

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

submitted to

the Board Accountability Mechanisms Committee

29 July 2022

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EXECUTIVE SUMMARY¹

1. In August 2015, Nu DotCo LLC (“**NDC**”) and VeriSign, Inc. (“**Verisign**”) entered into an agreement they styled as a “Domain Acquisition Agreement” (“**DAA**”).² It is undisputed that NDC did not disclose the DAA or any aspect of its contents to ICANN, the Internet community or the other applicants for the .WEB gTLD. It is also undisputed that Verisign did not apply for .WEB and was never qualified by ICANN to compete for .WEB. Pursuant to the DAA, NDC sold, transferred, and assigned its rights and obligations in connection with its application for .WEB to Verisign and it allowed Verisign to participate secretly in ICANN’s “auction of last resort” (“**ICANN Auction**”) for .WEB. Based on the terms of the DAA, there is no scenario in which NDC, which was the actual applicant for .WEB, can become the registry for .WEB, even though it technically won the ICANN Auction—albeit on behalf of Verisign and using Verisign’s money. NDC did not play by the same rules followed by the other .WEB applicants. Instead, it won the auction by deception and subterfuge.

2. In accordance with the requirements of the Articles and Bylaws, the task before the BAMC is to apply the New gTLD Applicant Guidebook, the Auction Rules, the Bidder

¹ This submission is accompanied by:

- **Expert Report of Professor Peter Cramton:** Professor Cramton is an expert in auction design, who was intimately involved in the design of the private auction mechanism for Contention Set resolution, and who has a detailed understanding of the rules of and policy objectives underlying the New gTLD Program, especially the ICANN Auction of “last resort.” In his independent expert report, he addresses whether NDC violated the Auction Rules and what the remedy should be for its violations. He also addresses NDC and Verisign’s Black-Out Period allegations.
- **Expert Report of Jeffrey Neuman:** Mr. Neuman has over 25 years’ experience in the domain name industry and with ICANN. He was heavily involved in the development of the New gTLD Program. In his expert report, he provides his independent expert opinion regarding the Domain Acquisition Agreement and whether the agreement and NDC’s performance of it violate the letter and spirit of the New gTLD Program.
- **Exhibits (Altanovo-1 through Altanovo-17):** As requested in Ms. Burr’s letter dated 19 May 2022, we provide hyperlinks for sources not included as Altanovo exhibits.

² Key terms of the DAA that are relevant to the issues before the BAMC are provided in Annex A to Afiliias’ Response to the *Amicus Curiae* Briefs (24 July 2020), (**Ex. Altanovo-1**).

Agreement, and related ICANN documents (the “**New gTLD Program Rules**” or the “**Rules**”)³ to determine *independently and impartially* (1) whether NDC’s entry into, and performance of, the DAA violated the Rules; and (2) if so, what the consequences must be. The Board is to make this determination and pronouncement “in the first instance,” if necessary, “subject to the ultimate independent review of an IRP Panel.”⁴

3. We emphasize the need for independence and impartiality. These are critical principles that are enshrined in ICANN’s Bylaws, which require ICANN to “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)[.]”⁵ To remain faithful to these principles, the Board cannot give any weight or deference whatsoever to the decision of Staff in June 2018 to proceed with the delegation of .WEB to NDC. That decision was specifically determined by the IRP Panel to constitute a violation of ICANN’s Articles and Bylaws.⁶ Further, the Board cannot allow itself to

³ ICANN, gTLD Applicant Guidebook (4 June 2012), <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf> (“**AGB**”) (**IRP Ex. C-3**); Auction Rules for New gTLDs: Indirect Contentions Edition, Version 2015-02-24, Prepared for ICANN by Power Auctions LLC, <https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf> (“**Auction Rules**”) (**IRP Ex. C-4**); ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), <https://newgtlds.icann.org/en/applicants/auctions/bidder-agreement-redline-03apr14-en.pdf> (“**Auctions Bidder Agreement**”) (**IRP Ex. C-5**); ICANN, Supplement to New gTLD Auctions Bidder Agreement (24 Feb. 2015), <https://newgtlds.icann.org/en/applicants/auctions/bidder-agreement-supplement-24feb15-en.pdf> (referred to collectively as the “**New gTLD Program Rules**” or the “**Rules**”).

⁴ Final Decision (as corrected) (20 May 2020) (“**Final Decision**”), (**Ex. Altanovo-2**), ¶ 296.

⁵ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), <https://www.icann.org/resources/pages/bylaws-2018-06-22-en> (“**ICANN Bylaws (2018)**”), (**IRP Ex. C-1**), Sec. 1.2(a)(v).

⁶ Final Decision, (**Ex. Altanovo-2**), ¶ 413(1) (declaring that ICANN “has violated its Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, ... and its Bylaws ... by (a) its staff (Staff) failing to pronounce on the question of whether the Domain Acquisition Agreement ... complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken ‘off hold.’”).

be influenced in anyway by the litigation positions taken by ICANN Legal and Staff in the IRP, which in critical respects not only supported but advanced arguments made by NDC and Verisign.

4. We also wish to remind the BAMC that Verisign has no standing in these proceedings. Verisign did not submit an application for .WEB, and it was not approved by ICANN for inclusion in the .WEB Contention Set. The task before the BAMC is resolution of the .WEB Contention Set. The fact that NDC was obligated to allow Verisign to “indirectly” participate in the .WEB Contention Set and secretly bid at the ICANN Auction for .WEB (“**.WEB Auction**”) pursuant to a private agreement it had with Verisign—which was not approved by or even disclosed to ICANN—cannot give Verisign any rights to participate in the resolution of the .WEB Contention Set. In short, Verisign’s arguments should be given no weight by the BAMC. It would be grossly unfair to allow Verisign to use the Board’s processes to legitimize and enforce its private contracts—it can only have standing in these proceedings on the basis that it purchased NDC’s application or somehow merged with the company, which Verisign and NDC deny. Verisign and NDC cannot be allowed to have it both ways.

I. The New gTLD Program Rules at Issue

5. ICANN and the Internet community developed the New gTLD Program over the course of a multi-year process and designed the Rules to protect and promote the principles of transparency, fairness, and predictability *at every step* in the application process. ICANN has repeatedly confirmed, including in the courts of the United States, that the New gTLD Program Rules form a contract between an applicant and ICANN.⁷

⁷ See Paragraphs 93-95.

6. The Rules plainly and strictly:
- Provide that an “[a]pplicant may not resell, assign, or transfer **any** of applicant’s **rights or obligations in connection with its [a]pplication.**”⁸
 - Require each applicant to “warrant[] that the statements and representations contained in the application ... are **true and accurate and complete in all material respects.**”⁹
 - Require each applicant to “agree[] to notify ICANN in writing of **any** change in circumstances that would render **any** information provided in the application **false or misleading.**”¹⁰
 - Provide for a **Change Request Process**, which each applicant was **required** to undergo if any “information previously submitted by an [A]pplicant becomes **untrue or inaccurate[.]**”¹¹ ICANN could (and did) require re-evaluation or reject the request if the change to the application was deemed material.¹²
7. The rules for ICANN Auctions are equally plain and strict. They provide that:
- Only Qualified Applicants that ICANN has placed in a published contention set and approved to proceed to string contention resolution for a particular gTLD are permitted to enter into a Bidder Agreement with ICANN and on that basis to have bids submitted on their behalf at the “auction of last resort” for the gTLD.
 - “[O]nly bids that comply with **all aspects of the auction rules** will be considered valid.”¹³
 - Invalid bids must be disqualified.
 - If a bid that ICANN initially declared to be winning is later disqualified, the Rules provide for the remaining Qualified Applicants to “receive offers to have their [a]pplications accepted, one at a time, in descending order of and subject to payment of its respective Exit Bid.”¹⁴

⁸ AGB, (**IRP Ex. C-3**), Module 6 (Terms and Conditions), ¶ 10 (at p. 6-6) (emphasis added).

⁹ AGB, (**IRP Ex. C-3**), Module 6, ¶ 1 (at p. 6-2) (emphasis added).

¹⁰ AGB, (**IRP Ex. C-3**), Module 6, ¶ 1 (at p. 6-2) (emphasis added).

¹¹ AGB, (**IRP Ex. C-3**), Module 1, Section 1.2.7 (at p. 1-30) (emphasis added).

¹² AGB, (**IRP Ex. C-3**), Module 1, Section 1.2.7 (at p. 1-30); *see also* ICANN, New gTLD Application Change Request Process and Criteria, <https://newgtlds.icann.org/en/applicants/global-support/change-requests>, (**IRP Ex. C-56**); ICANN, *Program Implementation Review* (29 Jan. 2016), <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf>, pp. 35-40.

¹³ AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.3 (at p. 4-22) (emphasis added).

¹⁴ Auction Rules, (**IRP Ex. C-4**), Rule 62.

II. Key Terms of the DAA

8. The express purpose of the DAA was to enable Verisign to
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9. Upon executing the DAA, Redacted - Third Party Designated Confidential
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. Moreover, NDC undertook to keep the DAA and its terms strictly confidential.
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10. NDC's compliance with the DAA not only breached the plain terms of the Rules;
it swept the Rules and the principles they were meant to advance into the trash bin.

III. The Rules Applied to the DAA and NDC's Conduct

A. Violation of the Anti-Transfer Provision

11. The Rules clearly prohibit an applicant from reselling, assigning, or transferring
any of its rights or obligations in connection with its application. The reason is obvious: ICANN

¹⁵ DAA, (**IRP Ex. C-69**), Sec.10(a) (emphasis added)

¹⁶ DAA, (**IRP Ex. C-69**), Sec.10(a).

intended to provide rights and obligations of performance only to entities that have complied with all of the application requirements and whose identity had been publicly disclosed to the Internet community and Governments. ICANN’s prohibition against an applicant transferring its rights and obligations of its performance under or “in connection with” the application is critical to the Program’s basic goals.

12. Notwithstanding this plain prohibition, NDC transferred virtually all its rights and obligations in connection with its application to Verisign for Redacted - Third Party Designated Confidential Information

. NDC’s argument that the DAA did not affect any transfer of rights and obligations in connection with its application is belied by the uncontestable fact that Redacted - Third Party Designated Confidential Information

13. When NDC entered into the DAA in August 2015, ICANN had long-approved NDC to proceed to string contention resolution for .WEB following ICANN’s pre-screening of NDC’s application and the mandatory posting of public portions of the application for public comment and GAC Advice. Under the Rules, NDC had the right to participate in and negotiate a private resolution of the Contention Set with the other Contention Set members; to choose whether or not to participate in an ICANN Auction; to place bids on its own behalf in the ICANN Auction (which was also an obligation under the Rules); to negotiate a Registry Agreement on its own behalf if it emerged as the winner of the Contention Set; and, if it successfully negotiated a Registry Agreement with ICANN, to operate the registry. NDC transferred all those rights to Verisign.

14. Specifically, the DAA provided that (i) Redacted - Third Party Designated Confidential Information

⁷ (ii) Redacted - Third Party Designated Confidential Information

¹⁷ DAA, (IRP Ex. C-69), Exhibit A, Sec. 1(i).

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¹⁸ and (iii)

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¹⁹

15. But, if for any reason, Redacted - Third Party Designated Confidential Information

²⁰ In sum, Redacted - Third Party
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16. NDC also sold its key obligations in connection with its application to Verisign.

Thus, Redacted - Third Party Designated Confidential Information

¹⁸ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1.

¹⁹ DAA, (**IRP Ex. C-69**), Exhibit A, Secs. 3(b), 3(c).

²⁰ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 10.

B. Violation of NDC’s Warranty of Truthfulness, Accuracy, and Completeness and Its Agreement To Notify ICANN of Changes in Circumstances

17. In its .WEB application, NDC included numerous representations and voluminous information concerning its organization, experience, and plans for operating the .WEB Registry. NDC represented, for example, that its “proven executive team” had a “*long-term commitment*” to successfully operate the .WEB Registry. NDC also represented that its team had special expertise and experience from having marketed .CO to compete against .COM—and that it was particularly able to compete even in a market that “fundamentally advantages older incumbent players” (*i.e.*, Verisign).

18. But upon entering into the DAA, the representations and information in its .WEB application—the public portions of which remain published on the ICANN website²¹—were no longer true, accurate, or complete. To the contrary, they were plainly false, inaccurate, and (at best) incomplete.

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. The sole purpose of its application was to enable non-applicant Verisign to become the .WEB registry operator by secretly and “indirectly” participating in the .WEB Contention Set. The true identity of the entity that was seeking to become the registry operator under NDC’s application was no longer NDC; it was Verisign, a non-applicant who, under the plain terms of the Rules, was prohibited from participating in the Program.

19. NDC not only breached its warranty of truthfulness, accuracy, and completeness. NDC also breached its agreement to notify ICANN “of any change in circumstances that would

²¹ See ICANN, New Generic Top-Level Domains, Application Details: Application ID 1-1296-36138 (String: WEB) by NU DOT CO LLC, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1053>.

render any information provided in the application false or misleading”, and its related obligation to “promptly notify ICANN” through the Change Request Process if any information in its application became “untrue or inaccurate.”²² Under the DAA Redacted - Third Party Designated Confidential Information

20. NDC not only misled ICANN (and by extension the entire Internet community) by omission, it affirmatively lied to ICANN on multiple occasions. For example, when ICANN specifically asked NDC pre-Auction if there had been any changes to its application or to the NDC organization, NDC stated that there had been no changes to its application and that the decision to proceed to the ICANN Auction had been made solely by NDC. In fact, Redacted - Third Party Designated Confidential Information . ICANN relied on these misrepresentations and omissions, advising a U.S. federal court that, if this proved incorrect, “the results of an auction ‘could be undone’ if a disqualification is discovered even long afterward.”²³ NDC’s violations of the Rules now require ICANN to disqualify NDC and offer .WEB to Afilias (now Altanovo) as the next highest bidder.

C. Violation of the Auction Rules

21. Both the Auction Rules and the Bidder Agreement contain numerous provisions stating the requirement that only a Qualified Applicant, *i.e.*, an applicant that has passed through all the steps in the application process qualifying it to be allowed by to proceed to string contention resolution as part of a Contention Set—may participate in an ICANN Auction. Moreover, once a

²² AGB, (IRP Ex. C-3), Module 1, Section 1.2.7 (at p. 1-30) and Module 6, ¶ 1 (at p. 6-2).

²³ *Ruby Glen v. ICANN*, Case No. 2:16-cv-05505 PA (ASx), ICANN’s Opposition to *Ex Parte* Application for Temporary Restraining Order (C.D.Ca. July 25, 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-icann-opposition-ex-parte-application-tro-25jul16-en.pdf> (“*Ruby Glen v. ICANN, ICANN’s Opposition to Ex Parte Application for TRO*”), (IRP Ex. R-8), [PDF] p. 25.

Qualified Applicant is participating in the ICANN Auction, the Qualified Applicant may only place bids on behalf of itself. Bids may not be made at an ICANN Auction on behalf of any entity other than the Qualified Applicant.²⁴

22. But at the .WEB Auction, NDC was *not* placing Bids on its own behalf. Rather, the
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²⁵ Specifically, NDC’s representative travelled to Verisign’s headquarters in Virginia (at Verisign’s expense), Redacted - Third Party Designated Confidential Information —solely in an effort to secure the .WEB Registry Agreement for Verisign. None of this was disclosed to ICANN or anyone else.

23. NDC’s submission of bids on Verisign’s behalf is contrary to the express provisions of the Auction Rules. Under the plain terms of these Rules as well, ICANN is required to disqualify NDC’s Bids and offer .WEB to Afilias as the next highest bidder.

IV. The Required Remedy and ICANN’s Discretion To Order It

24. During the IRP, both Verisign and NDC argued that ICANN has discretion under the California “business judgment rule” to decide whether NDC violated the Rules, and, if so, what the remedy should be. That is not correct. As a nonprofit public benefit corporation, ICANN must act in accordance with its public trust mission, consistent with its Articles and Bylaws.

