its competition claim and associated narrative early in the IRP Hearing. Afilias devoted less than four minutes of its more than two-hour opening to the subject of competition, and most of that was spent to notify the Panel that it would not be cross-examining ICANN’s or NDC’s and Verisign’s competition experts, both leaders in their fields.¹¹⁴ The only witness during the IRP Hearing who addressed ICANN’s competition obligations was Becky Burr, who testified that ICANN is *not* a competition regulator and defers to competent competition authorities on such matters.¹¹⁵ The closed DOJ investigation of .WEB served the same purpose as a referral to competition authorities under the Guidebook.

56. In its Final Decision, the IRP Panel agreed with ICANN, NDC and Verisign, and rejected Afilias’ claim that ICANN is required to act as a competition regulator and to assess the competitive impact of Verisign’s potential operation of .WEB. As the Panel ruled in the Final Decision, *“ICANN does not have the power, authority, or expertise to act as a competition*

¹¹² The undisputed evidence is that Verisign wants a TLD like .WEB for growth given the decreased name availability in .COM. See Verisign’s [Pre-Hearing Brief](#) (Phase II) (June 26, 2020), ¶¶ 135–39. Even Afilias’ own experts concede this point. Expert Report by Jonathan Zittrain (“Zittrain Report”) (Sept. 26, 2018), ¶ 47, available at <https://www.icann.org/en/system/files/files/irp-afiliias-expert-report-zittrain-26nov18-en.pdf>; Report of George Sadowsky (“Sadowsky Report”) (Mar. 20, 2019), ¶ 22, available at <https://www.icann.org/en/system/files/files/irp-afiliias-report-sadowsky-redacted-21mar19-en.pdf>; see also Expert Report by Kevin Murphy (“Murphy Report”) (May 30, 2020), ¶ 74 (Appendix Ex. AC-93).

¹¹³ See generally Murphy Report (May 30, 2020) (Appendix Ex. AC-93); Report of Dennis W. Carlton (“Carlton Report”) (May 30 2019), available at <https://www.icann.org/en/system/files/files/irp-afiliias-expert-report-carlton-31may19-en.pdf>.

¹¹⁴ [Hrg. Tr., Vol. I](#) (Aug. 3, 2020), 28:1–9 [Afilias Opening Statement].

¹¹⁵ [Hrg. Tr., Vol. II](#) (Aug. 4, 2020), 349:9–350:8 [Burr], available at <https://www.icann.org/en/system/files/files/irp-afiliias-transcript-day-2-04aug20-en.pdf>; see also Witness Statement of J. Beckwith Burr (“Burr Stmt.”) (May 31, 2019), ¶¶ 25, 30–31, available at <https://www.icann.org/en/system/files/files/irp-afiliias-witness-statement-burr-31may19-en.pdf>.

regulator by challenging or policing anticompetitive transactions or conduct.”¹¹⁶ The Panel cited to the “[c]ompelling evidence to that effect presented by Ms. Burr and Mr. Kneuer, supported by Mr. Disspain.”¹¹⁷ The Panel further specifically called out Afilias’ prior *inconsistent* statement that ICANN in fact was not a competition regulator. When it suited different interests, Afilias had stated in other proceedings:

While ICANN’s mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. ***Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.*** Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.¹¹⁸

57. The evidence presented during the IRP and now before this Committee is undisputed that, with respect to .WEB, the appropriate competition authority—the DOJ—reviewed the transaction and declined to take action.¹¹⁹ Having evaluated the very concerns now raised by Afilias in this IRP, the DOJ’s investigation and decision not to pursue action should resolve any claim that Verisign’s operation of .WEB would harm competition in violation of ICANN’s Bylaws.¹²⁰ For this and other reasons, the Board should not disturb the conclusion of the IRP Panel rejecting Afilias’ competition claim.

58. Afilias also nakedly (and falsely) contends that Verisign seeks to acquire .WEB in

¹¹⁶ [Final Decision](#) (July 15, 2021), ¶ 352 (emphasis added).

¹¹⁷ *Id.* (emphasis added)

¹¹⁸ *Id.* (quoting Registry Operators’ Submission Re: Objections to the Proposed Verisign Settlement, Ex. R-21, p. 8 (emphasis added)). Afilias further contradicted its prior position regarding ICANN’s authority during the IRP. Afilias’ counsel falsely claimed during his IRP opening statement that the U.S. Government “transferred virtually all regulatory authority over the DNS to ICANN.” The U.S. Government did nothing of the sort, and Afilias introduced no evidence to support this sweeping assertion. [Hrg. Tr., Vol. I](#) (Aug. 3, 2020), 14:4–5 [Afilias Opening Statement]. ICANN’s Bylaws are clear that ICANN may only exercise authority within the scope of its mission. “ICANN shall not act outside its mission.” [Ex. C-1](#) (Bylaws), at § 1.1(b). ICANN’s mission “is to ensure the stable and secure operation of the unique identifier systems,” *not* to supplant existing competition authorities. *Id.*, at § 1.1(a).

¹¹⁹ Final Decision (July 15, 2021), ¶ 111 (Appendix Ex. AC-94).

¹²⁰ Having failed to adduce any evidence in its favor at the IRP Hearing, and having *lost* this issue before the IRP Panel, Afilias’ competition claim remains defective for the reasons articulated in the Final Decision and ICANN’s, NDC’s and Verisign’s IRP briefing. NDC and Verisign will not restate those reasons here, but refer to the following evidence adduced at the IRP Hearing: *see, generally*, Murphy Report (May 30, 2020) (Appendix Ex. AC-93); Expert Report by the Honorable John Kneuer (“Kneuer Report”) (May 29, 2020), *available at* <https://www.icann.org/en/system/files/files/irp-afili-as-expert-report-kneuer-01jun20-en.pdf>; [Carlton Report](#) (May 30 2019); *see also* [Final Decision](#) (July 15, 2021), ¶ 352.

order to eliminate a potential competitor for .COM and that Afilias would make a better operator of .WEB.¹²¹ Afilias presented no evidence, either before or during the IRP Hearing, to support these claims. In fact, the evidence before the Panel and this Board refutes Afilias' claims.¹²²

IV. AFILIAS VIOLATED THE BLACKOUT PERIOD RULES AND SHOULD BE DISQUALIFIED FROM FURTHER .WEB PROCEEDINGS

59. Blinded by its efforts to interfere with NDC's and Verisign's rights, Afilias ignores its own violations of ICANN's Rules, namely, its violation of the Blackout Period Rules mandated by Auction Rules Clause 6 and Bidder Agreement Section 2.6. As described below, Afilias broke these rules by attempting to engage NDC in negotiations to resolve the .WEB Contention Set during the Blackout Period mere days before the public auction. The Blackout Period Rules are clear on their face and admit of no exception. Accordingly, Afilias' violation of these rules is a serious breach of the ICANN Rules that subjects Afilias to financial penalties and, most pertinent here, disqualification from pursuing objections to the Auction Award to NDC.

60. Afilias' Blackout Period violation must be put in context to fully understand Afilias' intent and the scale of Afilias' improper efforts to secure .WEB for itself. That violation was no accident; it was one piece of a larger scheme organized by Afilias and the other .WEB Contention Set members to (i) coerce NDC to participate in a private auction for .WEB, (ii) fix the results of that auction *ex-ante*—whereby NDC would agree to lose the private auction in exchange for a “guaranteed” payment of over \$17 million, and (iii) when NDC did not agree to participate in that scheme, question and undermine NDC's participation in the Contention Set through serial but baseless claims regarding NDC's ownership and control. These attacks on NDC are manifested in complaints directed to ICANN (rejected by ICANN and by the IRP Panel) and in litigation (since dismissed), and then finally through Afilias' years-long crusade against NDC and Verisign, which is now before this Committee.

61. Afilias must now face the consequences of its own actions, as this Committee is

¹²¹ [Afilias' Amended IRP Request](#) (Mar. 21, 2019), ¶ 82.

¹²² Murphy Report (May 30, 2020), ¶¶ 77–81, 82 (Appendix Ex. AC-93); [Carlton Report](#) (May 30, 2019), ¶¶ 28–32, 58–61.

expressly tasked with reviewing, considering, and evaluating NDC and Verisign’s “allegations relating to [Afilias’] conduct during the Auction Blackout Period of the .WEB Auction.”¹²³

A. Afilias Improperly Colluded with Contention Set Members to Derail the Public Auction and Secure Both .WEB and Auction Proceeds for Themselves

62. On April 27, 2016, ICANN scheduled the .WEB public auction for July 27, 2016, and notified the Contention Set. NDC’s decision to proceed to that public auction, which it had every right to do, is at the core of Afilias’ subsequent actions and violations of ICANN’s rules.

63. Prior to the Auction, Afilias, Donuts, and participants other than NDC agreed amongst themselves to settle the .WEB Contention Set via a private auction. They pressured NDC to join in that agreement, but NDC declined.¹²⁴ Although the New gTLD Program rules permit private resolutions, contention set members *are not obligated* to agree to a private auction to utilize that procedure. Thus, when NDC refused to agree to a private auction for .WEB, its decision prevented the other .WEB Contention Set members from resolving .WEB on that basis. Although it was not NDC’s purpose, because private auctions typically distributed the proceeds paid for the gTLD to the “losing” participants, NDC’s decision effectively cost the other participants significant amounts of money.

64. Unhappy at the prospect of likely losing millions of dollars in “losing” bidder distributions, and seeing that money instead paid to ICANN for the general benefit of the Internet, Afilias and other .WEB Contention Set members attempted to control the bidding for .WEB by interfering with a public auction. *First*, on June 6, 2016, Donuts asked NDC to agree to a private resolution and to postpone the public auction by two months. NDC said no.¹²⁵ One day later, on June 7, 2016, Steve Heflin of Afilias contacted Juan Calle of NDC and likewise asked NDC to reconsider its decision not to consent to a private auction. Afilias then went even further, offering

¹²³ Appendix at AC-95 (Letter from Burr to Altanovo Domains Limited, Nu Dotco, LLC and Verisign, Inc. (May 19, 2022)) at 1.

¹²⁴ [Kane Stmt.](#), ¶¶ 20–23.

¹²⁵ See Rasco Ex. I (Emails between J. Nevett (Donuts) and J. Rasco (NDC) (June 6 and 7, 2016)) (Appendix Ex. AC-96); see also [Rasco Stmt.](#) (June 1, 2020), ¶ 68.

to “guarantee [NDC] score[s] at least 16 mil if you go into the private auction and lose.”¹²⁶ When Mr. Calle still said no, Mr. Heflin then offered to increase the pay-out to NDC to lose the private auction to “\$17.02” million. Mr. Calle again declined.¹²⁷ Separately, John Kane of Afiliat contacted Mr. Rasco of NDC to make the same offer; Mr. Rasco similarly declined.¹²⁸ In fact, NDC never changed its position and never agreed to a private auction, let alone any payment in exchange for its agreement to lose that auction. Afiliat’s June 2016 communications with NDC thus amount to a failed attempt at bid-rigging by trying to secure a non-competitive bid from NDC in exchange for a guaranteed \$17.02 million payment to “lose.”

65. **Second**, with their collusive scheme thwarted by NDC, Afiliat and other .WEB Contention Set members then took additional, coordinated steps to undermine NDC as a legitimate applicant for .WEB and thereby derail the public auction. On June 23, 2016, Donuts and Ruby Glen falsely represented to ICANN that NDC had changed its ownership and/or management structure, but had not reported that change in violation of ICANN’s rules. On the basis of this misrepresentation, Donuts and Ruby Glen asked ICANN to delay the public auction.¹²⁹ Days later, on June 30, 2016, Donuts filed a complaint with ICANN’s Ombudsman repeating its false allegations against NDC. On July 11, 2016, other members of the Contention Set, Schlund¹³⁰ and Radix, submitted separate **but identical** letters to ICANN requesting the same delay based on the same false allegations offered by Donuts and Ruby Glen. Both Schlund and Radix argued to

¹²⁶ See [Rasco Stmt.](#) (June 1, 2020), ¶ 73; Rasco Ex. J (Text message from S. Heflin (Afiliat) to J. Calle (NDC) (June 7, 2016)) (Appendix Ex. AC-90).

¹²⁷ *Id.*

¹²⁸ *Id.* ¶ 74; Rasco Ex. K (Text message from J. Kane (Afiliat) to J. Rasco (NDC)) (Appendix Ex. AC-97).

¹²⁹ See [Rasco Ex. L](#) (Email from J. Nevett (Donuts/Ruby Glen, LLC) to ICANN (June 23, 2016)).

¹³⁰ On July 5, 2016, Oliver Mauss of Schlund took yet another step to entice NDC to agree to an “alternative private auction.” In this version, the so-called “benefits,” according to Mr. Mauss, included that the winning participant would pay less for the gTLD than it would in a competitive public auction. The agreement would include the following “principles:” “It divides the participants into groups of strong and weak”; “the weak players are meant to lose and are compensated for this with a pre-defined sum”; “the strong players bid for the asset”; “the losing strong players receive a higher return than in the Applicant Auction”; and “the losing weak players receive a lower return than in the Applicant Auction.” Rasco Ex. C (Email from O. Mauss (1 & 1 Internet/Schlund) to J. Calle (NDC) (July 5, 2016)) (Appendix Ex. AC-98). Through his proposal, Mr. Mauss contended, the “winning party” would pay “less for the asset in comparison to both” a public auction organized by ICANN and a private auction organized by the applicants themselves. *Id.* This proposal mirrored that of Afiliat in that it was meant to “guarantee” losing bids and predetermined amounts for those losing bids, potentially raising concerns under the antitrust laws. NDC never agreed to Schlund’s proposal.

ICANN: “We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls the applicant as the auction approaches.”¹³¹

66. ICANN investigated these complaints and communicated with Mr. Rasco of NDC several times between June 27 and July 11, 2016.¹³² In particular, Mr. Rasco exchanged written communications with Ms. Willett and the ICANN Ombudsman, Chris LaHatte, and spoke on the phone with Ms. Willett during that period.¹³³ Mr. Rasco answered all of ICANN’s questions and explained how the other Contention Set members’ complaints were both factually wrong and, as Ms. Willett understood independently,¹³⁴ motivated by a desire to “get more time to convince [NDC] to resolve the contention set via a private auction, even though [NDC had] made it very clear to them (and all other applicants) that [it would] not participate in a private auction and that [NDC was] committed to participating in ICANN’s auction as scheduled.”¹³⁵ Upon investigating the matter, ICANN properly denied all requests to delay the auction, finding “no basis to initiate the application change request process or postpone the auction” based on any alleged change in NDC’s management.¹³⁶ The ICANN Ombudsman similarly determined that there were no grounds for a delay of the auction.¹³⁷ Donuts and Radix thereafter requested reconsideration of ICANN’s decision, which ICANN properly rejected on July 21, 2016.¹³⁸

¹³¹ [Verisign VRSN-8](#) (Email from B. Joshi (Dot Web) to ICANN (July 11, 2016)); [Verisign VRSN-9](#) (Letter from T. Moarz (Schlund) to ICANN (July 11, 2016)).

¹³² Rasco Stmt. (June 1, 2020), ¶¶ 77–91 (Appendix Ex. AC-85); Rasco Ex. M (Emails between J. Erwin (ICANN) and J. Rasco (NDC) (June 27, 2016)) (Appendix Ex. AC-87); *id.* Ex. N (Emails between C. LaHatte (ICANN) and J. Rasco (NDC) (July 6–7, 2016)) (Appendix Ex. AC-99); *id.* Ex. O (Emails between C. Willett (ICANN) and J. Rasco (NDC) (July 8–11, 2016)) (Appendix Ex. AC-88).

¹³³ *Id.*

¹³⁴ Rasco Stmt. (June 1, 2020), ¶¶ 84–86 (Appendix Ex. AC-85); [Willett Stmt.](#) (May 31, 2019), ¶ 26.

