INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD., Claimant, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	ICDR CASE NO. 01-18-0004-2702

ICANN'S POST-HEARING BRIEF

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GLOSSARY OF DEFINED TERMS

Term	Definition
Afilias	Claimant Afilias Domains No. 3 Limited
Amended IRP Request	Amended Request by Afilias Domains No. 3 Limited for Independent Review, submitted on 21 March 2019
Articles	ICANN's Articles of Incorporation, Ex. C-2
Auction Rules	Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4
Bidders Agreement	New gTLD Auction Bidders Agreement, Ex. C-5
Bylaws	ICANN's Bylaws, as amended 18 June 2018, Ex. C-1
ccTLD	Country code top-level domain
CCWG-Accountability	A cross-community working group 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 ICANN's Bylaws
CIR	Contracting Information Request
Core Values regarding competition	ICANN's Commitment and Core Values regarding competition, as set forth in Article 1, Section 1.2(a) and Section 1.2(b)(iii), (iv) of ICANN's Bylaws
DAA	Domain Acquisition Agreement between Verisign and NDC, executed on 25 August 2015, Ex. C-69
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
GNSO	Generic Names Supporting Organization
gTLD	Generic top-level domain
Guidebook	ICANN's New gTLD Applicant Guidebook, Ex. C-3.
Hearing	The Phase II Hearing
ICANN	Respondent Internet Corporation for Assigned Names and Numbers
Interim Supplementary Procedures	Interim Supplementary Procedures for ICANN Independent Review Process, Ex. C-59
IOT	Independent Review Process Implementation Oversight Team
IRP	Independent Review Process
NDC	*Amicus Curiae* Nu DotCo LLC
NPV	Net present value
Program	New gTLD Program
Reply Memorial	Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review, submitted on 4 May 2020 and revised on 6 May 2020
Response to the *Amici* Briefs	Afilias Domains No. 3 Limited's Response to the *Amicus Curiae* Briefs, submitted on 24 July 2020
Ruby Glen	Ruby Glen, LLC

Term	Definition
Supplemental Proposal	CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Ex. C-122
Verisign	*Amicus Curiae* Verisign, Inc.

PANEL QUESTIONS

ICANN thanks the Panel for its preparation of the set of questions it posed to the Parties. ICANN has endeavored to answer each of them where appropriate throughout this brief and has noted where it has done so. For ease of reference, ICANN's responses to the Panel's questions can be found as follows:

Question Number	Panel Question	Location
Question 1	The Parties have cited a number of prior IRP decisions. What is the precedential value of these decisions on questions such as time limitation, the applicable standard of review, the remedial powers of IRP Panels, and other questions of principle in light of changes that may have been made to ICANN's Bylaws after the date of the decisions?	Paragraph 35, footnote 38
Question 2	What is the legal effect of the Board's adoption of the CCWG Report (C-122) insofar as the later-adopted (amended) Bylaws (C-1) contain provisions contrary to or inconsistent with the Report? Is the CCWG Report relevant to the interpretation of the provisions of the Bylaws relating to the accountability mechanisms of ICANN?	Paragraphs 37-45
Question 3	What is the effect on the claims in issue in this case of the timing of the adoption of Rule 4 of the Interim Supplementary procedures (25 October 2018), as it affects the timing of bringing the claims that have been advanced in this proceeding (4 months and 12 months repose period)?	Paragraphs 81-85
Question 4	What is the scope of the litigation waiver (Terms and Conditions of Module 6 in the Guidebook): "Applicant agrees not to challenge in court . . . any final decision made by ICANN with respect to the Application . . . or any other legal claim . . . with respect to the application"? What link, if any, exists between the litigation waiver and the scope of the jurisdiction of IRP panels under the Bylaws, in light of ICANN accountability obligations? Does the litigation waiver have any relationship to the specific claims advanced in the Claimant's Amended Request?	Paragraphs 46-48

Question Number	Panel Question	Location
Question 5	Please comment on VeriSign's stated concern that the private resolution of contention sets may involve collusion, in light of ICANN's stated preference for the private resolution of contention sets.	Paragraphs 130-135
Question 6	Please comment on the fact that NDC and Verisign deliberately sought to keep the DAA confidential until after the auction, and that VeriSign's support was essential to NDC winning the auction, in light of ICANN's commitment to transparency and accountability.	Paragraphs 157-158
Question 7	Is there an inconsistency between the contention that Afilias' claims are time barred and ICANN's position that it has not yet addressed the fundamental issue that Afilias complains of in this IRP? Please comment on the Respondent's observation that the Claimant's claims are in one sense premature and in another sense overdue (Respondent's Response, para. 7).	Paragraphs 62-72; Paragraphs 163-171
Question 8	The Claimant is invited to comment on article 4.3(o) of the Bylaws as it relates to the remedies it is seeking in this IRP.	This question is addressed to the Claimant. However, ICANN also addresses this question in paragraphs 23-48
Question 9	The Claimant is asked to clarify what is left to be decided in connection with the Claimant's Rule 7 claim given the disposition of those issues in the Decision on Phase I and the conduct of the IRP in accordance with that ruling. The Claimant is also asked to identify the source of its alleged entitlement to a cost award for the expenditure of effort because of VeriSign and NDC's participation in the IRP, on account of the alleged "wrongful" adoption of Rule 7.	This question is addressed to Claimant. However, ICANN also addresses this question in paragraphs 218-231.
Question 10	Please comment, in light of the relevant provisions of the Bylaws, on ICANN's decision not to disclose to Afilias, the Amici and the general public its Board's November 2016 decision regarding .WEB.	Paragraphs 179, 180, 182-189

Question Number	Panel Question	Location
	The Respondent is asked to explain the reason why this Board decision was disclosed allegedly for the first time in the Respondent's Rejoinder?	

INTRODUCTION

1. Afilias' case has been a moving target throughout this IRP, and it continued to evolve during the Hearing, where Afilias essentially abandoned its competition claim and associated narrative, which, though contrived, were clearly designed to give its case a greater sense of urgency and significance. Afilias' original and Amended IRP Request are both rooted in the contention that ICANN's founding purpose was to affirmatively promote competition and that this "competition mandate" left it no choice but to block Verisign's potential operation of .WEB as "the last, best hope of creating a competitive environment at the wholesale registry level of the DNS and ending VeriSign's market power."[1]

2. But in its effort to endow its case with a higher and more pressing purpose, Afilias ignored the following key facts: that ICANN has already authorized the addition of over 1,200 new gTLDs to the Internet, thereby increasing competition and consumer choice; that Afilias is on record as confirming that ICANN is not a competition regulator; that the Guidebook does not authorize ICANN to assess which applicant, among those vying for a particular gTLD, might do a better job "creating competition;" that the community, in developing the Program, could have recommended that Verisign be prohibited from applying for new gTLDs, but did not do so; and that the DOJ rejected the opportunity to block Verisign's plans. In addition, ICANN's and Verisign's multiple fact and expert witnesses issued witness statements and expert reports convincingly nailing the coffin shut on Afilias' competition claim through careful analysis of the factual record, ICANN's Bylaws and founding documents, as well as the available economic evidence.

3. Rather than attempt to rehabilitate its competition claim in response, Afilias ran

[1] Amended IRP Request ¶ 83.

away from that claim at the Hearing, thus reducing its case to a collection of alleged Guidebook and Auction Rules violations. Although ICANN does not minimize the importance of following the Guidebook and Auction Rules, this Panel is charged with determining whether ICANN failed to comply with its Articles and Bylaws, not deciding whether Afilias should be awarded .WEB on the basis of NDC's alleged violations of the Guidebook and Auctions Rules. Having effectively abandoned its competition claim, Afilias is left with no compelling argument that the Articles and Bylaws required ICANN to find NDC in violation of the Guidebook and Auction Rules and disqualify NDC for those alleged violations.

4. Afilias' flight from its competition claim was no oversight. Despite presenting the so-called competition mandate as the original lynchpin of its Amended IRP Request, Afilias chose not to cross-examine John Kneuer, whose expert report explained that ICANN does not have the type of competition mandate Afilias suggests, nor the authority or expertise to select which applicants for any given gTLD are most likely to achieve pro-competitive results. Likewise, Afilias failed to cross-examine Becky Burr on the portions of her witness statement that made clear that ICANN is not permitted to act as a competition regulator and does not have the authority to block potentially anticompetitive transactions like a government regulator. Afilias also failed to address at the Hearing the Bylaws provisions and ICANN foundational documents that explain that ICANN has no authority to act as a competition regulator, and Afilias never addressed (or even acknowledged) its previous, public statement that "***Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators***."[2] All of this evidence stands unrebutted.