²⁴ The Rules do provide for the designation by a Qualified Applicant of a Designated Bidder. These rules are irrelevant here. NDC did not designate Verisign as its Designated Bidder. Given that Verisign was not a member of the .WEB Contention Set, it could not designate NDC as a Designated Bidder. In any event, the designation of a Designated Bidder required disclosure and for the Designated Bidder to agree to abide by the Auction Rules.

²⁵ DAA, (IRP Ex. C-69), Exhibit A, Sec. 1 (emphasis added).

25. Thus, while the Rules state that “[t]he decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion[,]”²⁶ ICANN is required to exercise its discretion consistent with (and within the parameters of) its Articles and Bylaws. It is not a permissible exercise of ICANN’s discretion to overlook blatant and fundamental violations of the Rules, or to ignore the Rule’s requirements providing for invalid bids to be disqualified, with the gTLD then being offered to the next highest bidder.

26. Here, consistent with its Articles and Bylaws—which require ICANN to carry out its “Mission” through transparent, fair, and predictable processes—ICANN designed the Rules to ensure a fair, transparent, and predictable “roadmap” to delegation. Consistent with ICANN’s Bylaws, the Board must now apply the plain terms of the Rules to NDC’s conduct—making its first-instance decision on the questions before it “by applying documented policies consistently, neutrally, objectively and fairly, without singling out any particular party for discriminatory treatment”²⁷

27. No reasonable person, acting independently and impartially, could apply the plain language of the Rules to NDC’s conduct and come to any conclusion other than that NDC breached the plain terms of the Rules and its contractual obligations to ICANN—and did so in a way that subverted the most basic principles that the Rules were intended to ensure.

28. The Rules plainly provide for ICANN to reject NDC’s application for its numerous violations prior to and at the ICANN Auction. The Rules are categorical—bids submitted on behalf of entities other than Qualified Applicants are invalid and must be disqualified, with the string

²⁶ AGB, (**IRP Ex. C-3**), Module 6, ¶ 3 (at p. 6-2 – 6-3).

²⁷ ICANN Bylaws (2018), (**IRP Ex. C-1**), Sec. 1.2(a)(v).

being offered to the remaining Qualified Applicants in the descending order of the highest exit bid. Afilias made the second highest bid after NDC's invalid bid on behalf of Verisign.

29. Consistent with the Rules—as well as with ICANN's Articles and Bylaws—the Board must now apply their terms consistently, neutrally, objectively, and fairly.

V. The Alleged “Black-Out” Period Violation

30. NDC's violation of the New gTLD Program Rules in multiple respects is clear. But in an effort to distract ICANN's attention from the real issues at hand, NDC (and Verisign) have argued that Afilias violated the pre-auction “Blackout Period,” pursuant to which Contention Set members were prohibited from discussing bids or bidding strategies at an ICANN Auction, or otherwise negotiating a resolution of the Contention Set. In support of their allegation, NDC and Verisign cite to three text messages: two from Afilias executives to an NDC executive *before* the Blackout Period went into effect and a third text message from an Afilias executive to another NDC executive during the Blackout Period.

31. The text messages sent prior to the Blackout Period, by definition, cannot be considered a violation of the Rules. Professor Cramton, who designed the private auction rules and procedures and who is an expert in auctions, agrees.²⁸ The sole text message that was sent during the Blackout Period did nothing more than ask whether NDC would be willing to re-explore a private resolution of the Contention Set only in the event that ICANN postponed the .WEB Auction—which ICANN had been asked to do by other applicants. This was not a prohibited communication under the Blackout Period rules. Further, because Afilias' question was specifically restricted to a situation where the ICANN Auction had been postponed and the

²⁸ Expert Report of Peter Cramton (29 July 2022) (“**Cramton Report**”), ¶ 48: “Two of these texts were sent prior to the start of the Blackout Period and therefore were sent during a time when the New gTLD Program Rules allowed and indeed encouraged Contention Set members to communicate about the resolution of contention without any restrictions”.

associated Blackout Period lifted, this text could not violate the Blackout Period Rules. Again, Professor Cramton agrees.²⁹

32. We urge the BAMC to not allow itself to be distracted by NDC's and Verisign's tactics and to focus on the real issues at hand.

²⁹ Cramton Report, ¶¶ 48-49: "The substance of Mr. Kane's text does not fit into any of the categories prohibited by the Blackout Period rule".

SECTION 1: THE DEVELOPMENT AND CRITICAL GOALS OF THE NEW GTLD PROGRAM

1.1 Overview

33. This Section contains a brief history of ICANN’s New gTLD Program, focusing on the policy objectives and principles that ICANN and the Internet community stated should guide the rules for and implementation of the New gTLD Program. The Board must faithfully respect this guidance—which is reflected in the plain text of the New gTLD Program Rules, as well as numerous ICANN policy documents developing and implementing them—in deciding whether NDC violated the Rules and, if so, what should be the consequences.

34. ICANN developed the New gTLD Program after an intensive multi-year process, which involved significant and continuous input from stakeholders throughout the Internet community.³⁰ Even a brief review of the history demonstrates the overriding goals of the Program: to ensure transparency, fairness, and predictability from beginning to end. These goals will be eviscerated if ICANN turns a blind eye to NDC’s conduct.

1.2 The Path to Launching the Program

35. As explained in the Neuman Report, ICANN’s earlier TLD rounds in the 2000s had been criticized by the Internet community as lacking in transparency, clear rules and procedures, and objective criteria for proceeding to delegation. ICANN and the Community worked hard to address that criticism in developing the New gTLD Program.³¹

36. In 2007, the GNSO Council released its *Final Report on the Introduction of New Generic Top-Level Domains*—itself the product of an arduous and years-long process.³² The

³⁰ See Expert Report of Jeffrey J. Neuman (29 July 2022) (“**Neuman Report**”), ¶¶ 14-22.

³¹ See Neuman Report, ¶¶ 18-19.

³² Neuman Report, ¶ 19.

GNSO Council unanimously adopted as one of its key principles that ICANN must introduce new gTLDs “**in an orderly, timely, and predictable way.**”³³ To advance this objective, the GNSO Council issued a set of recommendations, which included:

The evaluation and selection procedure for new gTLD registries should respect the principles of **fairness, transparency and non-discrimination. All applicants** for a new gTLD registry should therefore be evaluated against **transparent and predictable criteria**, fully available to the applicants prior to the initiation of the process.³⁴

There must be a **clear and pre-published application process** using **objective and measurable** criteria.³⁵

37. In essence, the GNSO’s guidance called for an application process in which all applicants would know precisely the rules that they had to follow and the rules that ICANN would apply in evaluating their applications and resolving contention amongst competing applications.

38. On 26 June 2008, the ICANN Board adopted the GNSO policy recommendations for the introduction of new gTLDs. The Board directed ICANN staff to continue to develop and complete the Program consistent with those principles and recommendations.³⁶

1.3 The Development of the Applicant Guidebook

39. From 2008 to 2011, ICANN published at least 9 versions of the New gTLD Applicant Guidebook (“**Guidebook**” or “**AGB**”) for public notice and comment. The Board approved the final version of the Guidebook in June 2011. The Guidebook, comprising 6 detailed

³³ Neuman Report, ¶ 20 (quoting ICAANN|GNSO, Final Report: Introduction of New Genetic Top-Level Domains (8 August 2007), <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm> (the “**GNSO Report**”), (IRP Ex. C-20), Principles A and D).

³⁴ GNSO Report, (IRP Ex. C-20), Recommendation No. 1 (at pp. 6-7) (emphasis added).

³⁵ GNSO Report, (IRP Ex. C-20), Recommendation No. 9 (at p. 7) (emphasis added).

³⁶ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), <https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf> (“**ICANN Board Rationales**”), (IRP Ex. C-9), p. 9.

“Modules”,³⁷ is nothing but comprehensive, containing rules and guidance for all typical applicants, application scenarios, and circumstances.³⁸

40. According to the Board in its *Rationales for Approving the Launch of the New gTLD Program*, the rules and criteria in the Guidebook are designed to ensure “the principles of **fairness, transparency and non-discrimination**” throughout the Program.³⁹ The Board also sought to ensure that the rules and application processes were consistent with ICANN’s Articles and Bylaws.⁴⁰

41. As stated in its Preamble, the Guidebook reflects ICANN’s documented policies, developed with “[m]eaningful community input....”⁴¹ The Guidebook “**provides a clear roadmap for applicants to reach delegation, including Board approval.**”⁴²

42. In the words of one IRP Panel:

The Guidebook, running to almost 350 pages, sets out **comprehensive procedures for the gTLD application and review process**. It includes instructions for applicants, procedures for ICANN’s evaluation of applications, and procedures for objections to applications. In line with ICANN’s **policies of transparency and**

³⁷ The Guidebook contains six modules: Introduction to the gTLD Application Process (Module 1); Evaluation Procedures (Module 2); Objection Procedures (Module 3); String Contention Procedures (Module 4); Transition to Delegation (Module 5); and Top-Level Domain Application – Terms and Conditions (Module 6). *See* AGB, (IRP Ex. C-3).

³⁸ *See* Merits Hearing, Tr. Day 2 (4 Aug. 2020), (Ex. Altanovo-3), 307:18-25 (Burr Cross-Examination) (“Q. Would you also agree that ICANN must implement the various procedures and rules and policies set forth in the [ABG] consistently, neutrally, objectively and fairly? A. Yes, I believe ICANN is obligated to make decisions by applying documented policies consistently, neutrally, objectively and fairly in accordance with the bylaws.”).

³⁹ ICANN Board Rationales, (IRP Ex. C-9), p. 9 (emphasis added); Merits Hearing, Tr. Day 3 (5 Aug. 2020), (Ex. Altanovo-4), 548:4-7 (Willett Cross-Examination). *See also* Merits Hearing, Tr. Day 2 (4 Aug. 2020), (Ex. Altanovo-3), 307:18-25 (Burr Cross-Examination).

⁴⁰ ICANN Board Rationales, (IRP Ex. C-9), pp. 7, 9; Merits Hearing, Tr. Day 3 (5 Aug. 2020), (Ex. Altanovo-4), 548:4-7 (Willett Cross-Examination) (“Q. But you understood that the new gTLD Program and the [ABG] were designed to promote the principles in the bylaws, correct? A. Correct.”).

⁴¹ AGB, (IRP Ex. C-3), Preamble (New gTLD Program Background).

⁴² AGB, (IRP Ex. C-3), Preamble (New gTLD Program Background) (emphasis added).

accountability, applications for new gTLDs are posted on the ICANN website for community review and comment.⁴³

43. ICANN explicitly designed the detailed provisions of the Rules to guarantee these basic principles at every step of the Program—from the submission of applications to the resolution of competing applications, including, if necessary and as a last resort, through an ICANN Auction.

1.4 Overview of the Application Process

44. Module 1 of the AGB (Introduction to the gTLD Application Process) explicitly provides for a fair application process from the outset by placing all potential applicants on equal footing. All interested entities were required to submit an application before the established deadline; any applications submitted afterwards would “not be considered[.]”⁴⁴

45. ICANN then posted the public portions of each application for public comment.⁴⁵ Ms. J. Beckwith Burr explained during her testimony in the IRP that the public comment process is part of ICANN’s transparency commitment.⁴⁶ As stated by Ms. Christine Willett (former Vice President, gTLD Operations, Global Domains Division) in her IRP testimony, the public comment process set out in the New gTLD Program Rules furthers this commitment by guaranteeing that everyone—including other applicants—could know “which gTLD strings are being applied for

⁴³ *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration of the Independent Review Process Panel (19 Oct. 2016), <https://www.icann.org/en/system/files/files/irp-gcc-final-declaration-24oct16-en.pdf>, (IRP Ex. CA-17), ¶ 12 (emphasis added).

⁴⁴ AGB, (IRP Ex. C-3), Module 1, Sec. 1.1.1 (at pp. 1-2 – 1-3).

⁴⁵ ICANN, New Generic Top-Level Domains, New Top-Level Domain Name Applications Revealed Historic Milestone for the Internet’s Domain Name System, (13 June 2012), <https://newgtlds.icann.org/en/announcements-and-media/announcement-13jun12-en>.

⁴⁶ Merits Hearing, Tr. Day 2 (4 Aug. 2020), (Ex. Altanovo-3), 384:9-13 (Burr Cross-examination) (“Q. And that’s the entire point of ICANN’s obligation to act transparently, right, to post this stuff for public view? A. It is certainly a point of ICANN’s transparency commitment.”).

and who is behind the application[.]”⁴⁷ And, upon learning such information, the Internet community could “bring relevant information and issues to [ICANN’s] attention...”⁴⁸ ICANN was required to take these public comments into account during the application’s evaluation process.⁴⁹ In addition, formal (and separate) objection procedures exist for, respectively, the GAC and other members of the Internet community.⁵⁰

46. At around the same time as their applications are posted for notice and comment, ICANN also subjects them to background checks and a technical and financial evaluation phase, called the “initial evaluation.” Detailed evaluation and objection procedures are set forth in, respectively, Modules 2 and 3 of the Guidebook.

47. Applicants that have passed through the public and comment procedures, any resulting objections by the GAC or others in the Internet community, the initial evaluation criteria, and other requirements stated in the Rules are deemed Qualified Applicants. Where there are more than one Qualified Applicant for the same string, ICANN approves them for string contention resolution. The contention set is publicly posted. As Ms. Willett explained in the IRP, *only* entities that had “submitted applicat[i]ons and [who] are applying for a particular string and who have been identified in the public comment period” could participate in string contention resolution.⁵¹

⁴⁷ Merits Hearing, Tr. Day 3 (5 Aug. 2020), (**Ex. Altanovo-4**), 549:15-19 (Willett Cross-Examination); *see also id.*, 580:3-5 (Willett Cross-Examination) (“[WILLETT] ... Once [the applications] were published, the world, the applicants[,] were able to see who had applied for the same string.”); *id.*, 580:24 – 581:2 (“[WILLETT] ... [A]pplicants could see all of the other applications, so it was very easy for them to see that there were seven applications for .WEB.”).

⁴⁸ AGB, (**IRP Ex. C-3**), Module 1, Sec. 1.1.2.3 (at p. 1-6).

⁴⁹ AGB, (**IRP Ex. C-3**), Module 1, Sec. 1.1.2.3 (at p. 1-6).

⁵⁰ AGB, (**IRP Ex. C-3**), Module 1, Secs. 1.1.2.4, 1.1.2.6 (at pp. 1-7 – 1-8, 1-10).

⁵¹ Merits Hearing, Tr. Day 3 (5 Aug. 2020), (**Ex. Altanovo-4**), 575:1-5 (Willett Cross-Examination); *id.*, 574:5-17 (Willett Cross-Examination) (“Q. Okay. So under 4.1.3, ‘Self-Resolution of String Contention,’ it says in the first paragraph, quote, [‘]applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.’ Now, this applies only to applicants, correct? A. Correct. Yes, it is regarding applicants with new gTLD applications.”).

1.4.1 The Rules on Private Resolution

48. ICANN heavily encouraged members of contention sets “to reach a settlement or agreement that results in resolution of the contention ... at any stage of the process, once ICANN has posted the applications received.”⁵²

49. However, ICANN prohibits applicants from resolving contention sets in a manner that would cause “material changes in applications (for example, combinations of applicants to resolve contention)...”⁵³ As with *all* material changes to an application, any material changes resulting from private resolution efforts require “re-evaluation” of the changed application.⁵⁴

50. If applicants are unable to reach self-resolution of a contention set, they must then resolve contention through an ICANN Auction—described in the Guidebook as a “Mechanism of Last Resort.”⁵⁵

1.4.2 The ICANN Auction of Last Resort

51. The Guidebook provides the general requirements for an ICANN Auction, to be fleshed out in “[t]he detailed set of Auction Rules [that] will be available prior to the commencement of any [ICANN Auction] proceedings.”⁵⁶ ICANN published the final version of the Auction Rules for New gTLDs (“**Auction Rules**”) on 24 February 2015.⁵⁷ The New gTLD Auction Bidder Agreement (“**Bidder Agreement**”) was published in April 2014.⁵⁸

⁵² ICANN, New gTLD Program Explanatory Memorandum (18 Feb. 2009), <https://archive.icann.org/en/topics/new-gtlds/string-contention-18feb09-en.pdf>, p. 5.