¹³⁵ [Rasco Stmt.](#) (June 1, 2020), ¶ 88; Rasco Ex. O (Emails between C. Willett (ICANN) and J. Rasco (NDC) (July 8–11, 2016)) (Appendix Ex. AC-88).

¹³⁶ *See* Rasco Ex. P (Letter from C. Willett (ICANN) to .WEB Contention Set (July 13, 2016)) (Appendix Ex. AC-89). The IRP Panel has since rejected Afiliás’ contention that ICANN violated its Bylaws in connection with this investigation and conclusion. *See* [Final Decision](#) (July 15, 2021), ¶ 298.

¹³⁷ Rasco Ex. P (Letter from C. Willet (ICANN) to .WEB Contention Set (July 27, 2020)) (Appendix Ex. AC-89).

¹³⁸ [Verisign VRSN-12](#) (“Determination of the Board Governance Committee (BGC) Reconsideration Request,” (July 21, 2016)), at 11–12.

67. **Third**, despite ICANN’s clear rejection of its contrived allegations, Ruby Glen filed a civil action against ICANN in the United States District Court for the Central District of California (Case No. 16-5505) based on those same allegations and seeking a temporary restraining order (“TRO”) to postpone the public auction. The District Court denied Ruby Glen’s TRO on July 26, 2016, specifically noting “*the weakness of Plaintiff’s efforts* to enforce vague terms contained in the ICANN bylaws” and Guidebook and holding that Ruby Glen had failed to “establish that it is likely to succeed on the merits” and “*failed to establish that [it allegations] raise[d] serious issues.*”¹³⁹ Ruby Glen’s complaint was dismissed with prejudice,¹⁴⁰ and its appeal of that dismissal was rejected by the Court of Appeals for the Ninth Circuit.¹⁴¹

68. Here, Afilias undoubtedly will attempt to distance itself from the foregoing actions by Ruby Glen, Donuts, Radix, and Schlund on the grounds that those actions were taken by those other entities and not by Afilias. Afilias cannot reasonably hide behind such distinctions. Afilias’ own actions were, at a minimum, coordinated with those of the other participants. For example, Afilias’ offers to NDC of \$16 million and then \$17.02 million came the same day NDC declined Donuts’ offer to delay the public auction, June 7, 2016.¹⁴² It is inconceivable that Afilias did not know that NDC had declined Donuts’ proposal before “guaranteeing” NDC at least \$16 million to agree to a private auction. In addition, from the outset of the IRP, Afilias adopted and repeated the false allegations by Donuts and others against NDC. Afilias asserted in the IRP the same arguments by Donuts *et al.* that ICANN and the District Court had already rejected, *i.e.*, (i) that NDC failed to update its .WEB Application based on supposed changes of ownership and control and (ii) that ICANN violated its Bylaws by not properly investigating and deciding the other Contention Set members’ claims.¹⁴³ Of course, Afilias had no more success with those claims than

¹³⁹ [Verisign VRSN-16](#) (*Ruby Glen, LLC v. ICANN*, Court Order Denying Ex Parte Application (July 26, 2016)), at 4 (emphasis added).

¹⁴⁰ ICANN’s Response to Amended IRP Request (May 31, 2019), ¶ 48 (citing *Ruby Glen, LLC v. ICANN*, Memorandum (Nov. 28, 2016)), available at <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf>.

¹⁴¹ [ICANN R-14](#) (*Ruby Glen, LLC v. ICANN*, Memorandum (Oct. 15, 2018) (9th Cir. 2018)).

¹⁴² [Rasco Stmt.](#) (June 1, 2020), ¶¶ 68, 73.

¹⁴³ [Afilias’ IRP Request](#) (Nov. 14, 2018), ¶¶ 44, 47–55, 60–63.

anyone else; the IRP Panel found no fault with ICANN’s pre-auction investigation and “reject[ed] [Afilias’] contention that [ICANN] violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.”¹⁴⁴

69. The full extent of Afilias’ participation in those pre-auction activities remain hidden because of Afilias’ machinations during the IRP process. After fighting to prevent NDC and Verisign from participating in the IRP, Afilias prevented its witnesses from being questioned regarding that scheme at the IRP Hearing itself. For example, although Mr. Kane was scheduled to appear, Afilias withdrew his witness statement so that ICANN could not cross-examine him during the IRP Hearing. Notwithstanding Afilias’ obfuscation, the factual record that does exist, most specifically the documented settlement offer by Afilias to NDC to fix the Auction during the ICANN-imposed Blackout Period that capped the Contention Set’s efforts to prevent a public auction in favor of a private auction, conclusively establishes Afilias’ violation of the Auction Rules.

B. Afilias Violated ICANN’s Blackout Period Rules

70. NDC’s Blackout Period claim is straightforward. ICANN’s rules unambiguously state that, once the auction deposit deadline passes, all applicants within a contention set are prohibited from “cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies or discussing or negotiating settlement agreements” until the auction has completed and full payment has been received from the winner.¹⁴⁵ Violation of this “Blackout Period” is a “serious violation” of ICANN’s rules under the Bidder Agreement and Auction Rules—so much so that applicants are expressly warned in writing that violations may result in forfeiture of the offending party’s application.¹⁴⁶

71. Afilias is a sophisticated applicant with full knowledge of the rules, including those

¹⁴⁴ [Final Decision](#) (July 15, 2021), ¶ 298.

¹⁴⁵ [Afilias C-5](#) (ICANN, New gTLD Auctions Bidder Agreement (“Bidder Agreement”) (Apr. 3, 2014)), at § 2.6; [Afilias C-4](#) (Auction Rules for New gTLDs), at § 68.

¹⁴⁶ [Afilias C-5](#) (Bidder Agreement), at § 2.10; [Afilias C-4](#) (Auction Rules for New gTLDs), at § 61.

pertaining to the Blackout Period, and of their consequences. Afiliias, like every other .WEB Contention Set member, received from Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the Auction) an email on July 20, 2016, expressly reminding all applicants that “the Deposit Deadline for .WEB/.WEBS has passed and *we are now in the Blackout Period.*”¹⁴⁷

72. Despite that notice, Afiliias violated ICANN’s rules by continuing the efforts described above to resolve the Contention Set privately *during the Blackout Period*. On July 22, 2016, *two days after* Mr. Ausubel’s email and just five days before the Auction date of July 27, 2016, thus squarely within the Blackout Period, Afiliias contacted NDC to seek a settlement of .WEB in accordance with its earlier offers. Specifically, on July 22, Mr. Kane of Afiliias sent the following text message to Mr. Rasco of NDC: “If ICANN delays the auction next week would you again consider a private auction? Y-N?”¹⁴⁸

73. Mr. Rasco did not respond to Afiliias’ text message, which he (naturally and logically) understood to be a violation of the Blackout Period Rules. As Mr. Rasco has stated under oath, he “understood that message to be an attempt to discuss resolution of the .WEB Contention Set by settlement during the Blackout Period and thus viewed it as a direct inquiry regarding NDC’s strategy for the upcoming auction,” in violation of those rules.¹⁴⁹

74. In correspondence to ICANN, Afiliias has argued that Mr. Kane’s “text merely asked a very innocuous question about NDC’s potential willingness to participate in a private auction assuming that ICANN was not proceeding with the public auction.”¹⁵⁰ Afiliias has also characterized Mr. Kane’s text as soliciting “a simple yes or no answer” without making any “commitments or promises regarding either a possible private auction or the ICANN Auction.”¹⁵¹ And, Afiliias has contended that nothing “in Mr. Kane’s text can be legitimately taken to suggest

¹⁴⁷ See [Rasco Ex. Q](#) (Email from L. Ausubel (Power Auctions LLC) to J. Rasco (NDC) (July 20, 2016) regarding the commencement of the Blackout Period) (emphasis added).

¹⁴⁸ [Rasco Ex. R](#) (Text message from J. Kane (Afiliias) to J. Rasco (NDC) (July 22, 2016)) (Appendix Ex. AC-100).

¹⁴⁹ [Rasco Stmt.](#) (June 1, 2020), ¶ 96.

¹⁵⁰ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afiliias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 6.

¹⁵¹ *Id.*

that he was asking NDC to ‘communicat[e], or cooperat[e], with [Afilias] in terms of the *[ICANN] auction*,’” including because the text “did not concern the auction at all” but rather “was expressly limited to the scenario in which “ICANN delays [that] auction.”¹⁵²

75. That is nonsense; Afilias’ *ex-post* attempts to justify its actions are without merit. First, there was nothing “innocuous” about Mr. Kane’s outreach to NDC and it was not a “simple yes or no” inquiry. That inquiry must be read in context: By asking whether NDC would “again” consider a private auction, Mr. Kane unambiguously *referred back* to Afilias’ prior attempts days earlier to induce NDC to agree to a private auction for .WEB by guaranteeing NDC over \$17 million to go to such an auction and lose.¹⁵³

76. Second, an agreement to conduct a private auction would necessarily resolve the Contention Set without determining the winner of .WEB through the planned public auction. Therefore, by “again” asking NDC to consider that alternative, together with the implicit renewal of its \$17 million offer, Afilias sought a settlement of .WEB during the Blackout Period and simultaneously probed NDC’s strategy for the upcoming auction, both of which the ICANN Rules expressly prohibit. The Blackout Period Rules do not require that promises be made or agreements reached. Rather, as Afilias concedes, “auction participants are prohibited from communicating, or cooperating, with one another in terms of the auction.”¹⁵⁴ That is precisely what Afilias did. Indeed, Mr. Kane’s text message was a “communication” that cannot reasonably be construed as anything but a last-ditch effort to avoid the planned auction for .WEB and settle the Contention Set using a private auction.

77. Third, Afilias’ suggestion that Mr. Kane’s message did not concern the planned public auction for .WEB because it was phrased as a hypothetical “*if* ICANN” delayed that auction is disingenuous. By renewing Afilias’ efforts to induce NDC to avoid a public auction by agreeing to a private auction and receiving \$17 million for its losing bid, Mr. Kane was necessarily

¹⁵² *Id.* (emphasis added).

¹⁵³ [Rasco Stmt.](#) (June 1, 2020), ¶ 97; Rasco Ex. R (Text message from J. Kane (Afilias) to J. Rasco (NDC) (July 22, 2016)) (Appendix Ex. AC-100).

¹⁵⁴ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 6.

discussing the auction for .WEB. That is the unambiguous subject matter and context of Mr. Kane’s message, which followed months of similar messages that happened to be outside of the Blackout Period. Simply because Mr. Kane did not type the words “settlement” or “bids” or “bidding strategies” does not mean that his message was not intended to or did not address each of those prohibited subjects. Afilias would have ICANN interpret the Blackout Period Rules so narrowly that the magic words “settlement” or “bids” or “bidding strategies” must appear on the face of the communication. That, of course, is not the letter or the spirit of the Blackout Period Rules. Afilias’ proposed standard would open broad and dangerous loopholes in those rules, inviting the very collusive conduct they seek to prevent. Here, Afilias (i) sent a communication (ii) during the Blackout Period (iii) discussing settlement of the .WEB Auction and probing NDC’s strategy for that auction. That is a clear violation of the Blackout Period Rules, and Afilias should be held accountable, including by forfeiting its application and suffering disqualification from the Auction and all proceedings related to .WEB.¹⁵⁵

78. Afilias has held itself out as a victim for six years, instigating meritless attacks on NDC, Verisign, and ICANN because it failed to coerce a private auction for .WEB and was outbid during the public auction. But Afilias is far from a victim. At a minimum, Afilias engaged in its own Rules violation which, by definition, is a serious breach that deprives Afilias of standing to maintain this proceeding. Afilias’ conduct merits significant sanctions and an end to its incessant attacks on NDC, Verisign, and ICANN regarding .WEB.

V. THE DAA FULLY COMPLIES WITH THE GUIDEBOOK

79. The Board need not reach the merits of Afilias’ claims because Afilias violated the Blackout Period Rules and should be disqualified from the .WEB Contention Set. The IRP Hearing record, however, firmly establishes that the DAA fully complies with the Guidebook, including as interpreted and applied by ICANN and other industry participants in the Program.¹⁵⁶ The testimony of Christine Willett, the Vice President of gTLD Operations, Global Domains

¹⁵⁵ [Afilias C-5](#) (Bidder Agreement), at § 2.10; [Afilias C-4](#) (Auction Rules for New gTLDs), at § Clause 61.

¹⁵⁶ As a matter of law, ICANN and industry practices are controlling. *E.g.*, authorities cited at note 234, *infra*.

Division at ICANN, responsible for the Program, is *dispositive*. Ms. Willett confirmed that a pre-auction agreement to assign the *registry agreement* in exchange for financing the successful resolution of a contention set does *not* violate the Guidebook’s prohibition on a transfer of a new gTLD application. As Ms. Willett explained, the Guidebook prohibits an applicant only from selling its application—or as Ms. Willett testified: “*You couldn’t sell your application in total to someone else.*”¹⁵⁷ The Guidebook does not prohibit agreements to fund an auction bid or make a future assignment of a registry agreement upon ICANN’s consent, as provided in the DAA.¹⁵⁸

80. New gTLDs have been transferred hundreds of times post-delegation since the promulgation of the Guidebook, including, notably, to and from Afilias companies.¹⁵⁹ ICANN has *never* objected or refused to consent to an assignment on the grounds that (i) the pre-delegation agreement provided for a post-delegation assignment of the registry agreement and/or (ii) there was a lack of pre-delegation public scrutiny of the registry operator because the assignment was effected after the application evaluation period had closed.¹⁶⁰

81. ICANN must apply these same rules fairly and consistently to NDC and Verisign. There is no basis for discriminatory treatment.

A. Section 10 of the Guidebook Prohibits Only the Transfer of an Application for a New gTLD—Not the Future Assignment of a Registry Agreement

82. Section 10 of Module 6 of the Guidebook is intended to limit claims that an applicant has acquired rights in a potential new gTLD by virtue of filing a gTLD application, providing instead that an applicant will acquire rights upon execution of a post-delegation registry agreement with ICANN. The last sentence of Section 10 adds that an applicant cannot transfer the application to a third party without ICANN’s consent. Specifically:

¹⁵⁷ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 568:7–8 [Willett].

¹⁵⁸ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 775:21–24 [Willett].

¹⁵⁹ [ICANN’s Opposition to Request for Emergency Panelist](#) (Dec. 17, 2018), ¶¶ 25–30.

¹⁶⁰ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 775:21–24 [Willett]; *see generally* ICANN, “gTLD Registry Agreements,” available at <https://www.icann.org/en/registry-agreements?first-letter=a&sort-column=top-level-domain&sort-direction=asc&page=1> (Assignment Agreements between United TLD Holdco Ltd. and Dog Beach, LLC).

10. ***Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN***, and that applicant’s rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant’s proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). ***Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application.***¹⁶¹

83. Section 10 does not address agreements to support an application, finance a resolution of a contention set, or assign a registry agreement post-delegation (upon consent of ICANN). Section 10 addresses only the transfer of an application itself.¹⁶² Indeed, as interpreted by ICANN, Section 10 prohibits only the transfer of an “***total application***” to a third party.¹⁶³ Ms. Willett’s testimony is clear that Section 10 does not prohibit ancillary arrangements to support a gTLD application or a subsequent assignment of the registry agreement, such as the DAA. According to Ms. Willett:

[A]pplicants had agreements with a variety of vendors and third parties regarding ***all sorts of aspects of their application and future gTLD operations***. There were applicants – more than a handful of applicants who ***signed a Registry Agreement and then immediately transferred a TLD to another*** registry operator, requested such an assignment from ICANN.¹⁶⁴

[W]hat ICANN was looking at was that the applying entity continued to retain responsibility for the application.¹⁶⁵

Essentially they ***couldn’t change the applying entity.***¹⁶⁶

¹⁶¹ [Afilias C-3](#) (Guidebook), at Module 6, § 10 (emphasis added). Neither Section 10, nor any other section of the Guidebook, relevant ICANN policy, Bylaw, or other documentation, defines the terms “resell, assign or transfer.” Indeed, there is no other reference to the terms “resell, assign or transfer” of an applicant’s rights in the hundreds of pages of the Guidebook or related documentation. In common usage, the terms “resell,” “assign” and “transfer” are used interchangeably, without any distinction among them. Afilias has never disputed in these proceedings that the Guidebook uses the terms interchangeably to mean the same thing. ICANN agrees that it applies the terms interchangeably under the Guidebook. [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 566:25–568:8 [Willett].