5. With respect to Afilias' assertion that .WEB is "the most promising new gTLD,"

[2] Amended IRP Request at ¶ 8 & R-21 at 8 (emphasis added).

rather than submitting valid economic evidence to support this theory, Afilias relied upon the subjective opinions of Mr. Zittrain, who is not an economist, and Dr. Sadowsky, who is a technologist, not an expert economist. Moreover, these conclusions were exposed as wholly-unreliable and were contradicted by two of the world's most renowned competition economists, Dr. Dennis Carlton and Dr. Kevin Murphy. Afilias made no attempt even to address, much less rebut, Dr. Murphy's or Dr. Carlton's conclusions, either via cross-examination at the Hearing or via rebuttal expert reports, which Afilias had plenty of opportunity to submit. Afilias has thus effectively abandoned what was previously so central to its case – that ICANN's Core Values regarding competition "required" ICANN to disqualify NDC due to the potential assignment of the .WEB registry agreement to Verisign.

6. Without Afilias' narrative that the DAA threatened to vanquish competition in the DNS and subvert the rationale for ICANN's very existence—which Afilias wrongly describes as being to encourage competition with Verisign[3]—Afilias' case boils down to whether ICANN was "required" to disqualify NDC for a series of alleged violations, some highly technical, of the Guidebook and the Auction Rules. Afilias also makes ancillary complaints regarding ICANN's investigation of NDC's alleged violations. As discussed herein, these contentions are meritless and should be rejected. Indeed, most of Afilias' causes of action are not even within the Panel's jurisdiction, either because they are not properly pled in Afilias' Amended IRP Request, as required, or they are outside the repose and limitations periods established by Rule 4 of the Interim Supplementary Procedures. To assist the Panel, ICANN has created an index identifying Afilias' causes of action and requests for relief, together with ICANN's defenses to each, which is attached as Appendix A.

[3] Amended IRP Request ¶ 9.

7. Nearly all of Afilias' requests for relief are also outside the Panel's jurisdiction, which is expressly limited by Section 4.3(o) of the Bylaws. In fact, all of the affirmative relief Afilias seeks – such as an order that ICANN disqualify NDC and proceed to contracting with Afilias at a bid price set by the Panel – is manifestly in excess of the Panel's jurisdiction. Both the express terms of the Bylaws and the testimony given during the Hearing confirm that an IRP Panel's jurisdiction and authority is limited to issuing a binding declaration on whether a properly-alleged ICANN action or inaction violated ICANN's Articles or Bylaws.

8. Afilias will undoubtedly attempt to demonize ICANN for invoking these jurisdictional limits as an effort to evade accountability. But from the outset ICANN has emphasized the boundaries of the Panel's authority to ensure that its decision is compliant with applicable standards and is thus enforceable. All courts and tribunals have limits to their jurisdiction, and it is Afilias' demand that this Panel exceed its jurisdiction that should be firmly rejected.

9. As the testimony at the Hearing confirmed, ICANN has not decided whether the DAA violates the Guidebook or Auction Rules or the appropriate remedy for any violation that may be found. Ms. Burr and Chris Disspain, two current Board members, explained that, in addition to the fact that the Bylaws do not allow the Panel to decide the propriety of the DAA, ICANN would be best suited to decide such issues because of its unique familiarity with the Guidebook and the Program, and its deep appreciation of the various competing interests at play. Ms. Burr testified that the Panel should not evaluate the propriety of the DAA because "there are so many moving parts and parties here, imagine if this Panel said 'ICANN violated the bylaws, and you must award this to, you know, X, Y or Z.' There are going to be two or three parties

who then have a cause of action."[4] Likewise, Mr. Disspain explained that the propriety of the DAA "is a matter for the Board," rather than this Panel.[5] Mr. Disspain also made clear that any thoughts or recommendations the Panel may have for ICANN following its evaluation of the facts will be taken "very seriously by the Board."[6]

10. The .WEB contention set has been "on hold" for almost the entire period of time since the .WEB auction due to pending Accountability Mechanisms and the DOJ's antitrust investigation. Every ICANN witness questioned on the topic confirmed that ICANN has a longstanding practice of placing applications and contention sets on hold while related Accountability Mechanisms are pending, and that it does so out of deference to, and so as to not interfere with, those procedures and their outcomes. ICANN publicizes this practice and, in response to Afilias' letter-writing campaign in 2016, ICANN informed Afilias not only of the existence of the practice (if Afilias did not already know), but the fact that the .WEB contention set was placed on hold because of it.

11. Thus, it should have come as no surprise that, in November 2016, after the ICANN Board was updated by counsel regarding the issues swirling around .WEB – from the pending federal court litigation, to Afilias' informal complaints and the pending Accountability Mechanism – the Board elected to continue to follow ICANN's practice by not making any decisions regarding the .WEB contention set during the pendency of related Accountability Mechanisms and, later, the DOJ investigation. The Board's decision was reasonable, not only because taking precipitous action could have interfered with ongoing and future Accountability Mechanisms, but also because the outcome of such Accountability Mechanisms, and the DOJ

[4] Hearing Tr. at 334:5-20.
[5] *Id*. at 984:9-987:24.
[6] *Id*. at 985:22-988:19.

investigation, could have had an impact on any eventual analysis ICANN might be called upon to make. Because this decision was well within the Board's reasonable business judgment, the Panel should respect it.

12. Likewise, the Hearing testimony explained that ICANN's removal of the hold on the .WEB contention set and transmission of a form registry agreement to NDC did not reflect a decision that the DAA was compliant with the Guidebook and Auction Rules, but was instead a ministerial act taken pursuant to ICANN's normal processes because all Accountability Mechanisms had concluded. As Mr. Disspain explained, "ICANN was taking the next step in its process . . . without wishing to place any weight on either side in this matter, there are two sides . . . both sides need to be treated fairly by ICANN. The best way for ICANN to do that is to follow its process."[7] At the same time, consistent with ICANN's established practice and its transparency obligations, ICANN staff provided all of the members of the .WEB contention set, including Afilias, with notice of the change of status, which is what finally caused Afilias to make good on its repeated threats to invoke an Accountability Mechanism – a move that ICANN had been expecting from Afilias for nearly two years.

13. For these reasons, and as set forth more fully below, Afilias' claims should each be rejected and its requests for relief denied.

ARGUMENT

I. THE BYLAWS LIMIT THE PANEL'S JURISDICTION.

14. This Panel's jurisdiction is created and defined by ICANN's Bylaws and the Interim Supplementary Procedures applicable to this IRP. The Bylaws and Interim Supplementary Procedures narrowly circumscribe: (a) the types of disputes that may be

[7] *Id.* at 980:17-981:16.

addressed, and the claims that can be raised, in this IRP – *i.e.*, "Disputes" and the "Claim" as defined by the Bylaws; (b) the remedies available, as set forth in Section 4.3(o) of the Bylaws; (c) the time within which a Dispute may be brought – *i.e.,* the limitations and repose periods established by Rule 6 of the Interim Supplementary Procedures; and (d) the standard of review as set forth in Section 4.3(i) of the Bylaws. Despite Afilias' attempts to argue that the Panel has the discretion to ignore the plain language of the Bylaws, the Bylaws control and they could not be more clear on these subjects.

A. The Panel Has Jurisdiction Only Over the "Disputes" Set Out in Afilias' Amended IRP Request.

15. An IRP is a narrow, bespoke form of arbitration designed to resolve "Claims" that past actions or inactions by ICANN's Board, individual directors, officers or staff violated the Articles or Bylaws. This IRP Panel does not have jurisdiction to resolve disputes other than whether ICANN violated its Articles or Bylaws. Nor does it have jurisdiction over disputes other than the Claims asserted in Afilias' Amended IRP Request.

16. Section 4.3(a) of the Bylaws states that "[t]he IRP is intended to hear and resolve ***Disputes***[.]"[8] Similarly, Section 4.3(g) states that "the IRP Panel shall be charged with hearing and resolving the ***Dispute*****,** considering the ***Claim*** and ICANN's written response[.]"[9]

17. "Dispute" and "Claim" are defined terms. As relevant here, "Disputes" are "***Claims*** that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]"[10] "Covered Actions" are defined as "any actions or failures to act

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[8] Bylaws, Art. 4, § 4.3(a) (emphasis added), C-1.

[9] *Id*. Art. 4, § 4.3(g) ("***the IRP Panel shall be charged with hearing and resolving the Dispute***, considering the Claim and ICANN's written response ("**Response**") in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.") (emphasis added).