⁵³ AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.1.3 (at p. 4-6).

⁵⁴ AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.1.3 (at p. 4-6).

⁵⁵ AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.3 (Auction: Mechanism of Last Resort) (at p. 4-19).

⁵⁶ AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.3.1 (at p. 4-20).

⁵⁷ Auction Rules, (**IRP Ex. C-4**).

⁵⁸ Auctions Bidder Agreement, (**IRP Ex. C-5**).

52. As explained in the Cramton and Neuman Reports, as with the rest of the Program, ICANN developed the auction provisions of the Guidebook, Auction Rules,⁵⁹ and Bidder Agreement to ensure transparency and fairness at every step. These provisions explicitly incorporated all the requirements of the application process leading up to the ICANN Auction and formed part of the contract between ICANN and the applicant.

53. Under the Auction Rules, bids can be submitted only on behalf of a “Qualified Applicant” and only a Qualified Applicant may control the bidding process. The Rules specifically 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 within a Contention Set** to be resolved by an [ICANN] Auction[.]”⁶⁰ The Rules therefore do not authorize bids being made by or on behalf of non-applicants and are thus invalid as not complying with “all aspects of the Auction Rules.” Such invalid bids—once discovered—must be treated as “exit bids” under the Rules. In other words, any bid placed on behalf of an entity that is not a “Qualified Applicant” is “in default” and ineligible to proceed to the next bidding round.

54. When a “**Winning Bid**” is in default, the Rules require ICANN to offer the string to the next highest bidder.⁶¹ Here, too, the purpose of the Rules—consistent with providing applicants with a “clear road map to delegation”—are designed to guarantee that *only* applicants who have followed the Rules can participate and prevail in an ICANN Auction and be eligible for delegation of the TLD at issue.

⁵⁹ The Auction Rules were prepared for ICANN by Power Auctions.

⁶⁰ Auction Rules, (**IRP Ex. C-4**), Schedule – Table of Definitions (p. 19) (emphasis added).

⁶¹ Auction Rules, (**IRP Ex. C-4**), Rule 59 (at p. 12); AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.3.3 (p. 4-26).

SECTION 2: THE RECORD FACTS OF NDC’S MATERIAL RULE VIOLATIONS

2.1 Overview

55. In this **Section 2**, we set out the facts that are undisputed or that can no longer be disputed based on the testimony of NDC and Verisign’s witnesses in the IRP. In **Section 3**, we demonstrate why an application of the Rules to these facts and the terms of the DAA violated the Rules and fundamentally subverted the principles the New gTLD Program was designed to guarantee.

2.2 Seven Entities Timely Applied for .WEB and Passed Through the Notice and Comment Period and Initial Evaluation

56. Seven entities timely applied for .WEB by the ICANN-mandated deadline of 20 April 2012.⁶² Verisign was not among them. Verisign applied only for several gTLDs related to .COM or Verisign’s tradename.⁶³

57. By August 2014, ICANN had determined that each of the seven .WEB applicants had met the criteria and passed through the necessary steps to be placed into a published contention set. Those steps included the posting of extensive public portions of each application for notice and comment. We summarize below key representations and information posted from NDC’s application—as they show what ICANN and the rest of the Internet community (including each

⁶² In addition to Afiliacorp and NDC, the five other entities who timely filed applications for .WEB were Google (through Charleston Road Registry Inc.); Donuts (through Ruby Glen); Radix (through DotWeb Inc.); InterNetX GmbH (Schlund Technologies GmbH); and Web.com Group, Inc. ICANN, New Generic Top-Level Domains, New gTLD String Similarity Contention Sets as of 26 February 2013, <http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-26feb13-en.pdf>, p. 15. The 12 April 2012 application deadline stated in the AGB was extended by ICANN due to a technical glitch. ICANN, TAS Temporarily Offline (12 Apr. 2012), <https://www.icann.org/en/announcements/details/tas-temporarily-offline-12-4-2012-en>; AGB, (**IRP Ex. C-3**), Module 1, Sec. 1.1.1 (at p. 1-3).

⁶³ Witness Statement of Paul Livesay in Support of ICANN’s Rejoinder and *Amici*’s Briefs (1 June 2020), (**Ex. Altanovo-5**), ¶ 4 (“Verisign had participated in the New gTLD Program by filing applications for new TLDs that were variants of its company name (*i.e.*, ‘.Verisign’) or internationalized versions of Verisign’s existing TLDs, but Verisign had not sought to acquire the rights to new gTLD not already associated with Verisign.”).

applicant) understood about NDC as the applicant that was seeking to become the registry operator for .WEB, consistent with the transparency requirements underlying the Rules. They are therefore relevant to the Board’s assessment of whether NDC was required to disclose its entry into the DAA with Verisign and the contents of that agreement to ICANN, and on that basis submit a Change Request for ICANN’s consideration.

2.3 Summary of Key Representations in Publicly Posted Parts of NDC’s Application

58. NDC’s application consisted of a technical annex, in which NDC identified NeuStar, Inc. as its back-end service provider; a financial annex, setting out NDC’s financial capabilities to develop and operate the .WEB registry; a completed “User Registration” section, identifying preliminary information about the applicant; and an “Application and String Information” section that includes details about the applied-for string.⁶⁴ In its application, NDC identified itself as a limited liability company established under Delaware law, with its principal place of business in Miami, Florida.⁶⁵

59. NDC stated that it had three directors: Jose Ignacio Rasco III; Juan Diego Calle; and Nicolai Bezsonoff.⁶⁶ When asked to identify its officers or partners, NDC identified the same three individuals. NDC designated Mr. Rasco as its primary contact for the application.⁶⁷ NDC

⁶⁴ ICANN, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012) (“**NDC Application**”), (**Ex. Altanovo-6**); ICANN, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012) – Non-Public (Highly Confidential- Attorneys’ Eyes Only), (**IRP Rasco Ex. A.2**).

⁶⁵ NDC Application, (**Ex. Altanovo-6**), pp. 1, 3. NDC was established as a special purpose vehicle to acquire gTLDs in the New gTLD Program. Merits Hearing, Tr. Day 5 (7 Aug. 2020), (**Ex. Altanovo-7**), 801:17-20 (Rasco Cross-Examination) (“Q. Okay. So NDC was formed in 2012 for the purpose of applying for new gTLD strings in the new gTLD Program; is that right? A. That’s right.”). NDC applied for twelve other gTLDs, but lost every auction it entered other than the .WEB Auction.

⁶⁶ NDC Application, (**Ex. Altanovo-6**), p. 4.

⁶⁷ NDC Application, (**Ex. Altanovo-6**), p. 2.

identified two shareholders as owning at least 15% of its shares: Domain Marketing Holdings, LLC and NUCO LP, LLC.⁶⁸ There is no mention of Verisign anywhere in the application.

60. NDC’s application also stated its “Mission Statement.”⁶⁹ Module 2 of the Guidebook (“Evaluation Procedures”) sets forth the *Evaluation Questions and Criteria* for ICANN’s evaluation of each application. It explains that the evaluation process for applications would, among other things, consider whether applicants had “provide[d] a **thorough and thoughtful analysis** of the technical requirements to operate a registry **and the proposed business model.**”⁷⁰

61. Accordingly, the public portions of NDC’s .WEB application provided extensive information and representations about NDC’s proposed business model—and NDC’s description of what it considered to be its unique capabilities and experience to innovate and diversify the Internet name space if it could add .WEB to its existing “product portfolio.”⁷¹ NDC also represented itself as being strongly positioned to market .WEB as an alternative to .COM.

62. In a thinly veiled reference to commercial website names using the .COM TLD—essentially to Verisign itself—NDC asserted that “[c]ongestion in the current availability of commercial TLD names **fundamentally advantages older incumbent players.**”⁷² NDC cited its experience in having launched the .CO ccTLD—which was intended (and remains) as the country-code TLD for Colombia, but which has become an increasingly popular alternative to Verisign’s

⁶⁸ NDC Application, (Ex. Altanovo-6), p. 4.

⁶⁹ NDC Application, (Ex. Altanovo-6), p. 6.

⁷⁰ AGB, (IRP Ex. C-3), Attachment to Module 2 (Evaluation Questions and Criteria), p. A-1 (emphasis added).

⁷¹ NDC Application, (Ex. Altanovo-6), p. 7. For instance, NDC’s application represented that Neustar would serve as its “backend provider.” *Id.*, p. 5. This is no longer the case.

⁷² NDC Application, (Ex. Altanovo-6), p. 6 (emphasis added).

.COM.⁷³ NDC emphasized “the **long-term commitment**” and “**track record**” of its “**proven executive team**,” which, according to its application, would specially enable NDC to market .WEB to compete against .COM.⁷⁴

63. Thus, NDC represented itself to ICANN and to the entire Internet community (including to the other .WEB applicants) as a small and innovative company, which—based on the expertise and experience gained in launching .CO, and its “long-term” commitment to deploying a very similar strategy for .WEB—was uniquely situated to launch, operate, and promote .WEB as a competitor to .COM.

64. It is undisputed that NDC did not modify or update its application in any respect after its initial submission in 2012. The information and representations it made in its application therefore remained entirely unchanged and unamended throughout the resolution of the .WEB Contention Set, which culminated in the ICANN Auction in July 2016. NDC’s application therefore provided the *only* information and representations available to ICANN—and, in its public portions, to the Internet community—as to the identity and qualifications of the entity that was seeking delegation of .WEB and for operation of the .WEB registry by that entity.

2.4 Verisign and NDC Enter into the DAA

65. It is undisputed that Verisign only began pursuing .WEB years after the application deadline for the New gTLD Program had elapsed, and after the seven applicants for .WEB had—as required by the Rules—passed ICANN’s evaluation and were placed into a published Contention Set.

⁷³ An “increasingly popular alternative to .COM” must of course be taken in context. There are an estimated 145.4 million .COM registrations, compared with an estimated 2,370,371 .CO registrations. *See* Verisign, “The Verisign Domain Report,” 17(1) *Domain Name Industry Brief* (Mar. 2020), (IRP Ex. C-93), p. 2; Domain Name Stat, Domain name registrations in Country TLDs, <https://domainnamestat.com/statistics/tldtype/country> (last accessed 1 May 2020), (IRP Ex. C-94).

⁷⁴ NDC Application, (Ex. Altanovo-6), p. 6 (emphasis added).

66. As acknowledged by Mr. Livesay—the Verisign Vice-President and Counsel who negotiated the DAA and testified at the IRP hearing—sometime in 2015, Verisign decided to pursue .WEB, entered into negotiations with NDC in this regard, and eventually the two parties executed the DAA on 25 August 2015. As Mr. Livesay also testified, Verisign’s top executives including its CEO, Mr. James Bidzos, and its General Counsel and Executive Vice President Mr. Thomas Indelicarto, directed Mr. Livesay’s activities on .WEB.⁷⁵ Mr. Livesay testified further that .WEB was the only gTLD that Verisign decided to pursue after the deadline for application under the New gTLD Program had closed.⁷⁶ Mr. Livesay acknowledged Verisign’s plain objective in entering the DAA. It went far beyond simply “funding” NDC’s applications and bids. Through the DAA, Verisign sought to become the registry operator for .WEB, as well as to control each step of the process for achieving these ends. As Mr. Livesay testified at the IRP hearing: “**The goal was for us to become the operator of .WEB.**”⁷⁷

⁷⁵ Mr. Livesay testified that he had heard from his colleagues that “**.WEB looked like a great potential true generic**”—much like .COM—and that Verisign’s acquisition of the rights to .WEB would therefore advance Verisign’s business goals. Merits Hearing, Tr. Day 7 (11 Aug. 2020), (Ex. Altanovo-8), 1274:17 – 1275:9 (Livesay Cross-Examination) (emphasis added). Mr. Livesay’s testimony confirms Afiliias’ position (as supported *inter alia* by its experts, Dr. Sadowsky and Prof. Zittrain) on the competitive significance of .WEB. In the words of Dr. Sadowsky, the .WEB gTLD is “the only new domain that is likely to compete strongly with .com.” Report of George Sadowsky (20 Mar. 2019), (Ex. Altanovo-9), ¶ 39; see Expert Report of Jonathan Zittrain (26 Sept. 2018), (Ex. Altanovo-10), p. 24 (“**.WEB IS THE BEST AND CLOSEST POTENTIAL COMPETITOR FOR VERISIGN**”). See also Peter Lamantia, “.WEB Acquired for \$135 Million. Too much? How does it compare?,” *Authentic Web* (undated), <https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/>, (IRP Ex. C-29) (“**.WEB is what we call a ‘super generic’ and arguably the best new TLD alternative to .COM.**”); Kevin Murphy, “Verisign likely \$135 million winner of .web gTLD,” *Domain Incite* (1 Aug. 2016), <http://domainincite.com/20820-verisign-likely-135-million-winner-of-web-gtld>, (IRP Ex. C-30) (“**.web has been seen, over the years, as the string that is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide a real challenge to .com.**”).

⁷⁶ Merits Hearing, Tr. Day 7 (11 Aug. 2020), (Ex. Altanovo-8), 1136:1-6 (Livesay Cross-Examination).

⁷⁷ Merits Hearing, Tr. Day 7 (11 Aug. 2020), (Ex. Altanovo-8), 1136:1-6 (Livesay Cross-Examination) (emphasis added).

67. NDC of course knew the identity of each of the other applicants for .WEB.⁷⁸ NDC concluded Redacted - Third Party Designated Confidential Information

.⁷⁹ It therefore decided Redacted - Third Party Designated Confidential Information its application.⁸⁰ NDC thus took advantage of the transparency rules to assess its competition in the .WEB Contention Set. However, instead of using that information to participate in a private resolution of the Contention Set, as ICANN intended and specifically encouraged, NDC secretly sold the rights and obligations in its application to Verisign. In so doing, NDC enabled Verisign to “sandbag” the actual applicants, who—in reliance on the same transparency rules—never knew that Verisign was

Redacted - Third Party Designated Confidential Information in the Contention Set and had no idea that Verisign would be bidding.

2.5 Key Terms of the DAA

68. To understand the record facts of NDC’s material violations of Rules, it is important to be familiar with the DAA’s key terms. The key provisions of the DAA that are in issue can be found in Exhibit **Altanovo-1**. We address the DAA’s terms in the specific context of NDC’s violations of the Rules in **Section 3**.

⁷⁸ Merits Hearing, Tr. Day 5 (7 Aug. 2020), (**Ex. Altanovo-7**), 805:8-11 (Rasco Cross-Examination) (“Q. Okay. And you knew who all the members of the .WEB contention set were? A. Not all of them personally, but yes, in general I knew the organizations.”).

⁷⁹ Merits Hearing, Tr. Day 5 (7 Aug. 2020), (**Ex. Altanovo-7**), 804:1-20 (Rasco Cross-Examination) (“Q. Okay. Skipping ahead to 2015, you state in your witness statement that by 2015 market conditions had changed Redacted - Third Party Designated Confidential Information Do you

recall that testimony? A. I recall that section in my testimony, yes. Q. And you recall that given changing market -- given what you described as changing market conditions, you thought that NDC was Redacted - Third Party Designated Confidential Information A. My experience to that point is that in the auctions that we participated in, just our competitors were willing to bid a lot more than we were. Q. Okay. And you reached the same conclusion with respect to .WEB; is that right? A. That’s correct.”).

⁸⁰ Merits Hearing, Tr. Day 5 (7 Aug. 2020), (**Ex. Altanovo-7**), 802:16-21, 804:1 – 805:7 (Rasco Cross-Examination).

2.5.1 The Singular Objective of the DAA

69. The DAA leaves no question as to its plain and singular objective: to enable Verisign to take control of NDC's application for .WEB and to allow it, in secret, to control the process of acquiring .WEB by ^{Redacted - Third Party Designated Confidential Information} in the .WEB Contention Set.