¹⁶² [Afilias C-3](#) (Guidebook), at Module 6, § 10.

¹⁶³ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 568:3–8 [Willett].

¹⁶⁴ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 708:12–20 [Willett].

¹⁶⁵ *Id.* at 756:23–757:1 [Willett].

¹⁶⁶ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 576:17–18 [Willett]. Indeed, when Afilias’ counsel specifically asked Ms. Willett about Verisign financing in exchange for a subsequent assignment of the .WEB registry agreement, Ms. Willett expressed no concern that there might be a violation:

[M]y general understanding based on Verisign’s press release is that they had some future intention, hopes, aspirations to operate the TLD if ICANN approved of a TLD assignment. I also understood from the press release that they had committed funds that were put forwards towards the auction.

[T]hey are prohibited from assigning -- reassigning, *transferring their application*. *** So *applicants all the time were assigning rights or designating third parties to operate on their behalf*. But the way we -- like from an operational or transactional perspective, we viewed this Paragraph 10 about not assigning rights and obligations of the application to be of the *total application*. *You couldn't sell your application in total to someone else*.¹⁶⁷

84. As the Guidebook was interpreted and applied by ICANN, any contention that the DAA violates Section 10 is meritless. The opposite of such a claim is indisputably true: the DAA fully complies with the rules articulated and applied by ICANN for new gTLD applications. The .WEB application was never transferred by NDC to Verisign. NDC remains the applicant responsible for the application. At the very most, the DAA creates ancillary rights and obligations between NDC and Verisign concerning “*aspects of their application and future TLD operations*”—like “*applicants [did] all the time*.”¹⁶⁸ Such agreements are common in the industry and do not violate the Guidebook.

85. Afilias has admitted the critical distinction between an agreement to transfer a gTLD application and an agreement with respect to ancillary rights. Afilias further has admitted that the DAA concerns only the latter, namely, ancillary rights. In support of Afilias’ claim—made to preclude Verisign’s participation in the IRP—that “VeriSign has no rights in NDC’s .WEB application,” Afilias stated that the DAA is a “wholly separate agreement” between NDC and Verisign, which “is not the ‘property or transaction that is the subject of the action,’” NDC’s .WEB application.¹⁶⁹ Afilias further admitted: “VeriSign’s interest in the VeriSign/NDC Agreement could not give VeriSign any rights in either NDC’s .WEB application . . . or in any future registry agreement that NDC might conclude with ICANN.”¹⁷⁰ These admissions, made to the IRP Panel, critically undercut Afilias’ claim that the DAA transferred the .WEB application to Verisign in violation of Section 10. To the contrary, Afilias has conceded that the DAA does not

[Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 707:16–708:3 [Willett].

Many applicants “signed a Registry Agreement and then immediately transferred a TLD to another registry operator.” *Id.* at 708:17–19 [Willett].

¹⁶⁷ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 567:3–568:8 [Willett].

¹⁶⁸ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 708:12–20 [Willett].

¹⁶⁹ [Afilias’ Amici Opposition](#) (Jan. 28, 2019), ¶ 84 (quoting from the Federal Rule standard for what is a related action for purposes of joinder).

¹⁷⁰ *Id.*, ¶ 85.

change any rights or obligations in the application or a future registry agreement, and NDC remains the sole applicant for .WEB today.

86. According to ICANN’s representatives, only a sale of an application itself might run afoul of the Guidebook.¹⁷¹ Afilias concedes this has not occurred. The specific terms of the DAA, establishing that rights in the Application have not been transferred, are discussed in detail in the following Sections of this memorandum.¹⁷²

87. The Auction Rules themselves expressly acknowledge pre-auction agreements providing for “post-Auction ownership transfer arrangements.”¹⁷³ The rules prohibit such agreements only during the Blackout Period.¹⁷⁴ According to ICANN in this proceeding: “Thus, the Auction Rules appear to contemplate the possibility of a ‘post-Auction ownership transfer arrangement’ being in place prior to an auction.”¹⁷⁵

88. Ms. Willett’s pre-Hearing witness statement states that, even if NDC was sold to Verisign pre-auction—which it was not—ICANN still would not have disqualified NDC’s application because ICANN has never disqualified an applicant for changes to its ownership or control: “Even if NDC had submitted a change request indicating that it had undergone a change of control and/or ownership, NDC would not have been disqualified from the auction set to take place on 27 July 2016. In fact, ICANN has received over 2,700 application change requests. Nearly 800 of those requests made changes to the responses provided to questions pertaining to

¹⁷¹ ICANN’s interpretation of the Guidebook is consistent with similar provisions in other agreements. Generally, “the two purposes of anti-assignment clauses are (1) to ensure that the counterparty receives personal performance from the would-be assignor where material, and (2) to protect the counterparty from the danger of double liability to both the would-be assignor and would-be assignee.” (*Gallagher v. S. Source Packaging, LLC*, 564 F. Supp. 2d 503, 507 (E.D.N.C. 2008) (citing Rest. (Second) of Contracts § 322 cmt. a, b)). The DAA does not implicate either of these two purposes. The DAA did not purport to relieve NDC from any obligation to perform to ICANN. Instead, NDC warranted in the DAA that it “will remain at all relevant times prior to the completion of the Transfer, in compliance with the terms and conditions of all ICANN-related and all Auction-related, contracts, policies, rules and requirements applicable to Company as an applicant for the Domain, as a participant in the Auction, and as operator of the registry for the Domain.” *Livesay Ex. D (DAA)*, at § 4(g)(ii) (Appendix Ex. AC-84).

¹⁷² We do not believe that Section 10 has ever been applied to disqualify an application for a new gTLD. In fact, the opposite is true; ICANN has approved numerous assignments under facts like those here (Section V.D., *infra*).

¹⁷³ [Afilias C-4](#) (Auction Rules for New gTLDs), at § 68(a); *see also* [Afilias C-3](#) (Guidebook), at Module 4, § 4.1.3 (“It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention.”).

¹⁷⁴ ICANN’s Rejoinder Memorial (June 1, 2020), ¶ 83 (<https://www.icann.org/en/system/files/irp-afilias-icann-response-amended-request-01jun20-en.pdf>).

¹⁷⁵ *Id.* (emphasis added).

ownership or control of the applicant. To date, ICANN has *not disqualified a single application* in connection with a change to responses to those questions.”¹⁷⁶

89. Finally, the drafting history of the Guidebook further confirms that the Guidebook was not intended to limit agreements for post-delegation assignments of a new gTLD. Instead, requests for assignment would be considered under the standard assignment provisions of the registry agreement executed between the applicant and ICANN.

90. Specifically, in drafting the Guidebook, ICANN rejected proposals from Microsoft to limit agreements for post-delegation assignments of registry agreements.¹⁷⁷ Microsoft proposed that “ICANN should develop ‘Assignment Guidelines’ that set forth the conditions and criteria that a proposed gTLD Assignee must satisfy to obtain ICANN’s approval of the proposed assignment.”¹⁷⁸ Microsoft’s concern was, *inter alia*, that the Guidebook be revised to ensure that “participants do not successfully evade the examination and objection process.”¹⁷⁹ ICANN rejected Microsoft’s proposal. It determined that the assignment provisions of the standard registry agreement, Section 7.5, were sufficient.

91. The position Afilias takes here is a variation on the Microsoft proposal that was rejected by ICANN. Like Microsoft, Afilias asks ICANN to read into the Guidebook a limitation on agreements for future assignments of new gTLDs, among other claimed limitations on future assignments. The Guidebook rejects such an approach. Also like Microsoft, Afilias argues that an applicant otherwise would “evade the examination and objection process.”¹⁸⁰ ICANN already rejected Afilias’ arguments in adopting the Guidebook.¹⁸¹

¹⁷⁶ [Willett Stmt.](#) (May 31, 2019), ¶ 18 (emphasis added).

¹⁷⁷ [AC-35](#) (“New gTLDs Applicant Guidebook April 2011 Discussion Draft, Public Comment Summary and Analysis”), at 89.

¹⁷⁸ *Id.* Microsoft added that “[such] conditions and criteria at a minimum must be the equivalent of the full range of evaluation for new gTLD applicants.” *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Under basic principles of legal construction, the Panel may not read a requirement into the Guidebook that ICANN expressly considered and rejected—especially when, as here, such a requirement would be inconsistent with the Guidebook’s acknowledgement that agreements for future assignments are permissible. See [AA-1](#) (*Avila v. Spokane School Dist.*, 852 F.3d 936, 943–44 (9th Cir. 2017) (holding statute should be interpreted to adopt “discovery rule” instead of “occurrence rule” where occurrence rule appeared in initial draft of statute but was removed from final draft)); [AA-14](#) (*Edwards v. Symbolic Int’l Inc.*, 414 F. App’x 930, 931 (9th Cir. 2011) (holding

B. The Express Terms of the DAA Establish that It Does Not Transfer Rights or Obligations Under the Application

92. The DAA consists of two documents. The first is an executory agreement as of August 25, 2015 between NDC and Verisign, pursuant to which:

(i) Redacted - Third Party Designated Confidential Information

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(ii) Redacted - Third Party Designated Confidential Information

and

(iii) Redacted - Third Party Designated Confidential Information

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93. The DAA is explicit and unambiguous Redacted - Third Party Designated Confidential Information

185 Rights

and obligations under the Application were never assigned by the DAA.

94. The second document comprising the DAA consists of supplemental terms executed shortly before the auction.¹⁸⁶ Verisign requested the DAA Supplement as an

Redacted - Third Party Designated Confidential as provided for under the express terms of the original DAA.¹⁸⁷ Verisign made the request upon hearing rumors—confirmed in the supplemental agreement as untrue—that NDC had transferred control of its company and/or the .WEB Application to unidentified third parties.

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pre-contract negotiations rejecting a lengthy time period for payment refuted defendant's interpretation that time was not of the essence in contract)).

¹⁸² Livesay Ex. D (DAA), at 1 (Appendix Ex. AC-84).

¹⁸³ *Id.*, at Ex. A, § 3.

¹⁸⁴ *Id.*, at Ex. A, § 3(c).

¹⁸⁵ *Id.*, at Ex. A, § 3.

¹⁸⁶ Livesay Ex. H (DAA Supplement) (Appendix Ex. AC-86).

¹⁸⁷ The DAA provides that Redacted - Third Party Designated Confidential Information . Livesay Ex. D (DAA), at § 4(k) (Appendix Ex. AC-84); *see* Section V.B.2, *infra*.

¹⁸⁸ Livesay Ex. H (DAA Supplement), ¶¶ A & C (Appendix Ex. AC-86).

1. The DAA Provides Financing and a Contingent Future Assignment of the Registry Agreement Upon ICANN’s Consent

95. The DAA did not sell, assign, or transfer the Application or its rights or obligations.

The DAA provides Redacted - Third Party Designated Confidential Information

NDC remains the applicant today—*seven years*

after execution of the DAA.

96. The provisions of the DAA regarding a Redacted - Third Party Designated Confidential Information are clear and unambiguous:

a. Redacted - Third Party Designated Confidential Information

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b. Redacted - Third Party Designated Confidential Information

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c. Redacted - Third Party Designated Confidential Information

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d. Redacted - Third Party Designated Confidential Information

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Contrary to Afiliás’ claims, the DAA provides Redacted - Third Party Designated Confidential Information

97. Redacted - Third Party Designated Confidential Information

Under the DAA, for example, Redacted - Third Party Designated Confidential Information

¹⁸⁹ Livesay Ex. D (DAA), at Ex. A, § 3(c) (emphasis added) (Appendix Ex. AC-84).

¹⁹⁰ *Id.*, at Ex. A, § 3(h) (emphases added).

¹⁹¹ *Id.*, § 3 (emphases added).

¹⁹² *Id.*, § 5(a)(iv) (emphases added).

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98. Redacted - Third Party Designated Confidential Information

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99. Redacted - Third Party Designated Confidential Information

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100. Redacted - Third Party Designated Confidential Information

¹⁹³ *Id.*, § 4(c).

¹⁹⁴ *Id.*, § 4(a)(i) & (ii).

¹⁹⁵ *Id.*, § 9.

¹⁹⁶ NDC's warranties included that:

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¹⁹⁷ *Id.*, at Ex. A, § 3(b).

¹⁹⁸ *Id.*, at Ex. A, § 3(c)-(d).

¹⁹⁹ Livesay Ex. H (DAA Supplement), ¶ C (Appendix Ex. AC-86).

²⁰⁰ Livesay Ex. D (DAA), at Ex. A, § 9 (Appendix Ex. AC-84).

²⁰¹ Contrary to Afiliias' argument, Redacted - Third Party Designated Confidential Information
. See Livesay Stmt. (June 1, 2020), ¶ 23 (Appendix Ex.

AC-81); ¶ 95, *supra*.

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101. Redacted - Third Party Designated Confidential Information

. Section V.C., *infra*.

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2. The DAA Supplement Confirms that There Was No Resale, Assignment or Transfer of the Application

102. Afiliias' attempt to interfere with the delegation of .WEB began before the auction, before Afiliias knew that Verisign was providing financing to NDC, and before Afiliias knew of the DAA. As explained in more detail in Section IV.A., *infra*, Afiliias worked in concert with other Contention Set members to claim falsely that there had been a change in ownership or management of NDC.²⁰⁴ As a result of this conduct, rumors began circulating that NDC had sold or transferred control of the company or the .WEB application to an unknown third party—rumors that were later proven untrue.²⁰⁵ On becoming aware of these rumors, Redacted - Third Party Designated Confidential Information

²⁰² Livesay Ex. D (DAA), at Ex. A, § 1(k) (emphasis added) (Appendix Ex. AC-84).

²⁰³ *Id.*, at Ex. B.

²⁰⁴ [Rasco Stmt.](#) (June 1, 2020), ¶¶ 75–81.

²⁰⁵ Livesay Ex. H (DAA Supplement), ¶ A (Appendix Ex. AC-86).

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103. The DAA Supplement includes Redacted - Third Party Designated Confidential Information

:

(1) Redacted - Third Party Designated Confidential Information

u/

(2) “ Redacted - Third Party Designated Confidential Information

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(3) Redacted - Third Party Designated Confidential Information

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C. The Terms of the DAA are Inconsistent with the Legal Elements for a Resale, Assignment or Transfer of the Application

104. The Guidebook and established legal principals require that an assignment include (1) a specific *intention* to make (2) a *present transfer of ownership* of the application, and (3) the transferor *have no remaining interest* in the application. The DAA lacks each of these requirements. The parties to the DAA had no intention to effect a present transfer, and NDC remains the applicant. Further, as Afilias admits, any attempt to transfer the application to Verisign would have been a nullity under the Guidebook—with NDC remaining the applicant and leaving

²⁰⁶ *Id.*; Livesay Ex. D (DAA), at § 4(k) (Appendix Ex. AC-84).

²⁰⁷ Livesay Ex. H (DAA Supplement), ¶ C (emphasis added) (Appendix Ex. AC-86).

²⁰⁸ *Id.*, ¶ D (emphasis added).

²⁰⁹ *Id.*, ¶ F (emphases added).

Verisign to pursue whatever rights against NDC it might have under the DAA.

