

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

**ICDR Case No. 01-18-0004-2702**

**AFILIAS DOMAINS NO. 3 LIMITED,**  
*Claimant*

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,**  
*Respondent*

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**FINAL DECISION**

**Corrected version dated 15 July 2021**

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20 May 2021

Members of the IRP Panel

Catherine Kessedjian  
Richard Chernick  
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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## GLOSSARY OF DEFINED TERMS

Afilias	Claimant Afilias Domains No. 3 Limited.
Afilias' First DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 February 2018.
Afilias' Response to the <i>Amici's</i> Brief	Afilias' Response to the <i>Amici Curiae</i> Briefs dated 24 July 2020.
Amended Request for IRP	Afilias's Amended Request for Independent Review dated 21 March 2019.
<i>Amici</i>	Collectively, Verisign, Inc. and Nu DotCo, LLC.
<i>Amici's</i> PHB	Verisign, Inc. and Nu DotCo, LLC's post-hearing brief dated 12 October 2020.
Articles	<i>Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers</i> , as approved by the Board on 9 August 2016, and filed on 3 October 2016, Ex. C-2.
Auction Rules	Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
Board	ICANN's board of directors.
Blackout Period	Period associated with an ICANN auction extending from the deposit deadline until full payment has been received from the prevailing bidder, and during which discussions among members of a contention set are prohibited.
Bylaws	Bylaws for Internet Corporation for Assigned Names and Numbers, as amended 18 June 2018, Ex. C-1.
CCWG	The Cross-Community Working Group for Accountability created by ICANN's supporting organizations and advisory committees to review and advise on ICANN's accountability mechanisms.
CEP	ICANN's Cooperative Engagement Process, as described in Article 4, Section 4.3(e) of the Bylaws, intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in the IRP.

CEP Rules	Rules applicable to a Cooperative Engagement Process described in an ICANN document dated 11 April 2013, Ex. C-121.
Claimant	Afilias Domains No. 3 Limited.
Claimant’s PHB	Afilias’ post-hearing brief dated 12 October 2020.
Claimant’s Reply	Afilias’ Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 4 May 2020.
Claimant’s Reply Submission on Costs	Afilias’ reply dated 23 October 2020 to the Respondent’s submissions on costs.
Covered Actions	As defined at Section 4.3(b)(ii) of the Bylaws : “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”.
DAA, or Domain Acquisition Agreement	Domain Acquisition Agreement between Verisign, Inc. and Nu DotCo, LLC dated 25 August 2015, Ex. C-69.
Decision on Phase I	Panel’s decision on Phase I dated 12 February 2020.
DIDP	ICANN’s Documentary Information Disclosure Policy.
DNS	Domain Name System.
DOJ	United States Department of Justice.
Donuts	Donuts, Inc., the parent company of .WEB applicant Ruby Glen, LLC.
Donuts CEP	Cooperative Engagement Process invoked by Donuts on 2 August 2016 in regard to .WEB.
First Procedural Order	Panel’s first procedural order for Phase II, dated 5 March 2020.
gTLD	Generic top-level domain.
Guidebook	ICANN’s New gTLD Applicant Guidebook, Ex. C-3.
ICANN, or Respondent	Respondent Internet Corporation for Assigned Names and Numbers.
ICANN’s Response to the <i>Amici</i> ’s Briefs	ICANN’s response dated 24 July 2020 to the <i>amici curiae</i> briefs.

ICDR	International Centre for Dispute Resolution.
ICDR Rules	International Arbitration Rules of the ICDR.
Interim Procedures	Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process, Ex. C-59.
IOT	Independent Review Process Implementation Oversight Team.
IRP	Independent Review Process provided for under ICANN's Bylaws.
Joint Chronology	Chronology of relevant facts dated 23 October 2020, agreed to by the Parties and the <i>Amici</i> pursuant to the Panel's communication dated 16 October 2020.
NDC	<i>Amicus Curiae</i> Nu DotCo, LLC.
NDC's Brief	Nu DotCo, LLC's <i>amicus curiae</i> brief dated 26 June 2020.
New gTLD Program Rules	Collectively, ICANN's New gTLD Applicant Guidebook, Ex. C-3, and the Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
November 2016 Workshop	Workshop held by the Board on 3 November 2016 during which a briefing was presented by in-house counsel regarding the .WEB contention set.
Ombudsman	ICANN's Ombudsman.
Panel	The Panel appointed to resolve Claimant's IRP in the present case.
Phase I	First phase of this Independent Review Process which concluded with the Panel's Decision on Phase I dated 12 February 2020.
Procedural Order No. 2	Panel's second procedural order for Phase II dated 27 March 2020.
Procedural Order No. 3	Panel's third procedural order for Phase II dated 27 March 2020.
Procedural Order No. 4	Panel's fourth procedural order for Phase II dated 12 June 2020.
Procedural Order No. 5	Panel's fifth procedural order for Phase II dated 14 July 2020.
Procedural Order No. 6	Panel's sixth procedural order for Phase II dated 27 July 2020.

Procedural Timetable	Procedural timetable for Phase II attached to the First Procedural Order dated 5 March 2020.
Questionnaire	Questionnaire issued by ICANN on 16 September 2016.
Radix	Radix FZC.
Reconsideration Request 18-7	Reconsideration request submitted by Afilias challenging ICANN's response to its First Documentary Information Disclosure Policy Request.
Reconsideration Request 18-8	Reconsideration request submitted by Afilias challenging ICANN's response to its Second Documentary Information Disclosure Policy Request.
Request for Emergency Interim Relief	Afilias' Request for Emergency Panelist and Interim Measures of Protection, dated 27 November 2018.
Respondent, or ICANN	Respondent Internet Corporation for Assigned Names and Numbers.
Respondent's Answer	ICANN's Answer to the Amended Request for IRP dated 31 March 2019.
Respondent's PHB	ICANN's post-hearing brief dated 12 October 2020.
Respondent's Rejoinder	ICANN's Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 1 June 2020.
Respondent's Response Submission on Costs	ICANN's response dated 23 October 2020 to the Claimant's submissions on costs.
Revised Procedural Timetable	Revised procedural timetable for Phase II attached to the Procedural Order No. 3 dated 13 March 2020.
Ruby Glen	Ruby Glen, LLC.
Ruby Glen Litigation	Ruby Glen, LLC's complaint against ICANN filed in the US District Court of the Central District of California and application seeking to halt the .WEB auction.
Rule 7 Claim	Afilias' claim that ICANN violated its Bylaws in adopting the <i>amicus curiae</i> provisions set out in Rule 7 of the Interim Procedures.

Second DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 April 2018.
Staff	ICANN's Staff.
Supplemental Submission	Afilias' supplemental submission dated 29 April 2020 adding an additional argument in favour of a broader document production by ICANN.
Verisign	<i>Amicus Curiae</i> Verisign, Inc.
Verisign's Brief	Verisign, Inc.'s <i>amicus curiae</i> brief dated 26 June 2020.
10 June Application	Afilias' application dated 10 June 2020 regarding the status of the evidence originating from the <i>Amici</i> which had been filed with the Respondent's Rejoinder.
29 April 2020 Application	Afilias' application seeking assistance from the Panel regarding ICANN's document production and privilege log.



## I. INTRODUCTION

### A. Overview

1. The Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB generic Top-Level Domain (**gTLD**), pursuant to the rules and procedures set out in the Respondent's New gTLD Applicant Guidebook (**Guidebook**) and the Auction Rules for New gTLDs (**Auction Rules**) (collectively, **New gTLD Program Rules**).
2. gTLDs are one category of top-level domains used in the domain name system (**DNS**) of the Internet, to the right of the final dot, such as ".COM" or ".ORG". Under the Guidebook and Auction Rules, in the event of multiple applicants for the same gTLD, the applicants are placed in a "contention set" for resolution privately or, if this first option fails, through an auction administered by the Respondent.
3. On 27 and 28 July 2016, the Respondent conducted an auction among the seven (7) applicants for the .WEB gTLD. Nu DotCo, LLC (**NDC**) won the auction while the Claimant was the second-highest bidder. Shortly after the .WEB auction, it was revealed that NDC and Verisign, Inc. (**Verisign**) had entered into an agreement (**Domain Acquisition Agreement** or **DAA**) under which Verisign undertook to provide funds for NDC's bid for the .WEB gTLD, while NDC undertook, if its application proved to be successful, to transfer and assign its registry operating rights in respect of .WEB to Verisign upon receipt from the Respondent of its actual or deemed consent to this assignment.<sup>1</sup>
4. The Claimant initiated the present Independent Review Process (**IRP**) on 14 November 2018, seeking, among others, binding declarations that the Respondent must disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel, proceed with contracting the registry agreement for .WEB with the Claimant.
5. At the outset of these proceedings, on 30 August 2019, the Parties agreed that there should

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<sup>1</sup> Domain Acquisition Agreement entered into by NDC and Verisign on 25 August 2015, Ex. C-218, as amended and supplemented by the "Confirmation of Understanding" executed by these same parties on 26 July 2016, Ex. H to Mr. Livesay's witness statement. See below, paras. 39, 84 and 101.

be a bifurcated Phase I in this IRP to address two questions. The first was the Claimant's claim that the Respondent violated its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), in adopting the *amicus curiae* provisions set out in Rule 7 of the *Interim Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process*, adopted by the Respondent's board of directors (**Board**) on 25 October 2018 (**Interim Procedures**), and that Verisign and NDC should be prohibited from participating in the IRP on that basis. This question has been referred to in these proceedings as the Claimant's **Rule 7 Claim**. The second question to be addressed in Phase I was the extent to which, in the event the Rule 7 Claim failed, NDC and Verisign should be permitted to participate in the IRP as *amici*.

6. In its Decision on Phase I dated 12 February 2020 (**Decision on Phase I**), which concluded the first phase of the IRP, this IRP Panel (**Panel**) unanimously decided to grant the requests respectively submitted by Verisign and NDC (collectively, the *Amici*) to participate as *amici curiae* in the present IRP, on the terms and subject to the conditions set out in that decision. On the basis of the Claimant's alternative request for relief in Phase I,<sup>2</sup> the Panel decided to join to the Claimant's other claims in Phase II those aspects of Afiliias' Rule 7 Claim over which the Panel determined that it had jurisdiction<sup>3</sup> – to the extent the Claimant were to choose to maintain them.
7. On 4 March 2020, the Panel held a case management conference in relation to Phase II of the IRP. On that occasion, the Claimant informed the Panel that it intended to maintain its Rule 7 Claim in order to illustrate what it described as the “unseemly relationship between the regulator and the monopolist”<sup>4</sup> (*i.e.*, in this case, respectively, the Respondent and Verisign). For reasons set out later in this Final Decision, the Panel has determined that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I. Accordingly, the Panel has concluded that no useful

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<sup>2</sup> See Decision on Phase I, para. 183.

<sup>3</sup> In its decision on Phase I, the Panel found that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws: (a) committed by the Board; or (b) committed by Staff members of ICANN, but not over actions or failures to act committed by the IRP Implementation Oversight Team as such. See Decision on Phase I, para. 133.

<sup>4</sup> Transcript of the preparatory conference of 4 March 2020, p. 11.

purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as deemed appropriate. In this Final Decision, the Panel disposes of the Claimant's other substantive claims in this IRP, as well as its cost claims in connection with the IRP, including in relation to Phase I.

8. After careful consideration of the facts, the applicable law and the submissions made by the Parties and the *Amici*, the Panel finds that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the Board on 9 August 2016, and filed on 3 October 2016 (**Articles**) 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"; and (b) its Board, having deferred consideration of the Claimant's complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program. In the opinion of the Panel, the Respondent in so doing violated its commitment to make decisions by applying documented policies objectively and fairly. The Panel also finds that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure fairness.
9. The Panel is also of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application

should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules. The Panel therefore denies the Claimant's requests for (a) a binding declaration that the Respondent must disqualify NDC's bid for .WEB for violating the Guidebook and Auction Rules, and (b) an order directing the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.

## **B. The Parties**

10. The Claimant in the IRP is Afilias Domains No. 3 Limited (**Afilias** or **Claimant**), a legal entity organised under the laws of the Republic of Ireland with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several generic gTLD registries.
11. The Claimant's parent company, Afilias, Inc., was, until 29 December 2020, a United States corporation that was the world's second-largest Internet domain name registry. As noted below in paragraphs 244 to 249, in post-hearing submissions made in December 2020, the Panel was informed that pursuant to a Merger Agreement signed on 19 November 2020 between Afilias, Inc. and Donuts, Inc. (**Donuts**), these two (2) companies have merged as of 29 December 2020. The Claimant has explained, however, that this transaction does not include the transfer of the Claimant's .WEB application, as both the Claimant as an entity and its .WEB application have been carved out of the transaction.
12. The Claimant is represented in the IRP by Mr. Arif Hyder Ali, Mr. Alexandre de Gramont, Ms. Rose Marie Wong, Mr. David Attanasio, Mr. Michael A. Losco and Ms. Tamar Sarjveladze of Dechert LLP, and by Mr. Ethan Litwin of Constantine Cannon LLP.
13. The Respondent is the Internet Corporation for Assigned Names and Numbers (**ICANN** or **Respondent**), a not-for-profit corporation organised under the laws of the State of California, United States. ICANN oversees the technical coordination of the Internet's DNS on behalf of the Internet community. The essential function of the DNS is to convert

domain names that are easily remembered by humans – such as “icann.org” – into numeric IP addresses understood by computers.

14. ICANN’s core mission, as described in its Bylaws, is to ensure the stable and secure operation of the Internet’s unique identifier system. To that end, ICANN contracts with, among others, entities that operate gTLDs. The Bylaws provide that in performing its mission, ICANN will act in a manner that complies with and reflects ICANN’s commitments and respects ICANN’s core values, as described in the Bylaws.
15. ICANN is represented in the IRP by Mr. Jeffrey A. LeVee, Mr. Steven L. Smith, Mr. David L. Wallach, Mr. Eric P. Enson and Ms. Kelly M. Ozurovich, of Jones Day LLP.

### **C. The IRP Panel**

16. On 26 November 2018, the Claimant nominated Professor Catherine Kessedjian as a panelist for the IRP. On 13 December 2018, the International Centre for Dispute Resolution (**ICDR**) appointed Prof. Kessedjian on the IRP Panel and her appointment was reaffirmed by the ICDR on 4 January 2019.
17. On 18 January 2019, the Respondent nominated Mr. Richard Chernick as a panelist for the IRP and he was appointed to that position by the ICDR on 19 February 2019.
18. On 17 July 2019, the Parties nominated Mr. Pierre Bienvenu, Ad. E., to serve as the IRP Panel Chair. Mr. Bienvenu accepted the nomination on 23 July 2019 and he was appointed by the ICDR on 9 August 2019.
19. In September 2019, with the consent of the Parties, Ms. Virginie Blanchette-Séguin was appointed as Administrative Secretary to the IRP Panel.

### **D. The Amici**

20. Verisign is a publicly traded company organised under the laws of the State of Delaware. Verisign is a global provider of domain name registry services and Internet infrastructure that operates, among others, the registries for the .COM, .NET and .NAME gTLDs. Verisign is represented in this IRP by Mr. Ronald L. Johnston, Mr. James S. Blackburn,

Ms. Maria Chedid, Mr. Oscar Ramallo and Mr. John Muse-Fisher, of Arnold & Porter Kaye Scholer LLP.

21. NDC is a limited liability company organised under the laws of the State of Delaware. NDC was established as a special purpose vehicle to participate in ICANN's New gTLD Program. NDC was initially represented in this IRP by Mr. Charles Elder and Mr. Steven Marenberg, of Irell & Manella LLP, and from 1 March 2020 onward by Mr. Steven Marenberg, Mr. Josh B. Gordon and Ms. April Hua, of Paul Hastings LLP.

**E. Place (Legal Seat) of the IRP**

22. The Claimant has proposed that the seat of the IRP be London, England, without prejudice to the location of where hearings are held. In its letter dated 30 August 2019, the Respondent has confirmed its agreement with this proposal.

**F. Language of the Proceedings**

23. In accordance with Section 4.3(I) of the Bylaws, the language of the proceedings of this IRP is English.

**G. Jurisdiction of the Panel**

24. The Claimant's Request for IRP is submitted pursuant to Article 4, Section 4.3 of the Bylaws, the International Arbitration Rules of the ICDR (**ICDR Rules**), and the Interim Procedures. Section 4.3 of the Bylaws provides for an independent review process to hear and resolve, among others, claims that actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers or Staff members constituted an action or inaction that violated the Articles or the Bylaws.
25. In its Decision on Phase I, the Panel concluded, in respect of Afiliias' Rule 7 Claim, that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws:
  - (a) committed by the Board; or
  - (b) committed by Staff members;

but not over actions or failures to act allegedly committed by the IRP Implementation Oversight Team (**IOT**), on the ground that the latter does not fall within the enumeration “Board, individual Directors, Officers or Staff members” in the definition of **Covered Actions** at Section 4.3(b)(ii) of the Bylaws.

26. In relation to Phase II issues, the Parties and *Amici* have characterized a number of issues as “jurisdictional”, such as the scope of the dispute described in the Amended Request for IRP, the timeliness of the claims, the applicable standard of review, and the relief that the Panel is empowered to grant. Those issues are addressed in the relevant sections of this Final Decision. However, and subject to the foregoing, the jurisdiction of the Panel to hear the Claimant’s core claims against the Respondent in relation to .WEB is not contested.

#### **H. Applicable Law**

27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.
28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.
29. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.
30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.

## **I. Burden and Standard of Proof**

31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.
32. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, “more likely than not”. That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, “[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.”<sup>5</sup>
33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.

## **J. Rules of Procedure**

34. The ICDR is the IRP Provider responsible for administering IRP proceedings.<sup>6</sup> The Interim Procedures, according to their preamble and the contextual note at footnote 1 thereof, are intended to supplement the ICDR Rules in effect at the time the relevant request for independent review is submitted. In the event of an inconsistency between the Interim Procedures and the ICDR Rules, the Interim Procedures govern.<sup>7</sup>

## **II. HISTORY OF THE PROCEEDINGS**

### **A. Phase I**

35. The history of these proceedings up to 12 February 2020, the date of the Panel’s Decision on Phase I, is set out at paragraphs 33 to 67 of the Panel’s Phase I decision, which are

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<sup>5</sup> See, generally, Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 6<sup>th</sup> ed., Oxford, Oxford University Press, 2015, para. 6.87.

<sup>6</sup> See Bylaws, Ex. C-1, Section 4.3 (m).

<sup>7</sup> See Interim Procedures, Ex. C-59, Rule 2.



incorporated by reference in this Final Decision.

36. In order to provide context for the present decision, the Panel recalls that on 18 June 2018, Afiliás invoked ICANN’s Cooperative Engagement Process (**CEP**) after learning that ICANN had removed the .WEB gTLD contention set’s “on-hold” status. A CEP is intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in an IRP. The Parties participated in the CEP process until 13 November 2018.
37. On 14 November 2018, Afiliás filed its request for IRP with the ICDR. On the same day, ICANN informed Afiliás that it would only keep the .WEB gTLD contention set “on-hold” until 27 November 2018, so as to allow Afiliás time to file a request for emergency interim relief, barring which ICANN would take the .WEB gTLD contention set off of its “on hold” status. Afiliás filed a Request for Emergency Panelist and Interim Measures of Protection with the ICDR on 27 November 2018 (**Request for Emergency Interim Relief**), seeking to stay all ICANN actions that would further the delegation of the .WEB gTLD.
38. From November 2018 to March 2019, the Parties focused on the Claimant’s Request for Emergency Interim Relief and, pursuant to Requests to Participate as *Amicus* in the IRP filed by the *Amici* on 11 December 2018, on the possible participation of the *Amici* in the proceedings.
39. The Emergency Panelist presided over a focused document production process during which, on 18 December 2018, ICANN produced the Domain Acquisition Agreement entered into between Verisign and NDC in connection with .WEB. The Claimant then took the position that the documents produced to it by the Respondent warranted the amendment of its Request for IRP. Accordingly, on 29 January 2019, the Parties agreed to postpone the deadline for the submission of the Respondent’s Answer until after the Claimant filed its Amended Request for IRP. In the event, the Claimant filed its Amended Request for IRP with the ICDR on 21 March 2019 (**Amended Request for IRP**), and the Respondent submitted its Answer to the Amended Request for IRP on 31 May 2019 (**Respondent’s Answer**).
40. In January 2019, the Parties asked the Emergency Panelist to postpone further activity

pending resolution of the *Amici*'s requests to participate in the IRP. After the appointment of this Panel to determine the IRP, the Parties expressed their understanding that it would be for this Panel to resolve the Emergency Interim Relief Request. In the meantime, the Respondent agreed that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP.<sup>8</sup>

41. As for the *Amici*'s requests to participate in the IRP, they were first the subject of proceedings before a Procedures Officer appointed by the ICDR on 21 December 2018. In its final Declaration, dated 28 February 2019, the Procedures Officer found that "the issues raised [...] are of such importance to the global Internet community and Claimants [sic] that they should not be decided by a "Procedures Officer", and therefore the issues raised are hereby referred to [...] the IRP Panel for determination".<sup>9</sup> The *Amici*'s requests to participate in the IRP were referred to the Panel and, by agreement of the Parties, were resolved in Phase I of this IRP by the Panel's Decision on Phase I dated 12 February 2020.

## **B. Phase II**

42. On 4 March 2020, the Panel presided over a case management conference to discuss the issues to be decided in Phase II and the Parties' respective proposed procedural timetables for the Phase II proceedings. The Parties differed as to the timing of document production and the briefing schedule for Phase II. The Claimant favoured document production taking place after the filing of Afilias' Reply, ICANN's Rejoinder and the *Amici*'s Briefs, such production to be followed by the simultaneous filing of Responses from the Parties. The Respondent, for its part, proposed a document production stage at the outset of Phase II, to be followed by a briefing schedule for the filing of the Parties' additional submissions and the *Amici*'s Briefs.
43. In its First Procedural Order for Phase II, dated of 5 March 2020 (**First Procedural Order**), the Panel decided that the document production phase in relation to Phase II would take place at the outset of Phase II, as proposed by the Respondent, so as to give the Parties

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<sup>8</sup> See ICANN's Response to Afilias' Costs Submission, dated 23 October 2020, at para. 23.

<sup>9</sup> Declaration of the Procedures Officer dated 28 February 2019, p. 38.

the benefit of the documents produced during this process in their additional submissions in relation to Phase II. With respect to the other elements of the Procedural Timetable, the Panel adopted the Claimant’s proposed briefing sequence, which provided for the filing of the Claimant’s Reply, the Respondent’s Rejoinder, the *Amici*’s Briefs, and an opportunity for the Claimant and the Respondent subsequently to respond simultaneously to the *Amici*’s Briefs. The Panel attached to the First Procedural Order the following procedural timetable for Phase II, reflecting these decisions (**Procedural Timetable**):

No.	Action	Party	Date
1.	Simultaneous requests to produce (via Redfern Schedules)	Afilias and ICANN	6 March 2020
2.	Simultaneous responses/objections (via Redfern Schedules)	Afilias and ICANN	13 March 2020
3.	List of agreed issues to be decided in Phase II and, as the case may be, list(s) of additional issues to be decided in Phase II	Afilias and ICANN	13 March 2020
4.	Simultaneous replies to responses/objections (via Redfern Schedules)	Afilias and ICANN	20 March 2020
5.	Hyperlinked list of constituent elements (as of that date) of the Phase II record	Afilias and ICANN	20 March 2020
6.	Panel ruling on outstanding objections	N/A	27 March 2020
7.	Production of documents	Afilias and ICANN	17 April 2020
8.	Submissions on questions as to which the <i>Amici</i> will be permitted to submit briefings to the Panel, as well as page limits and other modalities	Afilias, ICANN, Verisign and NDC	24 April 2020
9.	Reply (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	1 May 2020
10.	Rejoinder (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	29 May 2020
11.	<i>Amici</i> ’s Briefs (along with all supporting exhibits, if any, and legal authorities)	Verisign and NDC	26 June 2020
12.	Simultaneous Responses to the <i>Amici</i> ’s Briefs	Afilias and ICANN	15 July 2020
13.	Parties to identify witnesses called for cross-examination at the hearing	Afilias and ICANN	24 July 2020
14.	Final status and pre-hearing conference	Afilias, ICANN, Verisign and NDC	29 July 2020
15.	Hearing	Afilias, ICANN, Verisign and NDC	3-7 August 2020

No.	Action	Party	Date
16.	Post-hearing submissions	Afilias, ICANN, Verisign and NDC	TBD

44. As reflected in the Procedural Timetable, in its First Procedural Order the Panel also asked the Parties to develop a joint list of issues to be decided in Phase II, and laid out a process for the determination, in consultation with the Parties and as contemplated in the Panel’s Decision on Phase I, of the questions as to which the *Amici* would be permitted to submit briefings to the Panel. The Panel also accepted the Parties’ proposal that the hearing, scheduled on 3-7 August 2020, be held in Chicago, IL.
45. In accordance with the Procedural Timetable, on or about 6 March 2020, the Parties exchanged document production requests in the form of Redfern Schedules. The Claimant addressed twenty-one (21) requests to produce documents to the Respondent, while the Respondent addressed two (2) requests to produce to the Claimant. Responses or objections to those requests were exchanged on or about 13 March 2020. The Claimant objected to both of the Respondent’s requests. The Respondent objected to many, but not all, of the Claimant’s requests, having agreed to search for some categories of documents requested by the Claimant.
46. Also on 6 March 2020, the Claimant sought clarification of the First Procedural Order as regards the question of whether the *Amici* would be permitted, in their briefs, to add new documents to the record as exhibits. The Claimant argued that any documents to be submitted by the *Amici* would inevitably be “cherry picked” and supportive of their submissions. The Claimant thus took the position that if the *Amici* were allowed to refer to documents that are not already in the record, the principles of fundamental fairness and due process required that it be granted an opportunity to request documents from the *Amici*. On 11 March 2020, the Respondent submitted in response that pursuant to the Decision on Phase I, the *Amici* are entitled to submit “briefings and supporting exhibits” and that the provisions of the Interim Procedures relating to the exchange of information do not apply to the *Amici*. On the same date, the *Amici* contended, for their part, that the First Procedural Order clearly states that they may submit exhibits, without specifying that such exhibits are limited to those already in the record. The *Amici* stressed that material evidence may

be in their possession and not in possession of the Parties. They further contended that the Panel had already ruled that they may not propound discovery nor be the recipient of information requests. In its reply dated 12 March 2020, the Claimant reiterated its fairness concerns and stated that the First Procedural Order did not address the question of whether the *Amici*'s exhibits were to be limited to those on record.

47. By email dated 13 March 2020, the Parties informed the Panel that they had attempted – for a second time and still without success – to agree on a joint list of issues to be decided in Phase II. While unable to agree on the joint issues list requested by the Panel, the Parties proposed an agreed procedure for the Panel ultimately to determine the questions on which the *Amici* would be invited to submit briefs. In the event, the Panel accepted the Parties' suggestion in Procedural Order No. 3, and issued a revised procedural timetable reflecting the changes proposed by the Parties (**Revised Procedural Timetable**).
48. In Procedural Order No. 2 dated 27 March 2020 (**Procedural Order No. 2**), the Panel ruled on the outstanding objections to the Parties' respective requests to produce, granting twelve (12) of the Claimant's fourteen (14) outstanding requests and one (1) of the two (2) requests presented by the Respondent. In the same order, the Panel directed each of the Parties to provide to the other a privilege log listing each document over which a privilege is asserted, on the ground that such logs might prove useful to the Parties and the Panel in addressing issues arising from refusals to produce based on privilege.
49. In Procedural Order No. 3, also dated 27 March 2020 (**Procedural Order No. 3**), the Panel ruled on the Claimant's clarification request in regard to the possibility for the *Amici*, as part of their briefs, to add to the evidentiary record of the IRP. It is useful to cite in full the Panel's ruling on that question:

In its Decision on Phase I, the Panel made clear that, under the Interim Procedures, the *Amici* are non-disputing parties whose participation in the IRP is through the submission of "written briefings", possibly supplemented by oral submissions at the merits hearing. The Panel also rejected the notion that, under the Interim Procedures, the *Amici* can enjoy the same participation rights as the disputing parties. It follows that it is for the Parties, who bear the burden of proving their case, to build the evidentiary record of the IRP, and it is based on that record that the *Amici* "may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP Panel may request briefing" (see Rule 7 of the Interim Procedures).

The Panel expects the Parties, in accordance with the Procedural Timetable, to file the entirety of the remainder of their case as part of the second round of submissions contemplated by the timetable, that is to say, with the Claimant's Reply and the Respondent's Rejoinder. As evoked in the Panel's Decision on Phase I (*see* par. 201), if there is evidence in the possession of the *Amici* that the Respondent considers relevant to, and that it wishes to adduce in support of its case, be it witness or documentary evidence, that evidence is required to be filed as part of the Respondent's Rejoinder, and not with the *Amici*'s Briefs.