[10] *Id*., Art. 4, § 4.3(b)(iii) (emphasis Added). The full definition of "Dispute" is as follows:

(iii) "Disputes" are defined as:

by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute."[11]

18. "Claim" is defined as the written statement filed by a Claimant to initiate an IRP: "An IRP shall commence with the Claimant's filing of a written statement of a Dispute ('a **Claim**') with the IRP Provider[.]"[12] The "written statement of a Dispute" that "commence[s]" the IRP is a Request for IRP. Read together, these definitions limit the Panel's jurisdiction to resolving the allegations set out in a Request for Independent Review Process (here, Afilias' Amended IRP Request) that actions or inactions of the Board, individual directors, officers or staff members violated the Articles or Bylaws. The Panel does not have jurisdiction to resolve disputes other than whether Covered Actions violated the Articles or Bylaws. These limitations were confirmed on cross-examination by Ms. Burr, a former member of the CCWG-Accountability and current ICANN Board member, who was involved in drafting Section 4.3 of ICANN's Bylaws:

> *(A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:*
> *(1) exceeded the scope of the Mission;*
> *(2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;*
> *(3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;*
> *(4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or*
> *(5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws.*
> *(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN's contractual rights with respect to the IANA Naming Function Contract, and*
> *(C) Claims regarding PTI service complaints by direct customers of the IANA naming functions that are not resolved through mediation.*

[11] *Id.*, Art. 4, § 4.3(b)(ii). The Panel recognized the jurisdictional boundaries established by these interlocking definitions in its Decision on Phase I at paragraphs 114-116.

[12] *Id.*, Art. 4, § 4.3(d). Throughout this brief, the capitalized term "Claim" is used as defined by Section 4.3(d) of the Bylaws, while the lower-case "claim" is used, when referring to Afilias' claims, in its colloquial sense as synonymous with "cause of action."

> The purpose of the IRP is to determine whether or not, in taking some action or inaction or failing to act, ICANN has violated its Bylaws, and that would be including in its application of the rules of the Applicant Guidebook if it's violated the Bylaws somehow.

19. Nor does the Panel have jurisdiction to resolve alleged violations not asserted in the Amended IRP Request. This limitation is consistent with Rule 6 of the Interim Supplementary Procedures, which states that "***[t]he Claimant's written statement of a Dispute shall include all claims that give rise to a particular Dispute***, but such claims may be asserted as independent or alternative claims." As the Panel in the .MERCK IRP stated, the Bylaws require the Claimant to "identify exactly" the actions it contests, and "also identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws."[13] Indeed, a Claimant's request for IRP may be its ***only*** pleading in the matter. An IRP Panel "may request additional written submissions,"[14] but a Claimant has no right to make further submissions absent such a request, and such further submissions (if permitted) cannot change the nature of the claims being asserted.

20. It is axiomatic that an arbitral tribunal's jurisdiction is confined by the submission to arbitration. "An arbitral tribunal has no authority to decide a dispute that the parties have not agreed to arbitrate, and submitted to it, and its awards on such matters are subject to non-recognition."[15] Under Article V(1)(c) of the New York Convention, recognition and enforcement may be refused for an arbitral award that "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or [that] contains decisions on

[13] *Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604, Final Declaration (Reichert, Matz, Dinwoodie) ("Merck, Final Declaration") (2015), ¶ 22, AA 55.
[14] Interim Supplementary Procedures, Rule 6, C-59.
[15] G. Born, INTERNATIONAL COMMERCIAL ARBITRATION §26.05 at 3542 (2nd Ed. 2014), RLA-74

matters beyond the scope of the submission to arbitration."[16] This principle is memorialized in the UK Arbitration Act of 1996 (the law of the arbitral seat) as well as federal and California law (the law governing the Bylaws).[17]

21. Accordingly, the Panel does not have jurisdiction to make determinations regarding NDC's and Verisign's alleged conduct except to the extent necessary to resolve whether Covered Actions violated the Articles or Bylaws.[18] Afilias' claims, however, focus almost exclusively on NDC's alleged violations of the Guidebook and Auction Rules, and fail to establish a crucial link to the only issue within the Panel's jurisdiction: whether or not ICANN violated its Articles or Bylaws. Afilias' attempt to create this linkage by asserting that ICANN had an absolute and unqualified obligation under its Articles and Bylaws to disqualify NDC's application (and award .WEB to Afilias) as a result of NDC's alleged violations is overreaching and untenable. Afilias can point to no provision of the Articles or Bylaws that required ICANN to automatically disqualify NDC and award .WEB to Afilias, because there is none.

22. The Panel also does not have jurisdiction to resolve purported violations of the Articles or Bylaws that are not alleged in the Amended IRP Request, such as the belated assertions regarding ICANN's post-auction investigation and ICANN's transmittal of a form registry agreement to NDC. This limitation is further discussed in Sections V and VI below.

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[16] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(1)(c) (New York, 1958), RLA-77.

[17] UK Arbitration Act of 1996, Art. 67 (allowing an arbitral award to be declared to be of no effect where made in excess of the arbitral tribunal's substantive jurisdiction), CA-124; *AT&T Techs., Inc. v. Commc'n Workers of* Am., 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.") (citation omitted), RLA-41; *Magness Petroleum Co. v. Warren Resources of Cal., Inc.*, 103 Cal. App. 4th 901, 909 (2002) ("It is well established that arbitration is a matter of contract, and the powers of the arbitrator derive from and cannot exceed the contract to arbitrate and the parties' submission to arbitration."), RLA-54.

[18] *Meat Cutters Local No. 439 v. Olson Bros., Inc.*, 186 Cal. App. 2d 200, 207 (1960), RLA-56; *Morris v. Zuckerman*, 69 Cal. 2d 686, 690 (1968), RLA-57; *Homesite Ins., Inc. v. Dhaliwal*, No. A131226, 2012 WL 1354528, at *7 (Cal. App. Apr. 19, 2012) (Unpublished), RLA-51.

B. The Panel's Remedial Authority Is Limited to Issuing a Declaration as to Whether Covered Actions Violated the Articles or Bylaws.

23. The Panel's remedial authority is strictly limited by Section 4.3(o) of the Bylaws. These limitations are extremely important because all but one of Afilias' requests for relief exceed the Panel's jurisdiction.

24. Section 4.3(o) states:

> 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).[19]

25. The only binding remedy authorized by Section 4.3(o) is a Declaration under Article 4.3(o)(iii). The only affirmative relief authorized under Section 4.3(o) is to "[r]ecommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered[,]" as set out in subsection (iv).[20]

[19] Bylaws, Art. 4, § 4.3(o) (emphasis added).
[20] *Id*., Art. 4, § 4.3(o)(iv).

Section 4.3(o) is an exhaustive enumeration of the Panel's authority. This is self-evident from the terms of Section 4.3(o), and it was confirmed by Ms. Burr, who was involved in the drafting of this provision.[21]

26. Indeed, as Ms. Burr explained, "the IRP's authority is limited to finding -- making a determination about whether an action or inaction violated the articles of incorporation and bylaws, and that's what's binding on ICANN."[22] Ms. Burr also explained during the Hearing that if there is a determination that ICANN breached its Articles or Bylaws, "ICANN must take – then take appropriate action to remedy the breach."[23]

27. Afilias' requests for relief clearly exceed the Panel's limited remedial authority. Afilias sets out these requests at paragraph 89 of its Amended IRP Request, and it reiterated them during its opening presentation at the hearing.[24] It asks for seven "Declaration[s]":

> (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;

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[21] Hearing Tr. at 394:1-395:1 ("**Q.** BY MR. ENSON: Ms. Burr, were you involved in the drafting of this particular provision? **A**. Yes, I was. **Q**. Sorry, go ahead. **A**. I was involved in Section 4, Article 4. **Q**. Would you describe for us what is set forth here in Section 4.3(o)? **A**. 4.3(o) is a statement of the authority of the IRP Panel, and it includes the three provisions that had been in the bylaws for some time, which is to dismiss -- actually, that may have been a new one, declare whether covered actions constituted an action or inaction that violated the articles. There was also an existing authority to stay actions or decisions, and we then added a few additional provisions relating to, for example, the PTI, determining the shift of IRP costs and expenses was actually moved from a different part of the section. So this was an attempt to gather the authority of the Panel and articulate the full authority of the Panel. **Q**. Is Section 4.3(o) an exhaustive listing of the IRP Panel's authority? **A**. Of the authority which is binding on ICANN, yes.").

[22] *Id*. at 323:25-324:22 (Burr).

[23] *Id*. at 333:23-334:29.

[24] *See* Afilias' Opening Presentation, at Slide 60, which reproduces paragraph 89 of Afilias' Amended IRP Request in its entirety, thus confirming Afilias' quest for remedies the Panel has no authority to grant.