105. Afilias concedes: “For an assignment to be effective [under Section 10 of the Guidebook], it ‘must include manifestation to another person by the owner of his *intention* to transfer the right, *without further action*, to such other person or to a third person.”²¹⁰ Similarly, assignment law provides: “In determining whether an assignment has been made, ‘the intention of the parties as manifested in the instrument is controlling.’”²¹¹ “Once an assignment has been made, ‘the assignor no longer has a right to enforce the interest because the assignee has obtained *all* rights to the thing assigned.’”²¹² “A contract to assign a right in the future is not an assignment.”²¹³ The DAA does not meet any of the conditions to an assignment.²¹⁴

106. **First,** Redacted - Third Party Designated Confidential Information

”²¹⁵ The DAA

further provides— Redacted - Third Party Designated Confidential Information

”²¹⁶ These

²¹⁰ [Afilias’ Response to the Amicus Curiae Briefs](#) (July 24, 2020), ¶ 79 (emphases added). “To ‘assign’ ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person.” [AA-18](#), *McCown v. Spencer*, 8 Cal. App. 3d 216, 225 (Cal. Ct. App. 1970) (emphasis added) (internal citation omitted).

²¹¹ [AA-9](#), *Cal. Ins. Guarantee Assn. v. Workers’ Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1335 (2012).

²¹² [AA-24](#), *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. Dist. Ct. App. 2015) (quoting [AA-11](#), *Continental Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008)) (emphasis added). *See also* [AA-19](#), *Merchants Serv. Co. v. Small Claims Court of City & Cty. of San Francisco*, 35 Cal. 2d 109, 114 (Cal. 1950) (an assignment contemplates that the former “extinguished his right . . . and this right was transferred to the company, so that it thereafter stood in the place of” the assignor); [AA-21](#), *Modern Law of Contracts* § 21:6 (“An assignor must show an intention to divest himself of a property interest and to vest indefeasible title to that property interest in an assignee. . . . Once the assignment is made, the assignee stands in the shoes of the assignor and may assert rights under the contract the same as the assignor. The assignor no longer has the right or power to enforce the assigned interest.”).

²¹³ [AA-31](#), *Springfield Int’l Rest., Inc. v. Sharley*, 44 Or. App. 133, 140 (Or. Ct. App. 1980) (citing [AA-26](#), *Restatement (First) of Contracts*, § 166(1) (1932)).

²¹⁴ In addressing the DAA, Afilias repeatedly fails to address the DAA Supplement executed between Verisign and NDC, Redacted - Third Party Designated Confidential Information, in response to false rumors of a sale of NDC spread by Afilias and those acting in concert with it. (¶ 94, *supra*). Afilias thus ignores contractual terms that form a part of the DAA, undoubtedly because, like the original DAA, the DAA Supplement is a clear contradiction of Afilias’ claims.

²¹⁵ *Livesay Ex. H (DAA Supplement)*, ¶ D (Appendix Ex. AC-86).

²¹⁶ *Livesay Ex. D (DAA)*, Ex. A, §§ 1(k), (g) and (h) (Appendix Ex. AC-84). The DAA expressly provides

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” *Id.* at Ex. A, § 1(k). Redacted - Third Party Designated Confidential Information

express provisions of the DAA are dispositive.²¹⁷

107. **Second**, Redacted - Third Party Designated Confidential Information

²¹⁸ Redacted - Third Party Designated Confidential Information

²¹⁹ Redacted - Third Party Designated Confidential Information ²²⁰

108. **Third**, the DAA could **not** transfer any rights to Verisign that were not granted to NDC. By operation of law, any attempted transfer would be void.²²¹ Afilias has admitted this critical rule of law and its inconsistency with Afilias' claim. As explained above, in attempting to block Verisign from participating as *Amici* in the IRP Hearing, Afilias made the following admission, stunning in light of its claims now: "**VeriSign has no rights in NDC's .WEB application, nor can it**"²²² and "VeriSign's interest in the VeriSign/NDC Agreement could not give VeriSign any rights in either NDC's .WEB application . . . or in any future registry agreement that NDC might conclude with ICANN."²²³

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Livesay Ex. H (DAA Supplement), ¶ F (Appendix Ex. AC-86).

²¹⁷ [AA-9](#), *Cal. Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1335 (Cal. Ct. App. 2012) ("In determining whether an assignment has been made, 'the intention of the parties as manifested in the instrument is controlling.'").

²¹⁸ See Section V.B., *supra*.

²¹⁹ See, e.g., [AA-19](#), *Merchants Serv. Co.*, 35 Cal. 2d at 114; [AA-21](#), *Modern Law of Contracts* § 21:6.

²²⁰ The DAA is a separate and independent legal agreement between different parties from the agreement comprising the Application, establishing distinct rights and obligations between Verisign and NDC (only). There is no change in ownership of the Application by reason of the DAA.

²²¹ See [AA-36](#), UNIDROIT Principles of International Commercial Contracts at 314 ("The assignment of a right . . . is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment.") The DAA also itself expressly states

Redacted - Third Party Designated Confidential Information
Livesay Ex. H (DAA Supplement), ¶ C

Redacted - Third Party Designated Confidential Information (Appendix Ex. AC-

86).

²²² [Afilias' Amici Opposition](#) (Jan. 28, 2019), ¶ 83 (emphasis added).

²²³ *Id.*, ¶ 85.

109. In contrast to a sale, assignment or transfer of NDC’s .WEB Application, the only transfer contemplated in the DAA is a possible future and conditional assignment of an as yet unexecuted registry agreement, not the Application. Specifically,

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Thus, Redacted - Third Party Designated Confidential Information

.225 As Ms. Willett put it, Verisign had a “future intention, hopes, aspirations to operate the TLD if ICANN approved of a TLD assignment.”²²⁶

110. Mr. Rasco specifically confirmed:

NDC remained the applicant and did not agree to assign anything related to its Application, let alone the Application itself . . . ²²⁷ NU DOT CO is and always was in control of our application. There was never—Verisign never controlled our application and never controlled NU DOT CO.²²⁸

In response to a question from Arbitrator Bienvenu, Mr. Rasco testified:

The way that I understood the DAA was that none of the elements of the DAA really touched the application. We were not transferring anything to Verisign at this time in entering into the DAA. . . . [F]rom my standpoint, there was never any doubt as to whether or not we were violating the guidebook because we would never -- we would never do something that violated the guidebook.²²⁹

As Mr. Livesay succinctly summarized:

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D. The DAA Is Consistent With Industry Practice Under the Guidebook

111. The DAA is consistent with ICANN’s interpretation of the Guidebook under the New gTLD Program, as applied across hundreds or thousands of transactions—including those in

²²⁴ Livesay Ex. D (DAA), at Ex. A, § 3 (Appendix Ex. AC-84).

²²⁵ See, e.g., [AA-19](#), *Merchants Serv. Co.*, 35 Cal. 2d at 114; [AA-21](#), *Modern Law of Contracts* § 21:6.

²²⁶ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 707:18–19 [Willett].

²²⁷ Rasco Stmt. (June 1, 2020), ¶ 49 (Appendix Ex. AC-85).

²²⁸ [Hrg. Tr., Vol. V](#) (Aug. 7, 2020), 859:4–8 [Rasco].

²²⁹ *Id.* at 897:4–17 [Rasco].

²³⁰ [Hrg. Tr., Vol. VII](#) (Aug. 11, 2020), 1232:3–8 [Livesay] (Appendix Ex. AC-83).

which Afilias itself has engaged.²³¹ It is a fundamental principle of contract law that a contract document, such as the Guidebook,²³² must be interpreted in light of the parties' intentions as reflected in their course of conduct²³³ and industry practice.²³⁴

112. According to ICANN, approximately 1,200 new gTLDs have been delegated and are operational under the New gTLD Program.²³⁵ In numerous instances, the gTLDs were assigned prior to being operated by the original applicant and with the intent that they be operated for purposes other than those specified by the original applicants. ICANN has approved transfer requests where it was satisfied that the assignee had the requisite financial and technical capability to operate a TLD.²³⁶ Agreements substantively like the DAA are common.

²³¹ Prior to the IRP, Afilias withdrew the very witnesses in the IRP Hearing in its employ who could testify regarding ICANN and industry practices. Presumably, Afilias did so because its witnesses would have confirmed rather than contradicted the facts presented by NDC and Verisign regarding those practices.

²³² [Afilias' Response to the Amicus Curiae Briefs](#) (July 24, 2020), ¶ 77 and n. 139.

²³³ [AA-63](#), 11 *Williston on Contracts* § 31:11 (4th ed.) (“The goal of contract interpretation is to give effect to the parties’ reasonable expectations which must be gleaned not only from the contract language, but also from extrinsic evidence, including evidence of the parties’ conduct, goals sought to be accomplished, and surrounding circumstances when the contract was negotiated.”); [AA-80](#), *Employers Reinsurance Co. v. Superior Court*, 161 Cal. App. 4th 906, 922 (Cal. Ct. App. 2008), *as modified* (Apr. 22, 2008) (“The very purpose of the admission of course of performance is the commonsense belief that when the parties perform under a contract, without objection or dispute, they are fulfilling their understanding of the terms of the contract. This is true *regardless* of the actual language of the contract, as long as the parties’ interpretation is reasonable.” (emphasis in original)); [AA-69](#), *Ass’n of Flight Attendants-CWA v. United Airlines, Inc.*, No. 19-CV-2867, 2020 WL 2085003, at *2 (N.D. Ill. Apr. 30, 2020) (“Arbitrators and courts recognize that ‘[c]ourse of performance when employed to interpret a contract is an . . . expression of the parties of the meaning that they give to the terms of the contract that they made.”); [AA-89](#), *Hanifin, Inc. v. Mersen Scotland Holytown, Ltd.*, No. CIV.A. 2010-11695, 2012 WL 1252999, at *2 (D. Mass. Apr. 12, 2012) (“Evidence as to how the course of conduct between the parties informs the interpretation”); [AA-81](#), *Energy Servs., Inc. v. F.E.R.C.*, 568 F.3d 978, 984 (D.C. Cir. 2009) (“The reasonableness of FERC’s interpretation is further confirmed by reference to the parties’ course of conduct. *See* [AA-100](#), *S.D. Pub. Utils. Comm’n v. F.E.R.C.*, 934 F.2d 346, 351 (D.C. Cir. 1991) (observing that course-of-performance evidence ‘of course is probative’ in the context of a FERC contract interpretation dispute).

²³⁴ [AA-98](#), *S.E.C. v. Johnson*, 525 F. Supp. 2d 66, 70 (D.D.C. 2007) (“[T]estimony will be allowed in order to aid the jury in understanding the meaning of terms employed in the contract and industry practice with respect to such contracts”); [AA-96](#), *Meyer Grp., Ltd v. United States*, No. 12-488C, 2014 WL 12513422, at *2 (Fed. Cl. Apr. 23, 2014) (“Evidence of industry practice and custom helps the Court determine a contract’s meaning. . . Expert testimony on the meaning of contract terms according to industry practice and custom, therefore, may assist the Court in determining how it should interpret a contract.”); [AA-86](#), *Fox Film Corp. v. Springer*, 273 N.Y. 434, 437 (NY Ct. App. 1937) (“To find out that intent from the language used the court must place itself in the position of the parties when they made the contract. It must be informed of the meaning of the language as generally understood in that business, in the light of the customs and practices of the business.”); [AA-66](#), *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 102 (2d Cir. 2002) (“Thus, standard industry practices are always relevant when interpreting contracts governed by the UCC, and Aceros failed to rebut TA’s assertion that arbitration provisions are commonplace in the steel industry.”).

²³⁵ ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection (Dec. 17, 2018), ¶ 25 (citing <https://newgtlds.icann.org/en/program-status/statistics>).

²³⁶ [Willett Stmt.](#) (Dec. 17, 2018), ¶¶ 34–35.

113. As addressed above at Section II.C.3, ICANN was aware of the varied agreements between applicants and third parties with respect to virtually every aspect of the application process and post-delegation operation, including transfer, of new gTLDs. Mr. Rasco testified regarding the broad range of transactions of applicants with third parties common in the industry:

Other companies, including Afilias, . . . ultimately treat[ed] gTLD applications as a form of arbitrage in which each application was an asset to be leveraged for profit without ever intending to actually operate any, or most, of the gTLDs . . . I believe ICANN was aware of these practices and, to my knowledge, did not object to them. I believed that these practices were acceptable to ICANN, which sought only to ensure that the ultimate operator was qualified and technically and financially capable of operating each respective gTLD.²³⁷

114. In applying the Guidebook, Ms. Willett summarized ICANN’s practices as follows, in response to questions from Arbitrator Bienvenu:

*I know there’s all sorts of creative arrangements that could be made, but as long as the applying entity still was managing the application, that would have been consistent with the rules.*²³⁸

115. During the IRP Hearing, Afilias tried to dispute the clear evidence of industry practices, including its own transactions, through varying sleights-of-hand based on nonexistent distinctions between the DAA and similar transactions.²³⁹ Afilias never introduced any evidence of its own on industry practice, instead it withdrew as witnesses its employees/officers who could have testified to industry practice and Afilias’ own transactions. The reason for Afilias’ tactics is that its unsupported arguments, which is all it ever offered, are pure fiction.

116. Instances of industry practice comparable to the DAA abound. For example: **Donuts and Demand Media.** Their agreement, governing the transfer of multiple new gTLDs, is consistent with industry practice and, in relevant respects, very similar to the DAA. Donuts and Demand Media entered into a *pre-auction agreement* for Demand Media to *finance 107 new*

²³⁷ [Rasco Stmt.](#) (June 1, 2020), ¶ 37.

²³⁸ *Id.* at 757:2–6 [Willett]. With the many variations in transactions involving new gTLD applications in the secondary market, “[Willett:] [a]s the program progressed, we had to continue to adapt our procedures to handle situations we hadn’t contemplated and beyond what was expressly stated in the AGB.” *Id.* at 757:23–758:1; *see also* Rasco Stmt. (June 1, 2020), ¶ 49 (Appendix Ex. AC-85); Hrg. Tr., Vol. V (Aug. 7, 2020), 823:7–9 ([Rasco:], (Appendix Ex. AC-80). “[W]e never transferred anything to Verisign, rights or the application.”), *id.* at 859:5–8; Hrg. Tr., Vol. VII (Aug. 11, 2020), 1232:3–8 [Livesay] (Appendix Ex. AC-83).

²³⁹ [Hrg. Tr., Vol. VII](#) (Aug. 11, 2020), 1176:5–1177:12 [Livesay]; *id.* at 1175:15–19, 1178:21–1179:13 [Livesay].

gTLD applications in exchange for a post-delegation assignment of the registry agreements. Twenty-four new gTLDs subsequently were assigned to Demand Media pursuant to this agreement *with ICANN's consent.*²⁴⁰

117. Afilias acknowledges that “Demand Media entered into a partnership with Donuts with respect to 107 of 307 gTLDs applied for by Donuts.”²⁴¹ However, in an attempt to mislead the Panel—an attempt repeated by Afilias before the ICANN Board in Afilias’ November 3 Letter—Afilias claimed in written briefings submitted to the Panel that “Donuts’ various New gTLD applications . . . *expressly disclosed its partnership with Demand Media.*”²⁴² Afilias’ claim is patently *false*. The only reference to Demand Media in the applications is to a garden-variety backend services arrangement, not to a partnership, financier, co-applicant or future assignee.²⁴³

118. Afilias tried to repeat this deception during the IRP Hearing. In its examination of Mr. Livesay, without showing the Donuts’ application to him, Afilias attempted to elicit from Mr. Livesay a false characterization of the Donuts “disclosure,” namely testimony to the effect that the pre-delegation assignment agreements were disclosed in the applications. It was only when *Amici*’s counsel objected that there was a lack of foundation for the questions that Afilias was forced actually to show the application to the witness and the true description of the relationship between Donuts and Demand Media.²⁴⁴ Upon reviewing the application, Mr. Livesay immediately recognized Afilias’ deception for what it was, and testified that “Demand Media is simply . . . not represented as a co-owner, but a back-end registry provider, *which is a different matter.*”²⁴⁵

119. Afilias again tried its deception—this time on the ICANN Board—in Afilias’ November 3 Letter. At page 11 of the Letter, Afilias represents that “Mr. Livesay *accepted*” Afilias’ false statements, including that the applications disclosed that Donuts and Demand Media

²⁴⁰ Verisign’s [Pre-Hearing Brief](#) (Phase II) (June 26, 2020), and evidence cited at ¶ 41.