The Panel did not preclude the possibility in its Phase I Decision (and the Procedural Timetable) that the *Amici* might wish to file documents in support of the submissions to be made in their Briefs. By referring to such documents as "exhibits", however, as other arbitral tribunals have in referring to materials to be filed with the submissions of *amicus* participants, the Panel did not mean to suggest that these "exhibits" (which the Panel would expect to be few in number, and to be directed to supporting the *Amici*'s submissions, not the Respondent's case) would become part of the record and acquire the same status as the documentary evidence filed by the Parties.

Should a Party be of the view that documents submitted in support of the *Amici*'s Briefs are incomplete or somehow misleading, it will be open to that Party to advance the argument in response to the *Amici*'s submissions and to seek whatever relief it considers appropriate from the Panel.<sup>10</sup>

50. As regards the Claimant's request to be granted an opportunity to request documents from the *Amici*, the Panel referred to its Decision on Phase I, in which it was noted that the provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to *Parties*, not to persons, groups or entities that are granted permission to participate in an IRP with the status of an *amicus curiae*.<sup>11</sup>
51. On 17 April 2020, the Respondent produced to the Claimant its document production pursuant to the Procedural Order No. 2. On 24 April 2020, the Respondent transmitted to the Claimant a privilege log identifying documents withheld from production based on the attorney-client privilege or the attorney work product doctrine.
52. On 29 April 2020, the Claimant filed an application seeking assistance from the Panel regarding what the Claimant described as the Respondent's "grossly deficient document production and insufficiently detailed Privilege Log" (**29 April 2020 Application**). By way of relief, the Claimant requested in this application that the Panel order the Respondent to "(i) supplement and remedy its production by producing those documents that are subject to the Tribunal's production order or ICANN's production agreement; (ii) produce those

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<sup>10</sup> Procedural Order No. 3, pp. 2-3.

<sup>11</sup> See Decision on Phase I, para. 195.

documents listed on ICANN's Privilege Log that are not privileged; (iii) produce those documents that contain privileged and non-privileged information with appropriate redactions covering only the privileged information; and (iii) (*sic*) for the remaining documents, remedy its Privilege Log so that the Panel and Afilias can properly assess the validity of the privilege that ICANN has invoked."<sup>12</sup> The Claimant also reserved "its right to request the Panel to conduct an in camera review of documents that ICANN has asserted are covered by privilege".<sup>13</sup>

53. As directed by the Panel, the Respondent responded to the 29 April 2020 Application on 6 May 2020, rejecting the Claimant's complaints and asserting that the Respondent had in all respects complied with the Procedural Order No. 2. The Respondent argued that it searched and produced all non-privileged documents responsive to the Claimant's requests to which the Respondent agreed or was directed by the Panel to respond, and that it properly withheld only those documents protected by attorney-client privilege or the work product doctrine. The Respondent added that it served a privilege log providing, in respect of each withheld document, all of the information necessary to establish privilege.
54. On 11 May 2020, the Panel, as suggested by the Claimant, held a telephonic hearing in connection with the 29 April 2020 Application. On that occasion, both Parties had the opportunity to amplify their written submissions orally and to present arguments in reply. Consistent with the Panel's Decision on Phase I, the *Amici* were permitted to attend this procedural hearing as observers, which they did. In the course of its counsel's reply submissions at the hearing, the Claimant articulated a new waiver argument, namely that by arguing that the Board reasonably decided, in November 2016, not to make any determination regarding NDC's conduct until after the conclusion of the IRP, as alleged in the Respondent's Rejoinder, the Respondent had in effect affirmatively put the reasonableness and good faith of that Board's decision at issue in the case.
55. In accordance with the Revised Procedural Timetable (as modified by the Panel's correspondence of 1 May 2020), on 4 May 2020, the Claimant filed its Reply Memorial in

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<sup>12</sup> 29 April 2020 Application, p. 11.

<sup>13</sup> *Ibid*, fn 29.

Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Claimant's Reply**) and, on 1 June 2020, the Respondent filed its Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Respondent's Rejoinder**).

56. On 10 June 2020, while the Claimant's 29 April 2020 Application regarding document production remained under advisement, the Claimant filed a supplemental submission to add an additional argument in favour of a broader document production by the Respondent, which echoed the new argument put forward in the course of its counsel's reply at the hearing of 11 May 2020 (**Supplemental Submission**). In that supplemental submission, the Claimant argued that the Respondent had waived potentially applicable privilege with the filing of its Rejoinder Memorial where it allegedly put certain documents for which it claimed privilege "at issue" in this IRP.
57. By emails dated 11 June 2020 (corrected the following day), the Panel established a briefing schedule in relation to the Claimant's Supplemental Submission. In accordance with this schedule, the Respondent set out its position in relation to the Supplemental Submission in a response dated 17 June 2020 and a sur-reply dated 26 June 2020, inviting the Panel to find that the Respondent did not waive privilege and, therefore, that the relief sought by the Supplemental Submission should be denied. As for the Claimant, its position in relation to the Supplemental Submission was amplified in a reply dated 19 June 2020. The relief sought by the Claimant's Supplemental Submission as set out in the Claimant's 19 June 2020 reply is that the Panel order the Respondent to produce all documents that formed the basis of its Board's alleged determination, in November 2016, to defer any decision on the .WEB contention set, as well as all documents reflecting any determination by the Board to continue or terminate such deferral, including all such documents for which the Respondent claimed privilege, on the ground that the Respondent has waived any applicable privilege by putting such documents at issue.
58. The Claimant filed another application on 10 June 2020, this one regarding the status of the evidence originating from the *Amici* which had been filed with the Respondent's Rejoinder with the caveat that "ICANN did so without endorsing those statements or



agreeing with them in full”<sup>14</sup> (**10 June Application**). The Claimant argued that ICANN was not permitted, pursuant to Procedural Order No. 3, to submit materials from the *Amici* unless it considered them relevant and wished to adduce them in support of its case. By way of relief, the Claimant requested that the Respondent be directed to resubmit the evidence filed with its Rejoinder that originated from the *Amici*, with a clear indication of the portions thereof with which the Respondent did not agree or which it did not endorse. Should the Respondent fail to do so, the Claimant invited the Panel to hold that all of the evidence submitted by the Respondent should be taken to have been submitted by and on behalf of the Respondent. On 15 June 2020, the Respondent responded to the 10 June Application, arguing that the submission of evidence on behalf of the *Amici* with the Respondent’s Rejoinder complied with Procedural Order No. 3. The Claimant replied on 17 June 2020, contending that the Panel could not allow Respondent to hide the basis for its actions and non-actions by letting the *Amici* defend it in the abstract and without affirming that it agrees with the *Amici*’s evidence.

59. In Procedural Order No. 4 dated 12 June 2020 (**Procedural Order No. 4**), the Panel denied the Claimant’s 29 April 2020 Application while reserving the question raised in the Supplemental Submission. The Panel decided that the Respondent had no obligation to ask the *Amici* to search for documents responsive to the Claimant’s requests to produce, and consequently rejected the Claimant’s claim that the Respondent ought to have produced responsive documents in the possession of the *Amici*. In that same order, a majority of the Panel concluded, applying California law as supplemented by US federal law, that the description used by the Respondent in its privilege log was sufficient to validly assert privilege and, therefore, that the Claimant had failed to justify its request that the Respondent be required to revise its privilege log. One member of the Panel, however, would have required disclosure of more detailed information from the Respondent in order to support the latter’s claims of privilege. Finally, the Panel rejected the remaining allegations of the Claimant regarding the alleged insufficiency of the Respondent’s production. Specifically, the Panel held that it would violate the attorney-client privilege and work product protection to call upon the Respondent, as requested by the Claimant, to

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<sup>14</sup> Respondent’s Rejoinder, fn 6.

redact privileged communications or work product documents so as to reveal “facts or information” contained in those protected documents.

60. On 26 June 2020, NDC and Verisign respectively filed the *Amicus Curiae* Brief of Nu DotCo, LLC (**NDC’s Brief**) and Verisign, Inc.’s Pre-Hearing Brief (Phase II) (**Verisign’s Brief**). In accordance with the Revised Procedural Timetable, the Claimant and the Respondent both responded to the *Amici*’s briefs on 24 July 2020, respectively in Afilias Domains No. 3 Limited’s Response to the *Amicus Curiae* Briefs (**Afilias’ Response to the Amici’s Briefs**) and ICANN’s Response to the Briefs of *Amicus Curiae* (**ICANN’s Response to the Amici’s Briefs**).
61. On 14 July 2020, the Panel issued its fifth procedural order (**Procedural Order No. 5**). In relation to the 10 June Application, the Panel found that the Respondent had allowed its Rejoinder to serve as a vehicle for the filing of what the Respondent itself described as the “*Amici*’s evidence”, the “*Amici*’s expert reports and witness statements”. In the Panel’s view, the Respondent had thus sought to do indirectly what the Panel had decided in Phase I could not be done directly under the Interim Procedures. By way of relief, the Panel directed the Respondent to clearly identify, in a communication to be addressed to the Claimant and the *Amici* and filed with the Panel, those aspects (if any) of the *Amici*’s facts and expert evidence which the Respondent formally refused to endorse, or with which it disagrees, and to provide an explanation for this non-endorsement or disagreement.<sup>15</sup> The Respondent complied with the Panel’s direction by letters dated 17-18 July 2020.
62. The Panel considers it useful to cite the reasons supporting this ruling as they laid the foundations to the Panel’s approach to the issues in dispute in this IRP:

17. The Respondent has filed a Rejoinder seeking to draw a distinction between the Respondent’s evidence, filed without reservation in support of the Respondent’s primary case, and the “*Amici*’s evidence”, which the Respondent states it is filing “on behalf of the *Amici*” “to help ensure that the factual record in this IRP is complete”. However, the Respondent files this *Amici* evidence with the caveat that it is neither endorsing it, nor agreeing with it in full, as set out in the above quoted footnote 6 of the Rejoinder.

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<sup>15</sup> Procedural Order No. 5, para. 24.

18. In the Panel's view, the Respondent is thus seeking to do indirectly what the Panel decided in Phase I could not be done directly under the terms of the Interim Procedures. Instead of the *Amici* filing their own evidence with their Briefs, the Respondent has allowed the Rejoinder to serve as a vehicle for the filing of the "*Amici's* evidence", the "*Amici* expert reports and witness statements". This is indeed how the Respondent describes that evidence in its 15 June 2020 correspondence. The fact that the Rejoinder serves as a vehicle for the filing of what is, in effect, the *Amici's* evidence is consistent with the Respondent's proposal, in its submissions of 22 June 2020 relating to the modalities of the merits hearing (discussed below), that "the *Amici* be permitted to [...] introduced and conduct redirect examination of their own witnesses" (Respondent's letter of 22 June 2020, p. 2, para. 3 [emphasis added in PO5]).

19. The Respondent explains, in its 15 June response, that the purpose of the so-called "*Amici* evidence" is to address the Claimant's challenge of the *Amici's* conduct. The Respondent goes on to explain [emphasis added in PO5]:

Given that ICANN has not fully evaluated the competing contentions of Afilias and the *Amici*, for reasons ICANN explains at length in its Rejoinder, ICANN is not in a position to identify the portions of the *Amici* witness statements with which it "agrees or disagrees." But ICANN views it as essential that this evidence be of record, and that the Panel consider it, if the Panel decides to address the competing positions of Afilias and Amici regarding the latter's conduct.

20. The Panel understands the resulting procedural posture to be as follows. The Respondent has adduced evidence in support of its primary case that the ICANN Board, in the exercise of its fiduciary duties, made a decision that is both consistent with ICANN's Articles and Bylaws and within the realm of reasonable business judgment when, in November 2016, it decided not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending. That, according to the Respondent, should define the proper scope of the present IRP.

21. However, recognizing that the Claimant's case against the Respondent includes allegations concerning the *Amici's* conduct (specifically, NDC's alleged non-compliance with the Guidebook and Auction Rules), the Respondent files the "*Amici* evidence" on the ground that the record should include not only Afilias' allegations against Verisign and NDC, "but also Verisign's and NDC's responses." The difficulty is that this evidence is propounded not as the Respondent's defense to Afilias' claims against it, but rather (on the ground that the Respondent has not fully evaluated the competing contentions of Afilias and the *Amici*) as the *Amici's* response to Afilias' allegations that NDC violated the Guidebook and Auction Rules.

22. The Panel recalls that this IRP is an ICANN Accountability Mechanism, the parties to which are the Claimant and the Respondent. As such, it is not the proper forum for the resolution of potential disputes between Afilias and two non-parties that are participating in these proceedings as *amici curiae*. While it is open to the Respondent to choose how to respond to the Claimant's allegations concerning NDC's conduct, and to evaluate the consequences of its choice in this IRP, the Panel is of the view that the Respondent may not at the same time as it elects not to provide a direct response, adduce responsive evidence on that issue on behalf of the *Amici* and, in relation to that evidence, reserve its position as to which portions thereof the Respondent endorses or agrees with. In the opinion of the Panel, this leaves the Claimant uncertain as to the case it has to meet, which the Panel considers unfair, and it has the potential to disrupt the proceedings if the Respondent were later to take a position, for example in its post-hearing brief, which the Claimant would not have had the opportunity to address prior to, or at the merits hearing.

23. The Panel has taken due note of the Respondent's evidence and associated contentions concerning its Board's decision of November 2016. Nevertheless, the Guidebook and Auction Rules originate from ICANN. That being so, in this ICANN Accountability Mechanism in which the Respondent's conduct in relation to the application of the Guidebook and Auction Rules is being impugned, the Respondent should be able to say whether or not the position being defended by the *Amici* in relation to these ICANN instruments is one that ICANN is prepared to endorse and, if not, to state the reasons why.

63. In Procedural Order No. 5, the Panel also ruled on the Claimant's Supplemental Submission by rejecting the Claimant's contention that the Respondent's Rejoinder had itself put in issue in the IRP documents over which the Respondent had claimed privilege, and that the Respondent had thus waived attorney-client privilege. Having quoted the leading case on implied waiver of attorney-client privilege under California law,<sup>16</sup> the Panel wrote:

37. In the Panel's opinion, the Supreme Court's reasoning directly applies, and defeats the Claimant's claim of implied waiver. While the Respondent has disclosed the fact that its Board received legal advice before deciding to defer acting upon Afilias' complaints, the Respondent did not disclose the content of counsel's advice. Nor is the Respondent asserting that the Board's decision was consistent with counsel's advice, or that the Board's decision was reasonable because it followed counsel's advice. Disclosure of the *fact* that the Board solicited and received legal advice does not entail waiver of privilege as to the *content* of that advice. If that were so, the Respondent's compliance with the Panel's directions concerning the contents of the privilege log to be filed in support of its claims of privilege would, in of itself, waive the privilege that the privilege log serves to protect.

[emphasis in the original]

64. On 26 July 2020, the *Amici* filed a request for "urgent clarification from the Panel regarding the status of the evidence from *Amici* that ICANN has not endorsed in response to Procedural Order No. 5". The *Amici* stressed that, while ICANN endorsed almost all of the statements of the *Amici*'s expert witnesses, ICANN declined to endorse almost all of the *Amici*'s fact witnesses. In its order dated 27 July 2020 (**Procedural Order No. 6**), the Panel ruled that, notwithstanding ICANN's decision not to endorse them, the witness statements of Messrs. Paul Livesay and Jose I. Rasco III remained part of the record of this IRP, and that the Panel would consider the evidence of these witnesses, as well as the rest of the evidence filed in the IRP.
65. On 29 July 2020, the Panel held a telephonic pre-hearing conference, which was attended

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<sup>16</sup> *Southern Cal. Gas Co. v. Public Utilities Com.*, 50 Cal. 3d 31 (1990).

by the Parties and *Amici*, to discuss various points of order in advance of the merits hearing.

66. The evidentiary hearing in relation to the merits of the IRP was held from 3 to 11 August 2020 inclusive. Because of the ongoing COVID-19 pandemic and the associated air travel restrictions, the hearing was conducted remotely using a videoconference platform selected by the Parties. Since the participants were located in multiple time zones, hearing days had to be shortened. To compensate, three (3) additional days to the five (5) days initially scheduled for the hearing were held in reserve. In the end, fewer witnesses than had been anticipated were heard and the hearing was completed in seven (7) days. A transcript of the hearing was prepared by Ms. Balinda Dunlap.
67. The Claimant had filed with its original Request for IRP witness statements from three (3) fact witnesses, Messrs. John L. Kane, Cedarampattu “Ram” Mohan and Jonathan M. Robinson, as well as one expert report by Mr. Jonathan Zittrain. Upon the filing of its Amended Request for IRP, on 21 March 2019, the Claimant filed one expert report, by Dr. George Sadowsky, and withdrew the witness statements of its three (3) fact witnesses “[i]n light of ICANN’s disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC”.<sup>17</sup>
68. For its part, the Respondents filed, on its own behalf, witness statements from five (5) fact witnesses, Ms. J. Beckwith Burr, Mr. Todd Strubbe, Ms. Christine A. Willett, Mr. Christopher Disspain and Ms. Samantha S. Eisner, and one (1) expert report by Dr. Dennis W. Carlton. In addition, the Respondent filed, on behalf of the *Amici*, witness statements from three (3) fact witnesses, Mr. Rasco, of NDC, and Messrs. David McAuley and Paul Livesay, of Verisign, and two (2) expert reports, one (1) by the Hon. John Kneuer, the other by Dr. Kevin M. Murphy. In its letter of 18 July 2020, the Respondent withdrew the witness statement of Mr. Strubbe, a Verisign employee whose evidence had been offered in support of the Respondent’s opposition to the Request for Emergency Interim Relief sought by the Claimant at the outset of the proceedings. The Respondent explained that Mr. Strubbe’s evidence related to the question of whether Verisign would be irreparably injured by a delay in the delegation of .WEB, an issue that had become moot

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<sup>17</sup> See Amended Request for IRP, fn 14, at p. ii.

by the time of the hearing.

69. The seven (7) fact witnesses whose witness statements remained in evidence, as well as the three (3) expert witnesses appointed by the Parties, were all initially called to appear at the hearing for questioning.<sup>18</sup> In the course of the hearing, the Claimant informed the Panel of its decision not to cross-examine the Respondent's expert witness, which prompted the Respondent to decide not to cross-examine the Claimant's experts.
70. The evidentiary hearing was thus devoted to hearing the Parties' and *Amici*'s opening statements, and to the questioning of the remaining seven (7) fact witnesses called by the Respondent, on its behalf or on behalf of the *Amici*, namely Ms. Burr, Ms. Willett, Mr. Disspain, Ms. Eisner, Mr. McAuley, Mr. Rasco and Mr. Livesay.
71. At the end of the hearing, it was decided that the Parties and *Amici* would be permitted to file post-hearing briefs on 8 October 2020. The Panel indicated, referring back to a question that had been discussed at the pre-hearing conference, that it would inform the Parties and *Amici* of a date – to be held in reserve – on which the Panel would make itself available to hear oral closing submissions from the Parties and *Amici* should the Panel feel the need to do so after perusing the post-hearing submissions. The date was later set to 20 November 2020.
72. On 23 August 2020, the Panel forwarded to the Parties and *Amici* a list of questions that the Panel invited them to address in their respective post-hearing submissions.
73. Pursuant to a short extension of time granted by the Panel on 6 October 2020, on 12 October 2020, the Parties filed their post-hearing briefs (respectively, **Claimant's PHB** and **Respondent's PHB**), submissions on costs, and updated lists of Phase II issues, along with a factual chronology agreed to by both of them.
74. Also on 12 October 2020, the *Amici* filed a joint post-hearing brief (***Amici's PHB***). In their cover email, as well as in footnote 2 to their PHB, the *Amici* noted that the Parties had not consulted with them in the preparation of their respective issues lists, nor in the preparation

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<sup>18</sup> The Claimant did not request the presence of the *Amici*'s expert witnesses at the hearing.

of their joint chronology. The *Amici* therefore objected to the Parties' Phase II issues lists "to the extent that they omit or misrepresent the issues before this Panel", and they objected also to the Parties' joint chronology, which they asserted was incomplete.

75. On 16 October 2020, the Panel noted the *Amici*'s conditional objection to the Parties' respective issues lists. As regards the Parties' joint chronology, the *Amici* were given until 23 October 2020 to file, after consultations with the Parties, an amended version of the joint chronology with marked-up additions showing the items that they consider should be added to the joint chronology for it to be complete.
76. Also on 16 October 2020, the Claimant sought leave to respond to a number of "new non-record documents" cited in the *Amici*'s PHB. Having considered the Respondent's and *Amici*'s comments on this request, on 22 October 2020 the Panel granted the Claimant's request and a response to the impugned non-record documents was filed by the Claimant on 26 October 2020.
77. On 23 October 2020, the Parties filed their respective replies to the cost submissions of the other party (respectively, **Claimant's Reply Submission on Costs** and **Respondent's Response Submission on Costs**). On that date, the Claimant also provided the Panel with a joint chronology which had been agreed by the Parties and the *Amici* pursuant to the Panel's communication dated 16 October 2020 (**Joint Chronology**). The 23 October 2020 Joint Chronology is the chronology referred to in this Final Decision, and it is the one that the Panel has used in its deliberations
78. On 3 November 2020, having had the opportunity carefully to review the Parties' and *Amici*'s comprehensive post-hearing submissions, the Panel informed them of its decision not to avail itself of the possibility to hear additional oral closing submissions. The date reserved for that purpose was therefore released.
79. In a series of letters beginning with counsel for Verisign's letter of 9 December 2020, sent on behalf of both *Amici*, the Panel was informed of an impending, and later consummated merger of the Claimant's parent company, Afilias, Inc., and its competitor Donuts, Inc. This was described by Verisign as "new facts arising subsequent to the merits hearing, as

well as related newly discovered evidence, that contradict critical representations made by Afiliás Domains No. 3 Limited (“Afiliás”) in the pre-hearing pleadings and at the merits hearing [...]”. The *Amici* requested that the Panel consider these new developments in resolving the Claimant’s claims in this IRP. The submissions of the Parties and *Amici* concerning these post-hearing developments are summarized in the next section of this Final Decision.

80. On 7 April 2021, the Panel, being satisfied that the record of the IRP was complete and that the Parties and *Amici* had no further submissions to make in relation to the issues in dispute, formally declared the arbitral hearing closed in accordance with Article 27 of the ICDR Rules.
81. The Panel concludes this history of the proceedings by expressing its gratitude to Counsel for the Parties and *Amici* for their assistance in the resolution of this dispute and the exemplary professional courtesy each and everyone of them displayed throughout these proceedings.

### **III. FACTUAL BACKGROUND**

82. The essential facts of this case have been conveniently laid out in the Joint Chronology dated 23 October 2020 agreed to by the Parties and *Amici*. In order to provide some background for the Panel’s analysis below, the most salient facts of this case are summarized in this section.
83. The deadline for the submission of applications for new gTLDs under the Respondent’s New gTLD Program was 30 May 2012. As mentioned in the overview, the Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB gTLD pursuant to the rules and procedures set out in the Respondent’s Guidebook and the Auction Rules for New gTLDs.
84. Because there were multiple applicants for .WEB, the applicants were placed in a “contention set” for resolution either privately or through an auction of last resort administered by the Respondent.
85. Towards the end of 2014, at a time when the .WEB contention set was still on hold, and



had thus not been resolved, Redacted - Third Party Designated Confidential Information

.<sup>19</sup> Apart from filing applications for new gTLDs that were variants of the company's name, for example “.Verisign”, or internationalized versions of Verisign's existing TLDs, Verisign had not otherwise sought to acquire rights to new gTLDs as part of ICANN's New gTLD Program. Redacted - Third Party Designated Confidential Information

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86. Verisign identified .WEB as one business opportunity in the New gTLD Program. Redacted - Third Party Designated Confidential Information

. In May 2015, Mr. Livesay contacted Mr. Rasco, NDC's CFO and manager, and expressed interest in working with NDC to acquire the rights to .WEB.<sup>21</sup>

87. On 25 August 2015, Verisign and NDC executed the DAA under which Verisign undertook to provide, Redacted - Third Party Designated Confidential Information, funds for NDC's bid for the .WEB gTLD while NDC undertook, if it prevailed at the auction and entered into a registry agreement with ICANN, to transfer and assign its .WEB registry agreement to Verisign upon receipt of ICANN's actual or deemed consent to the assignment.

88. On 27 April 2016, ICANN scheduled the .WEB auction of last resort for 27 July 2016.

89. Early in June 2016, it became known among members of the .WEB contention set that NDC did not intend to participate in a private auction in order to privately resolve the contention set. It is common ground that the Respondent, as a rule, favours the private resolution of contention sets. On 7 June 2016, in answer to a request to postpone the

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<sup>19</sup> Merits hearing transcript, 11 August 2020, pp. 1125:17-1126:15 (Mr. Livesay).

<sup>20</sup> Mr. Livesay's witness statement, 1 June 2020, para. 4.

<sup>21</sup> Merits hearing transcript, 7 August 2020, p. 806:12-18 (Mr. Rasco).

ICANN auction in order for members of the contention set to “try to work this out cooperatively”, Mr. Rasco stated in an email: “I went back to check with the powers that be and there was no change in the response and will not be seeking an extension.”<sup>22</sup> The email in question was addressed to Mr. Jon Nevett, of Ruby Glen, LLC (**Ruby Glen**).

90. On 23 June 2016, Ruby Glen informed ICANN that it believed NDC “failed to properly update its application” to account for “changes to the Board of Directors and potential control of [NDC]”.<sup>23</sup> On 27 June 2016, ICANN asked NDC to “confirm that there have not been changes to [its] application or [to its] organization that need to be reported to ICANN.” On the same day, NDC confirmed that “there have been no changes to [its] organization that would need to be reported to ICANN.”<sup>24</sup>
91. On 29 June 2016, Ms. Willett, then Vice-President of ICANN’s gTLD Operations, informed Ruby Glen that her team had investigated and that NDC had confirmed that there had been no changes to NDC’s ownership or control. As a result, she advised that “ICANN was continuing to proceed with the Auction as scheduled.”<sup>25</sup>
92. On 30 June 2016, Ruby Glen formally raised its concern about a possible change in control of NDC with ICANN’s ombudsman (**Ombudsman**). On 12 July 2016, the Ombudsman informed Ms. Willett that he had “not seen any evidence which would satisfy [him] that there ha[d] been a material change to the application. So [his] tentative recommendation [was] that there was nothing which would justify a postponement of the auction based on unfairness to the other applicants.”<sup>26</sup> The following day, Ms. Willett informed the .WEB contention set accordingly.
93. On 17 July 2016, two other .WEB applicants, Donuts and Radix FZC (**Radix**), filed an emergency Reconsideration Request, alleging that ICANN had failed to perform a “full

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<sup>22</sup> Mr. Rasco’s email dated 7 June 2016, Ex. C-35.

<sup>23</sup> Ms. Willett’s witness statement, 31 May 2019, Ex. A.

<sup>24</sup> Exchanges between Messrs. Rasco and Jared Erwin, Ex. C-96.

<sup>25</sup> Declaration of Ms. Willett in support of ICANN’s opposition to Plaintiff’s *ex parte* application for temporary restraining order, Ex. C-40, paras. 15-16.

<sup>26</sup> Ms. Willett’s witness statement, 31 May 2019, Ex. G.

and transparent investigation into the material representations made by NDC” and contesting ICANN’s decision to proceed with the ICANN auction.<sup>27</sup> Reconsideration is an ICANN accountability mechanism allowing any person or entity materially affected by an action or inaction of the Board or Staff to request reconsideration of that action or inaction.<sup>28</sup> Donuts’ and Radix’s Reconsideration Request was denied on 21 July 2016.<sup>29</sup>

94. On 22 July 2016, Ruby Glen filed a complaint against ICANN in the US District Court of the Central District of California, and an application for a temporary restraining order seeking to halt the .WEB auction (**Ruby Glen Litigation**). On 26 July 2016, the application for a temporary restraining order was denied.<sup>30</sup>
95. In the meantime, on 20 July 2016, the blackout period associated with the ICANN auction had begun. The blackout period extends from the deposit deadline, in this case 20 July 2016, until full payment has been received from the prevailing bidder (**Blackout Period**). During the Blackout Period, members of a contention set, including the .WEB contention set, “are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.”
96. On 22 July 2016, Mr. Kane, a representative of Afilias, wrote a text message to Mr. Rasco asking whether NDC would consider a private auction if ICANN were to delay the scheduled auction.<sup>31</sup> Mr. Rasco did not respond to this query, as he testified he considered

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<sup>27</sup> Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, p. 2.

<sup>28</sup> See Bylaws, Ex. C-1, Article 4, Section 4.2.

<sup>29</sup> Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, pp. 11-12.

<sup>30</sup> *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Order on *Ex Parte* Application for Temporary Order (26 July 2016), Ex. R-9.