70. Only Verisign had the ^{Redacted - Third Party Designated Confidential Information}

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2.5.2 The DAA's

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71. Under the DAA, ^{Redacted - Third Party Designated Confidential Information}

⁸¹ DAA, (**IRP Ex. C-69**), Sec. 10(a) (emphasis added).

⁸² DAA, (**IRP Ex. C-69**), Sec. 1 ^{Redacted - Third Party Designated Confidential Information}

⁸³ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 4(b).

⁸⁴ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 4(d).

72. Under the DAA, Redacted - Third Party Designated Confidential Information

73. But regardless of how events unfold, *once NDC entered into the DAA, it could no longer become the registry operator for .WEB*. For example, Redacted - Third Party Designated Confidential Information

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74. In other words, under the DAA, Redacted - Third Party Designated Confidential Information

2.5.3 Verisign's Complete Control of NDC's Application under the DAA

75. On entering the DAA with NDC in August 2015, Verisign took control of virtually all of NDC's rights and obligations in connection with its .WEB application. For example, under the DAA, Redacted - Third Party Designated Confidential Information

⁸⁵ DAA, (IRP Ex. C-69), Exhibit A, Sec. 10.

⁸⁶ DAA, (IRP Ex. C-69), Exhibit A, Sec. 10.

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⁸⁷ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 4(f) (emphasis added).

⁸⁸ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 8 (emphasis added).

⁸⁹ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 4(j) (emphasis added).

⁹⁰ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1(i) (emphasis added).

⁹¹ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1(i) (emphasis added).

⁹² DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1 (emphasis added).

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79. As discussed below, NDC has fully and faithfully complied with all its obligations under the DAA.

2.6 NDC Complies with the DAA Instead of the Rules and Lies to ICANN

80. As stated above, if a contention set is not resolved privately, the AGB provides that ICANN will resolve the contention set through its own auction mechanism. ICANN set 27 July 2016 as the date for the .WEB Auction.⁹⁸

⁹³ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1(c) (emphasis added)

⁹⁴ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1(h) (emphasis added).

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Id., Exhibit A,

Sec. 2(b).

⁹⁵ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 2(e) (emphasis added).

⁹⁶ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1(f) (emphasis added).

⁹⁷ DAA, (**IRP Ex. C-69**), 10(a) (emphasis added).

⁹⁸ Email communication from J. Kane (28 Apr. 2016) *in* Email communications between .WEB Applicants (various dates), (**IRP Ex. C-33**), p. 3.

81. By mid-May 2016, all the .WEB Contention Set members had apparently agreed to participate in a private auction.⁹⁹ An auction vendor was even retained to administer the auction, which was scheduled to take place on 15-16 June 2016.¹⁰⁰ NDC, however, failed to meet the deadline to submit its application to participate in the private auction. Because voluntary resolution of contention sets must be unanimous, NDC’s refusal meant that the .WEB Contention Set would have to be resolved through an ICANN Auction.¹⁰¹

82. The other members of the Contention Set asked NDC why it had backed out of the private auction. The explanation provided by NDC’s Jose Ignacio Rasco to Afiliás was that NDC’s “**board [had] instructed [Rasco]** to skip [the private auction] and proceed to [the] ICANN [auction].”¹⁰² In response to inquiries from Contention Set member Ruby Glen, Mr. Rasco explained that “the decision [to engage in a private auction] goes beyond just us” and that he had to “check with all the powers that be...”¹⁰³

83. Dissatisfied with NDC’s response, Ruby Glen informed ICANN of its concern that NDC had failed to maintain the truth and accuracy of its application.¹⁰⁴ ICANN Staff requested NDC to “confirm that there have not been changes to your application or the [NDC] organization that need to be reported to ICANN.”¹⁰⁵ Mr. Rasco responded only to the second part of the

⁹⁹ Email communications between .WEB Applicants (various dates), (**IRP Ex. C-33**), p. 2.

¹⁰⁰ Afiliás’ Amended Request for Independent Review (21 Mar. 2019), (**Ex. Altanovo-11**), ¶ 29.

¹⁰¹ AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.3 (at p. 4-19).

¹⁰² Email communication from J. Kane (Vice President, Afiliás’ Corporate Services) to H. Lubsen (CEO, Afiliás) (7 July 2016), (**IRP Ex. C-34**), p. 1 (emphasis added).

¹⁰³ Email communications between J. Nevett (CEO, Donuts, Inc.) and J. I. Rasco (CFO, NDC) (6 & 7 June 2016), (**IRP Ex. C-35**), p. 1.

¹⁰⁴ Applicant Portal Exchange between J. Nevett (CEO, Donuts, Inc.) and J. Erwin (ICANN) (27 June 2016), (**IRP Willett Ex. A**), [PDF] p. 2.

¹⁰⁵ Applicant Portal Exchange between J. Erwin (ICANN) and J. Rasco (NDC) (27 June 2016) *in Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 PA (ASx), Exhibit B to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (C.D. Ca. July 25, 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>,

question, informing ICANN Staff that NDC's *organization* had not changed.¹⁰⁶ He then plainly lied¹⁰⁷ to ICANN.

84. Mr. Rasco similarly misled the ICANN Ombudsman that “[t]here have been no changes to the [NDC] application. ... I take my duties very seriously and for major decisions, I confer with the Members (i.e., shareholders), which again for clarification, have never changed.”¹⁰⁸

85. Finally, Mr. Rasco restated his lie to Ms. Christine Willett (Vice President of gTLD Operations, Global Domains Division) that NDC's “application materials were still true and accurate” and that NDC's “decision to not resolve the contention privately ... was in fact his.”¹⁰⁹

86. Mr. Rasco's several representations to ICANN were false because neither he nor anyone else at NDC had any authority to make these decisions. In fact, Mr. Livesay testified that

(**IRP Ex. C-38**), [PDF] p. 3 (emphasis added). Ruby Glen's complaint was also investigated by ICANN's Ombudsman. *Id.*

¹⁰⁶ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 PA (ASx), Exhibit B to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (C.D. Ca. July 25, 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>, (**IRP Ex. C-38**), [PDF] p. 3. Rasco's response was carefully crafted and answered only part of ICANN's inquiry: “I can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN.” *Id.* Notably missing was a response to ICANN's request that NDC “confirm that there have not been changes to your application ... that need to be reported to ICANN.” *Id.*

¹⁰⁷ In his testimony in the IRP hearing, Mr. Rasco claimed that he had “told a little white lie” in asserting that the decision to proceed to the ICANN Auction was not his to make. Merits Hearing, Tr. Day 5 (7 Aug. 2020), (**Ex. Altanovo-7**), 860:17-25 (Rasco Cross-Examination) (“I mean, yes, I probably told him a little white lie in order to get him off my back, and yes.”). In fact, he told the truth to Ruby Glen and lied to ICANN.

¹⁰⁸ Email Communication from C. Willett (ICANN) to C. LaHatte (Ombudsman) (July 9, 2016) in *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 PA (ASx), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (C.D. Ca. July 25, 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>, (**IRP Ex. C-75**), [PDF] p. 4.

¹⁰⁹ See Email Communication from C. Willett (ICANN) to C. LaHatte (Ombudsman) (July 9, 2016) in *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 PA (ASx), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (C.D. Ca. July 25, 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>, (**IRP Ex. C-75**), [PDF] p. 4.

Verisign was opposed to all forms of private resolution of the .WEB Contention Set and had
Redacted - Third Party Designated Confidential Information .¹¹⁰

87. NDC had multiple opportunities to disclose to ICANN its agreement and the nature of its relationship with Verisign, but it failed to do so. This was no inadvertent or immaterial omission on the part of NDC. The DAA Redacted - Third Party Designated Confidential Information . Thus, NDC chose to lie to ICANN in order to keep its deal with Verisign a secret. NDC has never explained why it went to such extraordinary lengths to keep the DAA secret from ICANN – Redacted - Third Party Designated Confidential Information if the arrangement did not violate the Rules.

2.7 The DAA’s Impact on the ICANN Auction

88. As a consequence of NDC’s refusal to participate in a private auction, ICANN held the ICANN Auction on 27 July 2016.¹¹¹ As required by the DAA, Redacted - Third Party Designated Confidential Information There, Verisign’s Mr. Livesay instructed Mr. Rasco as to each and every bid that NDC *appeared* to be making on NDC’s behalf. Instead, as required by the DAA, Redacted - Third Party Designated Confidential Information

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89. The transparency rules are, among other things, supposed to enable each Qualified Applicant in a contention set to assess the other Qualified Applicants’ goals and financial resources, so that it can make an informed decision on what is required to prevail in the auction and to plan accordingly. During the ICANN Auction, Afilias was able to bid up to \$135 million

¹¹⁰ Merits Hearing, Tr. Day 7 (11 Aug. 2020), (**Ex. Altanovo-8**), 1277:18-24 (Livesay Cross-Examination) (“That kind of behavior is kind of the weird behavior we didn’t want to be a part of in a private resolution.”).

¹¹¹ Letter from A. Willett (ICANN) to Members of the .WEB/.WEBS Contention Set (13 July 2017), (**IRP Ex. C-44**), p. 1.

¹¹² DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1.

for .WEB, which was more than three times the record bid in any previous ICANN Auction.¹¹³ NDC, Redacted - Third Party Designated Confidential Information, won the ICANN auction with a \$142 million bid. Testimony by both Mr. Livesay and Mr. Rasco in the IRP confirms that NDC was nothing more than a puppet on a string during the auction.¹¹⁴

2.8 The Aftermath of the ICANN Auction

90. After the ICANN Auction, a flurry of media reports speculated that Verisign had acquired .WEB through NDC based on an assessment that it was very unlikely that an entity like NDC would have been able to bid an amount of \$142 million for .WEB on its own, and on a footnote buried in a Verisign filing with the SEC, referencing a commitment to pay approximately the same amount of money as NDC would have to pay as the “winner” of the .WEB Auction.¹¹⁵ This speculation proved to be correct. On 1 August 2016, Verisign announced via a press release that it had “entered into an agreement with [NDC] wherein [Verisign] provided funds for [NDC’s] bid for the .web TLD We anticipate that [NDC] will execute the .web Registry Agreement with [ICANN] and will then seek to assign the Registry Agreement to Verisign upon consent from

¹¹³ ICANN New Generic Top-Level Domains, New gTLD Auction Results, <https://gtldresult.icann.org/applicationstatus/auctionresults> (last accessed 15 Mar. 2019), (IRP Ex. C-76).

¹¹⁴ See, e.g., Merits Hearing, Tr. Day 5 (7 Aug. 2020), (Ex. Altanovo-7), 832:22 – 833:6 (Rasco Cross-Examination) Redacted - Third Party Designated Confidential Information

Merits Hearing, Tr. Day 7 (11 Aug. 2020), (Ex. Altanovo-8), 1222:13-24 (Livesay Cross-Examination) (“Q. I am asking you, Redacted - Third Party Designated Confidential Information

¹¹⁵ Andrew Allemann, “It looks like Verisign bought .Web domain for \$135 million (SEC Filing),” *Domain Name Wire* (28 July 2016), <https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/>, (IRP Ex. C-77); Kevin McCarthy, “Someone (cough, cough VeriSign) just gave ICANN \$135m for the rights to .web,” *The Register* (28 July 2016), https://www.theregister.co.uk/2016/07/28/someone_paid_135m_for_dot_web/, (IRP Ex. C-43); Kevin Murphy, “Verisign likely \$135 million winner of .web gTLD,” *Domain Incite* (1 Aug. 2016), <http://domainincite.com/20820-verisign-likely-135-million-winner-of-web-gtld>, (IRP Ex. C-30).

ICANN.”¹¹⁶ As is evident from even a summary of the DAA’s actual terms (which have been kept secret from the public), Verisign’s description of the DAA as merely an agreement to “fund” NDC’s bid in exchange for a possible future assignment of the .WEB Registry Agreement does not withstand any scrutiny. To the contrary, under the DAA—and as expressly prohibited by the Rules—NDC sold virtually all its rights and obligations in connection with its application to Verisign. That is of course why Verisign Redacted - Third Party Designated Confidential Information

And that is why NDC affirmatively misled ICANN when, in response to Ruby Glen’s concerns raised before the ICANN Auction, ICANN attempted to conduct due diligence into whether NDC’s application had undergone changes—only to be misled by NDC’s lies.

¹¹⁶ VeriSign Statement Regarding .Web Auction Results (1 Aug. 2016), <https://investor.verisign.com/static-files/3e326448-121d-4c6f-a5c0-0fce5dbb4b97>, (IRP Ex. C-46).

**SECTION 3:
NDC’S BREACHES OF
THE NEW gTLD PROGRAM RULES AND ITS CONTRACT WITH ICANN**

91. NDC’s breaches of the New gTLD Program Rules and its contractual obligation to ICANN were not merely “technical” or “trivial” violations. The *breaches decimate fundamental principles* underlying the New gTLD Program and that are reflected in the plain language of the Rules.

92. In **Section 3.1**, we first explain that NDC breached both the Rules and its contractual obligations to ICANN. In **Sections 3.2-3.4**, we turn to NDC’s violations of the Rules and its contractual obligations to ICANN, which fall into three general categories. Each of these violations delegitimizes core objectives of the New gTLD Program.

- NDC violated the prohibition against **the resale, assignment, or transfer of its rights and obligations in connection with its .WEB application (Section 3.2)**;
- NDC violated its warranty of **truthfulness, accuracy, and completeness**, and its obligation to promptly notify ICANN in writing of **any changes in circumstances** that would render any information in its application to be **untrue or inaccurate** by submitting a Change Request (**Section 3.3**); and
- NDC violated the Auction Rules, including NDC’s obligations under the Bidder Agreement, which are specifically incorporated into the New gTLD Program Rules by the Guidebook—which require (among other things) that *only Qualified Applicants* (or their specifically “Designated Bidders”) *may place bids* and that they may do so *only on behalf of Qualified Parties*. Qualified Bidders may *not* place bids (secretly or otherwise) on behalf of non-applicants. (**Section 3.4**).

As discussed in Section 1, ICANN and the Internet community worked for years to ensure that the Rules unambiguously guaranteed those principles, including transparency, fairness, and predictability.¹¹⁷ No reasonable person could read the Rules as applied to the DAA and come to

¹¹⁷ GNSO Report, (**IRP Ex. C-20**), Recommendation 1 (at pp. 6-7) (“The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for

any conclusion other than that the DAA was specifically designed to evade and subvert the most basic purposes that the Program was meant to serve.

93. In their expert reports, Prof. Cramton and Mr. Neuman succinctly summarize the manner in which the DAA swept away the Program’s basic principles, as set forth in the text boxes below.

<u>Cramton:</u>
In my view, the DAA violates the purpose of the ICANN Auction —to be a tie-breaker <i>among Contention Set members</i> —by inserting a new and undisclosed bidder into the mix. Verisign fundamentally distorted the process by resolving the tie in favor of itself , despite not having applied for .WEB, not having passed evaluation, not being a member of the .WEB Contention Set, not being a Qualified Applicant and was therefore ineligible to be a Bidder at the .WEB Auction. NDC’s agreement to cede control over its application to Verisign fundamentally distorts the ICANN[] Auction process. ¹¹⁸

<u>Neuman:</u>
NDC has claimed that even if it had a duty to notify ICANN about the changes to its application, there was no harm because Verisign would have passed its initial evaluation had they notified ICANN. This reasoning, however, ignores the fundamental truth that the DAA not only violated the Applicant Guidebook but also ultimately altered the outcome of the .web contention set . If this were allowed to move forward, ... [a]ll of the detailed rules that ICANN provided and the work the Community did concerning these requirements, criteria, and procedures would be meaningless. ¹¹⁹

a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”).

¹¹⁸ Cramton Report, ¶ 43 (emphasis added).

¹¹⁹ Neuman Report, ¶ 73 (emphasis added).