²⁴¹ [Afilias’ Response to the Amicus Curiae Briefs](#) (July 24, 2020), ¶ 122.

²⁴² *Id.*, ¶ 124.

²⁴³ Verisign’s [Pre-Hearing Brief](#) (Phase II) (June 26, 2020), and evidence cited at ¶ 41.

²⁴⁴ [Hrg. Tr., Vol. VII](#) (Aug. 11, 2020), 1176:5–1177:12 [Livesay].

²⁴⁵ *Id.* at 1179:9–13 [Livesay]; *see also id.* at 1175:15–19, 1177:7–13, 1178:21–1179:13 [Livesay].

were “partners.”²⁴⁶ In fact, as demonstrated by the transcript of the IRP Hearing (above), Mr. Livesay *expressly rejected* Afiliias’ claim.

120. Even if Afiliias’ misrepresentations that the Donuts’ applications disclosed the financing/assignment relationship (which they did not) were true, those facts would establish that such transactions are entirely proper under Section 10 of the Guidebook. In other words, when ICANN approved the assignments of the new gTLDs, it was confirming that pre-delegation agreements to finance a resolution of a contention set in exchange for an assignment of the registry agreement are proper and not, as Afiliias alleges, a violation of the anti-assignment provision of Section 10 of the Guidebook.

121. Significantly none of the 307 applications Donuts submitted to ICANN were ever amended to reflect the Donuts/Demand Media arrangement, including the “Mission/Purpose” statements in any Donuts’ new gTLD applications.²⁴⁷

122. ICANN clearly was fully aware of Donuts’ arrangement with Demand Media. Jeffrey Stoler, an attorney at the law firm of McCarter & English, sent letters to ICANN’s Board and submitted public comments²⁴⁸ during the New gTLD Program public comment period for each of Donuts’ new gTLDs detailing the arrangement between Donuts and Demand Media and describing past conduct by Demand Media that, in Mr. Stoler’s estimation, should have resulted in disqualification of Donuts’ applications under the background screening provisions in the Guidebook. The record is clear that ICANN took no adverse action with respect to Donuts’

²⁴⁶ Appendix Exhibit AC-74 (Letter from A. Ali (Counsel to Afiliias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 11 (emphasis added).

²⁴⁷ For example, in the application for .ATTORNEY (ultimately assigned to Demand Media), Donuts identified itself as the “parent applicant for this and multiple other TLDs,” referred to Donuts’ “inten[tion] to increase competition and consumer choice at the top level,” and referred to Donuts’ capital resources and ability to use those resources to “operate these TLDs and benefit Internet users.” (Appendix Exhibit AC-102) .ATTORNEY Assignment and Assumption Agreement, Victor North, LLC to United TLD Holdco, Ltd (May 7, 2014), available at <https://www.icann.org/sites/default/files/tlds/attorney/attorney-assign-pdf-07may14-en.pdf>. In or about August 2014, Demand Media spun off subsidiary businesses into Rightside Group Limited (“Rightside”). The assignments from Donuts were ultimately made to United TLD Holdco, Ltd. (“United TLD”), a Rightside subsidiary. Appendix Exhibit AC-103 (Victor North, LCC, New gTLD Application (.ATTORNEY) (June 13, 2012)), at §18(a), available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/883>.

²⁴⁸ [AC-53](#), Letter from Jeffrey Stoler, McCarter & English, to ICANN, “gTLD Applications of Demand Media, Inc. and Donuts, Inc. (July 28, 2012); see, e.g., Stoler objection to Ruby Glen, LLC’s (a subsidiary of Donuts) .WEB Application, available at <https://gtldcomment.icann.org/applicationcomment/commentdetails/5272>.

applications in response to Mr. Stoler’s multiple public comments²⁴⁹ and letters to the Board, and ultimately approved 24 assignments pursuant to the Donuts/Demand Media agreement.²⁵⁰

123. Under the Guidebook, public comments that relate to Guidebook evaluation criteria are sent to the evaluation panels that perform initial evaluations for new gTLD applications.²⁵¹ Mr. Stoler labeled his public comments as relating to “Background Screening,”²⁵² so under ICANN’s rules those comments should have been sent to the application evaluation panels. The Guidebook specifically provides that, if the comments are deemed relevant to evaluation, they will be considered as part of the evaluation process. If the comments “impact application scoring,” then that impact “will be reflected in the evaluators’ summary reports.”²⁵³ *None* of Donuts’ applications make any mention of Mr. Stoler’s public comments or indicate that those comments impacted scoring of Donuts’ applications.²⁵⁴ Given the clear directives in the Guidebook, the only conclusion to be drawn is that ICANN did not deem Mr. Stoler’s comments relevant to the evaluation process and/or that they did not impact the scoring of Donuts’ applications. This is consistent with Ms. Willett’s testimony that pre-auction transfer arrangements are simply not “part of the evaluation criteria that *we applied within the Guidebook*.”²⁵⁵ Afiliat has presented no reason why the DAA should be treated any differently than Donuts’ agreements.

²⁴⁹ ICANN, “New gTLD Current Application Status” (filter by “Donuts” for initial evaluation results), available at <https://gtldresult.icann.org/>

²⁵⁰ See ICANN, “gTLD Registry Agreements,” available at <https://www.icann.org/en/registry-agreements?first-letter=a&sort-column=top-level-domain&sort-direction=asc&page=1> (.NEWS, .BAND, .MARKET, .FAN, .FUTBOL, .SOFTWARE, .ATTORNEY, .FORSALE, .VET, .GAMES, .AUCTION, .VIDEO, .SALE, .MORTGAGE, .ROCKS, .LAWYER, .DEGREE, .DENTIST, .LIVE, .STUDIO, .FAMILY, .CONSULTING, .HAUS, .REVIEWS).

²⁵¹ *Afiliat C-3*, (Guidebook), at Module 1, § 1.1.2.3.

²⁵² See, e.g., Stoler objection to Ruby Glen, LLC’s (a subsidiary of Donuts) .WEB Application, available at <https://gtldcomment.icann.org/applicationcomment/commentdetails/5272>.

²⁵³ *Afiliat C-3*, (Guidebook), at Module 1, § 1.1.2.3.

²⁵⁴ For example, the .WEB application of Donuts’ affiliate Ruby Glen passed initial evaluation and makes no mention of Mr. Stoler’s comments, let alone that those comments impacted ICANN’s scoring. Appendix Ex. AC-104 (Initial Evaluation Report (Ruby Glen, LLC’s .WEB Application) (July 19, 2013)), available at <https://newgtlds.icann.org/sites/default/files/ier/2rlabo7chiehlazhluclu44a/ie-1-1527-54849-en.pdf>.

²⁵⁵ *Hrg. Tr., Vol. IV* (Aug. 6, 2020), 774:25–775:24 [Willett].

124. **.BLOG and Primer Nivel.** Similar to the Donuts/Demand Media transaction, WordPress *confidentially bid for .BLOG using Primer Nivel’s application in exchange for a subsequent assignment* of the new gTLD. WordPress subsequently disclosed that it “wanted to stay *stealth* in the bidding process and afterward in order not to draw too much attention.”²⁵⁶ Afilias was part of the .BLOG contention set. Nonetheless, Afilias did *not* object to WordPress’ undisclosed bid then nor contest the evidence of the transaction submitted in the IRP.

125. **.TECH and Radix.** Radix acquired the rights to the .TECH gTLD by means of a pre-auction agreement to acquire one of the gTLD’s applicants, Dot Tech, LLC (“Dot Tech”), contingent upon Dot Tech subsequently prevailing in an auction for the TLD.²⁵⁷ Dot Tech won the auction and the transfer was completed. Dot Tech’s application was updated to add Radix personnel and to substitute Radix for Dot Tech’s former parent company *after* the auction. ICANN consented to the transfer.²⁵⁸ There is no material difference between the .TECH agreement and the DAA with respect to ICANN policy or the purposes served by the Guidebook. Afilias offered no evidence in the IRP concerning this transaction.²⁵⁹

126. **Afilias’ Purchase and Sale of Multiple New gTLDs.** .MEET, .PROMO, .ARCHI, .BIO, and .SKI were all assigned to or from Afilias, notwithstanding changes in the “Mission/Purpose” of the new gTLDs from those in the applications. ICANN consented to each transfer.²⁶⁰ As Ms. Willett testified in her witness statement, these examples show that *ICANN agrees to assignments even when the purpose of the gTLD changes radically.*²⁶¹ The evidence offered during the IRP Hearing about these new gTLDs demonstrates that assignments of new gTLDs are common, and Afilias knows this (despite its arguments here) and, has benefitted from it.

²⁵⁶ Verisign’s [Pre-Hearing Brief](#) (Phase II) (June 26, 2020), and evidence cited at ¶ 40.

²⁵⁷ *Id.* at ¶ 42; Livesay Stmt. (June 1, 2020), ¶ 14 (Appendix Ex. AC-81); [Rasco Stmt.](#) (June 1, 2020), ¶ 44.

²⁵⁸ Verisign’s [Pre-Hearing Brief](#) (Phase II) (June 26, 2020), and evidence cited at ¶ 42.

²⁵⁹ In its November 3 Letter to the Board, Afilias purports to offer various distinctions between the .TECH contract and DAA. However, Afilias fails to cite any evidence for its description of the .TECH transaction—and none was offered during the IRP Hearing—and Afilias never disputes the similar substance of the agreements, pre-auction agreements in both cases to acquire rights in new gTLDs if the auction is successful and ICANN consents. Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 12.

²⁶⁰ [Verisign’s Pre-Hearing Brief](#) (Phase II) (June 26, 2020), and evidence cited at ¶ 38.

²⁶¹ [Willett Stmt.](#) (May 31, 2019), ¶ 18.

E. Afilias’ Argument that Particular Terms of the DAA Violate the Guidebook Are Without Merit

127. Since the DAA clearly says that it is not an assignment of NDC’s .WEB application, and the express terms of the DAA are inconsistent with the legal requirements for an assignment, Afilias only response is to cite specific language of the DAA out of context in a strained effort to show that the DAA violates the Guidebook. For the reasons set forth in Sections A through D above, Afilias’ arguments are baseless. As Ms. Willett summarized, “applicants all the time were assigning rights or designating third parties to operate on their behalf,” but Section 10 was interpreted by ICANN to mean only that the applicant “couldn’t sell [its] application in total to someone else.”²⁶² Nonetheless, we respond below to Afilias’ arguments of Guidebook violations.

1. Afilias’ Claim that NDC Violated The Guidebook By Agreeing That It
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-- Am. Request 64²⁶³

128. Afilias’ argument is based on a misreading of the DAA. Section 4(b) of the DAA
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²⁶⁵ This provision was confirmed in the DAA Supplement.

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²⁶² [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), at 576:25-578:8 [Willett].

²⁶³ The numbered references to Am. Request in this Section are to the corresponding numbered Paragraphs in Afilias’ Amended Request for IRP that set forth, in order, alleged violations of the Guidebook.

²⁶⁴ Rasco Stmt. (June 1, 2020), ¶ 66 (Appendix Ex. AC-85); Livesay Stmt. (June 1, 2020), ¶ 30 (Appendix Ex. AC-81); Livesay Ex. D (DAA), at 1 (Redacted - Third Party Designated Confidential Information) (Appendix Ex. AC-84).

²⁶⁵ Livesay Ex. D (DAA), at Ex. A, § 1(k) (emphasis added).

²⁶⁶ Livesay Ex. H (DAA Supplement), ¶ F (Appendix Ex. AC-86).

129. According to Mr. Livesay's Witness Statement:

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130. Similarly, Mr. Rasco explained in his Witness Statement:

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According to Mr. Rasco:

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²⁷⁰ (*see also* Section IV.E.7 below).

2. Afiliat's Claim that NDC Sold Its Right To Participate In A Private Auction To Verisign In Violation Of The Guidebook (Am. Request 65)

131. Mr. Rasco's testimony was clear that he and NDC's other owners made a decision not to participate in a private auction *prior* to entering into the DAA.

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²⁷¹ Thus, the decision to forego a private auction was made by NDC prior to signing the funding commitments set forth in the DAA.²⁷²

²⁶⁷ Livesay Stmt. (June 1, 2020), ¶ 24 (Appendix Ex. AC-81).

²⁶⁸ *Id.*, ¶ 30.

²⁶⁹ Rasco Stmt. (June 1, 2020), ¶ 47 (Appendix Ex. AC-85).

²⁷⁰ Hrg. Tr., Vol. V (Aug. 7, 2020), 813:18–21 [Rasco] (Appendix Ex. AC-80).

²⁷¹ *Id.* at 833:25–835:5 [Rasco].

²⁷² *Id.* at 873:10–15 [Rasco]. According to Mr. Livesay's Witness Statement:

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Livesay Stmt.

(June 1, 2020), ¶¶ 16–17 (Appendix Ex. AC-81).

132. Mr. Livesay testified that Verisign was concerned about the legal risks of a private agreement among direct competitors pursuant to which the winning bidder would pay its competitors to lose the auction and forego their rights to .WEB. Mr. Livesay believed such an arrangement may appear “collusive,” and suffered a “lack of transparency . . . between the contention set members.”²⁷³ By contrast, a public auction under the Guidebook takes place according to established rules, with oversight, and the proceeds from the auction are invested in the DNS infrastructure for the benefit of the entire internet community.²⁷⁴

133. As Mr. Rasco correctly observed: under the Guidebook, “[t]here’s no right to participate in a private auction”²⁷⁵ A private auction can only proceed upon the agreement of all members of the contention set. NDC simply made a decision to use Verisign’s funds to make its bid and forego a private auction as it was entitled to do under the Guidebook.²⁷⁶

3. Afilias’ Claim that the DAA Violates The Guidebook As It Provides Verisign With A Right To Participate In “ICANN’s Process To Move The Delegation Of .WEB Forward” -- Am. Request 66

134. The claim that Verisign’s participation in moving the process forward violates the Guidebook is nonsensical on its face. Any support by Verisign to move the delegation forward necessarily and obviously could only be done with ICANN’s knowledge and consent.²⁷⁷

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

Q. So there are particular rights or obligations that they are not allowed to resell, assign or transfer?

²⁷³ [Hrg. Tr., Vol. VII](#) (Aug. 11, 2020), 1276:21–1277:12 [Livesay].

²⁷⁴ *Id.* at 1276:7–1279:1 [Livesay].

²⁷⁵ [Hrg. Tr., Vol. V](#) (Aug. 7, 2020), 856:22–25 [Rasco].

²⁷⁶ In response to a question by Afilias whether assigning rights to decide the form of an auction might violate Section 10 of the Guidebook—a hypothetical that in any event did not occur here—Ms. Willett testified that Section 10 would only prohibit “transferring their application.” [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 567:4–5 [Willett]. By contrast, “applicants all the time were assigning rights or designating third parties to operate on their behalf.” *Id.* at 567:25–568:2 [Willett].

²⁷⁷ The DAA

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Livesay Ex. D (DAA), at Ex. A, ¶ K (Appendix Ex. AC-84).