(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;

(7) and granting such other relief as the Panel may consider appropriate in the circumstances.[25]

28. The first form of relief requested by Afilias is within the Panel's jurisdiction insofar as it seeks a declaration regarding whether ICANN acted consistently with its Bylaws and Articles, although it should be denied for the reasons set out in Sections II through VII below. Requests (2) through (7) clearly exceed the Panel's authority. The Panel does not have authority to order ICANN to disqualify NDC's bid (Request No. 2), proceed to contracting with Afilias (Request No. 3), specify the price to be paid by Afilias (Request No. 4), invalidate Rule 7 (Request No. 5) or order any other relief that it "may consider appropriate in the circumstances" (Request No. 7). The Panel should reject these requests as outside its jurisdiction, and the disputed factual or legal issues that form the basis for these requests should be disregarded as moot and unnecessary to the resolution of this dispute.

29. With regard to Afilias' requests for an award of costs (Request No. 5 and 6), the Panel's authority to shift costs is governed by Section 4.3(r) of the Bylaws, which provides that "each party to an IRP proceeding shall bear its own legal expenses[.]" The IRP Panel is authorized to shift costs only on a finding that "the losing party's Claim or defense [is] frivolous or abusive."[26] Afilias has not previously argued that this standard is satisfied, and it clearly is not, as discussed in Section VIII.

30. Afilias has not even attempted to explain how its requests for relief possibly could

[25] Amended IRP Request ¶ 98.
[26] Bylaws, Art. 4, § 4.3(r).

fall within the Panel's remedial authority as defined by Section 4.3(o). Instead, Afilias has mounted a series of shifting arguments in an attempt to sidestep Section 4.3(o). None has merit.

1. The "Purposes of the IRP" Do Not Expand the Panel's Remedial Authority.

31. Afilias' first tactic was to ignore Section 4.3(o) completely and to argue that its sought-for remedies are somehow mandated by the "purposes of the IRP." ICANN argued in its Response to the Amended IRP Request that "Afilias' requested relief from the Panel goes far beyond what is permitted by ICANN's Bylaws[.]"[27] Remarkably, Afilias' Reply Memorial fails even to ***mention*** Section 4.3(o), the Bylaws provision governing the Panel's remedial authority. Instead, Afilias argued that the Panel's purported authority to grant the remedies that Afilias requests somehow derives from statements in Section 4.3(a) that IRP Panels are to:

- "[R]esolve Disputes"[28];
- "Ensure that ICANN . . . otherwise complies with its Articles of Incorporation and Bylaws"[29];
- "Empower the global Internet community and claimants to enforce compliance with the Articles of Incorporation and Bylaws"[30];
- "Ensure that ICANN is accountable to the global Internet community and Claimants"[31];
- "Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction."[32]

32. None of these purposes conflicts with or overrides the limits on the Panel's

[27] ICANN's Response to Amended IRP Request ¶ 83.
[28] Afilias' Reply Memorial ¶¶ 150, 151 (citing Bylaws, Art. 4, §§ 4.3(a) and (g)); *see also* Afilias' Response to *Amici* Briefs ¶¶ 226, 231.
[29] Afilias' Reply Memorial ¶ 151 (citing Bylaws, Art. 4, § 4.3(a)(i)); Afilias Response to *Amici* Briefs ¶ 227.
[30] Afilias' Reply Memorial ¶ 151 (citing Bylaws, Art. 4, § 4.3(a)(ii)); Afilias Response to *Amici* Briefs ¶ 228.
[31] Afilias' Reply Memorial ¶ 151 (citing Bylaws, Art. 4, § 4.3(a)(iii)); Afilias Response to *Amici* Briefs ¶ 229.
[32] Afilias' Reply Memorial ¶ 151 (citing Bylaws, Art. 4, § 4.3(a)(viii)); Afilias Response to *Amici* Briefs ¶ 230.

remedial authority under Section 4.3(o). Recall that "Dispute" is defined as "Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws[.]"[33] Disputes thus concern past actions or inactions. The Panel resolves Disputes by issuing a Declaration as to whether a Covered Action violated the Articles or Bylaws. The purposes of the IRP as set out in Section 4.3(a) are entirely consistent with the Panel's limited remedial authority as defined by Section 4.3(o). Moreover, even if the general purposes of an IRP as stated in Section 4.3(a) somehow conflicted with the specific remedies available as set out in Section 4.3(o) (and they clearly do not), the latter would control under the rule that "when a general and particular provision are inconsistent, the latter is paramount to the former."[34]

2. Prior IRP Decisions Do Not Authorize Afilias' Requested Relief.

33. Afilias incorrectly asserted in its Reply Memorial that prior IRP decisions establish that the Panel has authority to issue "affirmative declaratory relief," a euphemism that Afilias uses to describe the mandatory injunctions sought by items (2) through (5) of its requests for relief. Afilias bases this assertion principally on the IRP Panel's decision in *GCC v. ICANN*.[35] But the *GCC* Panel found only that IRP Panels "may and should ***recommend*** affirmative steps to be taken by the Board."[36] The *GCC* Panel did not order the Board to take any such steps or suggest that it had authority to issue that type of order.[37]

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[33] Bylaws, Art. 4, § 4.3(b)(iii)(A).

[34] Cal. Civ. Proc. Code § 1859, RLA-21; *see also CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 466 (2006) ("when general and specific provisions are inconsistent, the latter control), RLA-6.

[35] Afilias' Reply Memorial ¶ 153 & n.279, (citing *GCC v. ICANN* , ICDR Case No. 01-14-0002-1065, Partial Final Declaration ¶ 146 (19 Oct. 2019), CA-17).

[36] *GCC v. ICANN*, ¶ 146, CA-17.

[37] The *GCC* case arose under the December 8, 2011 Bylaws. Sections 4.3(8)(b) and (c) of the December 8, 2011, Bylaws are substantially similar to Section 4.3(o)(iii) and (iv) of the current Bylaws in the respects relevant to this IRP.

34. Other IRP Panels have similarly found that their remedial authority is limited by the Bylaws. In *Booking.com v. ICANN*, the Panel found that the "authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws[,]" including Sections 4.3(11)(c) and (d) of the then-operative Bylaws, which are substantially similar to Article 4.3(o)(iii) and (iv) of the currently-operative Bylaws.[38]

3. The Bylaws Need Not Use the Word "Only" to Limit the Panel's Authority.

35. Apparently realizing that the arguments based on the purposes of the IRP and purported precedent were untenable, Afilias changed tack in its Response to the *Amici* Briefs filed one week before the Hearing and asserted for the first time that Section 4.3(o) should be construed as non-exhaustive because it does not state that the Panel has authority to issue "only" the remedies prescribed.[39] Afilias cites no authority to support this argument, which conflicts with fundamental and non-controversial principles of contract construction as well as Ms. Burr's testimony that Section 4.3(o) ***is*** an exhaustive list of a Panel's authority.[40]

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[38] *Booking.com B.V. v. ICANN*, ICDR Case No.: 50-20-1400-0247, Final Declaration, ¶ 104 (3 March 2015), (Drymer, Matz, Bernstein), CA-11. The Panel's Question No. 1 asked for the parties' views on the precedential value of prior IRP decisions. Under Section 4.3(a)(vi) of the Bylaws, the purposes of the IRP include to "[r]educe Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation." Similarly, under Section 4.3(g), the IRP Panel is charged with considering the Claim and ICANN's Response "in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law." Accordingly, prior IRP decisions are precedential in that they should be considered to the extent relevant, but they are not binding in subsequent Disputes or other ICANN processes. Moreover, prior IRP decisions are relevant only to the extent that the provisions of the Bylaws, Articles, Supplementary Procedures or other instruments that they construe are the same as, or "equivalent" to, the corresponding provisions of the instruments governing this IRP. The *Booking.com* decision was governed by ICANN's Bylaws dated 11 April 2013. Section 4.3(11)(c) and (d) of those Bylaws are similar to Section 4.3(o)(iii) and (iv) of the Bylaws that govern this IRP. Accordingly, the *Booking.com* Panel's interpretation of those provisions is relevant precedent.

[39] Afilias' Response to *Amici* Briefs ¶ 223.

[40] Hearing Tr. at 394:23-395:1 (Burr) ("**Q**. Is Section 4.3(o) an exhaustive listing of the IRP Panel's authority? **A**. Of the authority which is binding on ICANN, yes.").

36. The rule of *expressio unius est exclusio alterius* "creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions[.]"[41] Under this oft-applied rule, the list of available remedies set out in Section 4.3(o) is clearly exclusive. Indeed, if it were non-exclusive, it would be meaningless. A contract should be construed "to give effect to all of a contract's terms, and to avoid interpretations that render any portion superfluous, void or inexplicable."[42] There would be no reason for the Bylaws to state that an IRP Panel may issue *declaratory relief* determining whether a Covered Action violated the Articles or Bylaws if the Bylaws also intended to allow the Panel to issue *any relief* that a Panel may deem appropriate. Likewise, there would be no reason for the Bylaws to state that a Panel could *recommend* that ICANN take *interim action* during a period before it was able to fully consider the Panel's opinion if the Bylaws had intended to authorize a Panel to issue injunctive relief *requiring* ICANN to take interim or non-interim action.