3.1 The New gTLD Program Rules and NDC’s Contractual Obligations

94. Module 6 of the Guidebook contains the application’s “**Terms and Conditions**”. The module clarifies applicants’ obligations as participants in the Program by stating at the outset that—by submitting an application for a gTLD—the applicant agrees to the Terms and Conditions “**in their entirety;**” that they are “**binding**” on the applicant, and that they are a “**material part of this application.**”¹²⁰ ICANN has consistently taken the position that, by submitting an application in the New gTLD Program, the applicant enters into *a contract with ICANN* and is bound by the Rules as *legally enforceable contractual obligations*.

95. The New gTLD Program Rules are therefore important both as Rules *and* as contractual obligations to ICANN—which ICANN has taken on for the benefit of the Internet community as a whole, including each of the New gTLD applicants. As a nonprofit public benefit corporation, ICANN promulgates Rules and enters into contracts not simply to advance or protect its own interests as a private entity. ICANN carries out these activities to advance its public “Mission” “for the benefit of the Internet community as a whole...”¹²¹ ICANN has affirmed the foregoing (under oath) before the courts of the United States.¹²²

¹²⁰ AGB, (IRP Ex. C-3), Module 6 (at p. 6-2) (“By submitting this application through ICANN’s online interface for a generic Top Level Domain (gTLD) (this application), applicant ... agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.”).

¹²¹ ICANN Bylaws (2018), (IRP Ex. C-1), Sec. 1.2(a) (emphasis added); Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016), <https://www.icann.org/resources/pages/governance/articles-en> (“ICANN Articles (2016)”), (IRP Ex. C-2), Art. 2(III).

¹²² See *Ruby Glen v. ICANN*, Case No. 16-56890, ICANN’s Answering Brief (9th Cir. Oct. 30, 2017), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-icann-answering-brief-30oct17-en.pdf>, (IRP Ex. C-187), [PDF] pp. 17-18; *Ruby Glen v. ICANN*, ICANN’s Opposition to *Ex Parte* Application for TRO, (IRP Ex. R-8), [PDF] p. 10.

96. In *Ruby Glen, LLC v. ICANN*,¹²³ ICANN told the U.S. District Court for the Middle District of California that each gTLD applicant enters a binding contract with ICANN when it submits an application. According to ICANN, these obligations represent more than just a bilateral contract between two parties. ICANN told the Court:

The Guidebook is not merely a contract between two parties. It was adopted through an extensive public comment process to govern the nearly 2,000 applications that ICANN received and was tasked with evaluating—including competing applications for the same gTLD....¹²⁴

In submitting their applications, Plaintiff and all other applicants **agreed to a detailed set of procedures for the application process**, which ICANN developed over several years with extensive public participation Those procedures are embodied in [the Guidebook] and, of particular importance here, a 22-page set of ‘Auction Rules.’¹²⁵

The Guidebook includes critical terms and conditions that **all applicants ... acknowledged and accepted by submitting a gTLD application.**¹²⁶

All applicants agreed to the terms of the Guidebook when they applied, and Plaintiff has **recently signed a Bidder’s Agreement agreeing that the Auction is governed by the Auction Rules.**¹²⁷

¹²³ Ruby Glen had brought the case in July 2016, seeking to postpone the ICANN Auction for .WEB. It sought the postponement *after* NDC had rejected participation in the private auction, which had been agreed to by all the other members of the Contention Set. Redacted - Third Party Designated Confidential Information

which at that point had had secretly bought NDC’s .WEB application and was surreptitiously controlling NDC’s actions. At the time, however, NDC’s actions led to rumors that some other entity was controlling NDC and/or its .WEB application. ICANN had inquired of NDC whether there had been any changes to its .WEB Application. NDC’s representative lied to ICANN in asserting that there had been no such changes and that NDC still remained in complete control of its .WEB application. Based on NDC’s lies, ICANN decided to proceed to the ICANN Auction. In opposing Ruby Glen’s petition, ICANN took the position that, through its .WEB Application, Ruby Glen had agreed to the New gTLD Program Rules as contractual obligations—which worked to ensure fairness to all Applicants. Afiliias had no involvement in Ruby Glen’s lawsuit.

¹²⁴ *Ruby Glen v. ICANN*, ICANN’s Opposition to *Ex Parte* Application for TRO, (IRP Ex. R-8), [PDF] pp. 29-30.

¹²⁵ *Ruby Glen v. ICANN*, ICANN’s Opposition to *Ex Parte* Application for TRO, (IRP Ex. R-8), [PDF] p. 7 (emphasis added).

¹²⁶ *Ruby Glen v. ICANN*, ICANN’s Opposition to *Ex Parte* Application for TRO, (IRP Ex. R-8), [PDF] p. 12 (emphasis added).

¹²⁷ *Ruby Glen v. ICANN*, ICANN’s Opposition to *Ex Parte* Application for TRO, (IRP Ex. R-8), [PDF] p. 22 (emphasis added).

97. Consistent with its obligations as a nonprofit public benefit corporation, ICANN represented to the U.S. District Court that it sought to enforce the contractual obligations not solely for ICANN’s own benefit, but also to ensure fairness to the other .WEB applicants. ICANN argued that postponing the ICANN Auction in the absence of the agreement of all applicants (as required under the Auction Rules) “would be **manifestly unfair to the other applicants that have invested time and money in their applications**”¹²⁸ Therefore, ICANN asserted that no one would be prejudiced if the ICANN Auction proceeded and NDC was later discovered to be “subject to later disqualification.”¹²⁹ The U.S. District Court agreed with ICANN’s position and denied Ruby Glen’s application to enjoin the ICANN Auction from proceeding.

98. Accordingly, in considering NDC’s violations, it is important for the Board to keep in mind that NDC breached the Rules *and* its legally enforceable contractual obligations to ICANN. ICANN promulgated these Rules and conferred these rights and obligations not only for its own sake, but also for the benefit of the Internet community as a whole—including each New gTLD Program applicant—as required by ICANN’s Articles and Bylaws.

3.2 NDC’s Material Violation of the Prohibition Against the Resale, Assignment, or Transfer of its Rights or Obligations in Connection with the Application

3.2.1 The Rule and its Purpose

99. Paragraph 10 of the Terms and Conditions, contained in Module 6 of the Guidebook, prohibits the resale, assignment, or transfer by an applicant of the rights or obligations in connection with its application.

¹²⁸ *Ruby Glen v. ICANN*, ICANN’s Opposition to *Ex Parte* Application for TRO, (**IRP Ex. R-8**), [PDF] p. 27 (emphasis added).

¹²⁹ *Ruby Glen v. ICANN*, ICANN’s Opposition to *Ex Parte* Application for TRO, (**IRP Ex. R-8**), [PDF] p. 26 (emphasis added).

THE ANTI-TRANSFER PROVISION

“Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application.”

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

100. As shorthand, we refer to this provision as the “*Anti-Transfer*” provision. Its purpose is obvious and entirely consistent with the oft-stated goals of the Program, including to ensure that everyone in the Internet community—including each other applicant—knows the identity of each applicant, the string it sought through its application, and why it sought the string at issue.

101. The terms and purpose of the Anti-Transfer provision are easily understood. As Christine Willett testified to the IRP Panel, applicants “are prohibited from assigning -- reassigning, transferring their application.”¹³⁰ If an applicant could resell, assign, or transfer its rights or obligations in connection with the application, a non-applicant (*i.e.*, an entity that had failed to file a timely application, failed to undergo the public notice and comment period, and/or failed to undergo evaluation) could effectively participate in the Program without following the Rules required to be eligible for delegation. This provision also ensures that ICANN and the Internet community know that the entity applying for the string is applying for the string on its own behalf—and that no other entity controls its rights and/or obligations under the application.

102. As we discuss below, NDC transferred virtually all its rights and obligations in and relating to its application for .WEB to Verisign for Redacted - Third Party Designated Confidential Information

upon assignment of the .WEB Registry Agreement to Verisign.

¹³⁰ Merits Hearing, Tr. Day 3 (5 Aug. 2020), (Ex. Altanovo-4), 567:3-5 (Willett Cross-examination).

3.2.2 The Rights that NDC Transferred to Verisign

103. Under the New gTLD Rules, each applicant obtained certain **rights** as it progressed through the application process. By virtue of having been placed in the .WEB Contention Set, NDC had the right to decide whether to participate in a private settlement of the Contention Set—including through participating in a Private Auction.¹³¹ Under the DAA, Redacted - Third Party Designated Confidential Information

104. Similarly, by virtue of being deemed a Qualified Applicant, NDC had the right to choose to participate in an ICANN Auction—where it had the right to place bids solely on its own behalf. Redacted - Third Party Designated Confidential Information

105. Applicants who are able to resolve contention in their favor have the right and obligation to negotiate and enter into a Registry Agreement and operate a registry for the string for which it has applied, by following the “clear roadmap” to delegation as set forth in the Rules. Under the DAA, however, Redacted - Third Party Designated Confidential Information

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¹³¹ Merits Hearing, Tr. Day 3 (5 Aug. 2020), (**Ex. Altanovo-4**), 566:10-20 (Willett Cross-examination).

¹³² DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 3(b).

106. The most basic right under a gTLD application is, of course, the applicant’s opportunity to operate the applied-for registry. The DAA, however,

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.¹³³ Under any of these scenarios, NDC cannot become the registry operator for .WEB. NDC sold that right to Verisign on the day it entered into the DAA.

107. NDC has therefore breached the most fundamental purpose of the Anti-Transfer provision: to ensure that an applicant cannot transfer its rights to a non-applicant, thus enabling the non-applicant to evade the rules and procedures—the “clear roadmap to delegation”—that ICANN so painstakingly designed in developing the Program and its Rules.

3.2.3 The Obligations that NDC Transferred to Verisign

108. Under the DAA, NDC also sold its key **obligations** in connection with its application to Verisign. As discussed below in more detail in Section 3.4 below, an applicant’s obligation to ICANN include its warranty of truthfulness, accuracy, and completeness, and its agreement to notify ICANN in writing of any changes in circumstances that would render any information in its application to be untrue or inaccurate.

109. But under the DAA, as confirmed by the IRP testimony of Mr. Livesay and Mr. Rasco, NDC sold control of these obligations to Verisign. Thus, pursuant to the DAA’s terms:

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¹³³ DAA, (IRP Ex. C-69), Exhibit A, Sec. 9.

¹³⁴ DAA, (IRP Ex. C-69), Sec. 4(f) (emphasis added).

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110. As discussed below in **Section 3.5.4**, Redacted - Third Party Designated Confidential Information

111. ICANN required these obligations on the part of applicants to ensure the fundamental principles of the Program. NDC’s transfer of these obligations materially violated both the Anti-Transfer provision *and*—as discussed in the following sections—the provisions of the Rules setting forth those obligations. That is, NDC not only violated the Anti-Transfer provision by selling control over key obligations to Verisign; Verisign exercised control over those obligations in such a way as to cause NDC to breach those obligations.

3.3 NDC’s Material Violations of the Warranty of Truthfulness, Accuracy and Completeness and Its Agreement to Notify ICANN of Any Changes in Circumstances

3.3.1 The Warranty and its Purpose

112. The first part of Paragraph 1 of the Terms and Conditions states the warranty of truthfulness, accuracy, and completeness that each applicant makes in submitting its application. The language of the warranty is set forth in the box below.

¹³⁵ DAA, (**IRP Ex. C-69**), Sec. 10(a) (emphasis added).

¹³⁶ DAA, (**IRP Ex. C-69**), Sec. 10(a) (emphasis added).

THE WARRANTY OF TRUTHFULNESS, ACCURACY, AND COMPLETENESS

“Applicant **warrants that the statements and representations contained in the application** (including any documents submitted and oral statements made and confirmed in writing in connection with the application) **are true and accurate and complete in all material respects**, and that ICANN may rely on those statements and representations fully.... Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”

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

113. The purpose of this warranty is plain. In its application process, the applicant provides detailed information concerning its identity (including the identity of its owners, management, and financing sources, as well as the reasons for seeking the TLD at issue and its plans for operating the registry). ICANN must be able to rely on the truth, accuracy, and completeness of that information to evaluate the application—and so that ICANN itself can be sure of each applicant’s identity, reasons for seeking the string, and technical and financial qualifications. Moreover, ICANN publishes all non-confidential information for public comment, so that the Internet community—and, of course, each other applicant—has access to most of that same information. It is therefore critical for the information to be true, accurate, and complete—not only when the applicant submits its application, but throughout the entire application process, and even at the time of entering into a Registry Agreement.¹³⁷

114. As soon as NDC entered into the DAA with Verisign, NDC was in material breach of this warranty. The information in its application was no longer true, accurate or complete in all

¹³⁷ If NDC were to execute a Registry Agreement with ICANN, NDC would have to warrant that “all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were **true and correct in all material respects at the time made**, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN.” AGB, (IRP Ex. C-3), Module 5, Attachment (New gTLD Agreement), Sec. 1.3(a)(i) (emphasis added).

material respects. Indeed, the DAA rendered virtually *all* the information (material and otherwise) contained in the application untrue, inaccurate, or (at best) incomplete.

115. At its most basic level, the application misrepresented NDC as the entity that was seeking to become the registry operator for .WEB, when, under the DAA, Redacted - Third Party Designated Confidential Information
Even if NDC were declared the winner of the .WEB Contention

Set, the .WEB registry would *not*, under any circumstances, be operated by NDC. Under the DAA, Redacted - Third Party Designated Confidential Information

116. Thus, notwithstanding the representations and information in NDC’s application, the registry would *not* be operated by NDC’s “proven executive team.” The registry would *not* be operated by a team with a “track-record of building and successfully marketing affinity TLDs” (like .CO). It certainly would not be operated by team with special experience in penetrating markets that “fundamentally advantage[] older incumbent players.” To the contrary, if NDC successfully complied with the terms of the DAA, Redacted - Third Party Designated Confidential Information

117. As a result of the DAA, NDC’s representations about the “*long-term commitment*” of NDC’s team to operate the .WEB registry became an outright lie. The identity of the directors and shareholders of the entity seeking to become the .WEB registry was also false. The application’s information and representations concerning NDC’s technical and financial capabilities were rendered irrelevant, as those capabilities would not be used for the .WEB registry even if NDC’s application prevailed.

118. In short, virtually all of the representations and information in NDC’s application were now false. Following the DAA, NDC’s .WEB application became nothing but a vehicle for Redacted - Third Party Designated Confidential Information
deception—to enable non-applicant Verisign to and secretly participate in the .WEB

Contention Set. Verisign was now participating in the .WEB Contention Set *instead* of NDC—but under the cover of NDC’s application. That was so even though Verisign had *failed to satisfy a single obligation* for being included in the Contention Set. And it was so even though Verisign and NDC were concealing the fact from ICANN and the entire Internet community. NDC’s entering into the DAA did not merely *breach* its warranty of truthfulness, accuracy, and completeness. It crushed it—along with the principles of transparency, fairness, and predictability that the warranty was meant to ensure.

119. NDC also committed material violations of the warranty when, in July 2016, ICANN investigated Ruby Glenn’s complaint that NDC had likely undergone changes in ownership or control. ICANN specifically asked NDC to “confirm that there have not been any changes to your application or the [NDC] organization that need to be reported to ICANN.”¹³⁸ NDC responded in writing. NDC failed even to answer to the first question (whether there had been changes to the application)—which in itself was plainly an omission of material information in response to a direct question posed to it by ICANN.

120. As to the second question, NDC stated that “there have been no changes to the [NDC] organization that would need to be reported to ICANN.”¹³⁹ Construing the question as narrowly and technically as possible, that answer might arguably be accurate: NDC apparently had the same corporate structure and the same shareholders as it did when it submitted its application. Yet the DAA had fundamentally altered the NDC organization’s goals, as NDC had represented them in its application to both ICANN and the Internet community. NDC was no longer the entity

¹³⁸ Emails from J. Erwin (ICANN) to J. Rasco (NDC) (27 June 2016) (27 Jun. 2016), (**IRP Ex. C-96**), p. 1.