<sup>31</sup> See the exchange of text messages between Messrs. Kane and Rasco, Attachment E to Arnold & Porter’s letter to Mr. Enson dated 23 August 2016, Ex. R-18, p. 73.

it an attempt to engage in a prohibited discussion during the Blackout Period.<sup>32</sup>

97. Redacted - Third Party Designated Confidential Information

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98. On 27 and 28 July 2016, ICANN conducted the auction of last resort among the seven (7) applicants for the .WEB gTLD. As already mentioned, NDC won the auction while the Claimant was the second-highest bidder.

99. On 28 July 2016, Verisign filed a form with the U.S. Security and Exchange Commission stating that “[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third party consent.”<sup>34</sup>

100. On 31 July 2016, Mr. Rasco informed Ms. Willett that Redacted - Designated Confidential Information

.”<sup>35</sup> On 1 August 2016, Verisign issued a press release stating that it had “entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co’s bid for the .web TLD.”<sup>36</sup>

101. The following day, 2 August 2016, Donuts invoked the CEP with ICANN in regard to

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<sup>32</sup> Mr. Rasco’s witness statement, 10 December 2018, para. 17.

<sup>33</sup> Mr. Livesay’s witness statement, 1 June 2020, para. 27, and Ex. H attached thereto.

<sup>34</sup> Verisign’s Form 10-Q, Quarterly Report, Ex. C-45, p. 13.

<sup>35</sup> Ms. Willett’s email dated 31 July 2016, Ex. C-100, [PDF] pp. 1-2.

<sup>36</sup> Verisign statement regarding .WEB auction results, Ex. C-46.

.WEB (**Donuts CEP**).<sup>37</sup> The CEP is a non-binding process in which parties are encouraged to participate to attempt to resolve or narrow a dispute.<sup>38</sup> While the CEP is voluntary, the Bylaws create an incentive for parties to participate in this process by providing that failure of a Claimant to participate in good faith in a CEP exposes that party, in the event ICANN is the prevailing party in an IRP, to an award condemning it to pay all of ICANN's reasonable fees – including legal fees – and costs incurred by ICANN in the IRP.

102. On 8 August 2016, Ruby Glen filed an Amended Complaint against ICANN in the Ruby Glen Litigation. Also on 8 August 2016, Afiliis sent to Mr. Atallah a letter raising concerns about Verisign's involvement with NDC and in the ICANN auction, and, on the same day, submitted a complaint with the Ombudsman.
103. On 19 August 2016, ICANN informed the .WEB applicants that the .WEB contention set had been placed "on-hold" to reflect the pending accountability mechanism initiated by Donuts.
104. Redacted - Third Party Designated Confidential Information

105. On 9 September 2016, Afiliis sent ICANN a second letter regarding Afiliis' concerns about Verisign's involvement with NDC's application for .WEB, stating that "ICANN's Board and officers are obligated under the Articles, Bylaws and the Guidebook (as well as

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<sup>37</sup> Cooperative Engagement and Independent Review Processes Status Update, 8 August 2016, Ex. C-108, [PDF] p. 1.

<sup>38</sup> Bylaws, Ex. C-1, Article 4, Section 4.3 (e).

<sup>39</sup> Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. R-18, [PDF] pp. 1-8.

<sup>40</sup> See Respondent's Rejoinder, para. 35 and Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:9-15.

international law and California law) to disqualify NDC's bid immediately and proceed with contracting of a registry agreement with Afilias, the second highest bidder", and asking ICANN to respond by no later than 16 September 2016.<sup>41</sup>

106. On 16 September 2016, Ms. Willett sent Afilias, Ruby Glen, NDC and Verisign a detailed Questionnaire and invited them to provide information and comments on the allegations raised by Afilias and Ruby Glen.<sup>42</sup> The Respondent avers that the purpose of the Questionnaire "was to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen".<sup>43</sup> It is common ground that at the time, while ICANN, NDC and Verisign had knowledge of the provisions of the Domain Acquisition Agreement, of which each of them had a copy, Afilias and Ruby Glen did not. Responses to the Questionnaire were provided to ICANN on 7 October 2016 by Afilias<sup>44</sup> and Verisign<sup>45</sup>, and on 10 October 2016 by NDC.<sup>46</sup>
107. On 19 September 2016, the Ombudsman informed Afilias that he was declining to investigate Afilias' complaint regarding the .WEB auction because Ruby Glen had initiated both a CEP and litigation in respect of the same issue.<sup>47</sup>
108. On 30 September 2016, ICANN acknowledged receipt of Afilias' letters of 8 August 2016 and 9 September 2016, noted that ICANN had placed the .WEB contention set on hold "to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set", and added that Afilias would "be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms." ICANN further stated that it would "continue to take Afilias' comments,

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<sup>41</sup> Afilias' Letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

<sup>42</sup> ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

<sup>43</sup> Respondent's Rejoinder, para. 46.

<sup>44</sup> Afilias' letter to Ms. Willett dated 7 October 2016, Ex. C-51.

<sup>45</sup> Arnold & Porter's letter to Ms. Willett dated 7 October 2016, Ex. C-109.

<sup>46</sup> Mr. Rasco's email to ICANN dated 10 October 2016, Ex. C-110.

<sup>47</sup> Mr. Herb Waye's email to Mr. Hemphill dated 19 September 2016, Ex. C-101.

and other inputs that we have sought, into consideration as we consider this matter.”<sup>48</sup>

109. On 3 November 2016, the Board of ICANN held a Board workshop during which a briefing was presented by in-house counsel regarding the .WEB contention set (**November 2016 Workshop**).<sup>49</sup> A memorandum prepared by ICANN’s outside counsel and containing legal advice in anticipation of litigation regarding the .WEB contention set had been sent to “non-conflicted” ICANN Board members on 2 November 2016, in advance of the workshop.<sup>50</sup> As will be seen in the following section of this Final Decision, the November 2016 Workshop is of particular importance in this case. Suffice it to say for present purposes that, at least according to ICANN, during this workshop the Board “specifically [chose...] not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending”.<sup>51</sup> That decision of the ICANN Board was not communicated to Afilias at the time. Indeed, it was first made public and disclosed to Afilias 3 ½ years later, upon the filing of the Respondent’s Rejoinder in this IRP, filed on 1 June 2020.<sup>52</sup>
110. On 28 November 2016, the US District Court of the Central District of California dismissed Ruby Glen’s claims against ICANN in the Ruby Glen Litigation on the basis that “the covenant not to sue [in Module 6 of the Guidebook] bars Plaintiff’s entire action.”<sup>53</sup>
111. On 18 January 2017, the Department of Justice (**DOJ**) issued a civil investigative demand to Verisign, ICANN, and others regarding Verisign’s “proposed acquisition of [NDC’s] contractual rights to the .web generic top-level domain.”<sup>54</sup> The DOJ requested that ICANN take no action on .WEB during the pendency of the investigation. Between February

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<sup>48</sup> ICANN’s letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

<sup>49</sup> Joint Fact Chronology, and ICANN’s Privilege Log of 24 April 2020, pp. 29-30.

<sup>50</sup> Respondent’s Rejoinder, para. 40.

<sup>51</sup> *Ibid*, para. 3.

<sup>52</sup> There are multiple references to the November 2016 Workshop in the Respondent’s privilege log of 24 April 2020, but not to any decision made in respect of .WEB.

<sup>53</sup> *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), 28 November 2016, Ex. C-106.

<sup>54</sup> DOJ Civil Investigative Demand to Thomas Indelicarto of Verisign dated 18 January 2017, Ex. AC-31.

and June 2017, ICANN made several document productions and provided information to DOJ, Redacted - Third Party Designated Confidential Information

.<sup>55</sup> On 9 January 2018, a year after the issuance of the DOJ's investigative demand, the DOJ closed its investigation of .WEB without taking any action.

112. On 30 January 2018, the Donuts CEP closed, and ICANN gave Ruby Glen (the entity through which Donuts, Inc. had submitted an application for .WEB) until 14 February 2018 to file an IRP. Ruby Glen did not file an IRP in respect of .WEB.
113. On 15 February 2018, Mr. Rasco requested via email that ICANN move forward with the execution of a .WEB registry agreement with NDC in light of the termination of the DOJ investigation and the absence of any pending accountability mechanisms.<sup>56</sup>
114. On 23 February 2018, counsel for Afilias submitted a Documentary Information Disclosure Policy (**DIDP**) request to ICANN (**Afilias' First DIDP Request**) and asked for an update on ICANN's investigation of the .WEB contention set.<sup>57</sup> ICANN responded to Afilias' First DIDP Request on 24 March 2018.
115. On 28 February 2018, counsel for NDC sent a formal letter to ICANN requesting that it move forward with the execution of a registry agreement for .WEB with NDC.<sup>58</sup>
116. On 16 April 2018, counsel for Afilias wrote to the ICANN Board requesting an update on the status of the .WEB contention set, an update on the status of ICANN's investigation, and prior notification of any action by the Board related to .WEB, adding that Afilias "intend[ed] to initiate a CEP and a subsequent IRP against ICANN, if ICANN proceeds toward delegation of .WEB to NDC."<sup>59</sup>

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<sup>55</sup> Respondent's Rejoinder, para. 49.

<sup>56</sup> Mr. Rasco's email to ICANN dated 15 February 2018, Ex. C-182.

<sup>57</sup> Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

<sup>58</sup> Irell & Manella's letter to Messrs. Jeffrey and Atallah dated 28 February 2018, Ex. R-20.

<sup>59</sup> Dechert's letter to the Board dated 16 April 2018, Ex. C-113.



117. On 23 April 2018, counsel for Afilias wrote to the ICANN Board to object to the non-disclosure of the documents requested in the First DIDP Request by reason of their confidentiality, and to offer to limit their disclosure to outside counsel.<sup>60</sup> This request was treated as a new DIDP request (**Second DIDP Request**)<sup>61</sup>. On the same date, counsel for Afilias submitted a reconsideration request challenging ICANN’s response to Afilias’ First DIDP Request (**Reconsideration Request 18-7**).<sup>62</sup>
118. On 28 April 2018, ICANN’s outside counsel wrote to counsel for Afilias, confirming that the .WEB contention set was on-hold but declining to undertake to send Afilias prior notice of a change to its status on the ground that doing so “would constitute preferential treatment and would contradict Article 2, Section 2.3 of the ICANN Bylaws.”<sup>63</sup> Afilias responded to that letter on 1 May 2018, reiterating the arguments it had previously made.<sup>64</sup>
119. On 23 May 2018, ICANN responded to Afilias’ Second DIDP Request, and on 5 June 2018, Afilias’ Reconsideration Request 18-7 was denied.
120. On 6 June 2018, ICANN took the .WEB contention set off-hold and notified the .WEB applicants by emailing the contacts identified in the applications.<sup>65</sup> In the following days, the normal process leading to the execution of a registry agreement was put in motion within ICANN in relation to the .WEB registry.
121. On 12 June 2018, Ms. Willett and other Staff approved the draft Registry Agreement for .WEB and its transmittal to NDC. On 14 June 2018, ICANN sent the draft .WEB Registry Agreement to NDC, which NDC promptly signed and returned to ICANN. On the same day, Ms. Willett and other Staff approved executing the .WEB Registry Agreement on

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<sup>60</sup> Dechert’s letter to the Board dated 23 April 2018, Ex. C-79.

<sup>61</sup> See Determination of the Board Accountability Mechanisms Committee (BAMC) Reconsideration Request 18-7 dated 5 June 2018, Ex. R-32, p. 5.

<sup>62</sup> Afilias Domain No. 3 Limited Reconsideration Request, Ex. R-31 or VRSN-26.

<sup>63</sup> Jones Day’s letter to Mr. Ali dated 28 April 2018, Ex. C-80.

<sup>64</sup> Dechert’s letter to Mr. LeVee dated 1 May 2018, Ex. C-114.

<sup>65</sup> Exchange of emails between ICANN Staff dated 6 June 2018, Ex. C-166; and Mr. Erwin’s email to Ms. Willett and Mr. Christopher Bare dated 6 June 2018, Ex. C-167.

ICANN's behalf.<sup>66</sup>

122. On 18 June 2018, prior to ICANN's execution of the .WEB Registry Agreement, Afilias invoked a CEP with ICANN regarding the .WEB gTLD.<sup>67</sup> Two days later, ICANN placed the .WEB contention set back on hold to reflect Afilias' invocation of a CEP. As a result, the extant .WEB Registry Agreement was voided.<sup>68</sup>
123. On 22 June 2018, Afilias filed a second reconsideration request (**Reconsideration Request 18-8**), seeking reconsideration of ICANN's response to Afilias' 23 April 2018 DIDP Request. On 6 November 2018, the Board, on the recommendation of the Board Accountability Mechanisms Committee, denied that request.<sup>69</sup>
124. A week later, on 13 November 2018, ICANN wrote to counsel for Afilias to confirm that the CEP for this matter was closed as of that date and to advise that ICANN would grant Afilias an extension of time to 27 November 2018 (fourteen (14) days following the close of the CEP) to file an IRP regarding the matters raised in the CEP, if Afilias chooses to do so. As already noted, Afilias filed its Request for IRP on the following day, 14 November 2018.

#### **IV. SUMMARY OF SUBMISSIONS AND RELIEF SOUGHT**

125. The submissions made in relation to Phase II are voluminous. The Panel summarizes these submissions below. Where appropriate, the Panel refers in the analysis section of this Final Decision to those parts of the submissions and evidence found by the Panel to be most pertinent to its analysis. In reaching its conclusions, however, the Panel has considered all of the Parties' submissions and evidence.
126. The submissions made and the relief initially sought in relation to the Claimant's Rule 7 Claim are set out in detail in the Panel's Decision on Phase I. The position adopted by the Claimant in relation to its Rule 7 Claim in Phase II is discussed below, in section V.E. of

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<sup>66</sup> Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

<sup>67</sup> Dechert's letter to ICANN dated 18 June 2018, Ex. C-52.

<sup>68</sup> Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

<sup>69</sup> ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board, 6 November 2018, Ex. C-7, pp. 1-10.

this Final Decision.

**A. Claimant's Amended Request for IRP**

127. In its Amended Request for IRP dated 21 March 2019, the Claimant claims that the Respondent has breached its Articles and Bylaws as a result of the Board's and Staff's failure to enforce the rules for, and underlying policies of, ICANN's New gTLD Program, including the rules, procedures, and policies set out in the Guidebook and Auction Rules.<sup>70</sup>
128. The Claimant avers that NDC ought to have disclosed the Domain Acquisition Agreement to ICANN and modified its .WEB application to reflect that it had entered into the DAA with Verisign, or to account for the implications of the agreement's terms for its application. The Claimant submits that while it is evident that NDC violated the New gTLD Program Rules, the Respondent has failed to disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB auction.
129. The Claimant contends that the Respondent has breached its obligation, under its Bylaws, to make decisions by applying its documented policies "neutrally, objectively, and fairly," in addition to breaching its obligations under international law and California law to act in good faith. The Claimant also submits that the Respondent, by these breaches, has failed to respect one of the pillars of the New gTLD Program and one of ICANN's founding principles: to introduce and promote competition in the Internet namespace in order to break Verisign's monopoly.<sup>71</sup>
130. More specifically, the Claimant contends that NDC violated the Guidebook's prohibition against the resale, transfer, or assignment of its application, as NDC transferred to Verisign crucial application rights, including the right to reach a settlement or participate in a private auction. The Claimant also asserts that NDC's bids at the .WEB auction were invalid because they were made on Verisign's behalf, reflecting what the latter was willing to pay and implying no financial risk for NDC.

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<sup>70</sup> Amended Request for IRP, para. 2.

<sup>71</sup> *Ibid*, para. 5.

131. By way of relief, the Claimant requested the Panel to issue a binding declaration:
- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
  - (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
  - (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
  - (4) specifying the bid price to be paid by Afilias;
  - (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by Verisign and/or NDC;
  - (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
  - (7) granting such other relief as the Panel may consider appropriate in the circumstances.<sup>72</sup>

## **B. Respondent's Response**

132. In its Response dated 31 May 2019, the Respondent argues that it complied with its Articles, Bylaws, and policies in overseeing the .WEB contention set disputes and resulting accountability mechanisms.

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<sup>72</sup> Amended Request for IRP, para. 89.

133. The Respondent contends that it thoroughly investigated claims made prior to the .WEB auction about NDC’s alleged change of control, and notes that it was not alleged at the time that NDC had an agreement with Verisign regarding .WEB. Accordingly, what the Respondent investigated was an alleged change in ownership, management or control of NDC, which it found had not occurred.
134. With regard to alleged Guidebook violations resulting from the Domain Acquisition Agreement with Verisign, the Respondent notes that due to the pendency of the DOJ investigation and various accountability mechanisms – including this IRP – its Board has not yet had an opportunity to fully evaluate the Guidebook violations alleged by the Claimant, adding that those are hotly contested and would not in any event call for automatic disqualification of NDC.<sup>73</sup>
135. The Respondent explains that, with the exception of approximately two weeks in June 2018, after Afiliias’ DIDP-related Reconsideration Requests were resolved and before Afiliias initiated its CEP, the .WEB contention set has been on hold from August 2016 through today. The Respondent observes that during the entire period from July 2016 through June 2018, the Claimant took no action that could have placed the .WEB issues before the Board, although it could have.<sup>74</sup>
136. The Respondent adds that the Guidebook breaches alleged by the Claimant “are the subject of good faith dispute by NDC and VeriSign”. The Respondent also avers that while the Claimant’s IRP “is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and VeriSign to which NDC and VeriSign have responses”.<sup>75</sup> The Respondent argues, speaking of its Board, that deferring consideration of the alleged violations of the Guidebook until this Panel renders its final decision is within the realm of reasonable business judgment.<sup>76</sup>

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<sup>73</sup> Respondent’s Response, para. 61.

<sup>74</sup> *Ibid*, para. 62. As noted above, the Claimant’s second Reconsideration Request was lodged on 22 June 2018, and therefore after the Respondent placed the .WEB contention set back on hold following the Claimant’s commencement of a CEP.

<sup>75</sup> Respondent’s Response, para. 63.

<sup>76</sup> *Ibid*, para. 66.

137. The Respondent underscores that the Guidebook does not require ICANN to deny an application where an applicant failed to inform ICANN that previously submitted information has become untrue or misleading. Rather, according to ICANN, the Guidebook gives it discretion to determine whether the changed circumstances are material and what consequences, if any, should follow. By disqualifying NDC, this Panel would, in ICANN's submission, usurp the Board's discretion and exceed the Panel's jurisdiction.
138. As for the Claimant's allegation that the Domain Acquisition Agreement between NDC and Verisign is anticompetitive, the Respondent notes that this is denied by Verisign and contradicted by the DOJ's decision not to take action following its investigation into the matter. The Respondent also denies Afiliás' assertion that the sole purpose of the New gTLD Program was to create competition for Verisign. The Respondent also contends, relying on the evidence of its expert economist, Dr. Carlton, that there is no evidence that .WEB will be a unique competitive check on .COM, nor that the Claimant would promote .WEB more aggressively than Verisign.
139. As regards the applicable standard of review, the Respondent submits that an IRP panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN's Articles, Bylaws, and internal policies and procedures. However, with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, the Respondent submits that an IRP Panel is not empowered to substitute its judgment for that of ICANN. Rather, its core task is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.<sup>77</sup>
140. The Respondent contends that all of Afiliás' claims are time-barred under both the Bylaws in force in 2016 and the current Interim Procedures. The Bylaws in force in 2016 provided that an IRP had to be filed within thirty (30) days of the posting of the Board minutes relating to the challenged ICANN decision or action. The Interim Procedures now provide that an IRP must be filed within 120 days after a claimant becomes aware "of the material effect of the action or inaction" giving rise to the dispute, provided that an IRP may not be filed more than twelve (12) months from the date of such action or inaction.

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<sup>77</sup> Respondent's Response, para. 55.

The Respondent contends that Afiliás' claims regarding alleged deficiencies in ICANN's pre-auction investigation accrued on 12 September 2016, when it posted minutes regarding the Board's denial of Ruby Glen's Reconsideration Request challenging that investigation. The Respondent takes the position that the facts and claims supporting the Claimant's allegations of Guidebook and Auction Rules violations were set forth in Afiliás' letters dated August and September 2016, and were therefore known to the Claimant at that time.<sup>78</sup>

141. As for the Claimant's requested relief, the Respondent contends that it goes far beyond what is permitted by the Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the Board.

### **C. Claimant's Reply**

142. In its Reply dated 4 May 2020 (revised on 6 May 2020), the Claimant rejects ICANN's self-description as a mere not-for-profit corporation, averring that the Respondent serves as the *de facto* international regulator and gatekeeper to the Internet's DNS space, with no government oversight.<sup>79</sup>
143. Regarding the standard of review, the Claimant denies that this case involves the exercise of the Board's fiduciary duties. The Panel is required to conduct an objective, *de novo* examination of the Dispute. Moreover, quite apart from the Board's alleged determination to defer consideration of the Claimant's claims until this Panel has issued its decision, the Claimant notes that this IRP also impugns the flawed analysis of the New gTLD Program Rules by the Staff, ICANN's inadequate investigation of the *Amici*'s conduct, its failure to disqualify NDC's application and auction bids, and its decision to proceed with contracting with NDC in respect of .WEB.<sup>80</sup>
144. The Claimant submits that the Respondent's defences are baseless and self-contradictory:

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<sup>78</sup> *Ibid*, paras. 73-76.

<sup>79</sup> Claimant's Reply, paras. 1-3.

<sup>80</sup> *Ibid*, para. 8.

on the one hand it argues that it appropriately handled Afiliias' concerns while on the other it asserts that its Board has deferred consideration of these concerns until the Panel's final decision in this IRP.<sup>81</sup> The Claimant reiterates that ICANN violated its Bylaws and Articles by not disqualifying NDC's application and bids for .WEB, and in proceeding to contract with NDC for the .WEB registry agreement.

145. The Claimant contends that the New gTLD Program Rules are mandatory. In its view, it is not within ICANN's discretion to overlook violations of those rules by some applicants, such as NDC, nor to allow non-applicants like Verisign to circumvent them by "enlisting a shell like NDC".<sup>82</sup> According to the Claimant, the Respondent improperly ignored NDC's clear violation of the prohibition against the resale, transfer or assignment of rights and obligations in connection with its application.
146. In addition, the Claimant contends that the public portions of NDC's application, left unchanged after its agreement with Verisign, deceived the Internet community as to the identity of the true party-in-interest behind NDC's .WEB application.<sup>83</sup> All in all, the Domain Acquisition Agreement constituted, according to the Claimant, a change of circumstances that rendered the information in NDC's application misleading, yet the Respondent did nothing to redress that situation even after it was provided with a copy of the Domain Acquisition Agreement.<sup>84</sup>
147. In reply to the Respondent's argument that the Guidebook does not impose, but merely allows ICANN to disqualify applications containing a material misstatement, misrepresentation, or omission, the Claimant counters that the Respondent must exercise any discretion it may have in this regard consistent with its Articles and Bylaws and in accordance with its obligation towards the Internet community to implement the New gTLD Program openly, transparently and fairly, treating all applicants equally. According to the Claimant, the Respondent's position, were it accepted, would wipe away years of

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<sup>81</sup> *Ibid*, para. 20.

<sup>82</sup> *Ibid*, para. 27.

<sup>83</sup> Claimant's Reply, para. 40.

<sup>84</sup> *Ibid*, para. 69.



carefully deliberated policy development work by the ICANN community.<sup>85</sup>

148. The Claimant also submits that NDC's bids in the auction were invalid for failure to comply with the Auction Rules.<sup>86</sup> In that respect, the Claimant stresses that while the Auction Rules provide that bids must be placed by or on behalf of a Qualified Applicant, in the present case the DAA makes it clear that NDC was making bids “Redacted - Third Party Designated Confidential Information”

<sup>87</sup> Afilias therefore claims that the New gTLD Program Rules required ICANN to declare NDC's bids invalid and award the .WEB gTLD to Afilias, as the next highest bidder.

149. The Claimant avers that ICANN's investigation of its stated concerns was superficial, self-serving, and designed to protect itself, without the transparency, openness, neutrality, objectivity, fairness and good faith required under the Bylaws. In that respect, the Claimant stresses that the Respondent received the Domain Acquisition Agreement on 23 August 2016, and ought to have disqualified NDC's application and bids upon review of its terms.

150. Instead, the Respondent issued its 16 September 2016 Questionnaire to Afilias, Verisign, NDC and Ruby Glen, making no mention of the fact that the Respondent had already sought and received input from Verisign, nor of the fact that at the time, ICANN, Verisign and NDC had knowledge of the contents of the Domain Acquisition Agreement, whereas Afilias had not. According to the Claimant, the Questionnaire was a “pure artifice”, designed to elicit answers that would help Verisign's cause if its arrangement with NDC was challenged at a later date and to protect ICANN from the type of criticism and concerns already raised by Afilias.<sup>88</sup>

151. The Claimant notes that there is no indication that the Respondent did anything with the responses it received to the Questionnaire, or what steps were taken to achieve an “informed resolution” of the concerns raised by Afilias. What is known is merely that the

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<sup>85</sup> *Ibid*, para. 85.

<sup>86</sup> *Ibid*, para. 88.

<sup>87</sup> *Ibid*, para. 95.

<sup>88</sup> Claimant's Reply, para. 114.

Board decided not to make a determination on the merits on Afilias' contentions against Verisign and NDC until all accountability mechanisms had been concluded, and that on 6 June 2018, the Respondent decided to remove the .WEB contention set from its on-hold status and to proceed with the delegation of .WEB to NDC. This, the Claimant asserts, suggests that the Respondent had in fact made a determination on the merits of Afilias' contentions.<sup>89</sup>

152. According to the Claimant, ICANN must exercise its discretion insofar as the application of the New gTLD Program Rules is concerned consistently with what the Claimant describes as the Respondent's competition mandate, that is, the mandate to promote competition and to constrain the market power of .COM.<sup>90</sup> In the Claimant's view, the DOJ's investigation is irrelevant to deciding this IRP as the DOJ's official policy is that no inference should be drawn from a decision to close a merger investigation without taking further action.
153. In response to the Respondent's contention that its claims are time-barred, the Claimant argues that the lack of merit of this defence is underscored by the Respondent's assertion that the Claimant's claims are in one sense premature and in another sense overdue. The Claimant recalls that (1) between August 2016 and the end of 2016, ICANN represented that it would seek the informed resolution of Afilias' concerns, and keep Afilias informed of the outcome; (2) between January 2017 and January 2018, the DOJ was conducting its antitrust investigation, and had asked ICANN to take no action on .WEB; and (3) between January 2018 and June 2018, Afilias repeatedly asked ICANN for information about the status of .WEB, which ICANN failed to provide until the Claimant was notified that the .WEB contention set had been taken off-hold, whereupon Afilias invoked the Cooperative Engagement Process.<sup>91</sup>
154. The Claimant disputes that the complaints it made in its 2016 letters are the same as those relied upon in its Amended Request for IRP: the former were based on public information

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<sup>89</sup> *Ibid*, para. 118.

<sup>90</sup> *Ibid*, paras. 125-128.

<sup>91</sup> Claimant's Reply, paras. 137-139.

only, and requested an investigation; the latter were prompted by the realization that in spite of its requests that NDC's application and bids be disqualified, ICANN had now signaled that it was proceeding to contract with NDC.

155. The Claimant contends that the Respondent misstates the relief that an IRP Panel may order. According to the Claimant, the Panel has the power to issue "affirmative declaratory relief" requiring the Respondent to disqualify NDC's application and bids and to offer the Claimant the rights to .WEB.<sup>92</sup>

#### **D. Respondent's Rejoinder**

156. In its Rejoinder Memorial dated 1 June 2020, the Respondent states that a feature that sets this IRP apart is that ICANN has not yet fully addressed the ultimate dispute underlying the Claimant's claims.<sup>93</sup> In that respect, the Respondent stresses that, since the inception of the New gTLD Program, it placed applications and contention sets "on hold" when related accountability mechanisms were initiated.<sup>94</sup> In its view, the Respondent followed its processes by specifically choosing, in November 2016, not to address the issues surrounding .WEB while an accountability mechanism regarding that gTLD was pending.<sup>95</sup> When it received the Domain Acquisition Agreement in August of 2016, ICANN did not disqualify NDC's application because the .WEB contention set was on hold at that time due to a pending accountability mechanism by the parent company of another .WEB applicant.<sup>96</sup> The Respondent argues that it was reasonable for the Board to make this choice because the results of the accountability mechanism, and the subsequent DOJ investigation, could have had an impact on any eventual analysis ICANN might be called upon to make.<sup>97</sup>

157. The Respondent explains that, in the November 2016 Workshop, Board members and

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<sup>92</sup> *Ibid*, paras. 147-155.

<sup>93</sup> Respondent's Rejoinder, para. 1.

<sup>94</sup> *Ibid*, paras. 2 and 89.