4. The CCWG-Accountability's Supplemental Proposal Prior to the Adoption of the Final Bylaws Does Not Expand the Panel's Remedial Authority.

37. Another new argument that Afilias raised for the first time in its Response to the *Amici* Briefs and then repeated in its opening presentation at the Hearing is that the CCWG-Accountability's Supplemental Proposal, dated 23 February 2016, somehow modifies or takes precedence over the limitations on the Panel's authority imposed by the Bylaws. Because Afilias raised this argument for the first time just a week before the Hearing, the record is devoid of ***any*** examination of the Supplemental Proposal's drafting history or the role played by the

[41] *Crawford-Hall v. United States*, 394 F. Supp. 3d 1122, 1143 (C.D. Cal. 2019), AA-46.
[42] *United Farmers Agents Ass'n., Inc. v. Farmers Grp., Inc.*, 32 Cal. App. 5th 478, 495 (2019) (citation and quotation marks omitted), RLA-69.

Supplemental Proposal in the development of the Bylaws, which were made effective eight months ***later*** in October 2016.

38. Afilias relies on the Supplemental Proposal's statement that Claimants should be able to "seek redress," and IRP Panels should be authorized to "direct[] [ICANN] to take appropriate action to remedy the breach."[43] Based on a definition from Dictionary.com, Afilias argues that "[t]he most common definitions of the word 'redress' include: 'the setting right of what is wrong,' 'relief from wrong or injury,' and 'compensation or satisfaction for a wrong or injury.'"[44] Afilias reasons that a declaration permitted by the Bylaws is not a form of "redress" because it purportedly does not "provide[] relief or satisfaction that would eliminate the effects of the breach."[45]

39. Afilias is wrong. The statement that a Claimant should be able to seek redress cannot plausibly be construed to imply that a Claimant is entitled to any form of remedy that it may request, even where that remedy is not authorized by the Bylaws that create the IRP. A declaration that the challenged Covered Action constitutes an action or inaction in violation of the Articles or Bylaws – as authorized by Section 4.3(o)(iii) of the Bylaws – ***is*** redress.

40. The CCWG-Accountability's Supplemental Proposal is thus entirely consistent with the remedial limitations imposed by Section 4.3(o) of the Bylaws. The Supplemental Proposal is clear in stating that the result of an IRP would be "a declaration," not any other form of relief: "An IRP would result in a declaration that an action/failure to act *complied* or *did not*

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[43] Afilias' Response to *Amici* Briefs ¶ 222 (citing CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations ¶ 178 (23 Feb. 2016), C-91, and CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process ¶¶ 54, 57 (23 Feb. 2016), C-122; Hearing Tr. at 83:8-15 (Afilias Opening Statement) and Afilias' Opening Presentation, at Slides 64-65.

[44] Afilias' Response to *Amici* Briefs ¶ 220 n.409.

[45] *Id*. ¶ 220.

comply with ICANN's Articles of Incorporation and/or Bylaws."[46]

41. The Supplemental Proposal explained that "the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties."[47] This was confirmed by Ms. Burr, who was a member of the CCWG-Accountability and the Rapporteur for Work Stream 1, which produced the Supplemental Proposal.[48]

42. The Panel's Question No. 2 asked the parties to address "the legal effect of the Board's adoption of the CCWG Report (C-122) insofar as the later-adopted Amended Bylaws (C-1) contain provisions contrary to or inconsistent with the Report" and whether the CCWG Report is "relevant to the interpretation of the provisions of the Bylaws relating to the accountability mechanisms of ICANN." As shown above, the CCWG's Supplemental Proposal is not contrary to or inconsistent with the Amended Bylaws. As part of the Bylaws drafting

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[46] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), ¶ 16, C-122.

[47] *Id*.

[48] Hearing Tr. at 323:25-324:22 (Burr) ("The bylaws are clear, and this was always the intention. I was the rapporteur for this, and I was the person who wrote the -- was fundamentally charged with a relevant bylaws provision. This means -- and it is very clear in the bylaws, and that is what the CCWG meant – that they had a right to get a decision about whether an action or an inaction violated the bylaws. This does not say to me, it was never the intention of the CCWG, in my hearing, that the Panel could prescribe a remedy. And that totally makes sense in the context of ICANN IRPs, because often there are many, many parties who are affected by this. There are a lot of moving parts. So I do not see that as a statement, and I participated in both the CCWG discussions and the bylaws' drafting, which was not intended to, you know, damages, recovery, remedy, that kind of stuff, but the -- the IRP's authority is limited to finding -- making a determination about whether an action or inaction violated the articles of incorporation and bylaws, and that's what's binding on ICANN."); *id*. at 333:25-334:20 ("Well, so, first of all, I can read that construction, which is passive and which was put up as we were working this out. I do not read it to say that the Panel is going to direct ICANN to take a specific action to remedy the breach. The Panel, by making a finding that ICANN has violated its articles, ICANN must take – then take appropriate action to remedy the breach. That is not the same as saying that the Panel has the authority to say what the appropriate action is to remedy the breach. And the reason is there are so many moving parts and parties here, imagine if this Panel said 'ICANN violated the bylaws, and you must award this to, you know, X, Y or Z.' There are going to be two or three other parties who then have a cause of action. So ICANN must -- ICANN has an obligation to take appropriate action, but the CCWG did not contemplate that the Panel, the IRP Panel would decide what that appropriate action was."); *id*. at 303:5-10 ("The CCWG was split up into two work streams. One was the accountability mechanisms and the mission, commitment for value statement of the bylaws, and then there were other issues that another work stream took. I was the rapporteur for the accountability work stream.").

history, the Supplemental Proposal potentially could be relevant to interpreting aspects of the Bylaws; however, determining whether and the extent to which the Supplemental Proposal is relevant in any given instance would require a thorough examination of the drafting history of the Bylaws provisions at issue to ascertain their relationship to the Supplemental Proposal and the reasons for any differences. No such examination has been done because Afilias did not assert arguments based on the Supplemental Proposal until the Hearing.

43. If any relevant inconsistency existed between the Bylaws and the Supplemental Proposal, the Bylaws clearly would control. The Bylaws, not the CCWG-Accountability's Supplemental Proposal, establish the Panel's jurisdiction, as explained by Ms. Burr: "the language in the bylaws is the final implementation of the CCWG's recommendations . . . to the extent there's any discrepancy between [the Supplemental Proposal] and the bylaws, the bylaws is the relevant document."[49] The primacy of the Bylaws was also confirmed by the IRP Panel in *Booking.com*: "The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws."[50]

44. This is undeniably correct. The IRP Panel exists solely as a function of the Bylaws. The Panel's jurisdiction and remedial authority is therefore defined and circumscribed by the Bylaws. The Panel is charged with declaring whether a Covered Action violates the Articles or Bylaws, not whether it violates the CCWG-Accountability's Supplemental Proposal. The Panel has no jurisdiction to deviate from the Bylaws based on any alleged discrepancy between the Bylaws and the Supplemental Proposal.[51]

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[49] Hearing Tr. at 319:5-13 (Burr).

[50] *Booking.com B.V. v. ICANN*, ICDR, ¶ 104, CA-11.

[51] UK Arbitration Act of 1996, Art. 48(1) ("The parties are free to agree on the powers exercisable by the arbitral tribunal as regard remedies."), CA 124; *Sutter v. Oxford Health Plans*, 675 F.3d 215, 219-20 (3d Cir. 2012) ("An arbitrator oversteps these limits, and subjects his award to judicial vacatur under §10(a)(4), when he … grants relief

45. The Board did not adopt the Supplemental Proposal as a governing ICANN document akin to the Articles or Bylaws, and it certainly did not suggest that the Supplemental Proposal supersedes or takes precedence over the Bylaws, which would not become effective until eight months later. Indeed, the Supplemental Proposal itself explains that "[t]he language proposed in recommendations for the ICANN Bylaw revisions are conceptual at this stage" and that further work was required to develop language that could be incorporated into the Bylaws.[52] On 10 March 2016, the Board passed three resolutions relating to the CCWG's work: Resolutions 2016.03.10.16, 2016.03.10.17, and 2016.03.10.18.[53] The resolutions formally accept receipt of the Report (2016.03.10.16), approve transmittal of the report to the NTIA (2016.03.10.17) and direct the President and CEO of ICANN to plan for the implementation of the Report (2016.03.10.18).[54] The Supplemental Proposal was considered in preparing a draft of the revised Bylaws, which was then put out for public comment and further revised accordingly.[55] To the extent the Bylaws did not adopt a particular suggestion in the Supplemental Proposal, such suggestion was expressly or implicitly rejected.