¹³⁹ Emails from J. Erwin (ICANN) to J. Rasco (NDC) (27 June 2016) (27 Jun. 2016), (**IRP Ex. C-96**), p. 1.

that was seeking to become the registry operator for .WEB under its application. NDC's sole purpose was now to enable Verisign to become the registry operator for .WEB.

121. NDC, however, went further than simply omitting to tell the whole truth to ICANN. Mr. Rasco, NDC's Director, repeatedly assured Ms. Willett that NDC's "application materials were still true" and that NDC's "decision to not resolve contention privately ... was in fact his."¹⁴⁰ Those statements were clearly false. The application materials were no longer "true and accurate and complete" in any sense. NDC had not "decided" to forego the private auction; under the DAA,

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"¹⁴¹) and Mr. Livesay testified that

Verisign was against any private resolution of the .WEB Contention Set.¹⁴² ICANN relied on NDC's material misrepresentations not only in proceeding to the ICANN Auction—but also in advising the U.S. District Court in *Ruby Glen* that it had investigated Ruby Glen's complaints and had found no basis to support them.

122. In sum, following the DAA, the representations and information contained in the application—stating that NDC was the entity seeking .WEB and presenting detailed information about NDC as the entity supposedly seeking to become the .WEB registry (including its "long-term commitment" to serving in that capacity)—were materially false, inaccurate, and incomplete. NDC not only materially breached this basic warranty. It did so to circumvent and subvert the basic principles underlying the warranty. It did so to enable non-applicant Verisign surreptitiously

¹⁴⁰ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 PA (ASx), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (C.D. Ca. July 25, 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>, (IRP Ex. C-75), [PDF] p. 4.

¹⁴¹ DAA, (IRP Ex. C-69), Sec. 1(i).

¹⁴² Merits Hearing, Tr. Day 7 (11 Aug. 2020), (Ex. Altanovo-8), 1276:4 – 1278:13 (Livesay Cross-Examination).

to participate in the .WEB Contention Set, under the cover of NDC’s application, which NDC had secretly sold to Verisign for Redacted - Third Party Designated Confidential Information

3.3.2 The Agreement to Notify ICANN of Any Changes in Circumstances

123. Under the Rules, each applicant’s warranty of truthfulness, accuracy, and completeness is coupled with the applicant’s agreement to notify ICANN in writing of *any* change in circumstances that would render *any* information provided in the application false or even misleading. That agreement appears immediately after the warranty in Paragraph 1 of the Terms and Conditions. The language of that agreement is set forth in the box below.

THE AGREEMENT TO NOTIFY ICANN OF ANY CHANGE IN CIRCUMSTANCES
“Applicant agrees to notify ICANN in writing of <u>any</u> change in circumstances that would render <u>any</u> information provided in the application false or misleading.”
AGB, (IRP Ex. C-3), Module 6, ¶ 1 (at p. 6-2) (emphasis added)

124. The agreement to notify ICANN of any changes in circumstances is of course consistent with the warranty of truthfulness, accuracy, and completeness. The applicant does not merely warrant that the statements and representations are truthful, accurate, and complete when the application is submitted. The applicant is also contractually bound to maintain that warranty throughout the application process, and to notify ICANN in writing of any change of circumstance that would render any of the information in its application false or misleading. Applicants must, even after they pass ICANN’s initial evaluation and even when they are negotiating the Registry Agreement with ICANN, keep their application complete, true, and accurate in every respect.

125. Here, too, the purpose of the agreement is to guarantee transparency, fairness, and predictability. It is supposed to ensure that the information and representations contained in the

original application—which are published for notice and comment and used to evaluate the application—remain true and complete and accurate throughout the application process.¹⁴³

126. The agreement to notify ICANN of any changes in circumstances is reiterated and emphasized elsewhere in the Guidebook. Section 1.2.7 (“Notice of Changes to Information”) in Module 1 is set forth in the following text box:

1.2.7 Notice of Changes to Information
<p>“If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.</p> <p>ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent round.</p> <p>Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.”</p> <p style="text-align: right;">AGB, (IRP Ex. C-3), Sec. 1.2.7 (at p. 1-30) (emphasis added)</p>

127. Section 1.2.7 provides the mechanism by which an applicant complies with its obligation to notify ICANN of any changes in circumstances that renders information previously submitted as untrue or inaccurate.¹⁴⁴ As ICANN has explained, the Change Request Criteria “were carefully developed to enable applicants to make necessary changes to their applications **while**

¹⁴³ See Letter to IRP Panel from S. Smith (Counsel for ICANN) (18 July 2020), (**Ex. Altanovo-12**), pp. 3-4 (commenting on how the information provided in Section 18 is “relevant to the Program as it allows the community to comment on the application (during the public comment period) based on the applicant’s statement of the mission and purpose and how the gTLD is intended to be operated.”); ICANN, New Generic Top-Level Domains: Frequently Asked Questions, <https://newgtlds.icann.org/en/applicants/global-support/faqs/faqs-en> (last accessed 13 July 2020), (**IRP Ex. C-181**), p. 1 (explaining that Section 18 was required so that the public (including governments, consumers, and other applicants) knew the identity of each applicant and the purpose for which each applicant was seeking a particular string).

¹⁴⁴ Merits Hearing, Tr. Day 3 (5 Aug. 2020), (**Ex. Altanovo-4**), 579:1-6 (Willett Cross-Examination) (“Q. The applicants would have to provide notice to you so you could evaluate them, right? A. Correct. We asked that they submit what we called an application change request in writing, and then the program team determined if and what reevaluation might have been necessary.”).

ensuring a fair and equitable process for all applicants.¹⁴⁵ They were not designed to allow applicants to transfer their application to a third party, fundamentally changing the basis of their application, as NDC did with Verisign.

128. In any event, it is undisputed that NDC did not submit a Change Request, and instead breached its agreement to notify ICANN of the change in circumstances that rendered virtually all the representations and information in its application false and misleading. Nor is there any question that the breach is material. It swept transparency, fairness, and predictability out of the .WEB Contention Set. NDC’s breach not only allowed Verisign to conceal its “indirect” participation in the Contention Set. It also allowed Verisign to blindside the *bona fide* applicants with a high bid that none of the other applicants could have seen coming—not knowing that Verisign was hiding behind the NDC application.

3.4 NDC’s Material Violations of the Auction Rules

3.4.1 The Principles of the ICANN Auction as Stated in the Guidebook

129. As explained above, Section 4.3 of the Guidebook states the basic principles for an ICANN Auction (described as the “Mechanism of Last Resort” for resolution of a Contention Set), while noting that “[t]he detailed set of Auction Rules will be available prior to the commencement of any auction proceedings.”¹⁴⁶ The Guidebook plainly states that *only* bids that comply with *all* aspects of the auction rules are considered valid, as set forth in the text box below.

4.3 Auction: Mechanism of Last Resort
“5. Only bids that comply with all aspects of the auction rules will be considered valid.”
AGB, (IRP Ex. C-3), Sec. 4.3.1 (at p. 4-22) (emphasis added)

¹⁴⁵ ICANN, New gTLD Application Change Request Process and Criteria, <https://newgtlds.icann.org/en/applicants/global-support/change-requests>, (IRP Ex. C-56), p. 2 (emphasis added).

¹⁴⁶ AGB, (IRP Ex. C-3), Sec. 4.3.1 (at p. 4-20).

130. Therefore, any bids that fail to comply with all aspects of the auction rules are invalid. Invalid bids are to be declared in default, with the string to be offered to the next highest bidder:

4.3.3 Post-Default Procedures
<p>“After a winning bidder is declared in default, the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exist bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price.”</p> <p>AGB, (IRP Ex. C-3), Sec. 4.3.3 (at p. 4-26) (emphasis added)</p>

131. In addition to incorporating the terms of the Auction Rules, the Guidebook also specifically incorporates the terms of the **Bidder Agreement** that each Qualified Applicant must execute to participate in the ICANN Auction: “Any applicant that participates in an auction will be **required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction**[.]”¹⁴⁷

132. Consistent with the principles of the entire Program, “[t]he purpose of an [ICANN] auction is to resolve contention **in a clear, objective manner**”¹⁴⁸—*i.e.*, a manner that is transparent, fair, and predictable. Accordingly, both the Bidder Agreement and the Auction Rules repeatedly state clear and objective rules—and require unambiguous warranties, representations, and agreements from the Qualified Applicants—to ensure that the ICANN Auction facilitated final resolution of contention among applicants and not the maximization of auction revenues.

133. Thus, **only** a Qualified Applicants (or their Designated Bidder) that ICANN has placed in the Contention Set and allowed to proceed to string contention resolution may place bids in an ICANN Auction—and may do so **only** on behalf of the Qualified Applicant. In other words,

¹⁴⁷ AGB, (IRP Ex. C-3), Sec. 4.3.2 (at p. 4-25) (emphasis added).

¹⁴⁸ AGB, (IRP Ex. C-3), Sec. 4.3 (at p. 4-19, n.1) (emphasis added).

only a Qualified Applicant who has passed through all the prior stages of the application process—and whose identity has been disclosed and remains known to ICANN and the Internet community—may participate.

3.4.2 The Bidder Agreement

134. As stated above, the Guidebook requires each Qualified Applicant that participates in an ICANN Auction to execute the Bidder Agreement, in which the Qualified Applicant “acknowledges its **rights and responsibilities in the auction**[.]”¹⁴⁹ These are each “rights and obligations” that are subject to the Anti-Transfer Warranty discussed above.

135. Although the Bidder Agreement is a contract entered into between each “Qualified Applicant/Bidder” and Power Auctions LLC (the third-party entity that manages the auction on ICANN’s behalf), the Guidebook (i.e., the contract between ICANN and each applicant) specifically incorporates the Bidder Agreement’s terms. Moreover, the Bidder Agreement provides that “**ICANN is an intended third party beneficiary of this Bidder Agreement entitled to enforce this Bidder Agreement against the Bidder and the Auction Manager as if ICANN was a direct party to this Bidder Agreement.**”¹⁵⁰

136. The Recitals of the Bidder Agreement state the basic principle that only a Qualified Applicant placed by ICANN in the Contention Set, or its Designated Bidder, may participate in the ICANN Auction—and may submit bids only on behalf of the Qualified Applicant.¹⁵¹

¹⁴⁹ AGB, (**IRP Ex. C-3**), Sec. 4.3.2 (at p. 4-25) (emphasis added).

¹⁵⁰ Auctions Bidder Agreement, (**IRP Ex. C-5**), Sec. 7.10 (at p. 10) (emphasis added). The Bidder Agreement in turn incorporates the provisions of the Auction Rules and the Guidebook. *Id.*, p. 1. *See id.*, Sec. 1.4, p. 2 (“The Bidder shall participate in the Auction(s) for the relevant Contention Sets on the terms set forth herein and under the Auction Rules.”).

¹⁵¹ Auctions Bidder Agreement, (**IRP Ex. C-5**), Recitals (p.1).

137. The agreements, representations, and warranties that each Bidder makes in the Bidder Agreement advances the principles stated in the Recitals. Thus, each Bidder represents that it is a Qualified Applicant bidding on behalf of the Qualified Applicant:

REPRESENTATION THAT THE BIDDER IS A QUALIFIED APPLICANT OR ITS DESIGNATE BIDDER
<p>“The Bidder represents that it is either: (a) a Qualified Applicant for one or more Contention Strings for which ICANN has provided to the Qualified Applicant a Notice of Intent to Auction; or (b) the Designated Bidder authorized by a Qualified Applicant for one or more Contention Strings for which ICANN has provided to the Qualified Applicant a Notice of Intent to Auction.”</p> <p>Auctions Bidder Agreement, (IRP Ex. C-5), Sec. 1.1 (at p. 2) (emphasis (boldface and italics) added)</p>

138. Importantly, each Bidder also warrants that it has *full* power and authority to enter into and perform the Bidder Agreement:

WARRANTY THAT THE BIDDER HAS FULL POWER AND AUTHORITY
<p>Each Bidder “represents and warrants” that it has “full power and authority to execute, deliver and perform its obligations, under this Bidder Agreement.”</p> <p>Auctions Bidder Agreement, (IRP Ex. C-5), Sec. 2.1 (at p. 3) (emphasis (boldface and italics) added)</p>

139. Each Bidder therefore represents not only that the Bidder may legally enter into and perform the Bidder Agreement (it possesses the “full power” to do so) but also that it controls that decision (it has the “full authority” to make the decision to execute and perform the Bidder Agreement).

140. In addition:

- Each “Bidder agrees not to use the Auction Site for any purpose other than participation in Auctions that the Bidder is entitled to participate [in] or to take any actions aimed at preventing the appropriate use of the Auction Site by any party.”¹⁵²

¹⁵² Auctions Bidder Agreement, (**IRP Ex. C-5**), Sec. 2.5 (at p. 3) (emphasis added).

- Each Bidder agrees that it “shall participate in the Auction(s) for the relevant Contention Sets **on the terms set forth herein and under the Auction Rules.**”¹⁵³
- Each Bidder agrees that ICANN “reserves the right to conduct **due diligence** on the Qualified Applicant and the Designated Bidder in an effort to ensure **compliance with all applicable laws, regulations and rules governing the Auction**”¹⁵⁴
- Each “Bidder acknowledges that it may be subject to a penalty of up to the full amount of the Deposit and **forfeiture of its Applications or termination of its registry agreements** for a serious violation of the Auction Rules or Bidder Agreement.”¹⁵⁵

3.4.3 The Auction Rules

141. The Auction Rules reinforce and elaborate on terms and principles of the Bidder Agreement. Thus, a Bidder is defined as a “Qualified Applicant or its Designated Bidder identified as the Bidder in the ICANN Registration Form.”¹⁵⁶

142. A Qualified Applicant is defined as:

An entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction[.]¹⁵⁷

143. A **Bid** is defined as:

A **Bidder’s binding willingness** to secure **its Application** within the Contention Set at prices up to the specified price.¹⁵⁸

144. The Auction Rules provide even more detail on who may participate in an ICANN Auction. Rule 8 provides that “[p]rior to the scheduling of an Auction, an Intent to Auction notice

¹⁵³ Auctions Bidder Agreement, (**IRP Ex. C-5**), Sec. 1.4 (at p. 2) (emphasis added).

¹⁵⁴ Auctions Bidder Agreement, (**IRP Ex. C-5**), Sec. 2.7 (at p. 3) (emphasis added).

¹⁵⁵ Auctions Bidder Agreement, (**IRP Ex. C-5**), Sec. 2.10 (at p. 4) (emphasis added).

¹⁵⁶ Auction Rules, (**IRP Ex. C-4**), Table of Definitions, p. 16.

¹⁵⁷ Auction Rules, (**IRP Ex. C-4**), Table of Definitions, p. 19.

¹⁵⁸ Auction Rules, (**IRP Ex. C-4**), Table of Definitions, p. 16 (emphasis added).

will be provided to all members of an eligible Contention Set via the ICANN Customer Portal.”¹⁵⁹

The eligibility requirements to receive an Intent to Auction are set forth in the following text box:

Rule 8: Participation in the Auction
<p>“To be eligible to receive an Intent to Auction notice from ICANN, requirements a-d below must be met[.] All active [members] in the Contention Set have:</p> <ul style="list-style-type: none">a) Passed evaluationb) Resolved any applicable GAC advicec) Resolved any objectionsd) No pending ICANN Accountability Mechanisms” <p style="text-align: right;">Auctions Rules, (IRP Ex. C-4), Rule 8 (at p. 1)</p>

145. Thus, only Qualified Applicants who had passed through the requisite stages of the application process were eligible to receive an Intent to Auction notice. Then, like the Bidder Agreement, the Auction Rules provided numerous provisions to ensure that *only* a Bidder—i.e., a Qualified Applicant—could participate in the Auction, and that bids could be submitted only on behalf of the Qualified Applicant. Key Auction Rules on this point are set forth in the text box below:

KEY AUCTION RULES ON WHO CAN PARTICIPATE IN THE AUCTION
<p><u>Rule 12</u>: “Participation in an Auction is limited to Bidders.”</p> <p><u>Rule 13</u>: “Before each Auction, each Bidder shall nominate up to two people (‘Authorized Individuals’) to bid on its behalf in the Auction.”</p> <p><u>Rule 32</u>: “A Bid represents a price, which a Bidder is willing to pay to resolve string contention within a Contention Set in favor of its Application.”</p> <p><u>Rule 40</u>: “[T]he Bid must be placed by a Bidder....”</p> <p>Auctions Rule, (IRP Ex. C-4), Rules 12, 13, 32 and 40 (at pp. 2-3, 5, 7) (emphasis added)</p>

¹⁵⁹ Auction Rules, **(IRP Ex. C-4)**, Rule 8 (at p. 1).