<sup>95</sup> *Ibid*, paras. 3 and 89.

<sup>96</sup> *Ibid*, para. 4.

<sup>97</sup> *Ibid*, paras. 41 and 91.

ICANN's in-house counsel discussed the issue of .WEB and chose to not take any action at that time regarding .WEB because an accountability mechanism was pending regarding .WEB. The Respondent states that it did not seem prudent for the Board to interfere with or pre-empt the issues that were the subject of the accountability mechanism. The Respondent underscores that the Claimant does not explain how the Board's determination not to make a decision regarding .WEB during the pendency of an accountability mechanism or other legal proceedings on the same issue represents an inconsistent application of documented policies.<sup>98</sup>

158. Responding to the Claimant's suggestion that ICANN was beholden to Verisign, the Respondent avers that it has an arms-length relationship with Verisign which is no different from ICANN's relationship with other registry operators, including Afilias.<sup>99</sup>
159. Regarding the applicable standard of review, the Respondent argues that the Panel must apply a *de novo* standard in making findings of fact and reviewing the actions or inactions of individual directors, officers or Staff members, but has to review actions or inactions of the Board only to determine whether they were within the realm of reasonable business judgment. In other words, in the Respondent's view, it is not for the Panel to opine on whether the Board could have acted differently than it did.<sup>100</sup>
160. The Respondent maintains that the Claimant's claims regarding actions or inactions of ICANN in August through October 2016 are time-barred under Rule 4 of the Interim Procedures.<sup>101</sup> The Respondent stresses that the Claimant's IRP was filed more than two (2) years after it sent letters complaining about the auction and NDC's relationship with Verisign.<sup>102</sup> According to the Respondent, the Claimant was aware, in 2016, of the actions and inactions that it seeks to challenge, along with the material effect of those

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<sup>98</sup> Respondent's Rejoinder, paras. 40-41 and 92.

<sup>99</sup> *Ibid*, paras. 51-53.

<sup>100</sup> *Ibid*, paras. 54-62.

<sup>101</sup> *Ibid*, paras. 9 and 63-64.

<sup>102</sup> *Ibid*, para. 65.

actions, even if it did not have a copy of the Domain Acquisition Agreement.<sup>103</sup> In any event, the Respondent contends that the Claimant ignores the final clause of Rule 4, which states that a statement of dispute may not be filed more than twelve (12) months from the date of the challenged action or inaction.<sup>104</sup> Responding to the equitable estoppel argument advanced by the Claimant, the Respondent argues that there is nothing in its 2016 letters to suggest that it encouraged the Claimant to delay the filing of an IRP, and that the Claimant has not alleged that it relied on those letters in deciding not to file an IRP.<sup>105</sup> The Respondent also notes that the Claimant was represented by experienced counsel throughout the period at issue.<sup>106</sup>

161. Responding to the Claimant's contentions pertaining to its post-auction investigation, the Respondent notes that the Claimant asserted no claim in that regard in its Amended Request for IRP, which focussed on pre-auction rumors.<sup>107</sup> In addition, the Respondent avers that its post-auction investigation was prompt, thorough, fair, and fully consistent with its Bylaws and Articles.<sup>108</sup>
162. The Respondent also observes that the Guidebook and Auction Rules violations alleged by the Claimant do not require the automatic disqualification of NDC and instead that ICANN is vested with significant discretion to determine what the penalty or remedy should be, if any.<sup>109</sup>
163. The Respondent contends that it has, as yet, taken no position on whether NDC violated the Guidebook.<sup>110</sup> The Respondent adds that determining whether NDC violated the Guidebook "is not a simple analysis that is answered on the face of the Guidebook" which,

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<sup>103</sup> *Ibid*, paras. 66-70.

<sup>104</sup> Respondent's Rejoinder, paras. 64-65.

<sup>105</sup> *Ibid*, paras. 72-75.

<sup>106</sup> *Ibid*, paras. 76-78.

<sup>107</sup> *Ibid*, paras. 104-105.

<sup>108</sup> *Ibid*, paras. 8 and 107-113.

<sup>109</sup> *Ibid*, paras. 80-88.

<sup>110</sup> *Ibid*, para. 81.

according to the Respondent, includes no provision that squarely addresses an arrangement like the Domain Acquisition Agreement. The Respondent submits that a “true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA”. The Respondent argues that “[t]his analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.”<sup>111</sup>

164. The Respondent notes, referring to the evidence of the *Amici*, that there have been a number of arrangements that appear to be similar to the DAA in the secondary market for new gTLDs.<sup>112</sup> Because it has the ultimate responsibility for the New gTLD Program, the Board has reserved the right to individually consider any application to determine whether approval would be in the best interest of the Internet community.<sup>113</sup>
165. Turning to the Claimant’s arguments regarding competition, the Respondent denies that it has exercised its discretion to benefit Verisign, repeating that it has not “fully evaluated” the Domain Acquisition Agreement – and NDC’s related conduct – because the .WEB contention set has been on hold due to the invocation of ICANN’s accountability mechanisms and the DOJ investigation. Accordingly, the Claimant’s assertion that the Respondent has violated its so-called “competition promotion mandate” is not ripe for consideration.<sup>114</sup>
166. The Respondent adds that it is not required or equipped to make judgment about which applicant for a particular gTLD would more efficiently promote competition. Rather, ICANN complies with its core value regarding competition by coordinating and implementing policies that facilitate market-driven competition, and by deferring to the appropriate government regulator, such as the DOJ, the investigation of potential competition issues. The Respondent notes, pointing to the evidence of Drs. Carlton and

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<sup>111</sup> *Ibid*, para. 82.

<sup>112</sup> Respondent’s Rejoinder, para. 83.

<sup>113</sup> *Ibid*, para. 87.

<sup>114</sup> *Ibid*, para. 95.

Murphy, that there is no evidence that Verisign's operation of .WEB would restrain competition.<sup>115</sup>

167. Finally, the Respondent argues that the Claimant seeks relief which is beyond the Panel's jurisdiction and not available in these proceedings. While the Panel is empowered to declare whether the Respondent complied with its Articles and Bylaws, it cannot disqualify NDC's application, or bid, and offer Claimant the rights to .WEB.<sup>116</sup>

## **E. The *Amici's* Briefs**

### **1. NDC's Brief**

168. In its *amicus* brief dated 26 June 2020, NDC alleges that ICANN has approved many post-delegation assignments of registry agreements for new gTLDs pursuant to pre-delegation financing and other similar agreements.<sup>117</sup> NDC notes that Afilias itself has participated extensively in the secondary market for new gTLDs.<sup>118</sup>
169. NDC argues that, having won the auction, it has the right and ICANN has the obligation under the Guidebook to execute the .WEB registry agreement, subject to compliance with the appropriate conditions. Although additional steps remain before the delegation of .WEB, NDC characterizes those as routine and administrative.<sup>119</sup>
170. Turning to the Panel's jurisdiction, NDC stresses that the Panel's remedial powers are significantly circumscribed. Section 4.3(o) of the Bylaws provides a closed list that only authorizes the Panel to take the actions enumerated therein. NDC contends that while the Panel is authorized to determine whether ICANN violated its Bylaws, it cannot decide the Claimant's claims on the merits or grant the affirmative relief sought by Afilias.<sup>120</sup>

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<sup>115</sup> *Ibid.*, paras. 94-103.

<sup>116</sup> *Ibid.*, paras. 114-124.

<sup>117</sup> NDC's Brief, paras. 32-37.

<sup>118</sup> *Ibid.*, paras. 38-39.

<sup>119</sup> *Ibid.*, paras. 55-56.

<sup>120</sup> *Ibid.*, paras. 64-69.

171. NDC further argues that Section 4.3(o) does not permit the Panel to second-guess the Board's reasonable business judgment. If the Panel finds that there has been a violation of the Bylaws, the proper remedy is to issue a declaration to that effect. It would then be up to the Board to exercise its business judgment and decide what action to take in light of such declaration.<sup>121</sup>
172. According to NDC, the Panel's limited remedial authority is consistent with the terms of the Guidebook providing that ICANN retains the sole decision-making authority with respect to the Claimant's objections and NDC's .WEB application. NDC submits that only ICANN possesses the required expertise and resources to craft DNS policy and to weight the competing interests and policies that would factor into a decision on .WEB.<sup>122</sup>
173. NDC argues that if ICANN were to find that NDC violated the Guidebook or other applicable rules, ICANN's discretion to make determinations regarding gTLD applications would offer it a wide range of possible reliefs, not limited to the relief that the Claimant has asked the Panel to grant.<sup>123</sup>
174. Responding to the Claimant's argument that IRP decisions are intended to be final and enforceable, NDC contends that the binding nature of a dispute resolution procedure and the enforceability of a decision arising out of such procedure cannot expand the scope of the adjudicator's circumscribed remedial jurisdiction.<sup>124</sup> In that regard, the Cross-Community Working Group for Accountability (CCWG) did not, contrary to the Claimant's contention, recommend that IRP panels should be authorized to dictate a remedy in cases in which ICANN would be found to have violated its Articles or Bylaws. Rather, the CCWG stated that an IRP would result in a declaration that an action/failure to act complied or did not comply with ICANN's obligations.<sup>125</sup>

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<sup>121</sup> *Ibid*, paras. 70-74.

<sup>122</sup> NDC's Brief, paras. 75-79.

<sup>123</sup> *Ibid*, para. 80.

<sup>124</sup> *Ibid*, paras. 81-84.

<sup>125</sup> *Ibid*, paras. 85-89.



175. Finally, NDC denies making any material misrepresentations to ICANN, as there had been no change to its management, control or ownership since the filing of its .WEB application.<sup>126</sup> NDC also contends that it did not violate any ICANN rules by agreeing with Verisign to a post-auction transfer of .WEB. In arranging for such a post-auction transfer, NDC asserts that it acted consistently with what the industry understood was permissible.<sup>127</sup> In that respect, NDC argues that Afiliás' own participation in the secondary market – on both sides of transfers – belies its protestations in this case.<sup>128</sup> In addition, NDC submits that Afiliás itself violated the Guidebook by contacting NDC during the Blackout Period.<sup>129</sup>
176. For these reasons, NDC requests that the Panel deny in its entirety the relief requested by the Claimant.<sup>130</sup>

## 2. Verisign's Brief

177. In its *amicus* brief also dated 26 June 2020, Verisign declares that it joins in the sections of NDC's brief setting forth the background of this IRP and the scope of the Panel's authority, including as to the issues properly presented to the Panel for decision. In the submission of Verisign, the only question properly before the Panel is whether ICANN violated its Bylaws when it decided to defer a decision on the Claimant's objections, and the Panel should decline to determine the merits or lack thereof of these objections, or to award .WEB to the Claimant. According to Verisign, the Domain Acquisition Agreement complies with the Guidebook, is consistent with industry practices under the New gTLD Program, and there is no basis for refusing to delegate .WEB based on ICANN's mandate to promote competition.<sup>131</sup>
178. The Domain Acquisition Agreement, according to its terms, does not constitute a resale,

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<sup>126</sup> *Ibid*, paras. 96-99.

<sup>127</sup> *Ibid*, paras. 100-107.

<sup>128</sup> *Ibid*, paras. 108-113.

<sup>129</sup> *Ibid*, paras. 114-119.

<sup>130</sup> *Ibid*, para. 120.

<sup>131</sup> Verisign's Brief, pp. 1-2.

assignment, or transfer of rights or obligations with respect to NDC's .WEB application, nor does it require Verisign's consent for NDC to take any action necessary to comply with the Guidebook or with NDC's obligations under the application. Verisign argues that the only sale, assignment or transfer contemplated in the Domain Acquisition Agreement is the possible future and conditional assignment of the registry agreement for .WEB. Verisign contends that Section 10 of Module 6 of the Guidebook is intended to limit the acquisition of rights over the gTLD *by applicants*, providing that applicants would only acquire rights with respect to the subject gTLD upon execution of a post-delegation registry agreement with ICANN. Verisign contends that Section 10 does not prohibit future transfers of rights. Verisign further argues that restrictions on the assignment or transfer of a contract are to be narrowly construed consistent with the purpose of the contract.<sup>132</sup> Verisign argues that the Domain Acquisition Agreement provides only for a possible future assignment of the registry agreement of .WEB upon ICANN's prior consent.<sup>133</sup>

179. Verisign avers that the Domain Acquisition Agreement is consistent with industry practices under the Guidebook, including assignments of gTLDs approved by ICANN. According to Verisign, there exists a robust secondary marketplace with respect to the New gTLD Program in which Afilias itself has participated. Verisign argues that the Domain Acquisition Agreement contemplates nothing more than what has already often occurred under the Program.<sup>134</sup> Verisign further claims that it would be fundamentally unfair – and a violation of the equal treatment required under the Bylaws – if ICANN or the Panel were to adopt a new interpretation of the anti-assignment provision of the Guidebook.<sup>135</sup>
180. In addition, Verisign argues that the drafting history of the Guidebook contradicts the Claimant's claims. According to Verisign, ICANN purposely declined to include proposed limits on post-delegation assignments of registry agreements, choosing instead to rely on ICANN's right, upon a post-delegation request for assignment of a registry agreement, to

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<sup>132</sup> *Ibid*, paras. 2-4, 6 and 11-20.

<sup>133</sup> *Ibid*, paras. 4 and 21-34.

<sup>134</sup> Verisign's Brief, paras. 5, 9-10 and 35-45.

<sup>135</sup> *Ibid*, para. 46.

approve such assignment.<sup>136</sup>

181. Verisign contends that, in an attempt to contrive support for its contention that NDC sold the application to Verisign, the Claimant takes out of context select obligations of NDC under the Domain Acquisition Agreement to protect Verisign’s loan of funds to NDC for the auction.<sup>137</sup> Redacted - Third Party Designated Confidential Information

<sup>138</sup> In addition, Verisign underscores that there was no obligation for NDC to disclose Verisign’s support in the resolution of the contention set. As Verisign puts it, “confidentiality in such matters is common”.<sup>139</sup>

182. Verisign argues that the Guidebook requires an amendment to the application only when previously submitted information becomes untrue or inaccurate, which was not the case here since the Domain Acquisition Agreement did not make Verisign the owner of NDC’s application.<sup>140</sup> Furthermore, Verisign asserts that the mission statement in a new gTLD application is irrelevant to its evaluation.<sup>141</sup>

183. Verisign also argues that there is no basis for refusing to delegate .WEB based on ICANN’s mandate to promote competition.<sup>142</sup> According to Verisign, ICANN has no regulatory authority – including over matters of competition – and was not intended to supplant existing legal structures by establishing a new system of Internet governance.<sup>143</sup> In Verisign’s submission, ICANN has acted upon its commitment to enable competition by helping to create the conditions for a competitive DNS and by referring competition

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<sup>136</sup> *Ibid*, paras. 49-51.

<sup>137</sup> *Ibid*, para. 52.

<sup>138</sup> *Ibid*, para. 57.

<sup>139</sup> *Ibid*, para. 62.

<sup>140</sup> *Ibid*, paras. 65-76.

<sup>141</sup> *Ibid*, paras. 77-86.

<sup>142</sup> *Ibid*, paras. 88-93.

<sup>143</sup> Verisign’s Brief, paras. 94-101.

issues to the relevant authorities.<sup>144</sup>

184. Verisign claims that there is no threat or injury to competition resulting from its potential operation of the .WEB registry, and that the Claimant has submitted no economic evidence to support the contrary view.<sup>145</sup> Verisign further stresses that it does not have a dominant market position and that it is not a “monopoly”, as it has less than 50% of the relevant market.<sup>146</sup> In the view of the expert economists retained by Verisign and the Respondent, there is no evidence that .WEB will be a particularly significant competitive check on .COM.<sup>147</sup>
185. Verisign concludes by reiterating that this Panel should only determine whether ICANN properly exercised its reasonable business judgment when it deferred making a decision on Afiliás’ claims regarding the .WEB auction. To the extent that the Panel considers the substance of the Claimant’s claims, Verisign submits that they are meritless and should be rejected.<sup>148</sup>

## **F. Parties’ Responses to *Amici*’s Briefs**

### **1. Afiliás’ Response to *Amici*’s Briefs**

186. The Claimant begins its 24 July 2020 Response to the *Amici*’s Briefs by addressing what it describes as the omissions and misrepresentations of key facts in the *Amici*’s submissions.<sup>149</sup> The Claimant insists on the fact that Verisign failed to apply for .WEB by the set deadline<sup>150</sup> and provides no explanation for that failure. It observes that had Verisign applied for .WEB in 2012, its status as an applicant would have been known and the public

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<sup>144</sup> *Ibid.*, paras. 102-107.

<sup>145</sup> *Ibid.*, paras. 108-112.

<sup>146</sup> *Ibid.*, paras. 112-119.

<sup>147</sup> *Ibid.*, paras. 125-134.

<sup>148</sup> *Ibid.*, para. 140.

<sup>149</sup> Claimant’s Response to *Amici*’s Briefs, paras. 5-66.

<sup>150</sup> While not material to the issues in dispute, there is some confusion in the Claimant’s submissions as to what the deadline was. In the Claimant’s Response, the deadline is said to be 13 June 2012 (para. 9); in the Claimant’s PHB, it is said to be 20 April 2012 (para. 10); while in the Joint Chronology, it is stated that it was 30 May 2012.

portions of its application would have been available for the public and governments to comment upon.<sup>151</sup>

187. Turning to the circumstances of the execution of the Domain Acquisition Agreement, the Claimant notes that as a small company with limited funding, NDC had no chance of obtaining .WEB for itself and was thus the perfect vehicle to allow Verisign to fly “under the radar” of the other .WEB applicants and to blindsides them with a high bid that none could have seen coming.<sup>152</sup> The Claimant asks, if the *Amici* believed that their arrangement complied with the New gTLD Program Rules, why go through such lengths to conceal the Domain Acquisition Agreement not only to their competitors, but also to ICANN.<sup>153</sup> The Claimant notes in this regard Verisign’s inquiry to ICANN, shortly after the execution of the DAA, about ICANN’s practice when approached to approve the assignment of a new registry agreement. On that occasion, Verisign mentioned neither the DAA, nor .WEB.<sup>154</sup> The Claimant vehemently denies that the other transactions identified by the *Amici* as industry practice are analogous to the Domain Acquisition Agreement.<sup>155</sup>
188. According to the Claimant, the *Amici*’s pre-auction conduct, including the execution of the Confirmation of Understandings of 26 July 2016, also exemplifies their concerted attempts to conceal the DAA and Verisign’s interest in .WEB. In regard to the post-auction period, the Claimant argues that the *Amici* misrepresent the Claimant’s letters of 8 August and 9 September 2016 as asserting the same claims as those made in this IRP, and adds that they have failed to explain how and why ICANN’s outside counsel came to contact Verisign’s outside counsel, by phone, to request information about the DAA.
189. With respect to the *Amici*’s reliance on ICANN’s purported “decision not to decide” of November 2016, the Claimant denies the existence of the “well-known practice” upon which the Board’s decision was allegedly based; states that this alleged practice is

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<sup>151</sup> Claimant’s Response to *Amici*’s Briefs, paras. 8-16.

<sup>152</sup> *Ibid*, para. 20.

<sup>153</sup> *Ibid*, para. 22.

<sup>154</sup> *Ibid*, paras. 24-29.

<sup>155</sup> *Ibid*, para. 23.

inconsistent with ICANN’s conduct at the time; that not taking action on a contention set while an accountability mechanism is pending is not among ICANN’s documented policies;<sup>156</sup> that ICANN never informed Afiliás of such decision until well into this IRP;<sup>157</sup> and that such decision is not even documented.<sup>158</sup>

190. The Claimant also notes that there is no indication that the Staff had undertaken any analysis of the compatibility of the DAA with the New gTLD Program Rules when the Staff moved toward contracting with NDC in June 2018, as soon as the Board rejected Afiliás’ request to reconsider the denial of its most recent document disclosure request.<sup>159</sup> Nor is it known what assessment of that question had been made by the Board. In this regard, the Claimant claims there is a contradiction between the Respondent’s statement in this IRP that it has not yet considered the Claimant’s complaints, and the Respondent’s submission to the Emergency Arbitrator that ICANN had evaluated these complaints.<sup>160</sup>

191. According to the Claimant, the *Amici* misrepresent the nature of the Domain Acquisition Agreement. The Claimant notes that Redacted - Third Party Designated Confidential Information and were therefore not “executory” in nature.<sup>161</sup> The Claimant also rejects any analogy between the Domain Acquisition Agreement and a financing agreement.<sup>162</sup> In the Claimant’s submission, it is self-evident that the DAA was an attempt to circumvent the New gTLD Program Rules, and this should have been patently clear to the Staff and Board upon its review. The Domain Acquisition Agreement makes plain that NDC resold, assigned or transferred to Verisign several rights and obligations in its application for .WEB, including: Redacted - Third Party Designated Confidential Information

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<sup>156</sup> *Ibid*, paras. 54-55.

<sup>157</sup> Claimant’s Response to *Amici*’s Briefs, para. 56.

<sup>158</sup> *Ibid*, paras. 49-58.

<sup>159</sup> *Ibid*, para. 62.

<sup>160</sup> *Ibid*, para. 65.

<sup>161</sup> *Ibid*, paras. 67-71.

<sup>162</sup> *Ibid*, paras. 72-73.

192. The Claimant avers that NDC violated the Guidebook by failing to promptly inform ICANN of the terms of the Domain Acquisition Agreement since those terms made the information previously submitted in NDC's .WEB application untrue, inaccurate, false or misleading. The Claimant stresses that the Guidebook does not exempt the section of the application that details the applicant's business plan from the obligation to notify changes to ICANN. In any event, NDC also failed to update its responses regarding the technical aspects of NDC's planned operation of the .WEB registry. The Claimant argues as well that NDC intentionally failed to disclose the Domain Acquisition Agreement prior to the auction, when Mr. Rasco was specifically asked whether there were any changed circumstances needing to be reported to ICANN.<sup>164</sup>
193. The Claimant reiterates its arguments about NDC having violated the Guidebook by submitting invalid bids – made on behalf of a third party – at the .WEB auction. In the Claimant's submission, the *Amici's* examples of market practice are inapposite for a variety of reasons, and none of them reflects the level of control that the Domain Acquisition Agreement gave Verisign.<sup>165</sup>
194. Responding to the *Amici's* arguments pertaining to the discretion enjoyed by ICANN in the administration of the New gTLD Program, the Claimant contends that such discretion is circumscribed by the Articles and Bylaws, as well as principles of international law, including the principle of good faith.<sup>166</sup> The Claimant underscores that the Bylaws require ICANN to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Claimant argues that due process and procedural fairness require, among other procedural protections, that decisions be based on evidence and on appropriate inquiry into the facts. According to the Claimant,

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<sup>163</sup> *Ibid*, paras. 74-98.

<sup>164</sup> Claimant's Response to *Amici's* Briefs, paras. 99-114.

<sup>165</sup> *Ibid*, paras. 121-136.

<sup>166</sup> *Ibid*, paras. 140-144.

ICANN repeatedly failed to comply with those principles in regards to Afiliás' claims. The Claimant notes again that even in this IRP the Respondent has taken diametrically opposed positions as to whether or not it has evaluated Afiliás' concerns.<sup>167</sup>

195. The Claimant also argues that ICANN is required by its Bylaws to afford impartial and non-discriminatory treatment, an obligation that is consistent with the principles of impartiality and non-discrimination under international law. The Claimant submits that, upon receipt of the Domain Acquisition Agreement, and without conducting any investigation on the matter, ICANN accepted the *Amici*'s positions on their agreement at face value, and incorporated them into a questionnaire that was designed to elicit answers to advance the *Amici*'s arguments, and that was based on information that ICANN and the *Amici* had in their possession – but which they knew was unavailable to Afiliás.<sup>168</sup>
196. The Claimant avers that the Respondent also failed to act openly and transparently as required by the Articles, Bylaws and international law. The Claimant contends that, far from acting transparently, ICANN allowed NDC to enable Verisign to secretly participate in the .WEB auction in disregard of the New gTLD Program Rules, failed to investigate NDC's conduct and instead proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the auction, all the while keeping Afiliás in the dark about the status of its investigation regarding the .WEB gTLD for nearly two years.<sup>169</sup> The Claimant further claims that the Respondent failed to respect its legitimate expectations despite its commitment to make decisions by applying documented policies consistently, neutrally, objectively and fairly. According to the Claimant, had the Respondent followed the New gTLD Program Rules, it would necessarily have disqualified NDC from the application and bidding process.<sup>170</sup>
197. As regards the applicable standard of review, the Claimant denies that the Board's conduct in November 2016 constitutes a decision protected by the business judgment rule. The

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<sup>167</sup> *Ibid*, paras. 145-147.

<sup>168</sup> Claimant's Response to *Amici*'s Briefs, paras. 148-149.

<sup>169</sup> *Ibid*, paras. 151-158.

<sup>170</sup> *Ibid*, paras. 159-161.



Claimant also stresses that neither the *Amici* nor the Respondent assert that the business judgment rule applies to the decision taken by ICANN in June 2018 to proceed with delegating .WEB to NDC. The Claimant takes the position that its claims regarding (1) the Respondent’s failure to disqualify NDC, (2) its failure to offer Afilias the rights to .WEB and (3) the delegation process for .WEB after a superficial investigation of the Claimant’s complaints, do not concern the Board’s exercise of its fiduciary duties. The Claimant contends finally that, even assuming *arguendo* that the business judgment rule has any application, the secrecy regarding the Board’s November 2016 conduct makes it impossible for this Panel to evaluate the reasonableness of that conduct.<sup>171</sup>

198. Responding to the *Amici*’s claims regarding its own conduct, the Claimant denies having violated the Blackout Period. It contends that the provisions relating to Blackout Period are designed to prevent bid rigging and do not prohibit any and all contact among the members of the contention set.<sup>172</sup>
199. The Claimant states that the *Amici* misrepresent the scope and effect of ICANN’s competition mandate. The Claimant argues that ICANN must act to promote competition pursuant to its Bylaws, and that it failed to do so when it permitted Verisign to acquire .WEB in a program designed to challenge .COM’s dominance. The Claimant stresses that Dr. Carlton – the economist retained by the Respondent – expressed views on the competitive benefits of introducing new gTLDs in 2009 that differ from those expressed in his report prepared for the purpose of this IRP.<sup>173</sup> According to the Claimant, any decision furthering Verisign’s acquisition of .WEB is inconsistent with ICANN’s competition mandate. In the Claimant’s view, .WEB cannot be considered as “just another gTLD”, since it has been uniquely identified by members of the Internet community as the next best competitor for .COM. The Claimant contends that the high price paid by Verisign for .WEB was at least partly driven by the benefits it would derive from keeping that

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<sup>171</sup> *Ibid.*, paras. 165-178.

<sup>172</sup> *Ibid.*, paras. 179-184.

<sup>173</sup> Claimant’s Response to *Amici*’s Briefs, paras. 164 and 185-198.

competitive asset out of the hands of its competitors.<sup>174</sup> The Claimant reiterates its submission that the DOJ's decision to close its investigation is irrelevant to the Panel's analysis.<sup>175</sup>

200. Turning to the Panel's remedial authority, the Claimant argues that the *Amici* are wrong in asserting that the Panel's authority is limited to issuing a declaration as to whether ICANN acted in conformity with its Articles and Bylaws when its Board deferred making any decision on .WEB in November 2016. The Claimant urges that meaningful and effective accountability requires review and redress of ICANN's conduct. In that regard, the Claimant invokes the international law principle that any breach of an engagement involves an obligation to make reparation.<sup>176</sup> Finally, the Claimant contends that the Panel must determine the scope of its authority based on the text, context, object and purposes of the IRP, and not only on Section 4.3(o) of the Bylaws, which is not exhaustive and should be read, *inter alia*, with reference to Section 4.3(a).<sup>177</sup>

## 2. ICANN's Response to the *Amici*'s Briefs

201. In its brief Response dated 24 July 2020 to the *Amici*'s Briefs, the Respondent notes that the position advocated by the *Amici* in their respective briefs is generally consistent with its own position as regards the following three (3) issues: (1) the Panel's jurisdiction and remedial authority, (2) the nature and implications of the Bylaws' provisions in relation to competition, and (3) whether Verisign's potential operation of .WEB would be anticompetitive.<sup>178</sup>
202. The Respondent reiterates that it does not take a position on what it describes as the Claimant's and NDC's "allegations against each other" regarding their respective pre-auction, and auction conduct, or whether NDC violated the Guidebook and Auction

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<sup>174</sup> *Ibid*, paras. 199-209.

<sup>175</sup> *Ibid*, paras. 210-213.

<sup>176</sup> *Ibid*, paras. 218-220.

<sup>177</sup> *Ibid*, paras. 223-236.

<sup>178</sup> Respondent's Response to *Amici*'s Briefs, paras. 2-6.