A. Well, so applicants, because they were in many cases not always expert in how to submit an application, they engaged with third parties to submit their applications on their behalf or they -- to provide responses to how technical registry operations would be held to essentially provide them with the technical responses to their application. I mean, in fact, *Afilias was one of those consultants. They provided and submitted applications on behalf of a couple dozen other applicants.* *** But the way we -- like, from an operational or transactional perspective, we viewed this Paragraph 10 about not assigning the rights and obligation of the application to be of the total application.²⁷⁸

Afilias' claim, as demonstrated by its conduct in supporting new gTLDs of other applicants, is disingenuous.²⁷⁹

4. Afilias' Claim that "Under the DAA, There Is No Set Of Circumstances Whereby NDC Would Retain any Role Or Ownership Interest In .WEB" -- Am. Request 67

136. This claim is false. NDC is still the applicant of record six years after the auction and, as the winner of the auction, NDC could still end up operating .WEB. Furthermore, under the DAA, Redacted - Third Party Designated Confidential Information, including those quoted at Section V.B.1., *supra*. NDC remains the applicant, and Redacted - Third Party Designated Confidential Information

137. Afilias' claim apparently relies on Sections 9–10 of Exhibit A, Redacted - Third Party Designated Confidential Information of the DAA. Redacted - Third Party Designated Confidential Information

. If these circumstances were to materialize,

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²⁸⁰ Alternatively, Redacted - Third Party Designated Confidential Information

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²⁷⁸ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 567:11–568:7 [Willett]. Livesay Ex. H (DAA Supplement), ¶ F (Appendix Ex. AC-86). Numerous companies—like Afilias—are in the business of providing support services to develop and process new gTLD applications, such as Valideus and FairWinds Partners, both of whom contract with applicants to provide all of these services, including serving as liaison with ICANN. See note 61, *supra*; [Verisign's Pre-Hearing Brief](#) (Phase II) (June 26, 2020), ¶ 43.

²⁷⁹ Afilias' withdrawal of witnesses to its own transactions from the IRP Hearings allowed Afilias to evade scrutiny regarding the disconnect between its own conduct and its claims in this proceeding.

²⁸⁰ Livesay Ex. D (DAA), at Ex. A, §§ 9–10 (Appendix Ex. AC-84).

²⁸¹ *Id.* at Ex. A, § 9.

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139. As an additional example, Redacted - Third Party Designated Confidential Information .²⁸³ That action might carry its own consequences, but if NDC were to choose that course of action, NDC would continue to own the Application and any future registry agreement.²⁸⁴

140. Furthermore, were ICANN to reject the proposed assignment to Verisign, Redacted - Third Party Designated Confidential Information

. The DAA expressly Redacted - Third Party Designated Confidential Information .²⁸⁵ Mr. Rasco testified at the IRP Hearing that, Redacted - Third Party Designated Confidential Information

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141. In any of these scenarios, NDC would be free to raise financing through alternative means to repay the funds provided by Verisign. The Guidebook does not preclude NDC from entering into such transactions. Having repaid those funds, NDC could operate .WEB as it operated .CO—*e.g.*, in conjunction with a third party such as Neustar, Inc., as described in its .WEB application. In this event, NDC would be situated precisely as Afilias would have been had *it won* the .WEB Auction—operating the domain after relying on third-party financing for its

²⁸² *Id.*, § 9(b).

²⁸³ See generally [AA-91](#), *Huynh v. Vu*, 4 Cal. Rptr. 3d 595, 608 (Cal. Ct. App. 2003) (explaining that “where it is worth more to the promisor to breach rather than to perform a contract, it is more efficient for the law to allow the promisor to breach the contract and to pay the promisee damages based on the benefit the promisee expected to gain by the completed contract”).

²⁸⁴ Verisign’s Pre-Hearing Brief (Phase II) (June 26, 2020), ¶ 28 (Appendix Ex. AC-105).

²⁸⁵ Livesay Ex. D (DAA), at Ex. A, § 9 (Appendix Ex. AC-84).

²⁸⁶ Hrg. Tr., Vol. V (Aug. 7, 2020), 841:13–23 [Rasco] (Appendix Ex. AC-80).

auction bid and using a third-party to provide backend registry services providers in the operation of the registry.²⁸⁷

5. Afilias’ Claim that NDC Violated The Guidebook As Its Bid Was “
Redacted - Third Party Designated Confidential Information **Am. Request**
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142. Afilias’ claim is based on a mischaracterization of both the Guidebook and the DAA. NDC made the bids for itself as the applicant consistent with the Auction Rules.

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See ¶ 146, infra (ICANN’s description of the relevant auction rules as concerned only with the “mechanics” and Afilias claim under the rules as “strained”). In addition, to the extent Verisign participated in the bidding, Ms. Willett made clear that “applicants all the time had engaged third parties to act on their behalf.”²⁸⁸

143. Mr. Rasco explained in his Witness Statement that Redacted - Third Party Designated Confidential Information

. ²⁸⁹ Mr. Rasco understood

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. ²⁹⁰ Redacted - Third Party Designated Confidential Information

²⁸⁷ Afilias attempted to create a false impression that Verisign acquired a security interest or other present right in the Application because Verisign Redacted - Third Party Designated Confidential Information . See Hrg. Tr., Vol. VII (Aug. 11, 2020), 1220:20–1233:6 [Afilias cross-examination of Livesay] (Appendix Ex. AC-83). Specifically Redacted - Third Party Designated Confidential Information . See *id.* at 1223:2 – 1224:7 [Livesay]; Livesay Ex. D (DAA), at Ex. A, § 10 (Appendix Ex. AC-84). In exchange, Redacted - Third Party Designated Confidential Information As Mr. Livesay explained, Redacted - Third Party Designated Confidential Information Hrg. Tr., Vol. VII (Aug. 11, 2020), at 1225:15–23, 1231:14–1232:20 [Livesay]. Redacted - Third Party Designated Confidential Information . See *id.*

²⁸⁸ [Hrg. Tr., Vol. III](#) (Aug. 6, 2020), 665:21–21 [Willett].

²⁸⁹ Rasco Stmt. (June 1, 2020), ¶ 99 (Appendix Ex. AC-85).

²⁹⁰ *Id.*, ¶ 100. Indeed, rumors were spread before the Auction by Afilias and Donuts that NDC had transferred control over the company, resulting in the execution of the assurances of performance. See Verisign’s Pre-Hearing Brief (Phase II) (June 26, 2020), ¶ 23 (Appendix Ex. AC-105).

Redacted - Third Party Designated Confidential Information .”²⁹¹ NDC owned all rights under its .WEB Application before, during and after the auction.

6. Afilias’ Claim that NDC’s Bid Was Invalid Because NDC
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144. As explained more fully in the Livesay Witness Statement,²⁹²

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145. Redacted - Third Party Designated Confidential Information

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146. In addressing Afilias’ claims that the DAA violated the Auction Rules, ICANN explained during the IRP:

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

²⁹¹ Hrg. Tr., Vol. V (Aug. 7, 2020), 826:2–4 [Rasco] (Appendix Ex. AC-80).

²⁹² Livesay Stmt. (June 1, 2020), ¶¶ 32–33 (Appendix Ex. AC-81).

²⁹³ Hrg. Tr., Vol. V (Aug. 7, 2020), 828:11–13 [Rasco] (Appendix Ex. AC-80).

²⁹⁴ *Id.* at 827:21–25 [Rasco].

²⁹⁵ *Id.* at 826:20–25 [Rasco].

²⁹⁶ *Id.* at 829:19–25 [Rasco].

non-applicant — including a financier, affiliated entity, or contractual counterparty — *may be permitted to have an interest in a gTLD*.²⁹⁷

147. After reviewing Verisign’s press release and Afilias’ August 2016 letter objection regarding the DAA at the request of Afilias’ counsel, Ms. Willet testified “to me that was akin to and consistent with the auction rules”²⁹⁸ Even if Afilias’ claims with respect to the conduct of the Auction were correct (which they are not), Ms. Willet testified that, “the mere fact of an agreement to me and the fact that Verisign essentially acted as a bidder in the auction on behalf of NDC would not disqualify them.”²⁹⁹ Mr. Rasco explained: “Lots of folks participate indirectly in auctions, just as anyone financing -- I believe Afilias, I read, received a loan for their participation in the auction.”³⁰⁰ Indeed, Afilias admitted that its lender determined how much it would spend at the auction, ultimately limiting the amount of Afilias’ bid and causing Afilias to lose the auction to NDC.³⁰¹

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²⁹⁷ [ICANN’s Rejoinder](#) (June 1, 2020), ¶ 85 (emphases added).

²⁹⁸ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 707:23–707:24 [Willet].

²⁹⁹ *Id.* at 747:25–748:3 [Willet].

³⁰⁰ [Hrg. Tr., Vol. V](#) (Aug. 7, 2020), 822:15–18 [Rasco] (Appendix Ex. AC-80).

³⁰¹ [Afilias’ Amended IRP Request](#) (Mar. 21, 2019), ¶ 35.

³⁰² In an ICANN public auction, a price is set in each round and applicants must enter a bid amount that is equal to or greater than the set price to continue to the next round. Although applicants know how many parties are participating in each round, they do not know which parties remain at any time or the limits of each party’s financing or interest in the gTLD. See [Afilias C-3](#) (Guidebook), at Module 4, § 4.3.1.

7. **Afilias' Claim that NDC** Redacted - Third Party Designated Confidential Information

-- Reply 56

149. There is no requirement in the Guidebook or Application that NDC disclose Verisign's support in the resolution of the Contention Set. Confidentiality in such matters is common and does not create an assignment of the Application or violate the Guidebook.³⁰³

150. As a threshold matter, Verisign's and NDC's decision to maintain the confidentiality of the DAA is consistent with standard and prudent business principles. Messrs. Livesay and Rasco both testified Redacted - Third Party Designated Confidential Information
.³⁰⁴ From NDC's
point of view, Redacted - Third Party Designated Confidential Information

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151. Afilias never disclosed who was financing its bid.³⁰⁶ Nor did Afilias complain when WordPress (with which Afilias was a competing bidder), Donuts, Radix³⁰⁷ and others confidentially financed winning bids as part of pre-auction agreements to transfer new gTLDs after the auction. (Section V.D., *supra*.) Afilias' complaint here is disingenuous.

152. NDC and Verisign followed what they observed as common practice in the industry in terms of confidentiality. As Mr. Livesay testified: Redacted - Third Party Designated Confidential Information

³⁰⁸ ICANN has never taken the position (to our knowledge) that a transaction

³⁰³ See [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 568:3–8 [Willett].

³⁰⁴ Hrg. Tr., Vol. V (Aug. 7, 2020), 821:9–14 ([Rasco] public companies commonly maintain their agreements as confidential) (Appendix Ex. AC-80); Hrg. Tr., Vol. VII (Aug. 11, 2020), 1247:23–1248:2 ([Livesay:] Redacted - Third Party Designated Confidential Information (Appendix Ex. AC-83)).

³⁰⁵ Hrg. Tr., Vol. V (Aug. 7, 2020), 820:9–13 [Rasco]; *id.* at 864:9–10 ([Rasco:] the DAA Redacted - Third Party Designated Confidential Information (Appendix Ex. AC-80)).

³⁰⁶ See *infra* note 377.

³⁰⁷ Both Donuts and Radix were co-objectors with Afilias against NDC's arrangement with Verisign.

³⁰⁸ Hrg. Tr., Vol. VII (Aug. 11, 2020), 1248:13–16 [Livesay] (Appendix Ex. AC-83).

such as the DAA either should be publicly disclosed or disclosed to ICANN in advance of requesting an assignment of a registry agreement.³⁰⁹

153. Afiliás fails to cite any requirement in the Guidebook publicly to disclose the DAA because there is none. (*See* Section VI.A.1 *infra.*) By comparison, the parties always anticipated disclosing the DAA to ICANN for its review when a future assignment would be requested, if NDC prevailed at the auction, consistent with common practice.³¹⁰ Until then, there would not be a transfer of any rights in the Application or gTLD to Verisign.³¹¹

154. Afiliás also appears to argue that Redacted - Third Party Designated Confidential Information. This argument ignores the testimony of Messrs. Livesay and Rasco (Subsection V.E.1 above) and contradicts express terms of the parties' agreement. Redacted - Third Party Designated Confidential Information

”³¹²

155. In response to cross-examination questions as to how Mr. Rasco would have responded if ICANN asked to see the DAA, Mr. Rasco repeated: Redacted - Third Party Designated Confidential Information

³⁰⁹ Mr. Livesay states that he had every motivation to study carefully the requirements of the Guidebook, as Redacted - Third Party Designated Confidential Information Livesay Stmt. (June 1, 2020), ¶ 5 (Appendix Ex. AC-81). Redacted - Third Party Designated Confidential Information

See Hrg. Tr., Vol. VII (Aug. 11, 2020), 1246:9–1248:17 [Livesay] (Appendix Ex. AC-83). Of course, meritless attacks from competitors came before and after the auction, in the first instance when NDC would not agree to a private auction and thus the competitors were not able to split the proceeds of the .WEB Auction among themselves (rather than the proceeds being invested in the DNS infrastructure), and secondly when it was announced that Verisign had financed NDC's bid and NDC would seek an assignment of the registry agreement (*i.e.*, building .WEB into a healthy competitive registry). *Id.* at 1279:18–21 (“[Livesay:] Redacted - Third Party Designated Confidential Information *See* Verisign's Pre-Hearing Brief (Phase II) (June 26, 2020), ¶¶ 23, 33 (Appendix Ex. AC-105).

³¹⁰ Hrg. Tr., Vol. VII (Aug. 11, 2020), 1246:18–1247:8, 1272:5–20, 1279:18–1280:5 [Livesay] (Appendix Ex. AC-83).

³¹¹ Mr. Rasco confirmed that no transfer had taken place during his IRP testimony.

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.” Hrg. Tr., Vol. V (Aug. 7, 2020), 897:6–16 [Rasco] (Appendix Ex. AC-80).

³¹² Livesay Ex. H (DAA Supplement), ¶ F (Appendix Ex. AC-86).

Redacted - Third Party Designated Confidential Information .”³¹³ As Afilias’ lawyers persisted in seeking a response to the hypothetical question, Mr. Rasco stated:

Redacted - Third Party Designated Confidential Information ³¹⁴ In fact, in late August 2016—prior to the execution of the registry agreement or request for assignment—when ICANN asked to see the DAA, we immediately provided it to ICANN without objection.³¹⁵ Neither party was trying to hide the agreement from ICANN. And after receiving the agreement, ICANN never voiced any objection to NDC or Verisign regarding the terms of the DAA or its continued confidentiality.

VI. NDC DID NOT VIOLATE ANY OBLIGATION OF DISCLOSURE OR AVOID RELEVANT SCRUTINY OF ITS APPLICATION

A. NDC Did Not Violate the Guidebook In Statements in Its .WEB Application or Otherwise to ICANN

156. For years before the IRP Hearing and at the IRP Hearing itself, Afilias advanced the arguments that (1) NDC and Verisign violated the Guidebook’s disclosure requirements by not updating NDC’s .WEB Application to disclose the terms of the DAA prior to the public auction, and (2) NDC made material misstatements to ICANN in response to Contention Set members’ since-rejected and false complaints regarding changes in NDC’s ownership and control. Afilias’ arguments are baseless and must be rejected out of hand.

1. The DAA Did Not Require NDC to Update its .WEB Application

157. Afilias’ “non-disclosure” arguments are based on two sections of the Guidebook. *One*, Afilias relies on Section 1.2.7, which provides that, “[i]f at any time during the evaluation process information previously submitted by an applicant becomes *untrue or inaccurate*, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position or ownership or control over the applicant.”³¹⁶ And, *two*, in Module 6, the Guidebook provides that applicants agree “to notify ICANN in writing of any change in circumstances that would render any information provided in

³¹³ Hrg. Tr., Vol. V (Aug. 7, 2020), at 837:20–21 [Rasco] (Appendix Ex. AC-80).

³¹⁴ *Id.* at 838:2–3 [Rasco].

³¹⁵ Afilias C-102, Letter from R. Johnston (Counsel for Verisign) to E. Enson (Counsel for ICANN) (Aug. 23, 2016) (Appendix AC-101).