146. Again, the Guidebook provides: “Only bids that comply with all aspects of the auction rules will be considered valid.”¹⁶⁰ As discussed below, none of NDC’s Bids in the ICANN Auction complied with these Rules and are therefore each invalid. Auction Rule 42 governs what happens when a Bidder fails to submit a valid Bid during a round of an ICANN Auction. Specifically, a Bid in “the amount of the Bid of the previous Round (or \$1 in the first Round) will be entered automatically on the Bidder’s behalf.” Auction Rule 62 provides for what happens in the event that the declared Winner “is determined by ICANN to be ineligible.” In that event, consistent with Section 4.3.3 of the Guidebook:

[T]he remaining Bidders (with applications that have not been withdrawn from the New gTLD Program) will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective Exit Bid. In this way, **the next Bidder would be declared the Winner subject to payment of its Exit Bid.**¹⁶¹

3.4.4 NDC’s Breaches of the Bidder Agreement and Auction Rules

147. There is no doubt that the terms of the DAA—and NDC’s undisputed compliance with them—materially and repeatedly breached the Bidder Agreement and Auction Rules.

148. Thus, under the Bidder Agreement, NDC represented and warranted that it had the “full power and authority to execute, deliver and perform its obligations, under the Bidder Agreement,”¹⁶² which expressly provided that only a Qualified Bidder may “place bids in the Auction on its own behalf[.]”¹⁶³ NDC also agreed not to use the Auction Site “for any purpose

¹⁶⁰ AGB, (**IRP Ex. C-3**), Sec. 4.3.1 (at p. 4-22).

¹⁶¹ Auction Rules, (**IRP Ex. C-4**), Rule 62 (at p. 12) (emphasis added).

¹⁶² Auctions Bidder Agreement, (**IRP Ex. C-5**), Sec. 2.1 (at p. 3).

¹⁶³ Auctions Bidder Agreement, (**IRP Ex. C-5**), p. 1.

other than participation in Auctions.”¹⁶⁴ And NDC agreed to participate in the Auction “on the terms set forth [in the Bidder Agreement] and under the Auction Rules.”¹⁶⁵

149. Under the Auction Rules, participation was “limited to Bidders”—which, again, means a Qualified Applicant or its Designated Bidder submitting Bids on the Qualified Applicant’s behalf.¹⁶⁶ A “Bid” represented a price that the “Bidder is willing pay to resolve string contention within a Contention Set in favor of its Application.”¹⁶⁷ And “the Bid must be placed by the Bidder.”¹⁶⁸

150. The DAA required NDC to breach all these provisions. Under the DAA, NDC was not submitting Bids on its behalf. Under the DAA,

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151. Moreover, and contrary to its representation in the Bidder Agreement, NDC did not “have full power and authority to execute, deliver and perform its obligations, under the Bidder Agreement.”¹⁷⁰ It had transferred that authority to Verisign as NDC,

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”¹⁷¹

152. Nor was NDC submitting Bids representing the price that NDC was “willing to pay to resolve string contention within a Contention Set in favor of its Application.”¹⁷² It was

¹⁶⁴ Auctions Bidder Agreement, (IRP Ex. C-5), Sec. 2.5 (at p. 3).

¹⁶⁵ Auctions Bidder Agreement, (IRP Ex. C-5), Sec. 1.4 (at p. 2).

¹⁶⁶ Auction Rules, (IRP Ex. C-4), Rule 12 (at p. 2) (emphasis added).

¹⁶⁷ Auction Rules, (IRP Ex. C-4), Rule 32 (at p. 5) (emphasis added).

¹⁶⁸ Auction Rules, (IRP Ex. C-4), Rule 40 (at p. 7) (emphasis added).

¹⁶⁹ DAA, (IRP Ex. C-69), Exhibit A, Sec. 1 (emphasis added).

¹⁷⁰ Auctions Bidder Agreement, (IRP Ex. C-5), Sec. 2.1 (at p. 3).

¹⁷¹ DAA, (IRP Ex. C-69), Exhibit A, Sec. 1(a).

¹⁷² Auction Rules, (IRP Ex. C-4), Rule 32 (at p. 5) (emphasis added).

mechanically entering bids that Verisign was willing to pay, Redacted - Third Party Designated Confidential Information

153. Under the DAA, NDC agreed to Redacted - Third Party Designated Confidential Information

”¹⁷³ Verisign agreed to Redacted - Third Party Designated Confidential Information

¹⁷⁴ During the Auction, a Verisign Designee

Redacted - Third Party Designated Confidential Information ¹⁷⁵ Verisign even agreed

to Redacted - Third Party Designated Confidential Information

¹⁷⁶

154. In their testimony, Messrs. Rasco and Livesay confirmed that Redacted - Third Party Designated Confidential Information

Mr. Rasco travelled to Verisign’s corporate headquarters in Reston, Virginia.

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.” To the outside world (including, presumably, ICANN), Mr. Rasco appeared to be bidding on NDC’s behalf—as required by the Auction Rules—in an effort to resolve contention in NDC’s favor. Under the DAA, however, and as confirmed at the hearing, Redacted - Third Party Designated Confidential Information

¹⁷³ DAA, (IRP Ex. C-69), Exhibit A, Sec. 1(h) (emphasis added).

¹⁷⁴ DAA, (IRP Ex. C-69), Exhibit A, Sec. 2(b) (emphasis added).

¹⁷⁵ DAA, (IRP Ex. C-69), Exhibit A, Sec. 2(e) (emphasis added).

¹⁷⁶ DAA, (IRP Ex. C-69), Exhibit A, Sec. 2(d).

¹⁷⁷ As Mr. Livesay acknowledged in his hearing testimony, Mr. Rasco was entirely unconcerned with how the bidding went—or whether the bidding far surpassed Mr. Rasco’s assessment of .WEB’s value (assuming he ever made one)—

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155. In the Bidder Agreement, NDC agreed “not to use the Auction Site for any purpose other than participation in Auctions that the Bidder is entitled to participate” NDC did not participate in the .WEB Auction as required by the Auction Rules. It did not submit bids on the behalf of itself as a Qualified Applicant. Instead, it acted as no more than a highly-paid puppet, whose “exclusive” and secret purpose was to win the Contention Set for non-applicant Verisign,

¹⁷⁷ DAA, (**IRP Ex. C-69**), Exhibit A, Sec. 1 (emphasis added); Merits Hearing, Tr. Day 5 (7 Aug. 2020), (**Ex. Altanovo-7**), 830:18 – 831:18 (Rasco Cross-Examination) (“Q. And did Mr. Livesay tell you each bid to make? A. Well, the way the auction works is that I believe you have a continue price. So the auction provider generally provides a threshold for continuing the auction. You have to bid something above that amount in order to continue or that amount to continue, and I believe that’s how it worked.

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. Well, as our funding source, we were kind of limited as to what we were going to bid, just as I’m sure my competitors who were financed by outside sources were limited as to how much they were going to bid.”); *id.*, 832:22 – 833:6

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156. Finally, NDC violated its representation and warranty of “Compliance” under the Bidder Agreement in which it recognized ICANN’s “right to conduct due diligence on the Qualified Applicant ... in an effort to ensure compliance with all applicable ... rules governing the Auction”¹⁷⁸ As set forth above, when ICANN made inquiries of NDC just prior to the ICANN Auction, Mr. Rasco falsely asserted that that there had been no changes to NDC’s .WEB application and that the decision to proceed with the ICANN Auction was his. Neither assertion was true. Both deprived ICANN of its right to conduct due diligence on the Qualified Applicant, as required by Section 2.7 of the Bidder Agreement.

3.5 Conclusion on NDC’s Breaches

157. For the reasons stated above, any reasonable application of the New gTLD Program Rules to NDC’s conduct demonstrates that NDC violated (1) the **prohibition against the resale, assignment, or transfer of its rights and obligations** in connection with its .WEB Application; (2) NDC’s warranty of **truthfulness, accuracy, and completeness in all material respects**,¹⁷⁹

¹⁷⁸ Auctions Bidder Agreement, (**IRP Ex. C-5**), Sec. 2.7 (at p. 3).

¹⁷⁹ In construing the word “material” (and all the terms in the Rules), the Board should use its plain language meaning. Under California law, for example, “[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning[.]” CA Civ. Code (2009), § 1644, <https://law.justia.com/codes/california/2009/civ/1635-1663.html>. The dictionary definition of “material” is “of serious or substantial import; significant, important, of consequence.” *Oxford English Dictionary* (2022): **material**, (**Ex. Altanovo-13**). The legal definition is no different. For example, under California law, a breach of a contractual obligation is material “if it goes to the essence of the agreement.” *Urica, Inc. v. Pharmplast S.A.E.*, Case No. CV 11-02476 (RZx), 2013 WL 12123230, at *6 (C.D. Cal. May 6, 2013), (**Ex. Altanovo-14**). A misrepresentation or omission is “material” if “a reasonable [person] would attach importance to its existence or nonexistence in determining his [or her] choice of action in the transaction in question.” *Engalla v. Permanente Medical Grp., Inc.*, 15 Cal. 4th 951, 977 (1997), (**Ex. Altanovo-15**). In the context of a public procurement or bidding process, the determination of materiality typically goes beyond the importance of the breach or representation to the procuring entity alone. It also includes its importance to the participants in the procurement or process, as well as to the public. In that context, “materiality” is often evaluated based on whether the breach, misrepresentation, or omission undermines the “integrity” of the process and/or causes unfairness to the other applicants. *See, e.g., Plan. Rsch. Corp. v. United States*, 971 F.2d 736, 741 (Fed. Cir. 1992), (**Ex. Altanovo-16**)

and its obligation to promptly notify ICANN in writing of **any changes in circumstances that would render any information in its application to be untrue or inaccurate** by submitting a Change Request; and (3) the Auction Rules.

158. All these violations were designed to sweep away the Program’s principles of transparency, fairness, and predictability, and to allow Verisign as a non-applicant to secretly and participate (and prevail) in the .WEB Contention Set. If NDC’s violations are not deemed by ICANN to be material, then there was no point whatsoever for ICANN to have put the Rules in place. Indeed, if an Applicant could violate the Rules in this blatantly deceptive and dishonest manner without consequence—thus enabling a non-applicant to secretly compete against Applicants who are acting openly and transparently—then the Applicants who complied with the Rules will have been put at a profound and unfair disadvantage. The Rules will have been rendered to be nothing more a sham, enabling those who violate the Rules to profit at the expense of those who have followed them.

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159. In **Section 4** below, we address the necessary consequences of NDC’s material violations, and the parameters of ICANN’s discretion in determining the appropriate remedy.

(“We believe that the submission of a misstatement, as made in the instant procurement, which materially influences consideration of a proposal should disqualify the proposal. The integrity of the system demands no less. Any further consideration of the proposal in these circumstances would provoke suspicion and mistrust and reduce confidence in the competitive procurement system.”) (quoting *In re Informatics, Inc.*, B-188566, 57 Comp.Gen. 217 (1978)); *Algesse 2 s.c.a.r.l. v. United States*, 125 Fed. Cl. 431, 440 (2016), (**Ex. Altanovo-17**) (“A misrepresentation is material if the contracting officer relied on it in forming his opinion.”).

**SECTION 4:
THE REMEDY FOR NDC’S VIOLATIONS AS REQUIRED BY THE RULES**

160. In this Section, we address why a proper application of the New gTLD Program Rules in accordance with ICANN’s Articles and Bylaws requires the Board to exercise its discretion to (i) disqualify NDC’s application and/or bids; or (ii) deem NDC ineligible to enter into a Registry Agreement for .WEB, and as a result of the foregoing, to offer .WEB to Afilias as the next highest bidder in the .WEB auction.

161. The Board clearly has the authority to grant the remedies that Afilias has requested, as confirmed by ICANN in the context of its submissions in the *Ruby Glenn v. ICANN* litigation. In that case, ICANN represented to the court that if it were later discovered that NDC *had* violated the New gTLD Program Rules, the Rules provided mechanisms to disqualify NDC at that point:

[T]he risk that an auction might include a participant subject to later disqualification is already fully addressed in the Agreed Auction Rules. In particular, paragraph 62 of the Auction Rules concerns ‘Effect of Ineligibility of Winner To Sign a Registry Agreement or To Be Delegated the Contention String.’ **It provides mechanisms to address the situation when an auction took place with a participant that is later disqualified. ... Moreover, the results of an auction ‘could be undone’ if a disqualification is discovered even long afterward.**¹⁸⁰

4.1 Relevant Remedies Provided for in the New gTLD Program Rules

162. There are four relevant remedies contained in the New gTLD Program Rules, each of which could be applied, individually or collectively, in light of NDC’s breaches of the Rules. The application of these remedies would result in the disqualification or rejection of NDC’s application; or in the rejection of its bids in the ICANN Auction; or in NDC being deemed

¹⁸⁰ *Ruby Glen v. ICANN*, ICANN’s Opposition to *Ex Parte* Application for TRO, (IRP Ex. R-8), p. 20 (emphasis added).

ineligible to enter into a Registry Agreement for .WEB. Pursuant to the Rules, ICANN would then have to delegate .WEB to Afilias as the next highest bidder in the ICANN Auction.

163. The remedies set forth in the New gTLD Program Rules are as follows:

- **First**, as stated in Module 6 of the AGB, ICANN may reject an application if an applicant makes *any* “material misstatement or misrepresentation” in or omits *any* “material information” from the application.¹⁸¹ There is no time limitation on when this remedy may be applied, meaning that it may be applied at whatever point—including after the completion of an ICANN Auction—that ICANN discovers or determines that an applicant has made a material misstatement in or material misrepresentation in connection with its application or has omitted material information in or with respect to its application. For the sake of convenience, we refer to this remedy as the **Misrepresentation Remedy**.
- **Second**, under Rule 42 of the Auction Rules, if an applicant fails to submit a “valid Bid” during a round of an ICANN Auction, then “a Bid equal to the amount of the Bid of the previous Round (or \$1 in the first Round) will be entered automatically on the Bidder’s behalf.” This remedy may be applied during the course of the ICANN Auction, or following its conclusion and prior to delegation. For the sake of convenience, we refer to this remedy as the **Invalid Bid Remedy**.
- **Third**, Rule 61 of the Auction Rules provides that a bidder will be subject to various penalties, including the forfeiture of its applications, for a “serious violation” of the Auction Rules: “A Bidder will be subject to a penalty of up to the full amount of the Deposit[,] forfeiture of its Applications and/or termination of any or all of its registry agreements for a serious violation of the Auction Rules or Bidder Agreement”. This language is reiterated in Section 2.10 of the Bidder Agreement (“Penalties”). This remedy may be applied during the course of the ICANN Auction and even after a Registry Agreement has been fully executed and the gTLD delegated. For the sake of convenience, we refer to this remedy as the **Serious Bidding Violation Remedy**.
- **Fourth**, Rule 62 of the Bidding Rules allows ICANN to determine that an applicant that has won (or apparently won the ICANN Auction) is “ineligible” to enter into a Registry Agreement. In the event of a determination of

¹⁸¹ AGB, (IRP Ex. C-3), p. 6-2 (“Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. **Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.** Applicant agrees to notify ICANN in writing of **any** change in circumstances that would render **any** information provided in the application false or misleading.” (emphasis added)).

ineligibility, the Rule requires ICANN to offer the gTLD to the next highest bidder. The Rule states: “If, **at any time** following the conclusion of an Auction, the Winner is **determined by ICANN to be ineligible** to sign a Registry Agreement for the Contention String that was the subject of the Auction, **the remaining Bidders** (with applications that have not been withdrawn from the New gTLD Program) **will receive offers to have their Applications accepted, one at a time, in descending order** of and subject to payment of its respective Exit Bid. In this way, the next Bidder would be declared the Winner subject to payment of its Exit Bid. Each Bidder that is offered the relevant gTLD will be given four (4) Business Days to respond as to whether it wants its Application to win.”¹⁸² This remedy may be applied at any time prior to the execution of a Registry Agreement. For the sake of convenience, we refer to this remedy as the **Ineligibility Remedy**.