Rules by the execution of the DAA, adding that it will consider those issues after this IRP concludes.<sup>179</sup>

## **G. Post-Hearing Submissions**

203. The Parties and *Amici* have filed comprehensive post-hearing submissions in which they have reiterated their respective positions on all issues in dispute. In the summary below, the Panel focuses on those aspects of the post-hearing submissions that comment on the hearing evidence, or put forward new points.

### **1. Claimant's Post-Hearing Brief**

204. In its Post-Hearing Brief dated 12 October 2020, the Claimant argues that the two fundamental questions before the Panel are whether the Respondent was required to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules and, if so, (ii) offer the .WEB gTLD to the Claimant. The Claimant submits that the hearing evidence leaves no doubt that these questions must be answered in the affirmative.

205. The evidence revealed that the Respondent's failure to act upon the Claimant's complaints was a result of the unjustified position that these were motivated by "sour grapes" for having lost the auction. According to the Claimant, this attitude permeated every aspect of the Respondent's consideration of the Claimant's concerns, including its decision, in the course of 2018, to approve a gTLD registry contract for NDC.<sup>180</sup>

206. The Claimant notes that Ms. Willett acknowledged that the decision of an applicant to participate in an Auction of Last Resort is one of the applicant's rights under a gTLD application. Redacted - Third Party Designated Confidential Information <sup>.181</sup>

207. The Claimant argues that the evidence of Mr. Livesay confirms the competitive significance of .WEB, in that Verisign's CEO was directly involved in the 2014 initiative

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<sup>179</sup> *Ibid*, para. 7.

<sup>180</sup> Claimant's PHB, paras. 1-2.

<sup>181</sup> Claimant's PHB, para. 16.

to seek to participate in the gTLD market. Mr. Livesay also confirmed, as did Mr. Rasco, that Redacted - Third Party Designated Confidential Information

According to the Claimant, the evidence of these witnesses demonstrates that they harboured serious doubts as to whether they were acting in compliance with the Program Rules; otherwise, why conceal the DAA's terms from ICANN's scrutiny, and keep Verisign's involvement in NDC's application hidden from the Internet community? In sum, the Claimant submits that the *Amici's* conduct evidence an attempt to "cheat the system".<sup>182</sup>

208. In the pre-auction period, the Claimant focuses on Mr. Rasco's representation to the Ombudsman that there had been no changes to the NDC application, a statement that cannot be reconciled with the terms of the DAA, according to the Claimant. Also plainly incorrect, in the submission of the Claimant, is Mr. Rasco's assurance to Ms. Willett, as evidenced in the latter's email communication to the Ombudsman, that the decision not to resolve the contention set privately "was in fact his".
209. The Claimant notes that from the moment Verisign's involvement in NDC's application for .WEB was made public, the Respondent treated Verisign as though it was the *de facto* applicant for .WEB, for example, by directly contacting Verisign about questions concerning NDC's application and working with Verisign on the delegation process for .WEB. In regard to Verisign's detailed submission of 23 August 2016, which included a copy of the DAA, the Claimant notes that only the Claimant's outside counsel and Mr. Scott Hemphill have been able to review it and that the Internet community remains unaware of the Agreement's details. The Claimant finds surprising that Ms. Willett, in spite of her leadership position within ICANN in respect of the Program, would have never reviewed – indeed seen – the DAA, or Verisign's 23 August 2016 letter.<sup>183</sup>
210. The Claimant also notes Ms. Willett's inability to address questions concerning the Questionnaire that was sent to some contention set members under cover of her letter

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<sup>182</sup> *Ibid*, paras. 21-23.

<sup>183</sup> *Ibid*, paras. 46-56.

dated 16 September 2016, including the fact that some questions were misleading for anyone, such as the Claimant, who had no knowledge of the terms of the DAA. The Claimant also notes that the Respondent presented no evidence explaining what it did with the responses to the Questionnaire, other than Mr. Disspain confirming that the responses were never considered by the Board.

211. Turning to the “load-bearing beam of ICANN’s defense in this case”, the November 2016 Board decision to defer consideration of Afilias’ complains, the Claimant submits that the evidence belies that any such decision was in fact made. Rather, according to the Claimant, both Ms. Burr and Mr. Disspain testified that ICANN simply adhered to its practice to put the process on hold once an accountability mechanism has been initiated, a practice that the Claimant says has not been proven in fact to exist. The Claimant quotes the evidence of Ms. Willett, who testified that work and communications within ICANN would continue while an accountability mechanism was pending, simply that the contention set would not move to the next phase; and points to the fact that the Staff were engaging with NDC and Verisign in December 2017 and January 2018 on the subject of the assignment of .WEB even though Ruby Glen had not yet resolved its CEP, or ICANN considered Afilias’ concerns. The Claimant also sees a contradiction between the Respondent’s claim that it has not yet taken a position on the merits of Afilias’ complaints, and the evidence of Ms. Willett that ICANN would not delegate a gTLD until a pending matter was resolved.<sup>184</sup>
212. The Claimant reviews in its PHB the evidence concerning the genesis of Rule 7 of the Interim Procedures, as it reveals the degree to which, in its submission, the Respondent was willing to go to make things easier for itself and for Verisign to defend against future efforts by the Claimant to challenge ICANN’s conduct. The Claimant notes that Ms. Eisner and Mr. McAuley did speak over the phone on 15 October 2018, and that shortly thereafter, Ms. Eisner reversed her positions and expanded the categories of *amicus* participation to cover the circumstances in which the *Amici* found themselves at the time.<sup>185</sup>

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<sup>184</sup> Claimant’s PHB, paras. 61-76.

<sup>185</sup> *Ibid*, paras. 77-91.

213. Insofar as the DAA is concerned, the Claimant notes that the evidence confirms that NDC and Verisign performed exactly as the language of the DAA provides.<sup>186</sup>
214. The Claimant argues that ICANN violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign. For instance, the Claimant notes that ICANN: failed to provide timely answers to Afilias' letters while Verisign was able to reach ICANN easily to discuss .WEB, even though it was a non-applicant; informally invited Verisign's counsel to comment on Afilias' concerns; discussed the .WEB registry agreement with NDC, all the while stating that ICANN was precluded from acting on Afilias' complaints due to the pendency of an accountability mechanism; and also advocated for the *Amici* and against Afilias throughout this IRP. According to the Claimant, further evidence of disparate treatment can be found in the Staff's decision to make Rule 4 retroactive so as to catch the Claimant's CEP.<sup>187</sup>
215. According to the Claimant, the Staff's decision to take the .WEB contention set off hold and to conclude a registry agreement with NDC also violated the Bylaws and ICANN's obligation to enforce its policies fairly. The Claimant argues that the Board delegated the authority to enforce the New gTLD Program Rules to Staff who authorized the .WEB registry agreement to be sent to NDC and would have countersigned it if the Claimant had not initiated a CEP. The Board did not act to stop the process even though it was aware that the execution of the .WEB registry agreement was imminent.<sup>188</sup>
216. In addition, the Claimant contends that ICANN failed to enable and promote competition in the DNS contrary to its Bylaws. The Claimant submits that the only decision ICANN could have taken regarding .WEB to promote competition would have been to reject NDC's application and delegate .WEB to Afilias. In its view, ICANN cannot satisfy its competition mandate by relying on regulators or the DOJ's decision to close its .WEB investigation.<sup>189</sup>

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<sup>186</sup> *Ibid*, para. 103.

<sup>187</sup> Claimant's PHB, paras. 126-138.

<sup>188</sup> *Ibid*, paras. 139-143.

<sup>189</sup> *Ibid*, paras. 144-154.

217. In relation to its Rule 7 Claim, the Claimant maintains that the Staff improperly coordinated with Verisign the drafting of that rule. In response to a question raised by the Panel, the Claimant explained that its Rule 7 Claim remains relevant at the present stage of the IRP because the Respondent's breach of its Articles and Bylaws in regard to the development of Rule 7 justifies an award of costs in the Claimant's favour.<sup>190</sup>
218. As regards the Respondent's argument based on the business judgment rule, the Claimant points to the evidence of Ms. Burr concerning the nature of Board workshops to advance the position that a workshop is not a forum where the Respondent's Board can take any action at all, still less one that is protected by the business judgment rule. The Claimant also asserts that the evidence of the Respondent's witnesses supports its position that no affirmative decision regarding .WEB had been taken during the November 2016 workshop. Finally, the Claimant reiterates that there is no evidence of an ICANN policy or practice to defer decisions while accountability mechanisms are pending.<sup>191</sup>
219. Turning to the limitations issue, the Claimant avers that the Respondent's position that the Claimant's claims are time-barred is inherently inconsistent with its assertion that ICANN has not yet addressed the fundamental issues underlying those claims. According to the Claimant, its claims are based on conduct of the Staff and Board that culminated in irreversible violations of Afilias' rights when the Staff proceeded with the delegation of .WEB to NDC on 6 June 2018. Consequently, the Claimant argues that its claims are not time-barred pursuant to Rule 4 of the Interim Procedures.
220. Responding to the Respondent's argument that the claims brought in the Amended Request for IRP are time-barred because Afilias raised the same issues in its letters of August and September 2016, the Claimant contends that in the face of ICANN's representations that it was considering the matter, it would have been unreasonable for Afilias to file contentious dispute resolution proceedings in 2016. The Claimant adds that those letters described how NDC had violated the New gTLD Program Rules – not how ICANN had violated its

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<sup>190</sup> *Ibid*, para. 157.

<sup>191</sup> Claimant's PHB, paras. 159-170.

Articles and Bylaws.<sup>192</sup>

221. The Claimant further contends that, because of the circumstances in which Rule 4 of the Interim Procedures was adopted, it cannot be applied to its claims. The Claimant avers that four (4) days after the Claimant commenced its CEP – understanding that its claims had never been subject to any time limitation – ICANN launched a public comment process concerning the addition of timing requirements to the rules governing IRPs. In spite of the fact that the public comment period on proposed Rule 4 remained open, ICANN included Rule 4 in the draft Interim Procedures that were presented to the Board for approval, and adopted by the Board on 25 October 2018. The Respondent further provided that the Interim Procedures would apply as from 1 May 2018, and no carve out was made for pending CEPs or IRPs. According to the Claimant, the decision to make Rule 4 retroactive can only have been made in an attempt to preclude Afilias from arguing that its CEP had been filed prior to the adoption of the new rules. The Claimant avers that ICANN’s enactment and invocation of Rule 4 is an abuse of right and is contrary to the international law principle of good faith.<sup>193</sup>
222. In response to the argument that Afilias should have submitted a reconsideration request to the Board, the Claimant argues that, prior to June 2018, there was no action or inaction by the Staff or Board to be reconsidered.<sup>194</sup>
223. The Claimant contends that the Board waived its right to individually consider NDC’s application by failing to do so at a time where such review would have been meaningful. The Claimant underscores that the Board failed to do so in November 2016, and again in early June 2018 when it was informed that the Staff was going to conclude a registry agreement for .WEB with NDC. According to the Claimant, there is no evidence to suggest that the Board ever intended to consider whether NDC had violated the New gTLD Program Rules, and it is now for this Panel to decide the Claimant’s claims.<sup>195</sup>

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<sup>192</sup> *Ibid*, paras. 177-183.

<sup>193</sup> Claimant’s PHB, paras. 184-192.

<sup>194</sup> *Ibid*, paras. 193-195.

<sup>195</sup> *Ibid*, paras. 196-202.



224. Moving to the issue of the Panel’s jurisdiction, the Claimant emphasizes that this is the first IRP under both ICANN’s revised Bylaws and the Interim Procedures. The Claimant stresses that the IRP is a “final, binding arbitration process” and that the Panel is “charged with hearing and resolving the Dispute”. According to the Claimant, this is particularly important in light of the litigation waiver that ICANN required all new gTLD applicants to accept and to avoid an accountability gap that would leave claimants without a means of redress against ICANN’s conduct. The Claimant submits that the Panel’s jurisdiction extends to granting the remedies that Afilias has requested. In the Claimant’s view, the inherent jurisdiction of an arbitral tribunal sets the baseline for the Panel’s jurisdiction and any deviation must be justified by the text of the Bylaws. In that respect, the Claimant also invokes the international arbitration principle that a tribunal has an obligation to exercise the full extent of its jurisdiction.<sup>196</sup>
225. The Claimant notes that the CCWG intended to enhance ICANN’s accountability with an expansive IRP mechanism to ensure that ICANN remains accountable to the Internet community. In Afilias’ view, the CCWG’s report “provides binding interpretations for the provisions of ICANN’s Bylaws that set forth the jurisdiction and powers of an IRP panel – none of which are inconsistent with the CCWG Report.”<sup>197</sup>
226. The Claimant alleges that in the Ruby Glen Litigation before the Ninth Circuit, ICANN represented that the litigation waiver would neither affect the rights of New gTLD Program applicants nor be exculpatory, with the implication that the IRP could do anything that the courts could. In Afilias’ view, ICANN’s position before the Ninth Circuit contradicts ICANN’s position in this IRP when it asserts that the Panel cannot order mandatory or non-interim affirmative relief.<sup>198</sup>
227. In relation to the relief it is requesting from the Panel, the Claimant avers that the CCWG Report states that claimants have a right to “seek redress” against ICANN through an IRP. According to the Claimant, unless the Panel directs ICANN to remedy the alleged

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<sup>196</sup> *Ibid*, paras. 203-210.

<sup>197</sup> Claimant’s PHB, paras. 211-220.

<sup>198</sup> *Ibid*, paras. 221-228.

violations, there is a serious risk that this dispute will go unresolved. For that reason, the Claimant requests that the Panel issue a decision that is legally binding on the Parties and that fully resolves the Dispute. By way of injunctive relief, the Claimant asks the Panel to: reject NDC's application for the .WEB gTLD; disqualify NDC's bids at the ICANN auction; deem NDC ineligible to execute a registry agreement for the .WEB gTLD; offer the registry rights to the .WEB gTLD to Afilias, as the next highest bidder in the ICANN auction; set the bid price to be paid by Afilias for the .WEB gTLD at USD 71.9 million; pay the Claimant's fees and costs.<sup>199</sup>

## 2. Respondent's Post-Hearing Brief

228. In its Post-Hearing Brief dated 12 October 2020, the Respondent argues that the Claimant has effectively abandoned its competition claim, which was rooted in the notion that ICANN's founding purpose was to promote competition and that this competition mandate and ICANN's Core Values regarding competition required it to disqualify NDC and block Verisign's potential operation of .WEB. The Respondent contends that without this competition claim, the Claimant's case boils down to whether the Respondent was required to disqualify NDC for a series of alleged violations of the Guidebook and Auction Rules.<sup>200</sup> As to those, the Respondent reiterates that it has not decided whether the DAA violates the Guidebook or Auction Rules, or the appropriate remedy for any violation that may be found. Relying on the evidence of Mr. Disspain, the Respondent contends that the propriety of the DAA is a matter for the ICANN Board.
229. According to the Respondent, the practice of placing contention sets on hold while accountability mechanisms are pending is well known. Accordingly, the Board's decision to defer making a decision on .WEB in November 2016 should have come as no surprise to the Claimant and is entitled to deference from this Panel. As for the transmission of a registry agreement for .WEB to NDC in June 2018, the Respondent claims that it did not reflect a decision that the DAA was compliant with the Guidebook and Auction Rules, but

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<sup>199</sup> *Ibid.*, paras. 229-246. The Parties' submissions on costs are summarized below, in the section of this Final Decision dealing with the Claimant's cost claim.

<sup>200</sup> Respondent's PHB, paras. 1-6.

was merely a ministerial act triggered by the removal of the set's on hold status.<sup>201</sup>

230. The Respondent recalls that the Panel's jurisdiction is circumscribed by the Bylaws in relation to the types of disputes that may be addressed, the claims that can be raised, the remedies available, the time within which a Dispute may be brought, and the standard of review.<sup>202</sup> The Respondent contends that the Panel can only address alleged violations that are asserted in the Amended Request. In relation to those, the Panel's remedial authority is limited to issuing a declaration as to whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws. According to the Respondent, the relief requested by the Claimant clearly exceeds the Panel's limited remedial authority, which does not include the authority to disqualify NDC's bid, proceed to contracting with Afilias, specify the price to be paid by Afilias, or invalidate Rule 7. The Respondent argues that the Panel is authorized to shift costs only on a finding that the losing party's claim or defence is frivolous or abusive. The Respondent submits that the CCWG's Supplemental Proposal dated 23 February 2016 does not expand the Panel's remedial authority. If there is any inconsistency, the Bylaws clearly control.<sup>203</sup>
231. The Respondent argues that there is no "gap" created by the litigation waiver and avers that it takes the same position in this IRP as it did in the Ruby Glen Litigation, where it sought to enforce the litigation waiver. The Respondent submits that the Claimant's position in this regard is based on the false premise that remedies available in IRPs must be co-extensive with remedies available in litigation.<sup>204</sup>
232. The Respondent also contends that the Panel is required to apply the prescribed standard of review. The first sentence of Section 4.3(i) of the Bylaws establishes a general *de novo* standard, and Subsection (iii) then creates a carve-out, providing that actions of the Board in the exercise of its fiduciary duty are entitled to deference provided that they are within the realm of "reasonable judgment". The Respondent argues that all actions by the Board

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<sup>201</sup> Respondent's PHB, paras. 10-12.

<sup>202</sup> *Ibid*, para. 14.

<sup>203</sup> *Ibid*, paras. 15-45.

<sup>204</sup> *Ibid*, paras. 46-48.

on behalf of ICANN are subject to a fiduciary duty to act in good faith in the interests of ICANN.<sup>205</sup>

233. Turning to time limitation, the Respondent notes that the Panel has jurisdiction only over claims brought within the time limits established by Rule 4 of the Interim Procedures, and contends that the limitations and repose periods set out in Rule 4 are jurisdictional in nature.<sup>206</sup> According to the Respondent, the Claimant's claim that ICANN had an unqualified obligation to disqualify NDC is barred by the repose period and the time limitation, which are dispositive.<sup>207</sup> The Respondent contends that the Claimant's claim that the Staff violated the Articles and Bylaws in their investigation of pre-auction rumors or post-auction complaints is also time-barred and therefore outside the jurisdiction of the Panel.<sup>208</sup> The Respondent denies that it is equitably estopped from relying on its time limitation defence, and avers that the repose and limitations periods apply retroactively because of the express terms of the Interim Procedures. According to the Respondent, if the Claimant wished to challenge Rule 4, it could have brought such a claim in this IRP, as it did with Rule 7.<sup>209</sup>
234. Regarding the merits of the Claimant's claims, the Respondent notes the Claimant's decision not to cross-examine Mr. Kneuer, Dr. Carlton, or Dr. Murphy, indicating the abandonment of its competition claim, and reiterates that ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator of the DNS.<sup>210</sup> According to the Respondent, the unrebutted economic evidence establishes that .WEB will not be competitively unique such that Verisign's operation of .WEB would be anticompetitive.<sup>211</sup>

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<sup>205</sup> Respondent's PHB, paras. 49-57.

<sup>206</sup> *Ibid.*, paras. 58-61.

<sup>207</sup> *Ibid.*, paras. 62-69.

<sup>208</sup> *Ibid.*, paras. 70-72.

<sup>209</sup> *Ibid.*, paras. 73-85.

<sup>210</sup> *Ibid.*, paras. 86-101.

<sup>211</sup> *Ibid.*, paras. 102-129.

235. The Respondent further contends that it was not required to disqualify NDC based on alleged violations of the Guidebook and Auction Rules. According to the Respondent, “it is not a foregone conclusion that NDC is or is not in breach”.<sup>212</sup> The Respondent argues that the Guidebook and Auction Rules grant it significant discretion to determine whether a breach of their terms has occurred and the appropriate remedy, and that ICANN has not yet made that determination.<sup>213</sup> The Respondent maintains that it, and not the Panel, is in the best position to make a determination as to the propriety of the DAA, and its consistency with the Guidebook or Auction Rules.<sup>214</sup> According to the Respondent, its commitment to transparency and accountability is not relevant to the Claimant’s contention regarding NDC’s alleged violations.<sup>215</sup>
236. The Respondent reiterates that the Board complied with ICANN’s obligations by deciding not to take any action regarding the .WEB contention set while accountability mechanisms were pending, and that the Panel should defer to this reasonable business judgment.<sup>216</sup> The Respondent adds that its obligations to act transparently did not require the Board to inform Afiliats of its 3 November 2016 decision. In that respect, the Respondent argues that the Claimant has not put forward a single piece of evidence suggesting that it would have acted differently had it known that the Board decided in November 2016 to take no action while the contention set remained on hold.<sup>217</sup>
237. The Respondent takes the position that the Claimant has not properly challenged ICANN’s transmittal of a form registry agreement to NDC in June 2018 and, in any event, that in doing so it acted in accordance with Guidebook procedures and the Articles and Bylaws.<sup>218</sup>
238. According to the Respondent, the Claimant’s claims that ICANN’s pre- and post- auction

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<sup>212</sup> Respondent’s PHB, para. 138.

<sup>213</sup> *Ibid.*, paras. 136-150.

<sup>214</sup> *Ibid.*, paras. 151-156.

<sup>215</sup> *Ibid.*, paras. 157-158.

<sup>216</sup> *Ibid.*, para. 159.

<sup>217</sup> *Ibid.*, paras. 182-189.

<sup>218</sup> *Ibid.*, paras. 190-197.

investigations violated the Articles and Bylaws have no merit and in any event are time-barred.<sup>219</sup>

239. As regards the Rule 7 Claim, the Respondent submits that to the extent it is maintained, it must be rejected both as lacking merit and because there is no valid basis for an order shifting costs on the ground of Rule 7's alleged wrongful adoption.<sup>220</sup>

### **3. *Amici's Post-Hearing Brief***

240. In their joint Post-Hearing Brief dated 12 October 2020, the *Amici* submit that adverse inferences against the Claimant should be made with respect to every issue in the IRP based on "Afilias purposefully, voluntarily and knowingly withholding" evidence from the Panel. According to the *Amici*, the Claimant's executives whose witness statements were withdrawn had substantial direct personal knowledge and special industry expertise material to virtually every contested issue in the IRP.<sup>221</sup>

241. The *Amici* argue that the Panel's jurisdiction is limited to declaring whether the Respondent violated its Bylaws, and does not extend to making findings of fact in relation to third-party claims or awarding relief contravening third party rights.<sup>222</sup> As a result, the *Amici* submit that the Panel lacks authority to find that the Domain Acquisition Agreement violates the Guidebook or that the *Amici* engaged in misconduct.<sup>223</sup> According to the *Amici*, the Panel should limit its review to ICANN's decision making process and only make non-binding recommendations that relate to that process, as opposed to the decision ICANN should make.<sup>224</sup>

242. The *Amici* contend that a decision granting the Claimant's requested relief, or making findings on the Domain Acquisition Agreement or their conduct, would violate their due

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<sup>219</sup> *Ibid*, paras. 198-217.

<sup>220</sup> Respondent's PHB, paras. 218-231.

<sup>221</sup> *Ibid*, paras. 6 and 13-21.

<sup>222</sup> *Ibid*, paras. 22-49.

<sup>223</sup> *Ibid*, paras. 62-67.

<sup>224</sup> *Ibid*, paras. 68-81.

process rights because of their limited participation in the IRP.<sup>225</sup>

243. According to the *Amici*, the Domain Acquisition Agreement complies with the Guidebook. The *Amici* also allege that transactions comparable to the Domain Acquisition Agreement have regularly occurred as part of the gTLD Program, with ICANN's knowledge and approval and consistent with the Guidebook.<sup>226</sup> They further urge that Section 10 of the Guidebook prohibits only the sale and transfer of an entire application, and does not prohibit agreements between an applicant and a third party to request ICANN to approve a future assignment of a registry agreement.<sup>227</sup> The *Amici* aver that ICANN has approved many assignments of registry agreements under such circumstances.<sup>228</sup>
244. The *Amici* state that they did not seek to evade scrutiny by maintaining the Domain Acquisition Agreement confidential during the auction, and argue that the Guidebook did not require disclosure of that agreement prior to the auction. They note that the DAA was always intended to be, and will be subject to the same scrutiny as the numerous other post-delegation assignments of new gTLDs. In addition, the *Amici* deny that the confidentiality of the Domain Acquisition Agreement provided them with any undue advantage.<sup>229</sup>
245. The *Amici* argue that there is no evidence of anticompetitive intent or effect, and submit that Afilias has abandoned its competition claims. In addition, the *Amici* urge that ICANN is not an economic regulator, that competition is not a review criterion under the New gTLD Program, and that ICANN's competition mandate was fulfilled by the DOJ investigation.<sup>230</sup>
246. Finally, the *Amici* note that the Claimant never rebutted the evidence of its own violation of the Guidebook when a representative of the Claimant contacted NDC during

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<sup>225</sup> *Ibid*, paras. 82-86.

<sup>226</sup> *Ibid*, paras. 8 and 87-123.

<sup>227</sup> *Amici's* PHB, paras. 100-109.

<sup>228</sup> *Ibid*, paras. 124-153.

<sup>229</sup> *Ibid*, paras. 153-180.

<sup>230</sup> *Ibid*, paras. 181-205.

the Blackout Period.<sup>231</sup>

## H. Submissions Regarding the Donuts Transaction

247. As noted in the History of the Proceedings’ section of this Final Decision, the *Amici* have requested that the Panel take into consideration their submissions concerning the 29 December 2020 merger between Afilias, Inc. and Donuts, Inc. Those submissions, and that of the Parties, are summarized below.
248. In counsel’s letter of 9 December 2020, the *Amici* described the contemplated transaction, based on publicly disclosed information, as a sale to Donuts of Afilias, Inc.’s entire existing registry business, with only the .WEB application itself being retained within an Afilias, Inc. shell. This, the *Amici* averred, is information that the Claimant ought to have disclosed to the Panel as it is inconsistent with the Claimant’s claims and requested relief in this IRP. Moreover, the *Amici* contended that by withdrawing the witness statements of its party representatives in this IRP, the Claimant sought to prevent the Respondent and the *Amici* from eliciting this information.
249. In its response of 16 December 2020 to the *Amici*’s letter, the Claimant submitted that Afilias, Inc.’s arrangement with Donuts has no bearing on the issues in dispute in the IRP. The Claimant explained that the contemplated transaction concerned the registry business of Afilias, Inc., not its registrar business<sup>232</sup>, and that the Claimant as an entity, as well as its .WEB application, had been carved out of the transaction. The Claimant added that after the transaction it will remain part of a group of companies that will control a significant registrar business. Accordingly, the Claimant averred that its new structure will not impact its ability to launch .WEB. Finally, the Claimant noted that it has informed the Respondent of a possible sale of its registry business back in September 2020.

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<sup>231</sup> *Ibid*, paras. 206-214.

<sup>232</sup> Registry operators are parties to Registry Agreements with ICANN that set forth their rights, duties and obligations as operators. Companies known as “registrars” sell domain name registrations to entities and individuals within existing gTLDs. See Respondent’s Rejoinder, 31 May 2019, paras. 17 and 23. As explained in the preamble of the Guidebook, Ex. C-3, “[e]ach of the gTLDs has a designated ‘registry operator’ and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in the TLD. The gTLDs are served by 900 registrars, who interact with registrants to perform domain name registration and other related services.” (p. 2 of the PDF).



250. Also on 16 December 2020, the Respondent confirmed that it was aware that Afilias, Inc. and Donuts had entered into an agreement by which the latter would acquire the former's TLD registry business, excluding the Claimant's .WEB application. The Respondent submitted that these developments reinforced the importance for the Panel not to exceed its "limited jurisdiction to determine only whether a Covered Action by ICANN violated the Articles of Bylaws and to issue a declaration to that effect."
251. On 21 December 2020, with leave of the Panel, the *Amici* replied to the Parties' letters of 16 December 2020. According to the *Amici*, the Claimant's response only reinforced the "the inappropriateness and inadvisability of the Panel deciding allegations concerning the transactions at issue." That is because, according to the *Amici*, it is a fundamental principle and tenet of the Respondent's Bylaws and IRP procedures that matters involving multiple parties and interests such as the matters at issue in this case are to be addressed in the first instance by the Respondent. The *Amici* also reiterated their claim that the Claimant has not been transparent about its plans and that of Afilias, Inc. as they affected the Claimant's ability to execute on its proposed deployment of .WEB.
252. On 30 December 2020, the day after the closing of the Donuts transaction, Afilias responded to the *Amici*'s letter of 21 December 2020, stating that it "was yet another attempt to divert the Panel's attention from the relevant issue to be arbitrated in this IRP." The Claimant rejected the notion that the Donuts transaction, much like the other transactions the *Amici* had pointed to in their written submissions, bear any resemblance to the Domain Acquisition Agreement, and it listed what it considers are key differences between the two (2) situations.