5. There Is No "Gap" Created by the Litigation Waiver, and ICANN Takes the Same Position Here as It Did in the Ruby Glen Litigation, Where It Sought to Enforce the Litigation Waiver.

46. Afilias raised another new argument at the Hearing by suggesting that there is some type of a "gap" created by the litigation waiver to which applicants must agree as a

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in a form that cannot be rationally derived from the parties' agreement"), *aff'd,* 133 S.Ct. 2064 (U.S. S.Ct. 2013), RLA-68; *Rain CII Carbon, LLC v. ConocoPhillips Co*., 674 F.3d 469, 472 (5th Cir. 2012) ("'If the contract creates a plain limitation on the authority of an arbitrator, we will vacate an award that ignores the limitation.'") (quoting *Apache Bohai Corp. v. Texaco China BV*, 480 F.3d 397, 401 (5th Cir. 2007)), RLA-64.

[52] C-91 at 9 (bullet 2) & 12.

[53] C-184 at 43-44.

[54] C-184.

[55] Hearing Tr. at 389.22-390:14 (Burr).

condition to participating in the Program.[56] Afilias has never clearly articulated its argument, but it appears to be that because applicants agree to participate in ICANN Accountability Mechanisms in lieu of litigation, the remedies available in such Accountability Mechanisms must be co-extensive with remedies available in litigation or else there is a gap.[57]

47. This argument defies commercial reality and, not surprisingly, Afilias has cited no authority to support it. Parties frequently waive any entitlement to particular remedies as part of their agreed-upon means of dispute resolution. For example, waivers of consequential and punitive damages are virtually ubiquitous in international commercial contracts. No valid authority holds that such waivers are invalid or somehow undermine the enforceability of the parties' agreement to arbitrate disputes. Likewise, there is no authority holding that an arbitral tribunal can expand its own authority by granting expressly prohibited remedies on the basis that their prohibition creates a gap between the remedies available in arbitration versus those that would have been available had the parties left themselves free, without restriction, to proceed to court. Here, the parties agreed to a carefully circumscribed form of arbitration as one of their means of dispute resolution (along with the other Accountability Mechanisms). The fact that they could have additional claims or remedies available to them in some other contractually-excluded forum is irrelevant.[58]

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[56] *Id*. at 61:20-62:20; 326:10-327:25; 329:15-19.

[57] *Id*. at 329:24-330:6 ("[MR. LITWIN]: So in light of the litigation waiver, an IRP Panel's jurisdiction must cover all matters that could not be addressed by a court of competition – competent jurisdiction, otherwise a new gTLD applicant who was required to agree to the waiver would have no effective means of redress; is that fair"?); *id*. at 598:4-9 (Mr. Ali stating that the Panel's jurisdiction "is based on what is – what the scope of the litigation waiver is.").

[58] ICANN's Accountability Mechanisms are narrower than litigation in some respects, including with regard to the types of remedies potentially available. However, ICANN's Accountability Mechanisms are also broader in some respects than the rights an applicant might otherwise have in litigation. For example, ICANN's Accountability Mechanisms entitle applicants to seek a binding declaration with respect to whether ICANN has acted consistently with its Articles and Bylaws, as Afilias does here. Normally, however, a person who does not own an interest in a corporation would have no standing to assert a claim that the entity acted contrary to its Bylaws or Articles of Incorporation. *See* Cal. Corp. Code § 208, RLA-72.

48. ICANN understands that Afilias intends to argue in its Post-Hearing Brief that ICANN's position in this IRP somehow conflicts with its position before the Ninth Circuit Court of Appeals in the *Ruby Glen* litigation. This argument—which has never been raised before—is simply wrong. In its brief to the Ninth Circuit, ICANN stated that the Guidebook's Covenant Not to Sue does not leave applicants "without any form of redress" because they can challenge ICANN's implementation of the New gTLD Program through various ICANN accountability mechanisms, including an IRP.[59] ICANN further made clear that the redress available to an applicant through an IRP is a final and binding declaration: "[A]n Independent Review Process panel's declarations are 'final and have precedential value.'"[60] That is entirely consistent with ICANN's position in this IRP: the Panel properly provides redress by issuing a final and binding decision declaring whether the Covered Actions at issue violated ICANN's Articles or Bylaws, but the Panel does not have authority to grant other remedies not permitted by the Bylaws.

C. The Panel Is Required to Apply a Prescribed Standard of Review.

49. The Panel's jurisdiction is also limited by the standard of review prescribed by Section 4.3(i) of the Bylaws and Rule 11 of the Interim Supplementary Procedures, which are substantially identical. Section 4.3(i) states:

> 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.

[59] *Ruby Glen, LLC v. ICANN*, No. 16-56890, Appellee's Answer Brief at 3, 6 (9th Cir. Oct. 30, 2017), C-187.
[60] *Id*. at 11(citation omitted).

> (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.[61]

50. The first sentence of Section 4.3(i) establishes a general *de novo* standard of review. 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." This standard effectively incorporates the "business judgment rule," which is recognized in California and all other U.S. jurisdictions.[62]

51. Contrary to the plain language of subsection (iii), Afilias has advanced three different arguments as to why decisions of the Board are not entitled to any deference. First, Afilias asserts that prior IRP decisions have rejected any such deference.[63] But Afilias relies primarily on the IRP Panel's decision in *ICM v. ICANN,* dated 19 February 2010, which declined to apply the business judgment rule under a then-operative version of the Bylaws that had no provision analogous to the current Section 4.3(i)(iii). Indeed, the *ICM* Panel expressly based its decision on the absence of such a provision: "Articles and Bylaws . . . do not specify or imply that the International Review Process [*sic*] provided for shall (or shall not) accord deference to the decisions of the ICANN Board."[64] Accordingly, the *ICM* decision provides no guidance as to the proper interpretation and application of Section 4.3(i)(iii).

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[61] Bylaws, Art. 4, § 4.3(i).

[62] *Landen v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 257 (1999) (The California Supreme Court notes "that the rule of judicial deference to corporate decision making 'exists in one form or another in every American jurisdiction.'") (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507 n.14 (1986), RLA-13; *see also 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), RLA-15.

[63] Afilias' Reply Memorial ¶ 6 & n.16.

[64] *ICM Registry, LLC v. ICANN*, ICDR Case. No. 50-177-T 000224 08, Final Declaration ¶ 136 (19 February 2010) (citation omitted), CA-1.

52. In a footnote, Afilias cites the decisions in *Dot Sport Ltd.* and *Booking.com*. Again, both IRPs were decided under earlier versions of the Bylaws that did not include the current Section 4.3(i)(iii).[65] And while *Dot Sport Ltd.* and *Booking.com* both cited to *ICM*, they also both agreed that an IRP Panel must apply a deferential standard of review to Board action or inaction. The *Booking.com* Panel stated: "[W]e also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an 'IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.'"[66] Similarly, the *Dot Sport* Panel found that the Bylaws required the Panel to apply a "defined standard of review" drawn from the Bylaws, which accorded deference to the Board's reasonable business judgment by "focusing on: a. did the Board act without conflict of interest in taking its decision? b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the community?"[67]

53. Afilias' second argument for discounting the deference owed to the Board's business judgment is that, according to Afilias, its claims do not involve the Board's exercise of its fiduciary duties.[68] However, under California law, ***all*** actions by the Board on behalf of ICANN are subject to a fiduciary duty to act in good faith in the interests of ICANN. The California Corporations Code makes clear that, whenever a director is performing duties as a director, he or she does so subject to a fiduciary duty to the corporation:

> A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve,

[65] Afilias' Reply Memorial ¶ 6 & n.16.
[66] *Booking.com v. ICANN*, ¶ 115, CA-11.
[67] *Dot Sport Ltd. v. ICANN*, ICDR Case No. 01-15-0002-9483, Final Declaration ¶ 7.17 (31 Jan. 2017), CA-18.
[68] Afilias' Reply Memorial ¶ 16.

> in good faith, in a manner that the director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.[69]

54. This was confirmed at the Hearing by Ms. Burr, who testified that she has "an obligation to exercise my fiduciary – respect my fiduciary obligations to ICANN in everything I do related to ICANN," and that she had trouble imagining any circumstance where the Board could act on behalf of ICANN without exercising its fiduciary duty.[70]

55. Afilias conceded in its opening presentation that "Afilias does not claim that the ICANN Board failed to comply with its fiduciary duties to ICANN."[71] Accordingly, the Board's judgment is entitled to deference as long as it is objectively reasonable.

56. Finally, Afilias argues that the business judgment rule in Section 4.3(i)(iii) applies only to official Board action taken by a resolution at a duly held Board meeting. Afilias bases this argument on Sections 2.1 and 7.19 of the Bylaws.[72] Section 2.1 states that "the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board,"[73] and Section 7.19 states that "[a]ny action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action."[74] Afilias made this argument for the first time in its Response to the *Amici* Briefs.