The remedies set out in the New gTLD Program reflect ICANN and the Internet community’s strong interest in protecting the integrity of the New gTLD Program; in other words, to ensure that no applicant games the system or circumvents the rules by being evasive, non-transparent, dishonest or by engaging in bad faith conduct. As discussed below, by entering into and performing the DAA, NDC did each of the foregoing. A good faith application of the remedies foreseen in the New gTLD Program Rules therefore requires that NDC suffer the consequences of its conduct and .WEB be offered to Afilias as the second highest bidder.

4.2 Violation of the Anti-Transfer Clause

164. As discussed in **Section 3**, the Anti-Transfer Clause contains a material instruction by ICANN to applicants and is a material undertaking on the part of applicants. This is demonstrated by the mandatory language of the clause itself: “Applicant **may not** resell, assign, or transfer any of applicant’s rights or obligations in connection with the application.”¹⁸³ The materiality of the anti-transfer undertaking is further underscored by the fact that permitted assignments or transfers resulting from mergers, joint ventures or other arrangements require re-

¹⁸² Auction Rules, (**IRP Ex. C-4**), Rule 62 (at p. 12) (emphasis added).

¹⁸³ AGB, (**IRP Ex. C-3**), Module 6, ¶ 10 (at p. 6-6) (emphasis added).

evaluation of the application, subject to published criteria reflecting, among other factors, the impact of the circumstances requiring a change request on other contention set members.

165. Despite the materiality of the Anti-Transfer Clause, the New gTLD Program Rules do not contain a specific remedy associated with a breach of the Clause. While the Board could properly apply any of the remedies set out in the previous section for NDC's breach of a material provision of its agreement with ICANN, the most straightforward remedy is the Ineligibility Remedy. If the BAMC determines that the DAA violates the Anti-Transfer Clause, as we believe it must, ICANN must exercise its discretion to determine that NDC is ineligible to enter into a Registry Agreement for .WEB.

4.3 Violation of the Warranty of Truthfulness, Accuracy and Completeness and Agreement to Notify ICANN of Changes of Circumstance

166. By submitting its application for .WEB, NDC acknowledged that “any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”¹⁸⁴ While ICANN thus technically has a discretion as to whether it should disqualify NDC for its violation of the Warranty of Truthfulness, Accuracy and Completeness, the severity of NDC's violation demands that it be disqualified. NDC deliberately withheld information going to the heart of its application, *i.e.*, that it was secretly bidding on behalf of the dominant player in the market, Verisign, which by any assessment constitutes the “omission of material information.” If NDC is not disqualified for this dishonesty, it begs the question of when an applicant for a gTLD would *ever* be disqualified for a violation of the Warranty of Truthfulness, Accuracy and Completeness as envisaged by the New gTLD Program Rules.

¹⁸⁴ AGB, (IRP Ex. C-3), Module 6, ¶ 1 (at p. 6-2).

167. In addition to the Misrepresentation Remedy, the Board could also apply the Ineligibility Remedy for the same reasons.

4.4 Violation of the Auction Rules by submitting bids on behalf of Verisign

168. Rule 61 of the Auction Rules contains several remedies that the Board is required to apply (“will be subject to”) if an applicant has engaged in a “serious violation” of the Auction Rules or Bidder Agreement. These are as follows: a penalty of up to the full amount of the applicant’s Deposit, forfeiture of its application, and/or termination of its Registry Agreement.¹⁸⁵ As discussed in **Section 3**, based on the evidence, we believe that the BAMC must find that NDC participated in the .WEB Auction under false pretenses, submitting bids on behalf of Verisign rather than its own, as required by the Auction Rules and its Bidder Agreement. All of the applicable elements of the Serious Bidding Violation Remedy must be applied: a penalty equal to the full amount of NDC’s Deposit and forfeiture of its .WEB application.

169. Alternatively, ICANN should apply the Invalid Bid Remedy.¹⁸⁶ The New gTLD Program Rules provide that “[o]nly bids that comply with all aspects of the auction rules will be considered valid.”¹⁸⁷ As explained above, none of NDC’s bids were made in compliance with the Auction Rules, and therefore NDC did not submit a single valid bid during the .WEB Auction. Accordingly, pursuant to Rule 42, NDC should be deemed to have made a bid of \$1 in the first round of the .WEB Auction, and thus knocked out in that round.

4.5 Consequences of disqualification of NDC

170. As demonstrated above, NDC must be disqualified from its application for .WEB. The AGB and the Auction Rules are clear that, when an auction winner is determined by ICANN

¹⁸⁵ Auction Rules, (**IRP Ex. C-4**), Rule 61 (at p. 12).

¹⁸⁶ Auction Rules, (**IRP Ex. C-4**), Rule 42 (at p. 8).

¹⁸⁷ AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.3.1 (p. 4-22).

to be ineligible after an auction, the gTLD should be offered to the remaining bidders in descending order of their respective exit bids.¹⁸⁸ Therefore, here .WEB should be offered to Afiliias the second highest bidder in the .WEB Auction. The only question is the price to be paid by Afiliias.

171. If NDC is disqualified and all of its bids in the .WEB Auction are deemed invalid, Afiliias would have won the .WEB Auction with a final bid of \$71.9 million. Rule 47 of the Auction Rules states that the winning price of an Auction cannot exceed the highest bid submitted at the auction. In the .WEB Auction, assuming all of NDC's bids are declared invalid, the highest bid was the \$71.9 million bid submitted by Afiliias in Round 16.

172. Alternatively, Afiliias should be required to pay \$135 million as its last bid price in the .WEB Auction. This would be supported by a strict reading of Rule 62 of the Auction Rules and Section 4.3.3 of the AGB, which both provide that “the next bidder [after the winner is declared ineligible] would be declared the winner subject to payment of its last bid price.”¹⁸⁹

173. As stated, ICANN's discretion must be exercised consistent with its Articles and Bylaws, which, we submit, plainly require that remedy.

¹⁸⁸ Auction Rules, (**IRP Ex. C-4**), Rule 62 (at p. 12); AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.3.3 (at p. 4-26).

¹⁸⁹ AGB, (**IRP Ex. C-3**), Module 4, Sec. 4.3.3 (at p. 4-26); Auction Rules, (**IRP Ex. C-4**), Rule 62 (at p. 12) (“In this way, the next Bidder would be declared the Winner subject to payment of its Exit Bid.”).

**SECTION 5:
THE VERISIGN/NDC “BLACKOUT” VIOLATION
ALLEGATIONS ARE FRIVOLOUS**

174. In this Section, we address the allegation by NDC (again mainly through Verisign) that Afilias engaged in conduct that violated the private auction “blackout” period rules. Afilias has repeatedly stated, including to the Board, that there is no substance to NDC and Verisign’s allegations. Professor Peter Cramton, who designed the private auction system, developed its rules and is an expert in auctions, agrees:

Based on the materials that I have reviewed, I do not consider that Afilias violated the Blackout Period rules associated with the .WEB Auction. NDC and Verisign point to three texts sent by Afilias employees to NDC employees as violative of the Blackout Period. I have reviewed these texts. Two of these texts were sent prior to the start of the Blackout Period and therefore were sent during a time when the New gTLD Program Rules allowed and indeed encouraged Contention Set members to communicate about the resolution of contention without any restrictions. ... I do not consider that the transmission of [the third] text or its contents can be viewed as a violation of the Blackout Period. The substance of [the] text does not fit into any of the categories prohibited by the Blackout Period rule.¹⁹⁰

5.1 The Blackout Violation Allegation Is Not Properly Before the Board

175. As a threshold matter, while NDC and Verisign began publicly asserting their “blackout” period allegations as early as November 2016 (almost seven years ago), they have never (to our knowledge) initiated any accountability mechanisms concerning these allegations with ICANN. ICANN has never formally raised any concern with Afilias, or sought to investigate the matter. Indeed, ICANN did not offer any opinion or take a position on Verisign’s and NDC’s (offered in their capacity as *amici*) allegations in the IRP.

¹⁹⁰ Cramton Report, ¶¶ 48-49.

176. Afilias does not believe it should be required to address complaints that have been raised by Verisign (which was not a Contention Set member) or NDC regarding which ICANN has not taken a position or raised any concerns with Afilias. Nevertheless, for the avoidance of doubt, we set out below why NDC and Verisign’s arguments are unfounded.

5.2 The Blackout Violation Allegation Is Frivolous

177. NDC and Verisign’s Blackout Period argument is based on certain texts sent by Steve Heflin (Afilias) to Juan Diego Calle (NDC) and John Kane (Afilias) to Jose Ignacio Rasco (NDC).

178. Mr. Heflin’s text and the first text of Mr. Kane were sent on 7 June 2016, that is, approximately *six weeks before the Blackout Period began on 20 July 2016*.¹⁹¹ In the first text, Mr. Heflin suggested to Mr. Calle that he could “guarantee [that NDC] score at least 16 mil if you go into the private auction and lose”.¹⁹² Mr. Kane followed up on this later in the day with the (clearly half-joking) message to Mr. Rasco: “Heard Heflin offered Juan [Calle] \$17M; I’ll give you \$17.01M.”¹⁹³ As these texts were sent during the period where ICANN had expressly authorized Contention Set members to discuss private resolution of their contention, neither of these texts violate the Blackout Period. This is exactly what Messrs. Heflin and Kane were attempting to do – resolve contention for .WEB through a private auction, something that was expressly permitted under the Rules.

179. Mr. Kane’s second text was sent to Mr. Rasco on 22 July 2016, which was during the Blackout Period. But this text did not violate the Blackout Period either.

¹⁹¹ The Blackout Period begins on the “Deposit Deadline for the Auction”. Auction Rules, (**IRP Ex. C-4**), Rule 68 (at p. 13). The deposit deadline for the ICANN Auction was 20 July 2016. Updated Auction Schedule (27 Apr. 2016), <https://newgtlds.icann.org/en/applicants/auctions/schedule-27apr16-en.pdf>, p. 1.

¹⁹² Text messages between S. Heflin (Afilias) and J. Calle (NDC) (Confidential), (**IRP Rasco Ex. J**).

¹⁹³ Text messages between J. Kane (Afilias) and J. Rasco (NDC) (Confidential), (**IRP Rasco Ex. K**).

180. First, it is uncontested that the Blackout Period rule did not prohibit all communication among applicants. As the Bidder Agreement makes clear, the purpose of the Blackout Period is to prevent collusion between participants to an ICANN Auction.¹⁹⁴ Mr. Kane’s text, however, was not related to the ICANN Auction. The text message simply states that, “IF ICANN delays the auction next week would you again consider a private auction? Y-N”.¹⁹⁵ At the time, Mr. Kane and the wider Internet community believed in the reasonable possibility that ICANN would delay the ICANN Auction.¹⁹⁶ Accordingly, Mr. Kane’s text cannot be seen as promoting collusion between participants to an ICANN Auction because his question assumed that the ICANN Auction would be delayed and the associated Blackout Period lifted. For this reason alone, Mr. Kane’s text does not violate the Blackout Period.

181. Second, and independently, Mr. Kane’s question about possible resolution by a private auction *if the ICANN Auction were postponed*, does not fall within any of the three categories of prohibited communications. During the Blackout Period, applicants are *only* prohibited from discussing (a) “bids,” (b) “bidding strategies,” or (c) “settlement agreements or post-Auction ownership transfer arrangements.”¹⁹⁷ Mr. Kane’s text clearly did not raise any of these prohibited subjects – no bids were discussed, no bidding strategies were revealed, and no settlement agreement or transfer arrangement was proposed. There can simply be no case made

¹⁹⁴ Auctions Bidder Agreement, (IRP Ex. C-5), Sec. 2.6.

¹⁹⁵ Text Message (from cell phone belonging to J. Rasco) (21 July 2016), (IRP Rasco Ex. C), p. 2.

¹⁹⁶ Reports were circulating in industry press that Ruby Glen had filed a Reconsideration Request demanding that ICANN delay the ICANN Auction to allow ICANN sufficient time to investigate claims that NDC had breached its obligations under the AGB. Kevin Murphy, “Donuts joins to delay .web gTLD auction with emergency appeal,” Domain Incite (20 July 2016, 10:49 (UTC)), <http://domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal>.

¹⁹⁷ Auctions Bidder Agreement, (IRP Ex. C-5), Sec. 2.6 (emphasis added); ICANN, Supplement to New gTLD Auctions Bidder Agreement (22 June 2016), (IRP Ex. C-6), p. 1. See also, Auction Rules, (IRP Ex. C-4), Rule 68(a) (at pp. 13-14).

that such an innocuous communication violated the Blackout Period. As stated in his Expert Report, Prof. Cramton arrives at the same conclusion.¹⁹⁸

¹⁹⁸ Cramton Report, ¶ 49 : “The substance of Mr. Kane’s text does not fit into any of the categories prohibited by the Blackout Period rule. Mr. Kane does not disclose the substance of Afilias’ or any other bidder’s bids or otherwise discuss any bidding strategy for the .WEB Auction. Mr. Kane’s text also is clearly not an attempt to negotiate a transfer of .WEB after the auction”.

CONCLUSION

182. As with all of ICANN’s activities, the Board is required to carry out this task in accordance with ICANN’s Articles and Bylaws. It must consider and pronounce on the questions articulated by the IRP Panel “in conformity with relevant principles of international law and ... applicable local law.”¹⁹⁹ It must act “through open and transparent processes.”²⁰⁰ And it must make its first-instance decision “by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)[.]”²⁰¹

183. But in the final analysis, the task of applying the New gTLD Program Rules to the DAA—and to NDC’s conduct under the DAA—is not hard. This is matter of applying the plain language of the Rules to undisputed facts, which reside mostly in the terms of the DAA itself. The terms of the Rules on the one hand, and the terms of the DAA on the other, cannot be reconciled. NDC indisputably followed the terms of the DAA, which *required* NDC to violate critical and material terms of the Rules.

184. The result of any meaningful application of the Rules to the DAA and NDC’s conduct is unavoidable: ICANN must pronounce that NDC materially violated the New gTLD Program Rules in numerous critical respects. The consequences required by the Rules are equally plain: ICANN must reject NDC’s application for .WEB, disqualify NDC’s bids, and offer .WEB to Afiliis (now Altanovo) as the second highest bidder.

185. Any other conclusion would require ICANN to ignore the plain terms of the New gTLD Program Rules and sweep away the basic principles underlying them. ICANN cannot

¹⁹⁹ ICANN Bylaws (2018), (**IRP Ex. C-1**), Sec. 1.2(a); ICANN Articles (2016), (**IRP Ex. C-2**), Art. 2(III).

²⁰⁰ ICANN Bylaws (2018), (**IRP Ex. C-1**), Sec. 1.2(a); ICANN Articles (2016), (**IRP Ex. C-2**), Art. 2(III).

²⁰¹ ICANN Bylaws (2018), (**IRP Ex. C-1**), Sec. 1.2(a)(v).

simply choose to overlook its own Rules by proceeding to delegate .WEB to NDC, instead of offering .WEB to Altanovo as the second highest bidder. We respectfully submit that for ICANN to do so would be flatly inconsistent with its Articles and Bylaws. Having devoted many years and great effort to designing Rules meant to ensure transparency and fairness throughout the Program, ICANN must now enforce them. It must “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)[.]”²⁰²

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²⁰² ICANN Bylaws (2018), (**IRP Ex. C-1**), Sec. 1.2(a)(v).