## V. ANALYSIS

### A. Introduction

253. As the Panel observed in its Procedural Order No. 5, this IRP is an ICANN accountability mechanism, the Parties to which are the Claimant and the Respondent. As such, it is not the forum for the resolution of potential disputes between the Claimant and the *Amici*, two (2) non-parties that are participating in this IRP as *amici curiae*, or of divergence and

potential disputes between the *Amici* and the Respondent by reason of the latter's actions or inactions in addressing the question of whether the DAA complies with the New gTLD Program Rules.

254. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules.<sup>233</sup> The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.
255. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.
256. The Claimant's core claims have been articulated with increasing particulars as these proceedings progressed. This, in the opinion of the Panel, is understandable in light of the manner in which the Respondent's defences have themselves evolved, most particularly the defence based on the Board's 3 November 2016 decision to defer consideration of the issues raised in connection with .WEB. This reason alone justifies rejection of the Respondent's contention that the Claimant failed to sufficiently plead a violation of the Respondent's Articles and Bylaws in connection with ICANN's post-auction investigation of Afiliás' allegations that NDC violated the Guidebook and Auction Rules. In any event,

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<sup>233</sup> See Afiliás' PHB, para. 247. See also Claimant's Reply, para. 16, where the Claimant describes its "principal claim".

the Panel considers that the Claimant's core claims are comprised within the broad allegations of breach made in the Amended Request for IRP.<sup>234</sup>

257. The Respondent's main defences are, first, that the Claimant's claims regarding the Respondent's actions or inactions in 2016 are time-barred. While reserving its position about the propriety of the DAA under the New gTLD Program Rules, the Respondent also denies that it was obligated to disqualify NDC, whether it be by reason of its alleged competition mandate or as a necessary consequence of a violation of the Guidebook or Auction Rules. The Respondent also contends that it complied with its Articles and Bylaws when it decided not to take any action regarding the .WEB contention set while accountability mechanisms in relation to .WEB were pending, and that the Panel should defer to the Board's reasonable business judgment in coming to that decision. As noted, the Respondent rejects as unauthorized under the Bylaws, the Claimant's requests that the Respondent be ordered to proceed with contracting the Registry Agreement for .WEB with the Claimant, at a bid price to be specified by the Panel.
258. The Panel begins its analysis by considering the Respondent's time limitations defence. The Panel then addresses the standard by which the Respondent's actions or inactions should be reviewed. Thereafter, the Panel turns to examining the Respondent's conduct against the backdrop of the entire chronology of events, and considers whether it was open to the Respondent, both its Staff and its Board, not to pronounce upon the DAA's alleged non-compliance with the Guidebook and Auction Rules following the Claimant's complaints, an inaction that endures to this day. The Panel then considers, in turn, the Claimant's Rule 7 Claim, and the scope of the Panel's remedial authority in light of its findings that the Respondent, as set out in these reasons, violated its Articles and Bylaws. The Panel concludes its analysis by designating the prevailing party, as required by Section 4.3(r) of the Bylaws, and determining the Claimant's cost claim.

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<sup>234</sup> See, e.g., Amended Request for IRP, para. 2.

## **B. The Respondent's Time Limitations Defence**

### **1. Applicable Time Limitations Rule**

259. Three (3) successive limitations regimes have been referred to as potentially relevant to determining the timeliness of the Claimant's claims in this IRP.
260. Prior to 1 October 2016, at a time when only Board actions could be the subject of an IRP, the Bylaws required that a request for independent review be filed within thirty (30) days of the posting of the Board's minutes relating to the challenged Board decision.<sup>235</sup>
261. New ICANN Bylaws came into force as of 1 October 2016. However, these did not contain any provision setting a time limitation for the filing of an IRP. Since the supplementary rules for IRPs in force at the time did not contain a time limitation provision either, it is common ground that, during the period from 1 October 2016 to 25 October 2018, IRPs were subject neither to a limitation period nor to a repose period.
262. The Respondent's time limitations defence is based on Rule 4 of the Interim Procedures which, inclusive of the footnote that forms part of the Rule, reads as follows:

#### **4. Time for Filing<sup>3</sup>**

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

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<sup>3</sup> The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

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<sup>235</sup> See Bylaws (as amended on 11 February 2016), Ex. C-23, Article IV, Section 3.3.

263. This Rule 4 came into being as part the new Interim Procedures adopted by the Board on 25 October 2018. As set out in some detail in the Panel’s Decision on Phase I, this was the culmination of a development process within ICANN’s IOT that began on 19 July 2016, with the circulation to IOT members of a first draft of proposed Updated Supplementary Procedures, and concluded on 22 October 2018, when draft Interim Supplementary Procedures were sent to the Board for adoption.<sup>236</sup>
264. While the Interim Procedures were adopted on 25 October 2018, the first paragraph of their preamble provides that “[t]hese procedures apply to all independent review process proceedings filed after 1 May 2018.” Rule 2 of the Interim Procedures confirms the retroactive application of the Interim Procedures in two (2) ways: first, by providing that they apply to IRPs submitted to the ICDR after the Interim Procedures “go onto effect”; and second, by providing that IRPs commenced prior to the Interim Procedures’ “adoption” (on 25 October 2018) shall be governed by the procedures “in effect at the time such IRPs were commenced”. For IRPs commenced after 1 May 2018, this would point to the Interim Procedures.
265. Ms. Eisner acknowledged in her evidence that Rule 4 was the subject of considerable debate within the IOT. She also confirmed that by October 2018, “ICANN org”<sup>237</sup> was anxious to get a set of procedures in place. Indeed, Ms. Eisner had noted during the IOT meeting held of 11 October 2018 that “we at ICANN org are getting nervous about being on the precipice of having an IRP filed”.<sup>238</sup> It is recalled that on 10 October 2018, the day prior to this meeting, the Claimant had, in the context of its pending CEP, provided the Respondent’s in-house counsel with a draft of the Claimant’s Request for an IRP in connection with .WEB.<sup>239</sup>
266. Underlying the footnote to Rule 4 is the fact that the Interim Procedures were conceived as a provisional instrument, designed to apply until the Respondent, in accordance with the

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<sup>236</sup> See Decision on Phase I, paras. 139-171.

<sup>237</sup> “ICANN org” is an expression used to refer to ICANN’s Staff and organization, as opposed to ICANN’s Board or its supporting organizations and committees. See Merits hearing transcript, 4 August 2020, p. 391:6-15 (Ms. Burr).

<sup>238</sup> Merits hearing transcript, 5 August 2020, pp. 495 and 498; see also pp. 479-480 (Ms. Eisner).

<sup>239</sup> See Decision on Phase I, para. 151, and Merits hearing transcript, 5 August 2020, p. 494 (Ms. Eisner).

applicable governance processes, will come to develop and adopt final supplementary procedures for IRPs. Specifically in relation to the introduction of a “Time for Filing” provision in the Interim Procedures, Ms. Eisner explained that the IOT:

[...] agreed at some point and finalized language on a footnote that would confirm that if there was a future change in a deadline for time for filing, that ICANN would work to make sure no one was prejudiced by that. [...]

The footnote that was included in the Rule 4 was about the change between the -- we are putting the interim rules into effect. And then if in the future a discussion where people were suggesting that there should be basically no statute of limitations on the ability to challenge an act of ICANN, if that were to be the predominant view, and what the Board put into effect that there would be some sort of stopgap measure put in so that anyone who was not able to file under the interim rules and the timing set out there but could have filed if the other rules, the broader rules had been in effect, that we would put in a stopgap to make sure that no one was prejudiced by that differentiation because we had agreed on a different timing for the final set.<sup>240</sup>

267. In its Post-Hearing Brief dated 12 October 2020, the Respondent advised that as of that date, final Supplementary Procedures had not been completed or adopted.<sup>241</sup>
268. Having identified and placed in context the rule on which the Respondent relies in support of its time limitations defence, the Panel turns to consider the merits of that defence.

## **2. Merits of the Respondent’s Time Limitations Defence**

269. It is the Respondent’s contention that the Claimant’s claim that ICANN had an unqualified obligation to disqualify NDC upon receiving the DAA in August 2016 is barred by the repose period of Rule 4 because the Claimant challenges actions or inactions that occurred in 2016, more than two (2) years before the Claimant filed its IRP in November 2018. The Respondent adds that the limitations period of Rule 4 also bars the Claimant’s claims because the Claimant was aware of the material effect of the alleged actions or inactions of ICANN by August and September 2016, as evidenced by its letters of 8 August 2016 and 9 September 2016, demanding that ICANN disqualify NDC.
270. The Claimant’s position is that its claims against the Respondent for violating its Articles

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<sup>240</sup> Merits hearing transcript, 5 August 2020, pp. 496-498 (Ms. Eisner).

<sup>241</sup> Respondent’s PHB, fn 103, p. 38.

and Bylaws, as opposed to its claims that NDC had violated the New gTLD Program Rules, accrued no earlier than on 6 June 2018, when the Respondent proceeded with the delegation process for .WEB with NDC,<sup>242</sup> and that even if the time limitations and repose periods were applicable to its claims against the Respondent, which the Claimant contends they are not, they would have been tolled by its CEP that lasted from 18 June 2018 to 13 November 2018.

271. The Panel has carefully reviewed the Claimant's August and September 2016 correspondence relied upon by the Respondent, and cannot accept the latter's contention that the claims asserted by Afilias in its 2016 letters to ICANN are the same as the claims asserted by the Claimant in this IRP. Whereas the Claimant's 2016 letters sought to demonstrate NDC's alleged violations of the New gTLD Program Rules, the Claimant's IRP, using these violations as a predicate, impugns the conduct of the Respondent itself in response to NDC's conduct. Stated otherwise, the Claimant's claims in this IRP concern not NDC's conduct, but rather the Respondent's actions or inactions in response to NDC's conduct.<sup>243</sup>
272. As amplified later in these reasons, when the Panel considers the Respondent's handling of the Claimant's complaints, the Panel does not accept, as urged by the Respondent, that the Claimant can be faulted for having waited for some form of determination by the Respondent before alleging in an IRP that the Respondent's actions or inaction violated its Articles and Bylaws. The Panel recalls that, in its responses to the Claimant's letters of 8 August 2016 and 9 September 2016, the Staff indicated, on 16 September 2016, that ICANN would pursue "informed resolution" of the questions raised by the Claimant and Ruby Glen,<sup>244</sup> and, in ICANN's letter of 30 September 2016, that it would "continue to take Afilias' comments, and other inputs that [it] ha[d] sought, into consideration as [it] consider[ed] this matter."<sup>245</sup>

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<sup>242</sup> *Ibid*, para. 179.

<sup>243</sup> Claimant's PHB, para. 182.

<sup>244</sup> ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

<sup>245</sup> ICANN's letter to Mr. Hemphill dated 30 September 2016 and attached Questionnaire, Ex. C-61.

273. The first of these letters attached a detailed Questionnaire designed to assist ICANN in evaluating the concerns raised by Afiliias and Ruby Glen, and the second represented in no uncertain terms that the Respondent's consideration of this matter was continuing. In such circumstances, there is force to the Claimant's contention that commencing contentious dispute resolution proceedings at that time would have interfered with the "informed resolution" that ICANN had represented it would undertake, and would likely have attracted an objection of prematurity.
274. The Panel also recalls, a fact that is not in dispute, that the Respondent did not communicate to the Claimant any view or determination in respect of the many questions raised in the Questionnaire attached to the Respondent's letter of 16 September 2016. As for the Board's decision in November 2016 to defer consideration of the complaints raised in relation to NDC's conduct, it is common ground that it was never communicated to the Claimant or otherwise made public, and that it was disclosed for the first time upon the filing of the Respondent's Rejoinder in this case, on 1 June 2020.
275. From November 2016 to the beginning of the year 2018, as seen already, the .WEB contention set was on hold by reason of the pendency of an accountability mechanism and the DOJ investigation. The situation evolved with the DOJ's decision to close its investigation on 9 January 2018, the closure of Donuts' CEP on 30 January 2018, and the expiration on 14 February 2018 of the 14-day period given to Ruby Glen to file an IRP. Shortly thereafter, the Claimant, on 23 February 2018, formally requested an update on ICANN's investigation of the .WEB contention set and requested documents by way of its First DIDP Request.<sup>246</sup> The Claimant also requested that the Respondent take no action in regard to .WEB pending conclusion of this DIDP Request.
276. The Claimant was notified on 6 June 2018 that the Respondent had removed the .WEB contention set from its on-hold status.<sup>247</sup> While the Claimant was still ignorant of any determination by the Respondent in respect of the concerns raised in August and

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<sup>246</sup> Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

<sup>247</sup> ICANN Global Support's email to Mr. Kane dated 7 June 2018, Ex. C-62, p. 1. Mr. Kane was in Australia at the time, which is why the date on the Afiliias' copy is 7 June 2018, although ICANN sent it on 6 June 2018.



September 2016, which were the subject of the Respondent’s Questionnaire of 16 September 2016, a necessary implication of the Respondent’s decision was that these concerns did not stand – or no longer stood – in the way of the delegation of .WEB to NDC. In the Panel’s opinion, this is when the Claimant’s complaints about NDC’s conduct crystallized into a claim against the Respondent. To quote from Rule 4, but recalling that in June 2018 it had not yet been adopted, this is when the Claimant “[became] aware of the material effect of the action or inaction giving rise to the DISPUTE”.

277. The Claimant commenced its CEP on 18 June 2018, twelve days after the removal of the .WEB contention set from its on-hold status. As already explained, potential IRP claimants are “strongly encouraged” to engage in this non-binding process for the purpose of attempting to narrow the Dispute, and an additional incentive to do so resides in their exposure to a cost-shifting decision if they fail to partake in a CEP and ICANN prevails in the IRP.<sup>248</sup>
278. The rules applicable to a CEP are described in an ICANN document dated 11 April 2013 (**CEP Rules**).<sup>249</sup> The CEP Rules provide that, if the parties have failed to agree a resolution of all issues in dispute upon conclusion of the CEP, the potential IRP claimant’s time to file a request for independent review shall be extended for each day of the CEP but in no event, absent agreement, for more than fourteen (14) days.
279. The Claimant’s CEP was terminated by the Respondent on 13 November 2018. Consistent with the CEP Rules, the Respondent informed the Claimant that “ICANN will grant Afiliis an extension of time to 27 November 2018 (14 days following the close of CEP) to file an IRP”, adding that “this extension will not alter any deadlines that may have expired before the initiation of the CEP”.<sup>250</sup> The Claimant commenced its IRP the next day, on 14 November 2018.
280. The Respondent has not challenged the application of the CEP Rules to the Claimant’s

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<sup>248</sup> Bylaws, Ex. C-1, Article 4, Section 4.3(e)(i)-(ii).

<sup>249</sup> Cooperative Engagement Process Rules, 11 April 2013, Ex. C-121.

<sup>250</sup> Exchange of emails between ICANN and Dechert, Ex. C-54.

CEP and the time for the filing of its IRP. In response to the Claimant's argument that the retroactive time limitations period set out in Rule 4 was tolled from 18 June 2018 to 13 November 2018, while its CEP was pending, the Respondent argued that the tolling was irrelevant because the limitations period had already long expired based on its submission that the Claimant's claims had accrued in August/September 2016, a submission that this Panel has rejected.

281. In sum, the Panel finds that the Claimant's core claims against the Respondent, as summarized above in paragraph 251 of this Final Decision, only accrued on 6 June 2018. Since the Claimant's CEP had the effect of tolling the time available to the Claimant to file an IRP until 27 November 2018, fourteen (14) days after closure of the CEP, the Claimant's IRP was timely and the Respondent's time limitations defence insofar as the Claimant's core claims are concerned must be rejected.

282. The Claimant has accused the Respondent of having enacted Rule 4 and given it retroactive effect in order to retroactively time bar its claims in this IRP. In support of this contention, the Claimant advances the following factual allegations:

- The Respondent only launched the solicitation of public comments concerning the addition of timing requirements to the draft procedures governing IRPs on 22 June 2018, shortly after Afiliás filed its CEP;
- In spite of the fact that the public comment period on proposed Rule 4 remained open, Rule 4 was included in the proposed Interim Procedures presented to the Board for approval on 25 October 2018;
- Having received a draft of the Claimant's IRP in the context of its CEP on 10 October 2018, the Respondent decided to give retroactive effect to the Interim Procedures to 1 May 2018, six (6) weeks prior to the initiation of the Claimant's CEP, with no carve-out for pending CEPs (of which there were several) or IRPs

(of which there was none); and

- Having terminated the Claimant’s CEP on 13 November 2018, and received its IRP on 14 November 2018, the Respondent was able to rely on the retroactive application of the Interim Procedures to support its Rule 4 time limitations defence.

283. In light of the Panel’s finding as to the accrual date of the Claimant’s core claims, it is not necessary further to consider these allegations. However, the Panel does wish to record its view that, from a due process perspective, the retroactive application of a time limitations provision is inherently problematic. A retroactive law changes the legal consequences of acts committed or the legal status of facts and relationships prior to the enactment of the law.<sup>251</sup> The potential for unfairness is apparent and thus, in many legal systems, there are restrictions on, and presumptions against, giving legal rules a retroactive effect.

284. Between 1 October 2016 and 25 October 2018, there was no time limitation for the filing of an IRP in respect of the Respondent’s actions or failures to act. Yet an IRP timely filed under the Bylaws, say on 18 June 2018, would, if Rule 4 of the Interim Procedures were given effect to, retroactively be barred and the claims advanced therein defeated with no consideration of their merits because of the retroactive application of the Interim Procedures adopted on 25 October 2018. The fact that only a single case, the Claimant’s IRP, was in fact affected by the retroactive application of the Interim Procedures only heightens the due process concern. The Panel recalls that under Section 4.3(n)(i) of the Bylaws, the rules of procedure for the IRP to be developed by the IOT “should apply fairly to all parties”.

### **C. Standard of Review**

285. The standard of review applicable to an IRP under the Bylaws is provided in Section 4.3(i) of the Bylaws and Rule 11 of the Interim Procedures, which are in substance identical.

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<sup>251</sup> David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, p. 41. See also Black’s Law Online Dictionary, 2<sup>nd</sup> ed., s.v. “retroactive statute”: <https://thelawdictionary.org/retroactive-statute/> (consulted on 7 February 2021): “a law that imposes a new obligation on past things or a law that starts from a date in the past.”

Section 4.3(i) of the Bylaws reads in relevant parts as follows:

(i) Each IRP Panel shall conduct an objective, *de novo* examination of the Dispute.

(i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

286. It is common ground that, except for claims potentially falling under sub-paragraph (iii) of Section 4.3(i), the Panel must conduct an objective, *de novo* examination of claims that actions or failures to act on the part of the Respondent violate its Articles or Bylaws, and make appropriate findings of fact in light of the evidence. The Parties therefore agree that this is the standard applicable to the Panel's review of actions or failures to act on the part of the Respondent's Staff.

287. There is profound divergence between the Parties as to the import of sub-paragraph (iii) of Section 4.3(i), relating to Claims arising out of the Board's exercise of its fiduciary duties. The Respondent argues that the effect of this rule is to incorporate the "business judgment rule" into the independent review of ICANN's Board action, a doctrine which the Respondent avers is recognized in California<sup>252</sup> and, according to the California Supreme Court, which "exists in one form or another in every American jurisdiction".<sup>253</sup> More specifically, the Parties diverge both as to the scope of the carve-out made in Section 4.3 (i)(iii), and the question of whether the Board actions and inactions that are impugned by the Claimant involve the Board's exercise of its fiduciary duties.

288. These questions are addressed when the Panel comes to consider the merits of the Claimant's claims. For present purposes, it is noted that the Parties agree that, to the extent

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<sup>252</sup> Respondent's PHB, para. 50.

<sup>253</sup> *Landen v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507 n.14 (1986), RLA-13).

the Panel finds that the business judgment rule as it may have been incorporated in Section 4.3(i)(iii) of the Bylaws has any application in the present case, it refers to a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.”<sup>254</sup>

#### **D. Merits of the Claimant’s Core Claims**

289. While the Panel has found that the Claimant’s core claims against the Respondent crystallized on 6 June 2018, the Panel’s view is that a proper analysis of the Claimant’s claims requires an examination of the Respondent’s conduct – that of its Board, individual Directors, Officers and Staff – against the backdrop of the entire chronology of events leading to the Respondent’s decision of 6 June 2018. Before embarking on this examination, however, the Panel considers it useful to recall the key standards against which the Respondent has determined that its conduct should be assessed.

##### **1. Relevant Provisions of the Articles and Bylaws**

290. Article 2, paragraph III of the Respondent’s Articles reads, in part, as follows:

The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets.[...]

291. Under its Bylaws, the Respondent has committed to “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values”.<sup>255</sup>

292. The Respondent’s Commitments that are relied upon by the Claimant or appear germane to its claims, are expressed as follows in the Bylaws:

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and

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<sup>254</sup> *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)).

<sup>255</sup> Bylaws, Ex. C-1, Section 1.2.

open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

[...]

(v) Make 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); and

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.<sup>256</sup>

293. As for ICANN's Core Values, which are to "guide the decisions and actions" of the Respondent, they include:

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;<sup>257</sup>

294. The Bylaws further provide that ICANN's Commitments and Core Values "are intended to apply in the broadest possible range of circumstances".<sup>258</sup>

295. Finally, under Article 3 of the Bylaws, entitled Transparency, the Respondent has committed that it and its constituent bodies:

[...] shall operate to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness, [...]<sup>259</sup>

296. Bearing the standards set out in those commitments and core values in mind, the Panel turns to consider the Respondent's conduct, beginning with the Claimant's complaints about the Respondent's pre-auction investigation.

## 2. Pre-Auction Investigation

297. The Claimant has criticized the Respondent's pre-auction investigation of the allegation

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<sup>256</sup> Bylaws, Ex. C-1, Section 1.2(a)(v)(vi).

<sup>257</sup> *Ibid*, Section 1.2 (b) (v) and (vi).

<sup>258</sup> *Ibid*, Section 1.2 (b) (c).

<sup>259</sup> *Ibid*, Section 3.1.

by Ruby Glen that NDC had failed properly to update its application following an alleged change of ownership or control of NDC. This allegation was prompted by Mr. Rasco's email of 7 June 2016 to Mr. Nevett, where he stated that the "powers that be" had indicated there was no change in position and that NDC would not be seeking an extension of the auction date. The Claimant strenuously argues that Mr. Rasco's representations, first to an employee of ICANN's New gTLD Operations section, Mr. Jared Erwin,<sup>260</sup> and then to the Ombudsman,<sup>261</sup> were both misleading (in the first case) and erroneous (in the second).

298. As regards the Respondent's pre-auction investigation – on which, in the opinion of the Panel, very little turns insofar as the Claimant's core claims are concerned – the Panel accepts the evidence of Ms. Willett that prior to the auction, the Respondent was unaware of Verisign's involvement in NDC's application. Having considered the witness and documentary evidence on this question, which is preponderant, the Panel finds that the allegation presented to the Respondent was one of change of control within NDC, that it was promptly investigated by Ms. Willett's team and the Respondent's Ombudsman, and that in light of the representations made by Mr. Rasco, it was reasonable for the Respondent to conclude, as Ruby Glen and the other applicants in the contention set were advised in Ms. Willett's letter of 13 July 2016, that the Respondent "found no basis to initiate the application change request process or postpone the auction."<sup>262</sup> The Panel therefore rejects the Claimant's contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.

### **3. Post-auction Actions or Inactions**

#### **(i) Overview**

299. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds

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<sup>260</sup> Exchanges between Messrs. Erwin and Rasco, Ms. Willett's witness statement, 31 May 2019, Ex. B.

<sup>261</sup> Exchanges between Messrs. LaHatte and Rasco, Mr. Rasco's witness statement, 30 May 2020, Ex. N, [PDF] p. 2.

<sup>262</sup> Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.

300. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.
301. In the paragraphs below, the Panel sets out its reasons for making those findings and reaching this conclusion.

**(ii) The Claimant's 8 August and 9 September 2016 Letters**

302. In the first of these two (2) letters, Mr. Hemphill, at the time, Afilias' Vice President and General Counsel, makes clear that while he has not been able to review a copy of the agreement(s) between NDC and Verisign, what has been made public about the arrangements between the two (2) companies raises sufficient concerns for Afilias to "request that ICANN promptly undertake an investigation" and "take appropriate action against NDC and its .WEB application for violations of the Guidebook, as we had



requested". Mr. Hemphill concludes his letter by urging the Respondent to stay any further action in relation to .WEB and, in particular, not to act upon any request for NDC or Verisign to enter into a registry agreement for .WEB with the Respondent.<sup>263</sup>

303. The Claimant's 9 September 2016 letter, noting that the Respondent had not responded to its earlier letter of 8 August, reiterated the request that the Respondent take no steps in relation to .WEB until ICANN, its Ombudsman, or its Board had reviewed NDC's conduct and determined whether or not to disqualify NDC's bid and reject its application. The letter then proceeds to explain, in detail, the reasons why, in the opinion of Afilias, the Respondent was obliged to disqualify NDC's application and proceed to contract for .WEB with Afilias. Specifically, Afilias articulated, by reference to the New gTLD Program Rules, the Articles and the Bylaws, why it considered that NDC had violated the Guidebook and Auction Rules and why ICANN was under a duty to contract with the next highest bidder in the auction. The Claimant concluded its letter by requesting a response by no later than 16 September 2016.<sup>264</sup>
304. The Claimant is not the only member of the contention set that raised questions, after the auction, about the propriety of Verisign's involvement in, and support for, the application of NDC. Contemporaneously with the Claimant's letters just reviewed, on 8 August 2016 Ruby Glen filed an Amended Complaint in the proceedings it had commenced in the US District Court prior to the auction. In its Amended Complaint, Ruby Glen questioned the legality of the auction for .WEB and sought an order enjoining the execution of a registry agreement pending resolution of its claims.
305. Before coming to the Questionnaire that the Respondent sent out on 16 September 2016, in part in response to Afilias' two (2) letters, the Panel recalls that in the meantime the Respondent had initiated a dialogue directly with Verisign, when outside counsel for the Respondent communicated by telephone with Verisign's outside counsel. The exact request that was made of Verisign's counsel remains unknown. However, it is undisputed that it was prompted by the Claimant's and Ruby Glen's complaints about the propriety of

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<sup>263</sup> Afilias' letter to Mr. Atallah dated 8 August 2016, Ex. C-49, pp. 1 and 3-4.

<sup>264</sup> Afilias' letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

NDC's arrangements with Verisign. Why the Respondent chose to request assistance at that point directly from Verisign, a non-applicant, rather than from NDC, is a question that was largely left unaddressed apart from outside counsel for the Respondent explaining, during the hearing held in connection with Afiliás' Application of 29 April 2020, that counsel knew Verisign's lead counsel from prior cases, and therefore decided to contact him.<sup>265</sup>

306. On 23 August 2016, in response to this request, Verisign's and NDC's counsel, unbeknownst to the Claimant and likely to the other members of the contention set (except NDC), filed a submission with the Respondent on behalf of NDC and Verisign in the form of an eight (8) page letter and five (5) attachments, one of which was the DAA. The letter states that it is being submitted in response to the request by ICANN's counsel for information regarding the agreement between NDC and Verisign relating to .WEB. Redacted - Third Party Designated Confidential Information

<sup>266</sup> The *Amici's* counsel's letter was marked as "Highly Confidential – Attorneys' Eyes Only", while the attached DAA, as already mentioned, was marked as "Confidential Business Information – Do Not Disclose". The letter of 23 August 2016 sent on behalf of the *Amici* was not posted on ICANN's website or disclosed to the Claimant because of its sender's request that it be kept confidential.<sup>267</sup>

### **(iii) The 16 September 2016 Questionnaire**

307. Turning to the Respondent's Questionnaire of 16 September 2016, the evidence reveals that it resulted from a collaborative effort by and between Ms. Willett, who prepared a first

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<sup>265</sup> Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:12-15 (Mr. Enson: "The lawyers ... -- ICANN and Verisign had been adverse to one another on a number of occasions. The lawyers know each other well and there is nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this.") See also the response from counsel for the Claimant: Merits hearing transcript, 3 August 2020, p. 53:1-10 (Claimant's Opening).

<sup>266</sup> Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. C-102.

<sup>267</sup> See Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

draft of the questions, and Respondent's counsel. At that time, Ms. Willett held the position of Vice-President, gTLD Operations, Global Division of ICANN, reporting directly to Mr. Atallah.<sup>268</sup> The Questionnaire was sent out to Afilias, Ruby Glen, NDC, and Verisign, under cover of a letter of even date signed by Ms. Willett.<sup>269</sup> Ms. Willett was asked why the Questionnaire was not sent to all members of the contention set, but the question was objected to on the ground of privilege.

308. The Panel has already noted that Ms. Willett's cover letter refers in introduction to questions having been raised in various fora about whether NDC should have participated in the 27-28 July 2016 auction, and whether NDC's application should have been rejected. The letter goes on to note:

To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information.