³¹⁶ [Afilias C-3](#) (Guidebook), at Module 1, § 1.2.7.

the application *false or misleading*.”³¹⁷ Despite years of litigation, Afilias has never demonstrated that the DAA rendered NDC’s .WEB application untrue, inaccurate, false, or misleading in any respect. The opposite is true.

158. **First**, as Ms. Willett testified, ICANN only requires applicants to disclose changes in the applying entity, management, contact personnel, “and any ownership interest in the applying entity greater than 15 percent.”³¹⁸ Section V.C., *supra*, explains how (i) NDC at all times remained the applicant for .WEB, (ii) the DAA did not transfer ownership, management, or control of NDC to Verisign, and (iii) Verisign has never had any direct or indirect legal or beneficial ownership in NDC. Indeed, at all times the information on NDC’s application concerning NDC’s ownership, management, and contact personnel *remained 100% accurate*.³¹⁹ As a result, the DAA did not make any of the identifying information on NDC’s Application untrue or inaccurate or require any amendment.

159. Unable to identify any untrue or inaccurate information, Afilias argued at the IRP Hearing and continues to contend that NDC was obligated to disclose the DAA because Verisign had become the party “behind NDC’s application.”³²⁰ Ms. Willett rejected that argument, testifying that she did not know “what [Afilias’ meant] by ‘who was behind’ [a given application].”³²¹ As referenced above, Ms. Willett, and thus ICANN, viewed the material information and the “people related to the application” that warranted disclosure to be the applying entity, management, contact personnel, and any ownership interest in the applying entity greater than 15 percent.³²² **That information** had to be disclosed, as it was in the case of NDC’s bid. Since no change to that information ever took place, no need to update it ever arose. Moreover, as discussed in Section V.D., *supra*, Afilias’ long-running contention that other agreements made

³¹⁷ *Id.* at Module 6, § 1 (emphasis added).

³¹⁸ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 550:24-551:10 [Willett].

³¹⁹ [Rasco Stmt.](#) (June 1, 2020), ¶ 11.

³²⁰ [Afilias’ Response to the Amicus Curiae Briefs](#) (July 24, 2020), ¶ 40; [Hrg. Tr., Vol. V](#) (Aug. 7, 2020), 859:1–3 [Rasco]; Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 18.

³²¹ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 550:24–25 [Willett].

³²² *Id.* at 550:25–551:7 [Willett].

by an applicant in connection with its pursuit of a gTLD required disclosure or were material to ICANN is demonstrably false.³²³ What ICANN considered material, and what it used to evaluate an application, was “the information [an applicant] had provided in the application and the subsequent questions” as required by the Guidebook.³²⁴ In sum, ICANN was not concerned with third-party agreements or vague notions of who was “behind an application.” As Ms. Willett testified: “absent a change to the applying entity itself,” such agreements or assertions did not “fall within the scope . . . of the evaluation criteria that we applied within the guidebook.”³²⁵

160. Nor can Afilias plausibly contend that the DAA required NDC to update any of the financial information it provided in connection with its Application.³²⁶ As the Guidebook explains, ICANN solicits information “about the applicant’s financial capabilities for *operation* of a gTLD registry and its financial planning in preparation for *long-term stability of the new gTLD*.”³²⁷ There is no requirement that an applicant disclose financing available to *acquire* the gTLD. Of course, Afilias itself never disclosed the source or amount of *its* auction financing. Afilias cannot have it both ways.

161. **Second**, Afilias continues to argue that the DAA rendered NDC’s application “no longer true, accurate, or complete in several respects” due to statements NDC made in response to Question 18 of its application concerning its “Mission/Purpose” for .WEB.³²⁸ Again, Afilias’ arguments continue to be meritless.

162. As a threshold matter, it is undisputed that responses to Question 18 *are irrelevant* to ICANN’s evaluation of a new gTLD application.³²⁹ The Guidebook expressly provides that

³²³ See [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020) at 773:8–774:6 [Willett] (rejecting the notion that “if Verisign had been involved with NDC’s application, that would suggest a resell, transfer or assignment of NDC’s rights and obligations in the application” because applicants contracted with third parties, including Verisign, for many different reasons).

³²⁴ *Id.* at 708:24–709:1 [Willett].

³²⁵ *Id.* at 775:22–24 [Willett].

³²⁶ See [Afilias C-3](#) (Guidebook), at Module 4, § 4.3.2. & Questions 48(a) – 50(b) of Application; *see also* Afilias’ [Amended IRP Request](#) (Mar. 21, 2019), ¶ 35; NDC’s Pre-Hearing Brief (Phase II) (June 26, 2020), ¶ 32, *available at* <https://www.icann.org/en/system/files/files/irp-afili-as-amicus-curiae-brief-nu-dotco-redacted-26jun20-en.pdf>.

³²⁷ [Afilias C-3](#) (Guidebook), at Module 2, § 2.2.2.2 (emphasis added).

³²⁸ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 18–19.

³²⁹ [Rasco Stmt.](#) (June 1, 2020), ¶¶ 18–20; [Afilias C-3](#) (Guidebook), at Attachment to Module 2, A-11, A-12.

responses to Question 18 are “*not used as part of the evaluation or scoring of the application.*”³³⁰ Instead, “the Guidebook explains that Section 18 responses are used in connection with *ex-post* reviews of the gTLD program in general and not in connection with any specific application.”³³¹ That alone is sufficient to reject Afilias’ argument that NDC was obligated to update its responses to Question 18 in light of the DAA.

163. Additionally and independently, as Mr. Rasco testified in his witness statement, NDC’s “mission/purpose” described in its Application has never changed, “irrespective of who operates .WEB.”³³² As in applications for other TLDs, NDC provided “its general vision of new gTLDs in the marketplace” and, in this instance, “its general strategy at the time as to how .WEB might be successfully and productively introduced and used to benefit consumers.”³³³ Nothing in the DAA changed the veracity of those statements.³³⁴ In addition, Mr. Rasco explained that “NDC’s Section 18 responses expressly stated that NDC’s marketing and other business plans were not final and were subject to market conditions.”³³⁵

164. Even as written, therefore, NDC’s responses to Question 18 were never intended to be a definitive statement of NDC’s plans for .WEB. Nor were they required to be. As discussed in Section V.D., *supra*, many TLDs (such as .MEET) have been assigned to or from parties, *including Afilias*, despite changes in the “Mission/Purpose” of the gTLD as stated in the respective applications and without updates to those applications. Indeed, ICANN’s assignment documentation asks assignees if there will be any changes to a gTLD’s mission or purpose, belying Afilias’ novel contention that such changes must be disclosed before an assignment is requested.³³⁶ If ICANN believes that a change in mission or purpose deserves consideration, ICANN can do so when a request for ICANN to approve the assignment is made.

165. Further grasping at straws, Afilias continues to argue that NDC’s Application was

³³⁰ [Rasco Stmt.](#) (June 1, 2020), ¶ 18; [Afilias C-3](#) (Guidebook), at Attachment to Module 2, A-11, A-12.

³³¹ [Rasco Stmt.](#) (June 1, 2020), ¶ 19; [Afilias C-3](#) (Guidebook), at Attachment to Module 2, A-11, A-12.

³³² [Rasco Stmt.](#) (June 1, 2020), ¶ 16.

³³³ *Id.* ¶ 14.

³³⁴ *Id.* ¶ 16.

³³⁵ *Id.*

³³⁶ See RE-3, Application for Assignment – Registry Agreement for .MEET (Appendix Ex. AC-107).

false and misleading in light of the DAA because NDC gave up
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and, thus, it would never consummate its goals for the domain.³³⁷ That is

false. As discussed in Section V.E.4, *supra*, Redacted - Third Party Designated Confidential
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That Application, therefore, is not misleading in any respect, particularly in light of ICANN’s stated policy of requiring updates to gTLD applications only when changes concerned the ownership or management of the entity controlling the Application. Here, that was and remains NDC notwithstanding the DAA, and thus no update was required.³³⁸

2. NDC Did Not Make Misstatements to ICANN

166. Afilias next argues that NDC made material misrepresentations to ICANN regarding its .WEB application by “repeatedly concealing Verisign’s control over NDC’s application.”³³⁹ That contention should be rejected outright for the reasons discussed in Section V.B., *supra*: Under the plain terms of the DAA, Verisign did not have control over NDC’s Application or control over NDC itself.³⁴⁰

167. Moreover, Afilias’ claim is over the line and wreaks of desperation. First, in its November 3, 2021 letter to ICANN, Afilias continues its *ad hominem* attacks on Mr. Rasco, bolding and italicizing allegations that Mr. Rasco “lied” to other applicants and ICANN and casually accusing Mr. Rasco of “mendacity.”³⁴¹ With respect to supposed “lies” to other applicants, Afilias again relies on the same June 7, 2016 email from Mr. Rasco to Jon Nevett of Donuts that Donuts, Ruby Glen, and others unsuccessfully relied on to request a delay of the .WEB Auction.³⁴² As described in Section IV.A., *supra*, ICANN rejected the Contention Set’s complaints related to this one email and the IRP Panel rejected Afilias’ contention that ICANN

³³⁷ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 19.

³³⁸ We do not believe ICANN has ever taken any adverse action based on an applicant’s responses to the “mission” or “purpose” questions or later changes in the mission or purpose of a new gTLD.

³³⁹ Appendix AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 20.

³⁴⁰ Livesay Ex. D (DAA), at Ex. A (Appendix Ex. AC-84).

³⁴¹ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 20.

³⁴² Rasco Ex. I (Emails between J. Nevett (Donuts) and J. Rasco (NDC) (June 6 and 7, 2016)) (Appendix Ex. AC-96); *see* Section IV.A., *supra*.

improperly investigated those complaints.³⁴³

168. Nonetheless, seizing on Mr. Rasco’s statement that he told a “little white lie” to Mr. Nevett to “get him off [his] back” in connection with Donuts’ repeated attempts to induce NDC to agree to a private auction,³⁴⁴ Afiliat twists Mr. Rasco’s words, taking them completely out of context, to paint him as a serial liar.³⁴⁵ Nothing could be further from the truth. As the same testimony cited by Afiliat makes clear, Mr. Rasco and Mr. Nevett had a friendly relationship and, in his June 7 email, Mr. Rasco was “just trying to redirect and put off Mr. Nevett” in a polite way.³⁴⁶ What Mr. Rasco wrote is that he “went back to check with all the powers that be” and NDC’s position had not changed.³⁴⁷ In this, Mr. Rasco was not intending to “convey that there had been any change to the ownership or control of NDC, because there had not been.”³⁴⁸ In addition, Mr. Rasco had no “obligation or intention to provide detailed, formal information about” NDC or its management to Donuts.³⁴⁹ Whether characterized as a “white lie”³⁵⁰ or a polite “stiff-arm” response, Mr. Rasco merely wrote an email to dissuade a competitor “from continuing to pursue the issue of a private auction but, at the same time, not to create any ill will.”³⁵¹ No matter how many times Afiliat tries it, its repeated attempts to twist Mr. Rasco’s email and intent remains without any basis.

169. Second, irrespective of what Mr. Rasco said to Mr. Nevett, to whom he owed no obligation, the critical issue is whether, *as a factual matter*, there had been a change in NDC’s

³⁴³ [Final Decision](#) (July 15, 2021), ¶ 298.

³⁴⁴ [Hrg. Tr., Vol. V](#) (Aug. 7 2020), at 860:3–25 [Rasco].

³⁴⁵ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afiliat) to M. Botterman (ICANN) (Nov. 3, 2021)), at 20.

³⁴⁶ [Hrg. Tr., Vol. V](#) (Aug. 7 2020), at 858:10–18 [Rasco].

³⁴⁷ Rasco Ex. I (Emails between J. Nevett (Donuts) and J. Rasco (NDC) (June 6 and 7, 2016)) (Appendix Ex. AC-96).

³⁴⁸ Rasco Stmt. (June 1, 2020), ¶ 71(c) (Appendix Ex. AC-85).

³⁴⁹ *Id.*, ¶ 70.

³⁵⁰ Afiliat’s over-reliance on the phrase “white lie” is misplaced. As counsel explained during opening statements of the IRP, Mr. Rasco’s well-meaning deflection was akin to telling a colleague who invites you to the theater that you have to check with your wife, and your wife says you have plans, in order not to hurt the colleague’s feelings by saying outright that you are already going to the theater with someone else. [Hrg. Tr., Vol. I](#) (Aug. 3 2020), at 225:1–23 [NDC Opening Statement]. Mr. Rasco’s response was natural, and did not warrant the onslaught of baseless complaints that ensued.

³⁵¹ [Rasco Stmt.](#) (June 1, 2020), ¶ 72; *see also* [Hrg. Tr., Vol. V](#) (Aug. 7 2020), at 858:17–18 [Rasco] (“So I guess it was my fault for trying to be a little polite in trying to just redirect him.”).

ownership or control. The answer is unequivocally “No.”³⁵² When ICANN investigated the complaints raised by Donuts and other Contention Set members, Mr. Rasco truthfully informed ICANN that there had been no such changes.³⁵³ Hunting and pecking for supposed misstatements, Afilias has never demonstrated that Mr. Rasco failed to provide information, or provided false information, to ICANN. Nor could it; that allegation is categorically false.³⁵⁴ Moreover, the allegation is substantively irrelevant. As the IRP Panel held, “very little turns” on these questions “insofar as [Afilias’] core claims are concerned.”³⁵⁵ Compelled by Afilias’ blunderbuss allegations, however, we briefly respond below.

170. Afilias contends in its November 3, 2021 letter to ICANN that Mr. Rasco “avoided answering” ICANN’s questions about whether there was “any information that was no longer true and accurate” in NDC’s application.³⁵⁶ Not so. Mr. Rasco’s witness statement explains this correspondence in detail, demonstrating that he answered ICANN’s questions completely and truthfully.³⁵⁷

171. For example, in the June 27, 2016 email quoted by Afilias, ICANN wrote to “confirm that there have not been changes to [NDC’s] application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors [and/or] application contacts).”³⁵⁸ Mr. Rasco responded quickly, confirming that “there have been no changes to the [NDC] organization that would need to be reported to ICANN.”³⁵⁹ That response was and remains accurate and fully responsive, and

³⁵² See Section IV.B., *supra*; [Rasco Stmt.](#) (June 1, 2020), ¶¶ 90–91.

³⁵³ [Rasco Stmt.](#) (June 1, 2020), ¶¶ 76–91 (Appendix Ex. AC-85).

³⁵⁴ See *id.*

³⁵⁵ [Final Decision](#) (July 15, 2021), ¶ 298; see also *id.* (“The Panel therefore rejects the Claimant’s contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.”).

³⁵⁶ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 20.

³⁵⁷ [Rasco Stmt.](#) (June 1, 2020), ¶¶ 76–91 (Appendix Ex. AC-85).

³⁵⁸ [Rasco Ex. M](#) (Emails between J. Erwin (ICANN) and J. Rasco (NDC) (June 27, 2016)) (Appendix Ex. AC-87); [Rasco Stmt.](#) (June 1, 2020), ¶ 77.

³⁵⁹ [Rasco Ex. M](#) (Emails between J. Erwin (ICANN) and J. Rasco (NDC) (June 27, 2016)) (Appendix Ex. AC-87); [Rasco Stmt.](#) (June 1, 2020), ¶ 78.