Accordingly, ICANN invites Ruby Glen, NDC, Afilias, and Verisign, Inc. (Verisign) to provide information and comment on the topics listed in the attached. Please endeavor to respond to all of the topics/questions for which you have information to do so. To allow ICANN promptly to evaluate these matters, please provide response [...] no later than 7 October 2016.<sup>270</sup>

309. Ms. Willett was asked what she meant when she stated that the Respondent was seeking information to facilitate "informed resolution". It was put to her that this "sounds like an investigation at the end of which ICANN would resolve the questions that had been raised". In response, Ms. Willett denied that she was undertaking an investigation, and stated that the responses eventually received to the Questionnaire were simply passed on to counsel.<sup>271</sup>
310. The Questionnaire is six (6) pages long and lists twenty (20) "topics" on which the entities to which it was addressed are invited to comment. The introductory paragraph echoes Ms. Willett's cover letter in stating that "all responses to these questions will be taken into

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<sup>268</sup> Merits hearing transcript, 5 August 2020, p. 545 (Ms. Willett). Ms. Willett left the employ of the Respondent in December 2019.

<sup>269</sup> ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

<sup>270</sup> *Ibid.*, p. 1 [emphasis added].

<sup>271</sup> Merits hearing transcript, 6 August 2020, pp. 696-697 (Ms. Willett) : "[...] I was not undertaking an investigation. ICANN counsel handled and administered the CEP process. So the responses which I received to these letters I passed along to counsel."

consideration in ICANN's evaluation of the issues raised [...]".<sup>272</sup>

311. As already noted, while the Respondent, NDC and Verisign had knowledge of the terms of the DAA at that time, Afilias and Ruby Glen did not. It seems to the Panel evident that this asymmetry of information put Afilias and Ruby Glen at a significant disadvantage in addressing the topics listed in the Questionnaire in the context of "ICANN's evaluation of the issues raised". By way of example, the first topic asked for evidence regarding whether ownership or control of NDC changed after NDC applied for .WEB. The Respondent, NDC and Verisign were able to comment on the alleged change of ownership or control resulting from the contractual arrangements between the *Amici* by reference to the actual terms of the DAA. However, Afilias and Ruby Glen were not.
312. Other topics in the Questionnaire would attract very different answers depending on whether the responding party had knowledge of the terms of the DAA. By way of examples:

4. In his 8 August 2016, letter, Scott Hemphill stated: "A change in control can be effected by contract as well as by changes in equity ownership." Do you think that an applicant's making a contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a "change in control" of the applicant? Do you think that compliance with such a contractual promise constitutes such a change in control? Please give reasons.

5. Do you think that AGB Section 1.2.7 requires an applicant to disclose to ICANN all contractual commitments it makes to conduct its affairs in particular ways? If not, in what circumstances (if any) would disclosure be required? [...]

7. Do you think that changes to an applicant's financial condition that do not negatively reflect on an applicant's qualifications to operate the gTLD should be deemed material? If so, why? Do you think that an applicant's obtaining a funding commitment from a third party to fund bidding at auction negatively affects that applicant's qualifications to operate the gTLD? Please explain why, describing your view of the relevance of (a) the funding commitment the applicant received and (b) the consideration the applicant gave to obtain that commitment (e.g., a promise to repay; a promise to use a particular backend provider; an option to receive some ownership interest in the applicant in the future; some promise about how the gTLD will be operated).[...]

9. Do you think that requiring applicants to disclose funding commitments (whether through loans, contributions from affiliated companies, or otherwise) they obtain for auction bids would help or harm the auction process? Would a requirement that applicants disclose their funding arrangements create problems for applicants (for example, making funding commitments harder to obtain)? To what extent, if any, do you think scrutinizing such arrangements (beyond determining whether they negatively reflect on an applicant's

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<sup>272</sup> ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50, p. 2 [emphasis added].

qualifications) would be within ICANN's proper mission? Would required disclosure of applicants' funding sources pose any threat to robust competition?

313. Another noteworthy feature of the Questionnaire is that while it contains many references to Mr. Hemphill's letters, it does not refer to the letter of 23 August 2016 from counsel for the *Amici*, nor in terms to the DAA. This was because one and the other had been marked confidential when submitted to the Respondent. Ms. Willett was asked about ICANN's practice when presented with a request to keep correspondence confidential:

[...] our practice was that we respected those requests for confidentiality and we did not post those -- such correspondences, with one exception.

At some point if some other party asked for something to be published or it became desirable and relevant to something else, I recall, again, it's been years, so I don't recall a specific example, but as a general practice, I recall that ICANN might ask the sender if it would be possible to publish a letter, but we respected their requests for confidential correspondence.<sup>273</sup>

314. The Panel is of the view that the Respondent could have, and ought to have requested Verisign and NDC for authorization to disclose the DAA to the other addresses of its Questionnaire, be it on an "external counsel's eyes only" basis. There is no evidence that this possibility was explored. It seems to the Panel that in the context of an information gathering exercise such as that in which the Respondent chose to engage with its Questionnaire, it would have been, to quote Ms. Willett's evidence, both "desirable" and "relevant" to do so. The Panel also believes that ICANN's evaluation of the issues would have been better informed had Afiliias and Ruby Glen been given an opportunity to know, and address directly, the arguments advanced on behalf of the *Amici* in response to the concerns they had raised. At the very least, the Respondent could have disclosed that the Questionnaire had been prepared with knowledge of the terms of the DAA, which would have given interested parties an opportunity to seek to obtain a copy of the agreement, either voluntarily by requesting it from the *Amici*, or through compulsion by available legal means.
315. The foregoing leads the Panel to find that the preparation and issuance of the Respondent's Questionnaire in the circumstances just reviewed violated the Respondent's commitment,

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<sup>273</sup> Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

under the Bylaws, to operate in an open and transparent manner and consistent with procedures designed to ensure fairness.

316. As noted, Afilias, NDC and Verisign forwarded responses to the Questionnaire, but Ruby Glen did not. Ms. Willett testified that she passed on the responses she received to ICANN's legal team, without undertaking her own analysis. She was not sure what counsel did with them.<sup>274</sup> As for any external follow-up, it is common ground that no feedback whatsoever was given to the Claimant of the Respondent's evaluation of these responses.

**(iv) The Respondent's Letter of 30 September 2016**

317. In the meantime, on 30 September 2016, Mr. Atallah, on behalf of the Respondent, acknowledged receipt of Afilias' 8 August and 9 September 2016 letters and, as found by the Panel when considering the Respondent's time limitations defence, represented in explicit terms that the Respondent's consideration of this matter was continuing. It bears noting that in 2016, Mr. Atallah was President of the Respondent's Global Domains Division, reporting to the CEO, and was the person responsible for overseeing the administration of the New gTLD Program.<sup>275</sup>

**(v) Findings as to the Seriousness of the Issues Raised by the Claimant, and the Respondent's Representation that It Would Evaluate Them**

318. In the Panel's opinion, the implication of the Respondent's decision to prepare and send out its 16 September 2016 Questionnaire, and of Mr. Atallah's letter of 30 September 2016 in response to the Claimant's letters of 8 August and 9 September 2016, was that the questions raised by the Claimant and Ruby Glen in connection with NDC's conduct and the latter's arrangements with Verisign were serious and deserving of the Respondent's consideration. This was admitted by the Respondent in its pleadings in this IRP, where the

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<sup>274</sup> Merits hearing transcript, 6 August 2020, pp. 719-720 (Ms. Willett).

<sup>275</sup> Merits hearing transcript, 7 August 2020, pp. 917-918 (Mr. Disspain).

Respondent averred:

[...] ...determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA. A true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA. This analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.<sup>276</sup>

319. In making its finding as to the seriousness of the questions raised by the Claimant, the Panel is mindful of Ms. Willett’s evidence when asked, in cross-examination, whether she considered that the concerns that Afiliis had raised were serious. Her answer was that she “considered them to be sour grapes”, and she admitted that she may have shared that view with others within ICANN.<sup>277</sup> However, Ms. Willett having testified that she never even read the DAA when these events were unfolding, nor had she read the 23 August 2016 letter sent to the Respondent on behalf of the *Amici*, the Panel must conclude that her stated view was more in the nature of a personal impression than a considered opinion. Moreover, in all appearance her impression was not shared by those who invested time in assisting her preparing the Questionnaire, or by Mr. Atallah who subsequently confirmed that ICANN was continuing to consider the questions raised by the Claimant. In any event, and as just seen, it is not the position formally adopted by the Respondent in this IRP.
320. The questions raised by the Claimant that are, in the opinion of the Panel, serious and deserving of the Respondent’s consideration, include the following, which the Panel merely cites as examples:
- Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an “Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application”.
  - Whether the execution of the DAA by NDC constituted a “change in circumstances

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<sup>276</sup> Respondent’s Rejoinder, para. 82.

<sup>277</sup> Merits hearing transcript, 6 August 2020, p. 746 (Ms. Willett).

that [rendered] any information provided in the application false and misleading”.

- Whether by entering into the DAA after the deadline for the submission of applications for new gTLDs, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, Verisign impermissibly circumvented the “roadmap” provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules.

321. The Panel expresses no view on the answers that should be given to those questions and the other questions arising from the execution of the DAA by NDC and Verisign, other than to reiterate, as acknowledged by the Respondent, that they are deserving of careful consideration.

322. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and “others in the contention set” were worthy of the Respondent’s consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent’s contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent *represented* that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism.<sup>278</sup> Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD

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<sup>278</sup> Merits hearing transcript, 6 August 2020, p. 745 (Ms. Willett).



Program, but also to disseminate the Respondent’s position on those questions within the Internet community and allow market participants to act accordingly.

**(vi) The November 2016 Board Workshop**

323. The Panel comes to the November 2016 Workshop session at which “the Board chose not to take any action at that time regarding .WEB because an Accountability Mechanism was pending regarding .WEB.”<sup>279</sup>
324. The existence of this November 2016 Workshop was revealed for the first time in the Respondent’s Rejoinder, filed on 1 June 2020. For example, no mention of it is made in the chronology of events contained in the Respondent’s Response,<sup>280</sup> where it was merely pleaded, with no reference to the workshop session, that the Board had not yet had an opportunity to fully address the issues being pursued by Afiliis in this IRP and that “[d]eferring such consideration until this Panel renders its final decision is well within the realm of reasonable business judgment.”<sup>281</sup>
325. The Panel had the benefit of hearing the evidence of two (2) witnesses who were in attendance at the November 2016 Workshop: Mr. Disspain, a long-standing member of ICANN’s Board, and Ms. Burr, who attended the workshop as an observer shortly before being herself appointed to the Board. Both of these witnesses are intimately familiar with the Respondent and its processes, and both testified openly and credibly.
326. This is how Mr. Disspain described the November 2016 Workshop session in his witness statement:

10. In November 2016, the Board received a briefing from ICANN counsel on the status of, and issues being raised regarding, .WEB. The communications during that session, in which ICANN’s counsel, John Jeffrey (ICANN’s General Counsel) and Amy Stathos (ICANN’s Deputy General Counsel), were integrally involved, are privileged and, thus, I will not disclose details of those discussions so as to avoid waiving the privilege. I recall that, prior to this session, the Board received Board briefing materials directly from ICANN’s counsel that set forth relevant information about the disputes regarding .WEB, the parties’ legal and factual contentions and a set of options the Board could consider.

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<sup>279</sup> Respondent’s Rejoinder, paras. 40-41.

<sup>280</sup> Respondent’s Response, paras. 40-54.

<sup>281</sup> Respondent’s Response, para. 66.

During the session, Board members discussed these topics and asked questions of, and received information and advice from, ICANN’s counsel.

11. At the November 2016 session, the Board chose not to take any action at that time regarding the claims arising from the .WEB auction, including the claim that, by virtue of the agreement between Verisign and NDC, NDC had committed violations of the Applicant Guidebook which merited the disqualification of its application for .WEB and the rejection of its winning bid. Given the Accountability Mechanisms that had already been initiated over .WEB, and given the prospect of further Accountability Mechanisms and legal proceedings, the Board decided to await the results of such proceedings before considering and determining what action, if any, to take at that time. [...]

327. In the course of his cross-examination, Mr. Disspain had the opportunity to add the following to the evidence set out in his witness statement:

- The workshop session of 3 November 2016 was separate and distinct from the actual Board meeting, which took place on 5 November 2016.<sup>282</sup>
- The session was attended by a significant number of Board members, in his estimation more than 50%.<sup>283</sup> Also in attendance were ICANN’s CEO, its in-house lawyers, and likely Mr. Atallah.<sup>284</sup>
- The letters that Afiliis had sent Mr. Atallah were known to those in attendance and “would have been part of the briefing”;<sup>285</sup> the Questionnaire prepared by ICANN in response to these letters was also known.<sup>286</sup> However, the DAA, the 23 August 2016 letter sent on behalf of the *Amici*, and the Questionnaire were not part of the briefing materials.<sup>287</sup>

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<sup>282</sup> Merits hearing transcript, 7 August 2020, pp. 918-919 (Mr. Disspain).

<sup>283</sup> *Ibid.*, p. 923 (Mr. Disspain).

<sup>284</sup> Merits hearing transcript, 7 August 2020, p. 924 (Mr. Disspain).

<sup>285</sup> Merits hearing transcript, 7 August 2020, p. 917 (Mr. Disspain).

<sup>286</sup> Merits hearing transcript, 7 August 2020, p. 928 (Mr. Disspain).

<sup>287</sup> Merits hearing transcript, 7 August 2020, pp. 930-931 (Mr. Disspain).

- There was a full and open discussion, that likely lasted more than fifteen (15) minutes.
- Rather than “proactively decide” or “agree” its course of action, the Board “made a choice” to follow its longstanding practice of not doing anything when there is a pending outstanding accountability mechanism.<sup>288</sup>
- The Board made this choice without the need for a vote, straw poll or show of hands.<sup>289</sup>

328. Ms. Burr explained that Board workshops are informal working sessions. A quorum is not required, attendance is not taken, nor are minutes prepared or resolutions passed.<sup>290</sup>

329. It is common ground that the choice, or decision, made by the Board at its November 2016 Workshop session was not communicated to Afilias or otherwise made public. In response to a question from the Panel, Mr. Disspain indicated that the question of whether the Board’s 3 November 2016 decision would or would not be communicated to the members of the .WEB contention set was not discussed at the workshop session.<sup>291</sup> Indeed, Mr. Disspain only became aware through his involvement in this IRP that the November 2016 Board decision to defer consideration of the issues raised in relation to .WEB was only communicated to the Claimant – and made public – when it was revealed in the Respondent’s Rejoinder.

330. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC’s bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a “pending question, one on which the Board had not pronounced and had decided not to address.” [emphasis added]

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<sup>288</sup> Merits hearing transcript, 7 August 2020, pp. 938-939 (Mr. Disspain).

<sup>289</sup> Merits hearing transcript, 7 August 2020, p. 935 (Mr. Disspain).

<sup>290</sup> Merits hearing transcript, 4 August 2020, pp. 282-286 (Ms. Burr).

<sup>291</sup> Merits hearing transcript, 7 August 2020, p. 975 (Mr. Disspain).

Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

331. The Respondent urges that it was not a violation of the Respondent’s Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC’s application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board’s exercise of its fiduciary duties.
332. The Panel does find, however, that it was a violation of the commitment to operate “in an open and transparent manner and consistent with procedures to ensure fairness”<sup>292</sup> for the Respondent to have failed to communicate the Board’s decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC’s application and auction bids for .WEB. Since the Board’s decision to defer consideration of these issues contradicted the Respondent’s representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.

**(vii) The Respondent’s Decision to Proceed with Delegation of .WEB to NDC in June 2018**

333. Mr. Disspain confirmed that by early 2018, the situation as described in paragraph 327 above “remained unchanged.”<sup>293</sup> That is, the question of whether NDC’s bid, post-DAA, was compliant with the New gTLD Program Rules had been raised and remained a pending question on which the Board had yet to pronounce. The extent to which the Respondent’s

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<sup>292</sup> See Bylaws Ex. C-1, Art. 3.

<sup>293</sup> Merits hearing transcript, 7 August 2020, pp. 976-977 (Mr. Disspain).

Staff had, by early 2018, progressed in their consideration of the questions that had been raised by the Claimant, if at all, is unknown. However, the evidence establishes that no determination of these questions was communicated to the Claimant, and that neither those questions nor any Staff position in relation thereto were brought back to the Board for its consideration. Ms. Willett explained in the course of her cross-examination that the on-hold status of an application or contention set does not mean “that all work ceases”, or that the Respondent is prevented from continuing to gather information.<sup>294</sup> Hence, the fact that the contention set was on hold throughout the period from November 2016 to June 2018 would not justify the lack of progress in evaluating the issues that had been raised in connection with .WEB.

334. This brings the Panel to considering the Respondent’s decision to put the .WEB contention set “off hold” on 6 June 2018, the day after Afiliat’s Reconsideration Request 18-7 was denied.<sup>295</sup> As seen, this immediately set back in motion the Respondent’s internal process leading to the execution of a registry agreement. On 12 June 2018, Ms. Willett and other ICANN staff approved a draft registry agreement for .WEB; the registry agreement was forwarded for execution to NDC on 14 June 2018; the agreement was promptly signed and returned to ICANN and, on the same day, ICANN’s Staff approved executing the .WEB Registry Agreement with NDC on behalf of ICANN.
335. In the opinion of the Panel, the Respondent’s decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett’s letter of 16 September 2016, the text in the introduction to the attached Questionnaire,<sup>296</sup> and Mr. Atallah’s letter of 30 September 2016.<sup>297</sup> The Panel also finds this conduct to be inconsistent with the Board’s decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated

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<sup>294</sup> Merits hearing transcript, 6 August 2020, pp. 697-698 (Ms. Willett).

<sup>295</sup> See above, para. 117.

<sup>296</sup> ICANN’s letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

<sup>297</sup> ICANN’s letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

by the Respondent in this IRP.

336. Mr. Disspain testified about the Respondent's decision to put the contention set off hold in June 2018. While he had made the point in his witness statement that this was a decision made by ICANN's Staff,<sup>298</sup> he confirmed at the hearing that the Board was aware, ahead of time, that the .WEB contention set would be put off hold. He added, however, that he and his fellow Board members fully expected the Claimant to make good on its promise to initiate an IRP, which would result in the contention set being put back on hold.<sup>299</sup>
337. Mr. Disspain was asked by the Panel what would the Board have done had the Claimant, contrary to his and his colleagues' expectation, *not* initiated an IRP. Might that not have resulted in a registry agreement for .WEB being signed by the Staff on behalf of the Respondent without the Board having the opportunity to address the questions it had chosen to defer in November 2016? Mr. Disspain, understandably, did not want to speculate as to what the Board would have done.<sup>300</sup> However, when shown internal correspondence evidencing that signature of the registry agreement for .WEB on behalf of ICANN had in fact been approved by ICANN's Staff after receipt of the executed copy of the agreement by NDC, he did confirm that Board approval is not required for the execution of a registry agreement by ICANN.<sup>301</sup> Thus, clearly, a registry agreement with NDC for .WEB could have been executed by ICANN's Staff and come into force without the Board having pronounced on the propriety of the DAA under the Guidebook and Auction Rules.
338. In the course of her examination, Ms. Willett was asked the following hypothetical question:

**[PANEL MEMBER]:** [...] If [...] an applicant had failed to respect the guidebook, but there had been no accountability mechanism to complain about that noncompliance, would you, by reason of the absence of an accountability mechanism, have sent a draft Registry Agreement for execution?

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<sup>298</sup> Mr. Disspain's witness statement, 1 June 2020, para. 13.

<sup>299</sup> Merits hearing transcript, 7 August 2020, pp. 978-980 (Mr. Disspain).

<sup>300</sup> *Ibid.*, pp. 981-982 (Mr. Disspain).

<sup>301</sup> *Ibid.*, pp. 1002-1004 (Mr. Disspain).

**THE WITNESS:** No, I don't believe we would have. If we determined that an applicant had violated the terms of the guidebook, I don't believe that my team and I would have given our approvals to proceed with contracting.<sup>302</sup>

339. In the Panel's view, Ms. Willett's evidence in answer to this question reflects the kind of ownership of compliance issues with the New gTLD Program Rules that the Respondent did not display in its dealing with the concerns raised in connection with NDC's arrangements with Verisign.
340. The Panel observes that the Respondent's Staff's failure to take a position on the question of whether the DAA complies with the New gTLD Program Rules before moving to delegation stands in contrast with the resolution that was brought to the pre-auction allegation of change of control within NDC, which had also been raised, initially, in correspondence. Ms. Willett confirmed in her evidence that the Respondent's pre-auction investigation was prompted by Ruby Glen's email of 23 June 2016.<sup>303</sup> Once the investigation was completed, Ms. Willett informed Ruby Glen of ICANN's decision<sup>304</sup> and advised Ruby Glen that if dissatisfied with the decision, it could invoke ICANN's accountability mechanisms.<sup>305</sup> No such decision was made by ICANN's Staff in relation to the issues raised by the Claimant that could have formed the basis for a formal accountability mechanism, in the context of which positions would have been adopted, battle lines would have been drawn, and an adversarial process such as an IRP would have resulted in a reasoned decision binding on the parties.
341. What the Panel has described as a failure on the part of the Respondent to take ownership of the issues arising from the concerns raised by the Claimant and Ruby Glen finds expression in the Respondent's submission in this IRP that the dispute arising out of NDC's arrangement with Verisign is in reality a dispute between the Claimant and the *Amici*. For example, the Respondent writes in its Response:

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<sup>302</sup> Merits hearing transcript, 6 August 2020, pp. 749-750 (Ms. Eisner).

<sup>303</sup> Merits hearing transcript, 6 August 2020, p. 617 (Ms. Willett).

<sup>304</sup> See Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

<sup>305</sup> Merits hearing transcript, 6 August 2020, pp. 621-622 (Ms. Willett).

[...] the Guidebook breaches that Afilias alleges are the subject of good faith dispute by NDC and Verisign, both of which are seeking to participate in this IRP pursuant to their *amicus* applications. [...] While Afilias' Amended IRP Request is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and Verisign, to which NDC and Verisign have responses. [...]<sup>306</sup>

342. Another example can be found in the Respondent's post-hearing brief where it is stated:

The testimony at the hearing established that there is a good-faith and fundamental dispute between *Amici* and *Afilias* about whether the DAA violated the Guidebook or Auction Rules, meaning that reasonable minds could differ on whether NDC is in breach of either and, if so, whether this qualification is the appropriate remedy. Accordingly, Afilias' additional argument that ICANN can only exercise its discretion reasonably by disqualifying NDC must be rejected.<sup>307</sup>

343. It may be fair to say, as averred in the Respondent's Response, that "ICANN has been caught in the middle of this dispute between powerful and well-funded businesses".<sup>308</sup> However, in the Panel's view, it is not open to the Respondent to add, as it does in the same sentence of its Response, "[and ICANN] has not taken sides", as if the Respondent had no responsibility in bringing about a resolution of the dispute by itself taking a position as to the propriety of NDC's arrangements with Verisign.

344. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on

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<sup>306</sup> See Respondent's Response, para. 63.

<sup>307</sup> Respondent's PHB, para. 90 [emphasis added].

<sup>308</sup> Respondent's Response, para. 4.



whether NDC violated the Guidebook”.<sup>309</sup>

345. The same can be said of the Respondent taking the position, shortly after Afilias filed its IRP, that it would only keep the .WEB contention set on hold until 27 November 2018, so as to allow the Claimant to file a request for interim relief, barring which the Respondent would take the contention set off hold.<sup>310</sup> It seems to the Panel that the Respondent was once again adopting a position that could have resulted in .WEB being delegated to NDC without the Board having determined whether NDC’s arrangements with Verisign complied within the New gTLD Program Rules.
346. The Panel also finds it contradictory for the Respondent to assert in pleadings before this Panel that the Respondent has not yet considered the Claimant’s complaints, having represented to the Emergency Panelist earlier in these proceedings that ICANN “ha[d] evaluated these complaints” and that the “time ha[d] therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers”.<sup>311</sup>
347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN’s Staff, and the rationale of the Board’s decision, in November 2016, to defer consideration of the issues raised in relation to NDC’s application for .WEB, for the Respondent’s Staff, to the knowledge of the Respondent’s Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.
348. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent’s failure to disqualify NDC’s application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the

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<sup>309</sup> Respondent’s Rejoinder, para. 81.

<sup>310</sup> See Decision on Phase I, para. 40.

<sup>311</sup> ICANN’s Opposition to Afilias Domains No. 3 LTD.’s Request for Emergency Panelist and Interim Measures of Protection, para. 3.

unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.

**(viii) Other Related Claims**

349. In addition to what the Panel has described as the Claimant’s core claims, the Claimant has advanced a number of related claims, including that the Respondent violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign, and by failing to enable and promote competition in the DNS.
350. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant’s core claims, such as turning to Verisign rather than NDC to obtain information about NDC’s arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afilias’ letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant’s claims within its reach. Accordingly, the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant’s core claims.
351. Turning to the claim that the Respondent failed to enable and promote competition in the DNS, it was summarized in the Claimant’s PHB as the contention that “to the extent ICANN has discretion regarding the enforcement of the New gTLD Program Rules, ICANN may not exercise its discretion in a manner that would be inconsistent with its competition mandate (or with its other Articles and Bylaws).”<sup>312</sup> As seen, the Respondent

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<sup>312</sup> Claimant’s PHB, para. 145.

has not as yet exercised whatever discretion it may have in enforcing the New gTLD Program Rules in relation to .WEB, and therefore this claim, as just summarized, appears to the Panel to be premature.

352. For reasons expressed elsewhere in this Final Decision, the Panel is of the opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook and Auction Rules and, assuming the Respondent determines that it did, what consequences should follow. Likewise, the Respondent is invested with the authority to approve an eventual transfer of a possible registry agreement for .WEB from NDC to Verisign, which it may or may not be called upon to exercise depending on whether NDC's application is rejected and its bids disqualified. That said, and even though it is not strictly necessary to decide the question, the Panel accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct. Compelling evidence to that effect was presented by Ms. Burr and Mr. Kneuer, supported by Mr. Disspain, and it is consistent with a public statement once endorsed by the Claimant, in which it was asserted:

While ICANN's mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.<sup>313</sup>

353. As noted in the History of the Proceedings section of this Final Decision,<sup>314</sup> the Parties came to the understanding that it would be for this Panel to determine the Claimant's Request for Emergency Interim Relief upon the Respondent agreeing that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP. For the reasons set out in the section of this Final Decision analysing the Claimant's cost claim,<sup>315</sup> the Panel is of the view that the Claimant's Request for Emergency Interim Relief was well founded, and that it should be granted with effect until such time as the Respondent has considered

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<sup>313</sup> Registry Operators' Submission Re: Objections to the Proposed Versign Settlement, Ex. R-21, p. 8 [emphasis added].

<sup>314</sup> See above, para. 40.

<sup>315</sup> See below, paras. 402-407.

the present Final Decision.

354. As regards the Donuts transaction of 29 December 2020, the Panel does not consider it relevant to the issues determined in this Final Decision. It will be for the Respondent to consider, in the first instance, whether this transaction is of relevance to the Claimant's request that following a possible disqualification of NDC's bid for .WEB, the Respondent must, in accordance with the New gTLD Program Rules, contract the Registry Agreement for .WEB with the Claimant.

#### **E. The Rule 7 Claim**

355. The Panel recalls that the Rule 7 Claim was first raised as a defence to the *Amici*'s requests, based on Rule 7 of the Interim Procedures, to participate in this IRP as *amici curiae*. In its Decision on Phase I, the Panel granted the *Amici*'s requests – subject to modalities set out in that decision – and, to the extent the Claimant wished to maintain its Rule 7 Claim, joined those aspects of the claim over which the Panel found it has jurisdiction to the claims to be decided in Phase II. The *Amici* have since participated in this IRP to the full extent permitted by the Decision on Phase I, as described in earlier sections of this Final Decision.
356. The Panel included in its list of questions to be addressed in post-hearing briefs a request to the Claimant to clarify what remained to be decided in connection with its Rule 7 Claim given the Decision on Phase I and the conduct of the IRP in accordance with that ruling. The Claimant's response is that the Rule 7 Claim remains relevant to justify an award of costs in its favour.
357. As explained in the sections of this Final Decision dealing, respectively, with the designation of the prevailing party and the Claimant's cost claim, there is, in the opinion of the Panel, no basis on which the Claimant could be awarded costs in relation to Phase I or in relation to the outstanding aspects of the Rule 7 Claim. This being so, it is the Panel's opinion that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision on Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as appropriate. The Panel wishes to make clear that in making this Final Decision, the Panel expresses no view on

the merit of those outstanding aspects of the Rule 7 Claim over which the Panel found that it has jurisdiction, beyond that expressed in paragraph 408 of these reasons.