Mr. Rasco did not “avoid answering” anything, least of all anything about the DAA. As Mr. Rasco testified:

ICANN’s June 27 emails to me did not reference any complaint received by ICANN from any other party or any specific information that ICANN or any other party believed might be incorrect. Rather, given the type of potential changes highlighted in ICANN’s email—“changes that occur as part of regular business operations (*e.g., changes to officers and directors [and/or] application contacts*)” (my emphasis)—I understood ICANN to be making a routine inquiry of the Contention Set members given that many years had passed since the .WEB applications had been submitted and that the public auction date had been set and was rapidly approaching. That is, in the context of this very specific inquiry, I understood ICANN to be asking whether the identifying information set forth in NDC’s application, (*e.g., management, ownership, and contacts*) had changed, not whether *any aspect of NDC’s business had changed*.³⁶⁰

172. Critically, as of June 2016, ICANN was not aware of the DAA and, therefore, its inquiry of Mr. Rasco necessarily did not encompass the DAA. As Ms. Willett testified, because Donuts had complained about supposed changes in NDC’s ownership or control, *that is what* ICANN investigated.³⁶¹ Moreover, for the reasons described in Section V., *supra*, the DAA did not result in any change to NDC’s Application. For each of these reasons, it “never occurred to [Mr. Rasco] that ICANN’s routine inquiry might require disclosure of NDC’s financing arrangement with Verisign in general or the DAA in particular, especially given the well-known industry practice of transferring domains, with ICANN’s consent, after the auction process concluded.”³⁶² Far from avoiding any subject, Mr. Rasco’s witness statement explains how he communicated multiple times with ICANN, including Ms. Willett, and “endeavored to be as thorough and responsive as possible,” providing “accurate and what [he] thought were clear answers to the questions [he] was asked.”³⁶³

173. Afiliis’ cherry-picked quotes do not show otherwise. Afiliis suggests that Mr. Rasco’s statement to the ICANN Ombudsman informing him that, “as a manager, I take my duties

³⁶⁰ [Rasco Stmt.](#) (June 1, 2020), ¶ 78.

³⁶¹ [Hrg. Tr. Vol. IV](#) (Aug. 6, 2020), at 616:13–20 [Willett] (stating that “insomuch it was about control and ownership, we just followed up with NDC about those matters”); *id* at 628:10–16 (Willett to the ICANN Ombudsman: “I know that you have been in communication with [NDC] to inquire about the recent complaint filed by Donuts regarding its ownership and potential impact on the .WEB/.WEBS auction . . .”).

³⁶² [Rasco Stmt.](#) (June 1, 2020), ¶ 78.

³⁶³ *Id.*, ¶ 80; *see also id.* ¶¶ 81–91.

very seriously and for major decisions, I confer with the Members (i.e. shareholders), which again for clarification, have never changed,” was inaccurate because, at the time, “neither Mr. Rasco nor NDC’s other managers were making any ‘major decisions’ in connection with NDC’s .WEB application. Under the terms of the DAA, Verisign was making all such decisions.”³⁶⁴ Afiliias again twists the facts.³⁶⁵ Nothing in the Ombudsman’s inquiry or Mr. Rasco’s response concerned Verisign in the least. Rather, as Mr. Rasco has explained, the Ombudsman “asked if other NDC directors were involved with the .WEB application and if any shareholders had changed” and Mr. Rasco “truthfully answered that neither was true.”³⁶⁶ Afiliias’ focus on the phrase “major decisions” is another red herring. In stating that he conferred “with other Members regarding ‘major decisions,’ [Mr. Rasco] only meant to clarify our general practice at NDC and not to represent anything specifically about .WEB.”³⁶⁷ Furthermore, Afiliias’ underlying premise is false. Even if ICANN had been inquiring about the DAA, which it was not, under the terms of the DAA

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Accordingly, Mr. Rasco testified accurately that NDC’s decisions *were not* “in the hands of Verisign.”³⁶⁹ Rather, he and the other managers of NDC continued to make all major decisions for NDC, notwithstanding the DAA.³⁷⁰

174. Next, Afiliias repeats the debunked notion that Mr. Rasco’s statements to Ms. Willett that (i) NDC’s Application was true and accurate and (ii) NDC’s “decision to not resolve the Contention Set privately was in fact his” were not accurate because the decision not to agree to a private auction was Verisign’s decision.³⁷¹ Mr. Rasco’s testimony at the IRP Hearing squarely refuted this allegation. In particular,

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³⁶⁴ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afiliias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 21.

³⁶⁵ [Rasco Stmt.](#) (June 1, 2020), ¶ 79–82; Ex. N (Emails between C. LaHatte (ICANN) and J. Rasco (NDC) (July 6–7, 2016)) (Appendix Ex. AC-99).

³⁶⁶ [Rasco Stmt.](#) (June 1, 2020), ¶ 82.

³⁶⁷ *Id.*

³⁶⁸ Livesay Ex. D (DAA), Ex. A, § 1(k) (emphasis added) (Appendix Ex. AC-84).

³⁶⁹ [Hrg. Tr., Vol. V](#) (Aug. 7 2020), at 855:2–8 [Rasco].

³⁷⁰ *See id.*

³⁷¹ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afiliias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 21.

.³⁷² Afilias’ contention that NDC violated its obligations of candor to ICANN and thus should be stripped of .WEB because of a difference of opinion on *who* made *what* decision *when* is preposterous and emblematic of the weakness of Afilias’ claim. The evidence shows that NDC made that decision when it entered into the DAA and Mr. Rasco’s statements to ICANN on the issue were unequivocally true.³⁷³

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

175. Afilias also contends that ICANN must disqualify NDC due to alleged violations of certain provisions of the Auction Rules and Bidder Agreement. As ICANN itself has noted, those agreements concern “only [] the mechanics of the Auction and each applicant’s participation in the Auction,” *not* applicant qualification requirements independent of the Guidebook, and “cannot bear the weight Afilias puts on them.”³⁷⁴ In particular, the Auction Rules and Bidder Agreement do not address the extent to which a non-applicant—including a financier or affiliated entity—might support a bidding applicant in an auction, and they clearly do not limit an applicant’s post-auction transfer arrangements or auction financing.

176. As discussed *supra*, the Auction Rules state that applicants within a contention set may discuss and negotiate, among other things, “settlement agreements *or post-Auction ownership transfer arrangements*” for the domain at issue, as long as those discussions do not take place during a restricted Blackout Period shortly before the auction itself.³⁷⁵ Similarly, while the application form for a new gTLD requires that an applicant disclose any financing obtained for the *operation* of a gTLD, it does not require an applicant to make any disclosures regarding *auction* financing.³⁷⁶ Moreover, neither the Guidebook nor the Auction Rules contain any requirement that an applicant disclose, pre-auction, a “post-auction ownership transfer

³⁷² Hrg. Tr., Vol. V (Aug. 7, 2020), 833:25–835:5 [Rasco] (Appendix Ex. AC-80).

³⁷³ *Id.* at 873:10–15 [Rasco].

³⁷⁴ [ICANN’s Rejoinder](#) Memorial (June 1, 2020), ¶ 86.

³⁷⁵ [Afilias C-4](#) (Auction Rules for New gTLDs), § 68(a).

³⁷⁶ [Afilias C-3](#) (Guidebook), at Attachment to Module 2 at Question 45-50 (the questions in this section are intended to give applicants an opportunity to demonstrate their financial capabilities to run a registry).

arrangement” or whether the applicant has obtained any auction financing.³⁷⁷

177. Afilias advances three arguments why the Auction Rules purportedly include substantive limitations on an applicant’s eligibility to participate in an ICANN auction. None of these arguments has merit.

1. The Definitions of “Bidder” and “Qualified Applicant” in the Auction Rules Do Not Invalidate NDC’s Auction Bids.

178. Afilias argues that NDC’s bids were invalid due to an alleged failure to meet the Auction Rules’ definition of “Bidder” or a “Qualified Applicant.”³⁷⁸ Afilias’ argument rests entirely on a rhetorical sleight of hand. Rather than arguing, because its cannot, that *NDC* does not fit within these definitions,³⁷⁹ Afilias argues that *Verisign* is neither a “Bidder” nor a “Qualified Applicant.”³⁸⁰ *Verisign*’s status, however, is irrelevant because the evidence adduced in the IRP makes it clear that NDC was the Qualified Applicant acting as a Bidder. *Verisign* merely provided the financing for NDC to participate in the .WEB Auction.

179. NDC made the bids for itself as the applicant as required by the Auction Rules. *Verisign* participated in the auction because it was funding those bids. The DAA

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³⁷⁷ Afilias admits that it obtained its own auction financing, but did not disclose that fact to ICANN or the other .WEB contention set members prior to the .WEB Auction. See [Afilias’ Original IRP Request](#) (Nov. 18, 2018), ¶ 30 (“Due to its financing arrangements, Afilias was able to bid up to USD 135 million” for .WEB). Afilias’ financier presumably placed limits on the manner in which Afilias could use its funds to bid for .WEB that impacted Afilias’ bidding in the .WEB Auction. Under Afilias’ own views, these limitations mean that it also was not a “Qualified Applicant,” as its bids were subject to its lender’s requirements.

³⁷⁸ Afilias’ Reply Memorial (May 4, 2020), ¶¶ 87–96 (Appendix Ex. AC-106).

³⁷⁹ The Auction Rules define a “Qualified Applicant” as “[a]n entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included in the Contention Set to be resolved in an Auction.” [Afilias C-4](#) (Auction Rules for New gTLDs) at 19. Afilias has never argued that NDC does not meet each of these qualifications.

³⁸⁰ Afilias’ Reply Memorial (May 4, 2020), ¶¶ 87–96 (Appendix Ex. AC-106).

³⁸¹ Rasco Stmt. (June 1, 2020), ¶ 99 (Appendix Ex. AC-85).

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⁸² NDC always has owned all rights under its .WEB Application.

180. As Mr. Livesay explains more fully in his Witness Statement,³⁸³

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As Mr. Rasco likewise testified during the IRP Hearing: “NDC was the bidder. NDC always retained control. As the one putting up Redacted - Third Party Designated Confidential Information,³⁸⁴ Redacted - Third Party Designated Confidential Information

³⁸⁵ In short, NDC was the Bidder and the Qualified Applicant as defined in the Auction Rules, even if Verisign was financing NDC’s bids.

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³⁸⁶ Indeed, Afilias admitted that its lender determined how much it would spend at the Auction, ultimately limiting the amount of Afilias’ bid and causing Afilias to lose the Auction to NDC.³⁸⁷

182. Verisign’s provision of funds for NDC to participate in the .WEB Auction did not divest NDC of its status as the “Bidder” and “Qualified Applicant” in that auction. If Afilias’ argument to the contrary were true, then every applicant in a new gTLD auction who relied on third-party financing—including Afilias itself—would be in violation of the Auction Rules. Such an interpretation would call into question the results of multiple auctions under the New gTLD Program, a clearly unintended result that underscores the unreasonableness of Afilias’ arguments.

2. NDC Bid on its “Own Behalf”

183. Afilias also argues NDC’s auction bids should be deemed invalid because Section 12 of the Auction Rules provide that a Bidder may only bid on “its behalf,” and NDC purportedly

³⁸² *Id.*, ¶ 100.

³⁸³ Livesay Stmt. (June 1, 2020), ¶¶ 32–33 (Appendix Ex. AC-81).

³⁸⁴ Hrg. Tr., Vol. V (Aug. 7, 2020), at 828:11–13 [Rasco] (Appendix Ex. AC-80).

³⁸⁵ *Id.* at 827:21–25 [Rasco].

³⁸⁶ Hrg. Tr., Vol. V (Aug. 7, 2020), 822:15–18 [Rasco] (Appendix Ex. AC-80).

³⁸⁷ [Afilias’ Amended IRP Request](#) (Mar. 21, 2019), ¶ 35.

was bidding for Verisign.³⁸⁸ First, the evidence submitted in the IRP by Messrs. Livesay and Rasco³⁸⁹ demonstrates conclusively that NDC *did bid on its own behalf*—NDC submitted the bids and was legally obligated to pay the bid amount under the Auction Rules regardless of the input received from its financier regarding those bids.³⁹⁰ Second, Section 12 provides that a “Qualified Applicant may designate a party to bid on its behalf (‘Designated Bidder’).”³⁹¹ It does not, as Afilias claims, impose a requirement that a Qualified Applicant bid only on its “own behalf.”³⁹² Afilias’ cherry-picked language does not demonstrate—as Afilias contends—that the Auction Agreement or the Bidder Agreement, are concerned with policing the guidance a Qualified Applicant may receive during an ICANN auction.

3. NDC’s Bids Represent the Amount that NDC Was Willing to Pay for .WEB.

184. Finally, Afilias argues that NDC’s bids were invalid because the “Auction Rules provide that all bids must reflect a ‘price[] which [the] *Bidder* is willing to pay to resolve string contention within a Contention Set in favor of its Application” and NDC’s bids purportedly only represented what Verisign was willing to pay for .WEB.³⁹³ Afilias’ argument is not supported by the evidence, as Mr. Rasco clearly testified that Redacted - Third Party Designated Confidential Information

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185. Once again, the Auction Rules cannot bear the weight that Afilias places on them.

³⁸⁸ Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 24; [Afilias’ Reply Memorial](#) (May 4, 2020), ¶ 92.

³⁸⁹ Livesay Stmt. (June 1, 2020), ¶¶ 32–33 (Appendix Ex. AC-81); Hrg. Tr., Vol. V (Aug. 7, 2020), 828:11–13 [Rasco] (Appendix Ex. AC-80); *id.* at 827:21–25, 826:20–25, 829:19–25 [Rasco].

³⁹⁰ [Afilias C-4](#) (Auction Rules for New gTLDs), at § 56.

³⁹¹ *Id.* at § 12.

³⁹² Afilias also cites to the Bidder Agreement as purported support for its claim that NDC was “obligated under the auction rules to participate in the ICANN Auction ‘on its own behalf.’” Appendix Ex. AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 24 (citing ICANN, New gTLD Auctions Bidder Agreement (Apr. 3, 2014), p. 1). But that statement is found in a “Whereas” clause in the Bidder Agreement, not a contractually binding obligation. Appendix AC-108 17A C.J.S. Contracts § 420 (“Recitals in a contract, such as ‘whereas’ clauses, are merely explanations of the circumstances surrounding the execution of the contract, and are not binding obligations, unless the operative provisions of the contract refer to them.”); Appendix Ex. AC-109 *Whetstone Candy Co. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1074 (11th Cir. 2003) (“Moreover, ‘whereas’ clauses are not binding when the contract is otherwise unambiguous. . . . They are merely prefatory recitations of the facts that lead the parties to enter the agreement.” (internal citation omitted)).

³⁹³ Appendix AC-74 (Letter from A. Ali (Counsel to Afilias) to M. Botterman (ICANN) (Nov. 3, 2021)), at 24–25.

³⁹⁴ Hrg. Tr., Vol. V (Aug. 7, 2020), 829:10–13 [Rasco] (Appendix Ex. AC-80).

Nothing in the Auction Rules suggests that they are intended to test whether the Bidder itself had the financial means to pay a winning bid. Under that construction, Afilias’ own bids do not reflect the amount *it* was willing to pay; rather, they reflected the amount that Afilias’ financier was willing to lend it for the .WEB auction.³⁹⁵ Rather, the provisions cited by Afilias provide only that a Bidder must be willing to *pay* the amount that it bid if it prevailed in the auction.³⁹⁶ Here, NDC did pay the amount it bid when requested by the auction provider, thus clearly evidencing that it was “willing to pay” that amount to resolve string contention.³⁹⁷

VII. CONCLUSION

Therefore, NDC and Verisign request that the Board direct the following:

- (1) Afilias’ claims that NDC or Verisign violated the Guidebook or engaged in other misconduct in connection with .WEB are rejected;
- (2) The Auction Award in favor of NDC is confirmed;
- (3) ICANN staff is directed to proceed to execute the registry agreement with NDC; and
- (4) Afilias is disqualified from the .WEB Contention Set for violation of the Blackout Period in the Auction Rules.

Dated: July 29, 2022

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By: /s/ Steven A. Marenberg

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³⁹⁵ See [Afilias’ Original IRP Request](#) (Nov. 18, 2018), ¶ 30.

³⁹⁶ [Afilias C-4](#) (Auction Rules for New gTLDs), § 32.

³⁹⁷ Rasco Stmt. (June 1, 2020), ¶ 103 (Appendix Ex. AC-85).