#### **F. Determining the Proper Relief**

358. The remedial authority of IRP Panels is set out in Section 4.3(o) of the Bylaws, which reads as follows:

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;

(iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

[emphasis in the original]

359. Of relevance to situating the remedial authority of IRP Panels in their proper context are the provisions of Section 4.3(x), which it is useful to cite in full:

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

*[italics in the original]*

360. The Panel also notes the provisions of Section 4.3(t) which, among others, require each IRP Panel decision to “specifically designate the prevailing party as to each part of a Claim”.
361. In the opinion of the Panel, the Claimant is entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision, and to being designated the prevailing party in respect of the liability portion of its core claims.
362. As foreshadowed earlier in these reasons, the Panel is firmly of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC’s application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.
363. The Panel also accepts the Respondent’s submission that it would be improper for the Panel to dictate what should be the consequence of NDC’s violation of the New gTLD Program

Rules, assuming a violation is found. The Panel is mindful of the Claimant’s contention that whatever discretion the Respondent may have is necessarily constrained by the Respondent’s obligation to enforce the New gTLD Program Rules objectively and fairly. Nevertheless, the Respondent does enjoy some discretion in addressing violations of the Guidebook and Auction Rules and it is best that the Respondent first exercises its discretion before it is subject to review by an IRP Panel.

364. In the opinion of the Panel, the foregoing conclusions are consistent with the authority of IRP Panels under Section 4.3 (o) (iii) of the Bylaws, which grants the Panel authority to “declare” whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.

#### **G. Designating the Prevailing Party**

365. Section 4.3(t) of the Bylaws requires the Panel to designate the prevailing party “as to each part of a Claim”.<sup>316</sup> This designation has relevance, among others, to the Panel’s exercise of its authority under Section 4.3(r) of the Bylaws to shift costs by providing for the “losing party” to pay the administrative costs and/or fees of the “prevailing party” in the event the Panel identifies the losing party’s Claim or defence as frivolous or abusive.<sup>317</sup>
366. The Panel has already determined that the Claimant is entitled to be designated as the prevailing party in relation to the liability portion of its core claims. In the opinion of the Panel, the Claimant should also be designated the prevailing party in relation to its Request for Emergency Interim Relief, insofar as the Respondent eventually agreed to keep .WEB on hold until this IRP is concluded, consistent with the rationale of the Board’s decision of November 2016 to defer consideration of the issues raised in relation to .WEB and the status of NDC’s application, post-DAA, while accountability mechanisms remained

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<sup>316</sup> The equivalent provision in the Interim Procedures, Ex. C-59, Rule 13 b., differs slightly in that it requires the IRP Panel Decision to “specifically designate the prevailing party as to each Claim”.

<sup>317</sup> See also Section 4.3(e)(ii) of the Bylaws, which requires an IRP Panel to award to ICANN all reasonable fees and costs incurred by ICANN in the IRP in the event it is the prevailing party in a case in which the Claimant failed to participate in good faith in a CEP.

pending.

367. With respect to Phase I of this IRP, the Claimant has argued that the prevailing party remained to be determined depending on the outcome of Phase II.<sup>318</sup> This is correct in regard to those aspects of the Claimant's Rule 7 Claim that were joined to the Claimant's other claims in Phase II, pursuant to the Panel's Decision on Phase I. However, the Respondent prevailed in Phase I on the question of whether the Panel had jurisdiction over actions or failures to act committed by the IOT and, importantly, on the principle of the *Amici*'s requests to participate in the IRP as *amici curiae*. These requests were both granted, albeit with narrower participation rights than those advocated by the Respondent.<sup>319</sup> In light of the foregoing, the Panel does not consider that the Claimant can be designated as the prevailing party in respect of Phase I of the IRP.
368. Turning to the requests for relief sought by the Claimant, the Respondent must be designated as the prevailing party in regard to all aspects of the Claimant's requests for relief other than (a) the request for a declaration that ICANN acted inconsistently with its Articles and Bylaws as described, among others, in paragraph 8 of this Final Decision and the *Dispositif*, and (b) the outstanding aspects of the Rule 7 Claim. With regard to the latter, which the Panel has determined have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I, the Claimant cannot be designated as the prevailing party either, the matter not having been adjudicated upon. For the reasons set out in next section of this Final Decision, however, the fact that those aspects of the Rule 7 Claim have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim because, in the opinion of the Panel, it simply cannot be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive.

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<sup>318</sup> See *Afilias' Reply Costs Submission*, para. 9.

<sup>319</sup> See *Decision on Phase I*, paras. 96-97.



## VI. COSTS

### A. Submissions on Costs

369. In its decision on Phase I, the Panel deferred to Phase II the determination of costs in relation to Phase I of this IRP.<sup>320</sup> The Parties' submissions on costs therefore relate to both phases of the IRP.

#### 1. Claimant's Submissions on Costs

370. The Claimant submitted its cost submissions in a brief separate from, but filed simultaneously with its PHB, on 12 October 2020.<sup>321</sup> The Claimant argues that it should be declared the prevailing party on all of its claims in the IRP. Relying on Section 4.3(r) of the Bylaws, the Claimant requests that the Panel shift all of its fees and costs to the Respondent on the ground that the Respondent's defences in the IRP were "frivolous or abusive". In the alternative, the Claimant argues that the Respondent should at least bear all of its costs and fees related to the participation of the *Amici* in the IRP and the Emergency Interim Relief proceedings.

371. The Claimant states that there was no need for this IRP to be as procedurally and substantively complicated as it has been.<sup>322</sup> First, the Claimant avers that the Respondent used the CEP as cover to push through "interim procedures" that would provide the Respondent with a limitations defence. Second, the Claimant argues that the Respondent ought not to have forced the Claimant to seek emergency interim relief to protect against the .WEB contention set being taken off hold. Third, the Claimant blames the Respondent's belated disclosure of the DAA for the need for it to have filed an Amended Request for IRP. Fourth, the Claimant reproaches the Respondent for pressing for the *Amici*'s participation in the IRP, particularly Verisign, which was not even a member of the contention set. Finally, the Claimant contends that the Respondent ought

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<sup>320</sup> Decision on Phase I, para. 205(c).

<sup>321</sup> The Claimant's Submissions on Costs were corrected on 16 October 2020 apparently due to a technical problem with Afiliast's exhibit management software.

<sup>322</sup> Claimant's Submissions on Costs, paras. 1-2.

not to have hidden its central defence – the Board’s decision of November 2016 – until the filing of its Rejoinder.

372. In the Claimant’s submission, the Respondent’s central defence in this IRP – articulated for the first time on 1 June 2020 and based on an alleged Board decision taken during the November 2016 Workshop – frivolously and abusively sought to immunize the Respondent from any accountability and to render the present IRP an empty shell.<sup>323</sup> The Claimant argues that it was abusive for the Respondent to center its defence around a decision that had never been made public or disclosed to Afiliis prior to the Respondent’s Rejoinder.<sup>324</sup>
373. The Claimant also contends that the Respondent’s defence frivolously and abusively sought to deprive the Claimant of an effective forum. In that regard, the Claimant avers that ICANN’s enactment of the Interim Procedures, weeks before the Claimant filed its IRP, was frivolous and abusive because it allowed the Respondent to advance a time-limitation defence that would otherwise not have been available to it previously and to enable the participation of the *Amici* in the IRP. In the Claimant’s view, the circumstances in which ICANN enacted the Interim Procedures made it clear that they were specifically targeted to undermine the Claimant’s position in the present IRP.<sup>325</sup>
374. The Claimant submits that ICANN’s refusal to put .WEB on hold after the filing of the IRP was also frivolous and abusive and needlessly forced the Claimant to pursue a “costly, distracting, and unwarranted Emergency Interim Relief phase”. The Claimant avers that the Respondent’s action was frivolous and abusive because the Respondent later abandoned its refusal to put .WEB on hold – but only after the Claimant had incurred extensive fees and costs on the Request for Emergency Interim Relief.<sup>326</sup>
375. The Claimant argues as well that the Respondent must bear its costs and fees associated with the *Amici*’s participation in the IRP. This is so because, in the submission of

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<sup>323</sup> Claimant’s Submissions on Costs, para. 16.

<sup>324</sup> *Ibid*, paras. 12-17.

<sup>325</sup> *Ibid*, paras. 19-25.

<sup>326</sup> *Ibid*, paras. 26-27.

the Claimant, the Respondent abusively included Rule 7 in the Interim Supplementary Procedures in view of the present IRP and then used the *Amici* as surrogates for its defence.

## **2. Respondent's Submissions on Costs**

376. The Respondent's submissions on costs are set out in its PHB dated 12 October 2020.

377. The Respondent takes the position that the Bylaws and Interim Procedures authorize the Panel to shift costs only in the event of a finding that, when viewed in its entirety, a party's case was frivolous or abusive. The Respondent stresses that while this is an uncommonly high standard for international arbitration, it is more permissive than the "American rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party. The Respondent also recalls that, under the Bylaws, it is the Respondent that bears all the administrative costs of maintaining the IRP mechanism, including the fees and expenses of the panelists and the ICDR.<sup>327</sup>

378. ICANN states that it does not view the Claimant's case as a whole to be frivolous or abusive, even though, in the Respondent's submission, the Claimant has from time to time employed abusive tactics and taken positions that clearly have no merit. The Respondent therefore does not seek an award for costs.

379. The Respondent argues that the Claimant cannot plausibly contend that ICANN's defence triggers the Panel's authority to allocate legal expenses in favour of the Claimant. For these reasons, ICANN contends that the Parties should bear their own legal expenses.<sup>328</sup>

## **3. Claimant's Reply Submission on Costs**

380. In its Reply Costs Submissions dated 23 October 2020, the Claimant argues that the Panel is empowered to shift costs if any part of the Respondent's defence lacked merit or was otherwise improper. In the Claimant's view, the standard for cost shifting must be informed, not by the California Code of Civil Procedure, which is relied upon by

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<sup>327</sup> Respondent's PHB, paras. 232-234.

<sup>328</sup> *Ibid*, paras. 235-240.

the Respondent, but by international arbitration norms and ICANN’s obligation to conduct its activities “consistently, neutrally, objectively, and fairly” and “transparently.”<sup>329</sup>

381. The Claimant avers that the Respondent’s PHB underscores that its defence has been frivolous and abusive, both in general and in its particulars.<sup>330</sup> The Claimant argues that the three (3) main planks of ICANN’s substantive defence were each frivolous and abusive: the belatedly disclosed Board decision of November 2016,<sup>331</sup> the allegedly limited remedial jurisdiction of the Panel,<sup>332</sup> and the time bar defence, based on Rule 4, which was made applicable to this IRP by distorting the Respondent’s rule-making process and violating the “fundamental rule” against retroactivity.<sup>333</sup> The Claimant also asserts that the Respondent’s alleged reliance on the *Amici* as a defensive tactic allegedly to deflect attention from its own conduct has been frivolous and abusive, “both in conception and execution” in that it was facilitated by improper collaboration with Verisign in the process of adoption of Rule 7, and by using the *Amici* participation as an excuse to avoid answering the Claimant’s claims.<sup>334</sup>

382. In light of the foregoing, the Claimant requests that the Panel order the Respondent to pay the Claimant: USD 11,291,997.13 in compensation for the total fees and costs incurred by the Claimant in this IRP; or, in the alternative: USD 2,383,703.11 for the Claimant’s fees and costs incurred in relation to the *Amici* participation; and USD 823,811.88 for the fees and costs incurred in relation to the Emergency Interim Relief phase, along with pre- and post-award interest “at a reasonable rate from the date of this filing”.<sup>335</sup>

#### **4. Respondent’s Response Submission on Costs**

383. In its 23 October 2020 Response to Afiliias’ Costs Submission, the Respondent contends

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<sup>329</sup> Claimant’s Reply Submissions on Costs, paras. 3-4.

<sup>330</sup> *Ibid.*, para. 5.

<sup>331</sup> *Ibid.*, para. 6.

<sup>332</sup> *Ibid.*, para. 7.

<sup>333</sup> *Ibid.*, para. 8.

<sup>334</sup> *Ibid.*, para. 9.

<sup>335</sup> *Ibid.*, paras. 10-11.

that the Claimant's request for an order requiring ICANN to pay all its costs and legal fees should be denied because it is legally and factually baseless. In the Respondent's submission, the Claimant applies an incorrect standard for cost shifting, since Section 4.3(r) of the Bylaws allows the Panel to shift legal expenses and costs only when a party's IRP Claim or defence as a whole is found to be frivolous or abusive.<sup>336</sup> The Respondent further argues that the Claimant's cost-shifting arguments are misplaced and baseless since its arguments in defence were not frivolous or abusive.<sup>337</sup> Finally, the Respondent avers that the Claimant's legal fees and costs are unreasonable as to both their total amount and their allocation as between the subject matters in relation to which separate cost shifting requests are made.<sup>338</sup>

384. For those reasons, the Respondent requests that the Claimant's request for an order requiring the Respondent to reimburse its costs and legal fees should be denied in its entirety.<sup>339</sup>

## **B. Analysis Regarding Costs**

### **1. Applicable Provisions**

385. The Panel begins its analysis by citing the provisions of the Bylaws and Interim Procedures that are relevant to the Claimant's cost claim.

386. Section 4.3(r) of the Bylaws reads as follows:

(r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

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<sup>336</sup> Respondent's Reply Submissions on Costs, paras. 4-8.

<sup>337</sup> *Ibid*, paras. 9-24.

<sup>338</sup> *Ibid*, paras. 25-28.

<sup>339</sup> *Ibid*, para. 29.

387. Rule 15 of the Interim Procedures is to the same effect:

15. Costs

The IRP Panel shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

388. As discussed in the previous section of this Final Decision, it is pursuant to the provisions of Section 4.3(t) that the Panel is required to designate the prevailing party "as to each part of a Claim".<sup>340</sup>

## 2. Discussion

389. A threshold issue that falls to be determined is whether the Respondent is correct in arguing that costs and legal expenses can only be shifted, pursuant to Section 4.3(r) and Rule 15, if a Claim as a whole, or an IRP defence as a whole, is found by the Panel to be frivolous or abusive. In support of its position, the Respondent relies on the definition of Claim in Section 4.3(d) of the Bylaws, which reads as follows:

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC to commence an IRP ("**Community IRP**"), the EC shall first comply with the procedures set forth in Section 4.2 of Annex D.

390. Based on this definition, the Respondent submits that "costs and legal expenses may be shifted onto the Claimant only if the Request for IRP as a whole is frivolous or abusive".<sup>341</sup> By parity of reasoning, the Respondent argues that the same standard must apply to the Panel's authority to shift legal expenses onto ICANN which, so the argument goes, can only be done if ICANN's defence as a whole is found to be frivolous or abusive.

391. The Panel cannot accept the Respondent's proposed interpretation of the Bylaws

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<sup>340</sup> Rule 13 b. of the Interim Procedures, Ex. C-59, requires the Panel to designate the prevailing party "as to each Claim".

<sup>341</sup> ICANN's Response to Afiliias' Costs Submission, para. 5.

and Interim Procedures, which the Panel considers to be inconsistent with Section 4.3(t) of the Bylaws and Rule 13 b. of the Interim Procedures, and which would considerably restrict the scope of application of a carve-out that is already very narrow. The Panel's reasons in that respect are as follows.

392. The cost-shifting authority of IRP Panels is contingent upon two (2) findings. First, that the party claiming its costs be the prevailing party; and second, that the IRP Panel identify the losing party's Claim or defence as frivolous or abusive.
393. The Panel's obligation to designate the prevailing party is based on Section 4.3(t), which requires the Panel to make such a designation "as to each part of a Claim". It seems to the Panel that there would be no purpose in designating a prevailing party as to "each part of a Claim" if the Panel were required to consider "a Claim" as an indivisible whole for the purpose of the Panel's cost-shifting authority.
394. The Respondent's argument also fails if consideration is given to the slightly different wording used in Rule 13 b. of the Interim Procedures, which calls for the designation of the prevailing party "as to each Claim".
395. Finally, it would seem that the interpretation of the applicable provisions advocated by the Respondent would be unfair if it mandated that a single, isolated well-founded element of a Claim otherwise manifestly frivolous or abusive would suffice to save a Claimant from a potential cost-shifting order.
396. The better interpretation, one that harmonizes the provisions of Sections 4.3(r) and 4.3(t) of the Bylaws (that are clearly meant to operate in tandem) and reflects the practice of international arbitration, is the interpretation that allows IRP Panels to shift costs in relation to "parts" of the losing party's Claim or defence, which parts are the necessary reflection of the "parts" in respect of which the other party is designated as the prevailing party.
397. Applying the relevant provisions of the Bylaws and Interim Procedures, properly construed, to the facts of this IRP, the only parts of the Claimant's case as to which it has been designated as the prevailing party are the liability portion of its core claims and its Request for Emergency Interim Relief. This being so, those are the only parts of

the Claimant's case as to which the Panel needs to evaluate whether the Respondent's defence was frivolous or abusive.

398. While the Respondent has failed in its defence of the conduct of its Staff and Board in relation to the Claimant's core claims, the Panel cannot accept the Claimant's submission that ICANN's defence of its conduct in relation to these aspects of the case was frivolous or abusive.
399. To state the obvious, not every claim or defence that does not prevail in an IRP will result in an award of costs. The applicable cost shifting rule requires that the claim or defence be found to be frivolous or abusive. This standard binds the Parties as well as the Panel.
400. The Bylaws and Interim Procedures do not define the terms "frivolous" or "abusive". The Respondent has contended that they should be interpreted having regard to their well-established meaning under California law. The Panel agrees with the Claimant that there are good reasons not to seek guidance for the interpretation of those terms in a California statutory standard, which operates in an environment where the default rule is the so-called "American Rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party.
401. In the opinion of the Panel, the terms "frivolous" and "abusive" as used in the Bylaws and Interim Procedures should be given their ordinary meanings. According to the Merriam-Webster Dictionary, "frivolous" means "of little weight or importance", "having no sound basis (as in fact or law)" or "lacking in seriousness".<sup>342</sup> According to Black's Law Dictionary, "[a]n answer or plea is called 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff."<sup>343</sup> For its part, the term "abusive" is defined by the Merriam-Webster Dictionary as "characterized by wrong or improper use or action"<sup>344</sup>, while the term "abuse" is defined in Black's Law

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<sup>342</sup> Merriam-Webster *s.v.* "frivolous": <https://www.merriam-webster.com/dictionary/frivolous> (consulted on 23 March 2021).

<sup>343</sup> Black's Law Online Dictionary, 2<sup>nd</sup> ed., *s.v.* "frivolous": <https://thelawdictionary.org/frivolous/> (consulted on 23 March 2021).

<sup>344</sup> Merriam-Webster *s.v.* "abusive": <https://www.merriam-webster.com/dictionary/abusive> (consulted on 23 March 2021).



Dictionary as a “misuse of anything”.<sup>345</sup>

402. In the case of the Claimant’s core claims, the Respondent’s defences consisted in the main of the time limitations defence, and the rejection of the Claimant’s arguments based on the Respondent’s so-called competition mandate and on the asserted manifest incompatibility of the DAA with the provisions of the Guidebook and Auction Rules. The Respondent also raised as a defence the deference owed to its Board’s business judgment when it decided to take no action regarding the .WEB contention set while a related accountability mechanism was pending.
403. The time limitations defence was asserted by the Respondent in circumstances where the validity of Rule 4, unlike that of Rule 7, had not been directly challenged by the Claimant. While the Panel has expressed concern as a matter of principle with the retroactive application of a time limitations rule, the Respondent’s reliance on a rule, the validity of which had not been challenged and that on its face appeared to provide a defence, was not, in the opinion of the Panel, abusive or frivolous.
404. As regards the Respondent’s other defences, the Panel does not accept that it was frivolous or abusive for the Respondent to argue that it was reasonable for its Board to defer consideration of the issues raised with .WEB while accountability mechanisms were pending; that the propriety of the DAA under the New gTLD Program Rules was a debatable issue requiring careful consideration by the Respondent’s Board; or that the Respondent did not have the “competition mandate” contended for by the Claimant. These were all defensible positions and there is no evidence that they were advanced for an improper purpose or in bad faith. While the Respondent did fail in its contention that there was nothing for its Staff or Board to pronounce upon in the absence of a formal accountability mechanism challenging their action or inaction in relation to .WEB, the Respondent’s position in this respect cannot, in the opinion of the Panel, be said to have been frivolous or abusive. Accordingly, the Claimant’s claim for reimbursement of its costs in relation to the liability portion of its core claims must be dismissed.

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<sup>345</sup> Black’s Law Online Dictionary, 2<sup>nd</sup> ed., s.v. “abuse”: <https://thelawdictionary.org/abuse/> (consulted on 23 March 2021).

405. The Panel does consider that the Claimant’s cost claim in relation to its Request for Emergency Interim Relief is meritorious. The Claimant was forced to introduce this request as a result of the Respondent’s refusal to keep the .WEB contention set on hold in spite of the Claimant having commenced an IRP upon the termination of its CEP. When this decision was made, the .WEB contention set had already been on hold for more than two (2) years, precisely because accountability mechanisms were pending. The Board’s decision to defer consideration of the questions raised in relation to .WEB in November 2016 was likewise based on the fact that accountability mechanisms were pending. This is how the Claimant describes the sequence of events in its Request for Emergency Interim Relief:

13. On 13 November 2018, Afilias and ICANN participated in a final CEP meeting, following which ICANN terminated the CEP. On 14 November 2018, Afilias filed its Request for IRP. Hours later, ICANN responded by informing Afilias that it intended to take the .WEB contention set “off hold” on 27 November 2018 even though Afilias had commenced an ICANN accountability procedure that follows-on from a failed CEP.<sup>30</sup> ICANN provided Afilias with no explanation justifying its decision.

14. On 20 November 2018, Afilias wrote to ICANN about its decision to proceed with the delegation of .WEB despite Afilias’ commencement of the IRP.<sup>31</sup> In its letter, Afilias questioned ICANN’s motives for removing the hold on .WEB, given that ICANN had voluntarily delayed the delegation of .WEB for several years and the lack of any apparent harm to ICANN if the .WEB contention set were to remain on hold for the duration of the IRP. Afilias requested an explanation justifying what appeared to be rash and arbitrary conduct by ICANN in proceeding with delegation of .WEB at this time, as well as the production of relevant documents. Afilias wrote to ICANN again on 24 November 2018 requesting a response to its 20 November 2018 letter.

15. ICANN did not respond to Afilias’ letter until after 9:00 pm EDT on 26 November 2018—quite literally the eve of the deadline that ICANN previously set for Afilias to submit this Interim Request to prevent ICANN from taking the .WEB contention set “off hold.”<sup>32</sup> ICANN noted in its response that ICANN’s practice is to remove the hold on contention sets following CEP, notwithstanding the pendency of an IRP and despite the unanimous criticism of this practice in previous IRPs. ICANN also rejected Afilias’ request to produce documents related to its dealings with NDC and VeriSign about .WEB. Instead, ICANN inexplicably offered to keep the .WEB contention set “on hold” for another two weeks, until 11 December 2018, something that Afilias had not requested and that did not remotely address any of the concerns Afilias had raised.<sup>33</sup>

16. It is because of ICANN’s unreasonable conduct and refusal to act in a transparent manner—as required by its Articles and Bylaws—that Afilias has been forced to file, at significant cost and expense, this Interim Request.

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<sup>30</sup> Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afilias) (14 Nov. 2018), [Ex. C-64], p. 1.

<sup>31</sup> Letter from A. Ali (Counsel for Afilias) to Independent Review (ICANN) (20 Nov. 2018), [Ex. C-65].

<sup>32</sup> Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66].

<sup>33</sup> Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66], p. 1.

406. Having forced the Claimant to initiate emergency interim relief proceedings, the Respondent eventually changed course and agreed to keep .WEB on hold until the conclusion of this IRP.
407. In the opinion of the Panel, the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was "abusive" within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures, all the more so in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP. In the opinion of the Panel, this conduct on the part of the Respondent was unjustified and obliged the Claimant to incur wasted costs that it would be unfair for the Claimant to have to bear.
408. The Claimant has claimed in relation to its Request for Emergency Interim Relief an amount of USD 823,811.88. This is said to represent 50% of the Claimant legal fees from 14 November 2018 to 10 December 2018; 33% of the Claimant's total fees from 11 December 2018 through 31 March 2019; and 50% of its fees from 1 April 2019 through 14 May 2019.
409. The Respondent has challenged the reasonableness of the fees claimed by the Claimant in relation to its Request for Emergency Interim Relief, pointing out that it entailed the preparation and presentation of the request, one supporting brief, and requests for production of documents which were resolved by 12 December 2018.<sup>346</sup> As noted in the History of the Proceedings' section of this Final Decision, the Parties asked the Emergency Panelist to postpone further activity in January 2019.

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<sup>346</sup> See ICANN's Response to Afiliias' costs Submission, para. 28.

410. The Panel has difficulty accepting that such a significant amount of fees as that claimed by the Claimant in regard to the Request for Emergency Interim Relief can reasonably be attributed to the preparation of this request and the subsequent proceedings before the Emergency Panelist. Exercising its discretion in relation to the fixing of the legal expenses reasonably incurred that may be ordered to be reimbursed pursuant to a cost-shifting decision, the Panel reduces the Claimant's claim on account of the Request for Emergency Interim Relief to USD 450,000, inclusive of pre-award interest.
411. This leaves for consideration the Claimant's cost claim in relation to the outstanding aspects of the Rule 7 Claim which, pursuant to the Panel's Decision on Phase I, were joined to the Claimant's other claims in Phase II, a cost claim that the Panel takes to have been subsumed in the Claimant's global cost claim in relation to the *Amici* participation. In the opinion of the Panel, it suffices to read the Panel's Decision on Phase I to conclude that it cannot seriously be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive. It follows from this assessment of the Respondent's defence that the fact that those aspects of the Rule 7 Claim have been found by the Panel to have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim. In other words, the Panel has sufficient familiarity with the Parties' respective positions on the merits of the outstanding aspects of the Rule 7 Claim to know, and hereby to determine, that regardless of the outcome, the Panel would not have accepted the submission that the Respondent's defence to this claim was frivolous and abusive.
412. The ICDR has informed the Panel that the administrative fees of the ICDR and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer in this IRP total USD 1,198,493.88. The ICDR has further advised that the Claimant has advanced, as part of its share of these non-party costs of the IRP, an amount of USD 479,458.27. In accordance with the general rule set out in Section 4.3(r) of the Bylaws, the Claimant is entitled to be reimbursed by the Respondent the share of the non-party costs of the IRP that it has incurred, in the amount of USD 479,458.27.

## VII. *DISPOSITIF*

413. For the reasons set out in this Final Decision, the Panel unanimously decides as follows:

1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu DotCo, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the “Confirmation of Understanding” executed by these same parties on 26 July 2016 (**DAA**), 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”; and (b) its Board, having deferred consideration of the Claimant’s complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board’s expertise and the discretion afforded to it in the management of the New gTLD Program;
2. **Declares** that in so doing, the Respondent violated its commitment to make decisions by applying documented policies objectively and fairly;
3. **Declares** that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure

fairness;

4. **Grants** in part the Claimant's Request for Emergency Interim Relief dated 27 November 2018, and directs the Respondent to stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent has considered the present Final Decision;
5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;
6. **Designates** the Claimant as the prevailing party in relation to the above declarations, decisions, findings, and recommendations, which relate to the liability portion of the Claimant's core claims and the Claimant's Request for Emergency Interim Relief dated 27 November 2018;
7. **Dismisses** the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that that the Respondent be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in sub-paragraph 410 (5);
8. **Designates** the Respondent as the prevailing party in respect of the matters set out in the immediately preceding paragraph;
9. **Determines** that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of

the *Amici* in this IRP in accordance with the Panel's Decision on Phase I and, for that reason, decides that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I;

10. **Fixes** the total costs of this IRP, consisting of the administrative fees of the ICDR, and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer at USD 1,198,493.88, and in accordance with the general rule set out in Section 4.3(r) of the Bylaws, **declares** that the Respondent shall reimburse the Claimant the full amount of the share of these costs that the Claimant has advanced, in the amount of USD 479,458.27;
11. **Finds** that the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was abusive within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP; and, as a consequence of this finding,
12. **Grants** the Claimant's request that the Panel shift liability for the Claimant's legal fees in connection with its Request for Emergency Interim Relief, **fixes** at USD 450,000, inclusive of pre-award interest, the amount of the legal fees to be reimbursed to the Claimant on account of the Emergency Interim Relief proceedings, and **orders** the Respondent to pay this amount to the Claimant within thirty (30) days of the date of notification of this Final Decision, after which 30 day-period this amount shall bear interest at the rate of 10% *per annum*;
13. **Dismisses** the Claimant's other requests for the shifting of its legal fees in connection with this IRP;
14. **Dismisses** all of the Parties' other claims and requests for relief.

414. This Final Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

*(s) Catherine Kessedjian*

*(s) Richard Chernick*

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Catherine Kessedjian

Richard Chernick

*(s) Pierre Bienvenu*

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Pierre Bienvenu, Ad. E., Chair

Dated: 20 May 2021