57. The argument is simply wrong. Section 4.3(i)(iii) does not, on its face, impose

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[69] Cal. Corp. Code § 5231, RLA-22.
[70] Hearing Tr. (Burr) at 336:17-25, 392:25-393:3.
[71] Afilias Opening Presentation at Slide 63.
[72] Afilias' Response to *Amici* Briefs ¶¶ 170-171. Afilias erroneously cites to Section 2.19. However, the Bylaws contain no Section 2.19. The correct reference is to Article 2, Section 2.1.
[73] Bylaws, Art. 2, § 2.1.
[74] *Id*., Art. 7, § 7.19.

any such requirement. Nor does the language of that provision permit such an inference. The deference to Board judgment created by Section 4.3(i)(iii) encompasses more than the types of official Board actions governed by Sections 2.1 and 7.19. While Sections 2.1 and 7.19 govern official Board "action," Section 4.3(i)(iii) expressly applies to both "the Board's action ***or*** inaction."[75] Section 4.3(i)(iii) therefore is not limited to official actions adopted by resolution at an "annual, regular or special" meeting under Section 2.1 and 7.19; it applies to any exercise of "business judgment" by the Board, including where, as here, it results in the Board taking no action.

II. AFILIAS' CLAIMS REGARDING ALLEGED ACTIONS AND INACTIONS IN 2016 ARE TIME-BARRED.

A. The Panel Has Jurisdiction Only Over Claims Brought Within the Time Limits Established by the Interim Supplementary Procedures.

58. In addition to the jurisdictional limits imposed by the Bylaws discussed above, the Interim Supplementary Procedures also impose a jurisdictional limit on the time period in which a claim may be brought. Rule 4 of the Interim Supplementary Procedures states:

> 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 inactions 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.

59. Rule 4 thus establishes a limitations period and a repose period. The limitations period provides that an IRP must be filed within 120 days after the Claimant becomes aware of the material effect of the action or inaction giving rise to the Dispute. However, the repose period stipulates that no IRP may be filed more than 12 months after the date of the action or

[75] *Id*., Art. 4, § 4.3(i)(iii) (emphasis added).

inaction giving rise to the Dispute, regardless of the Claimant's state of mind.

60. These time limitations are jurisdictional. A claim that is brought outside the time periods established by Rule 4 is not properly filed and may not be properly decided by an IRP Panel. In *Glamis Gold Ltd. v. United States*, a NAFTA arbitration under the UNCITRAL Rules (1976), the Tribunal held that "an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for the purposes of Article 21(4)."[76] Similarly, in *Resolute Forest Products Inc. v. Canada*, another NAFTA arbitration, the Tribunal found that "although the time limit specified in Article 1116(2) and 1117(2) [of NAFTA] is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction."[77]

61. Here, Rule 4 of the Interim Supplementary Procedures *is* a procedure. Article V(1)(c) of the New York Convention provides that an arbitral decision may not be recognized or enforced if "the arbitral procedure was not in accordance with the agreement of the parties." Relevant national arbitration law is in accord. Article 68(2)(c) of the UK Arbitration Act of 1996 states that an award may be set aside for "failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties." Likewise, U.S. courts applying the Federal Arbitration Act "may decline enforcement of an arbitral award on the basis that 'the arbitral procedure was not in accordance with the agreement of the parties."[78] Prior IRP decisions also have recognized time limitations as jurisdictional in nature.[79]

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[76] *Glamis Gold Ltd. v. United State*s, Arbitration Under Chapter 11 of NAFTA, Procedural Order No. 2, ¶ 18 (Revised) (May 31, 2005), RLA-75.
[77] *Resolute Forest Products Inc. v. Canada (NAFTA)*, PCA Case No. 2016-1, Decision on Jurisdiction and Admissibility ¶ 83 (Jan. 30, 2018), RLA-76
[78] *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010), RLA-63.
[79] *GCC v. ICANN*, Partial Final Declaration at § VII (Oct. 19, 2016) ("JURISDICTION: TIMELINESS OF THE REQUEST FOR IRP"), CA-17.

B. Afilias' Claim that ICANN Had an Unqualified Obligation to Disqualify NDC Is Time-Barred.

62. Afilias asserts that "ICANN violated its Articles and Bylaws when it failed to disqualify NDC's bid and application upon receiving the DAA ***in August 2016***."[80] Fundamentally, Afilias' position is that ICANN's Articles and Bylaws created an immediate, absolute and unqualified obligation on ICANN to disqualify NDC's bid once ICANN became aware of the DAA, and that ICANN had no discretion with regard to the interpretation and application of the Guidebook, the consequences of any potential violation, or the timing of ICANN's consideration of those issues. This claim is clearly barred by the repose period because it challenges actions or inactions that occurred in 2016, more than two years before Afilias filed this IRP in November 2018.

63. Because the repose period is dispositive, the Panel need not consider whether Afilias' claim also is barred by the limitations period. If the Panel reaches that issue, however, the Panel should find that the limitations period also bars Afilias' claims. Afilias unquestionably was aware of the material effect of the alleged actions or inactions of ICANN by August and September 2016, when it was writing letters to ICANN demanding that it disqualify NDC. The claims asserted in those letters are the same as the claims asserted by Afilias in this IRP, which is self-evident from a comparison of Afilias' August and September 2016 letters and its submissions in this IRP.

64. For example, in its September 2016 letter, Afilias asserted that NDC violated the Guidebook by reselling, assigning or transferring rights or obligations in connection with the

[80] Afilias' Reply Memorial ¶ 86 (emphasis added); *see also id.* ¶ 20 ("This IRP, however, claims that ICANN was required to disqualify NDC's application and bid in August 2016 when ICANN first learned of NDC's violations[.]").

.WEB application to Verisign:

> NDC violated Paragraph 10 of the Terms and Conditions in Module 6 of the New gTLD Applicant Guidebook (the "Guidebook"), which expressly prohibits any applicant for a gTLD to "*resell, assign or transfer any of the applicant's rights or obligations in connection with the application*."[81]

That contention is not materially distinguishable from Afilias' claim in this IRP that:

> NDC secretly sold, transferred and assigned its rights and obligations in the application to a non-applicant (*i.e.*, Verisign), in plain violation of the Terms and Conditions of the AGB, including that "Applicant may not resell, assign, or transfer any of the applicant's rights or obligations in connection with the application."[82]

65. Likewise, in its September 2016 letter, Afilias asserted that NDC violated the Guidebook by failing to notify ICANN that information in NDC's application had allegedly become untrue or inaccurate:

> NDC violated Section 1.2.7 of the Guidebook, which requires applicants to "*promptly notify ICANN via submission of the appropriate forms*" "*if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate,*" including "*changes in financial position and changes in ownership or control of the applicant*."[83]

That contention is not materially distinguishable from Afilias' claim in this IRP:

> As soon as NDC entered into the DAA with ICANN [*sic*], almost *none* of the information in NDC's .WEB Application—and certainly, almost none of the information that had been posted for public comment—was true, accurate, or complete. Nor were the statements made by NDC's representatives, in phone calls and in writing, to ICANN. There can be little argument that NDC's failure to update its application constituted an "omission of material information" that rendered its application to be false and certainly misleading.[84]

66. In its September 2016 letter, Afilias asserted that NDC violated the Auction Rules by purportedly placing bids on behalf of Verisign:

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[81] C-103 at 2.

[82] Afilias' Reply Memorial ¶ 42 (citation omitted).

[83] C-103 at 2.

[84] Afilias' Reply Memorial ¶ 65.

> NDC violated the Auction Rules for New gTLDs ("Auction Rules"). Rule 12 provides that "participation in an Auction is limited to Bidders," which is defined by the Auction Rules as a "*Qualified Applicant*" or a "*party designated by a Qualified Applicant to bid on its behalf"*. This rule prohibits bids placed on behalf of a third-party that is not a "Qualified Applicant", defined by the Auction Rules as "*an entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention set to be resolved by an Auction*."[85]

Again, this contention is not materially distinguishable from the claim Afilias makes in this IRP with regard to the Auction Rules:

> [T]he prohibition against bids being made on behalf of any entity other than a Qualified Applicant was stated plainly and repeatedly throughout the Auction Rules. A simple review of the DAA's terms demonstrate that they *required* NDC to violate and subvert the Auction Rules—which is precisely what NDC did. NDC—the "Qualified Applicant"—was *not* making bids "on its own behalf".[86]

67. The remedy demanded by Afilias in its August and September 2016 letters is also the same as the one it demands in this IRP, *i.e.*, the immediate disqualification of NDC and awarding of .WEB to Afilias:

> ICANN must disqualify NDC's application for .WEB and proceed to contract for .WEB with Afilias, the next highest bidder in the Auction, in compliance with its obligations under ICANN's Articles of Incorporation and Bylaws (as well as principles of international law and California law)[.][87]

68. Afilias has argued that it could not assert its claims in 2016 because it did not have a copy of the DAA at that time.[88] But that argument directly contradicts the position Afilias took in its 2016 letters to ICANN, in which Afilias stated that ***it did not need the DAA to prove its claims***, much less to raise its claims in an IRP:

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[85] C-103 at 2.
[86] Afilias' Reply Memorial ¶ 95.
[87] C-103 at 1.
[88] Afilias' Reply Memorial ¶¶ 140-141; Afilias' Response to *Amici* Briefs ¶ 43.

> Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from Verisign's own press release and its disclosure in its Form 10-Q filed with the U.S. Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign.[89]

Indeed, Afilias drafted its IRP Request without a copy of the DAA.

69. In sum, Afilias' claim that ICANN, upon learning in August 2016 of NDC's arrangement with Verisign, had an immediate, absolute and unqualified obligation under its Articles and Bylaws to disqualify NDC and award .WEB to Afilias, is barred by both the repose period and the limitations period. Accordingly, that claim is outside the jurisdiction of this Panel and must be rejected.[90]

C. Afilias' Claim that ICANN Staff Violated the Articles and Bylaws in Their Investigation of Pre-Auction Rumors or Post-Auction Complaints Is Also Time-Barred.

70. Afilias asserted in its Amended IRP Request that ICANN violated the Bylaws in July 2016 when it allegedly "failed to fully investigate ***rumors*** that NDC had reached an agreement with VeriSign ***prior to the .WEB Auction***."[91] In fact, prior to the auction, ICANN was not aware of any rumors that Verisign was involved in NDC's .WEB application. ICANN's

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[89] C-103 at 2.

[90] It has been suggested that application of the time bar may be unfair because, until receiving ICANN's Rejoinder, Afilias was not aware of the Board's November 2016 decision to follow its policy of not taking action on applications and contention sets that are the subject of Accountability Mechanisms. But Afilias' claim is not that ICANN's Board violated the Articles and Bylaws in making this decision. Afilias confirmed this in its opening statement. *See* Hearing Tr. at 81:13-22 ("In fact, we couldn't have made a claim that would implicate the business judgment rule because we didn't know about the November 2016 meeting. So when we made – when we filed our amended request for IRP, how could we be making a claim regarding Board conduct when we didn't even know that there had been any Board conduct?"). On the contrary, Afilias asserts that ICANN had violated its Articles and Bylaws three months before the Board's November 2016 meeting when ICANN failed to disqualify NDC immediately upon receipt of Afilias' complaints. Thus, the Board's November 2016 decision is irrelevant to the application of the time-bar. It is also irrelevant that the Board's decision was made during a privileged discussion at a closed workshop and not published on ICANN's website.

[91] Amended IRP Request ¶ 78, bullet 4 (emphasis added).

pre-auction investigation related to Ruby Glen's contention that there had been a change of ownership or control of NDC, not to any allegations or rumors regarding Verisign. In any event, however, Afilias appears to have abandoned this claim, having failed even to mention it in Afilias' Reply Memorial or Response to the *Amici* Briefs. Instead, Afilias used those briefs to attempt to introduce a wholly new claim, *i.e.*, that ICANN purportedly violated the Bylaws in its August and September 2016 ***post-auction investigation of Afilias' allegations against NDC***.[92] ICANN shows below (*infra* at Section VI) that this new claim is not properly pled and is therefore outside the Panel's jurisdiction and that, in any event, the claim is meritless.

71. But Afilias' claims concerning ICANN's 2016 investigations – whether pre- or post-auction – also fail because they are time-barred. These claims are outside the period of repose because they concern alleged actions and inactions in July through September 2016. The claims are also outside the limitations period because Afilias unquestionably was aware, at the time, of the material effect of the alleged violations – *i.e.*, ICANN's failure to disqualify NDC either before the .WEB auction or immediately thereafter.

72. Accordingly, Afilias' claims concerning ICANN's investigations of Ruby's Glen's pre-auction allegations regarding a change in control of NDC and Afilias' post-auction allegations regarding Verisign's arrangement with NDC are time-barred and therefore outside the jurisdiction of the Panel.

D. Afilias' Equitable Estoppel Defense Has No Merit.

73. Apart from contending that its current claims are somehow different from those asserted in its August and September 2016 letters (an argument that is flatly refuted by its own letters), and that it was not aware of the status of ICANN's post-auction investigation (an

[92] Afilias' Reply Memorial ¶ 110.

unsupported assertion that is irrelevant to the period of repose, which begins on the date of the challenged ICANN actions or inactions), Afilias' only response to the application of the limitations and repose periods has been to argue that ICANN is equitably estopped from relying on them.

74. Afilias bases its equitable estoppel argument on two statements that ICANN made in 2016. First, Afilias cites Ms. Willett's 16 September 2016 letter to Afilias posing a series of questions regarding the allegations against NDC and Verisign. Afilias relies on Ms. Willet's statement that: "To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information."[93] Second, Afilias cites Mr. Atallah's 30 September 2016 response to Afilias' letter demanding to know the status of ICANN's investigation. Afilias relies on Mr. Atallah's statements that: "As an applicant in the contention set, the primary contact for Afilias's application will be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms. We will continue to take Afilias's comments, and other inputs that we have sought, into consideration as we consider this matter."[94]

75. Afilias' positions fail because California law imposes strict requirements for the application of equitable estoppel that Afilias does not meet.

> The doctrine of equitable estoppel is founded on notions of equity and fair dealing and provides that a person may not deny the existence of a state of facts if that person has intentionally led others to believe a particular circumstance to be true and to rely upon such belief to their detriment.... Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to

[93] Afilias' Reply Memorial ¶ 145 (quoting from C-50).
[94] *Id*., C-61.

> believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.[95]

76. Afilias satisfies ***none*** of the doctrine's four elements. In particular: ICANN's statements do not misrepresent any facts; Afilias does not contend that any relevant facts existed of which ICANN was aware and about which it misled Afilias; and Afilias was notified of changes to the contention set status and the status of relevant Accountability Mechanisms, as were other .WEB applicants, just as Mr. Atallah said that they would be.

77. Afilias also does not contend—and has not even attempted to prove—that ICANN's statements were intended to dissuade Afilias from filing an IRP or otherwise pursuing its claims. Afilias subjected Ms. Willett to several hours of cross-examination but decided not to question her on this subject. Afilias cannot properly ask the Panel to make findings based on inference and surmise when it had the opportunity to obtain evidence on this issue and elected not to do so.

78. In addition, Afilias has submitted no evidence that it relied on Ms. Willett's or Mr. Atallah's letters in failing to assert its claims in 2016. "[R]eliance is an essential element of equitable estoppel."[96] If Afilias actually had decided not to file an IRP based on these statements, it could have submitted witness statements to that effect. Where, as here, a party submits no evidence of reliance, any claim of equitable estoppel must be rejected.[97]

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[95] *Krolikowski v. San Diego City Employees' Retirement Sys.*, 24 Cal. App. 5th 537, 564-65 (2018) *review denied* (Sept. 19, 2018) (quotations marks and citation omitted), RLA-12.

[96] *Atkins, Kroll (Guam), Limited v. Cabrera*, 295 F.2d 21, 23 (9th Cir. 1961), RLA-4; *see also Elmore v. Cone Mills Corp.,* 187 F.3d 442, 446 (1999) ("The Supreme Court has held that '[an] essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations.'") (citation omitted), RLA-7.

[97] *In re Katz Interactive Call Processing Patent Litig.*, Nos. 07-NL-1816, 01-2196, RGK (FFMx) 2009 WL 1351043, at *15 (C.D. Cal. May 1, 2009) ("Essentially, FedEx is attempting to argue that reliance can be inferred from evidence of misleading conduct. That analysis impermissibly eliminates an essential element of estoppel."), RLA-10; *Sood v. Grief*, No. H033875, 2010 WL 2595128, at *4-5 (Cal. Ct. App. June 29, 2010) (unpublished) (rejecting equitable estoppel where the evidentiary record was "devoid of any indication that [counsel's] conduct

79. Further, as a matter of law, equitable estoppel cannot apply where, as here, a party was represented by counsel. Afilias was represented by experienced counsel throughout the entire period at issue. Its letters were signed by its General Counsel, Mr. Hemphill, and its 9 September 2016 letter copies Afilias' outside counsel, Mr. Arif Ali (who has been counsel for other claimants in previous IRPs, including the *ICM* IRP).[98] Under California law, "[w]here one has been represented by an attorney in connection with a claim the necessary elements of estoppel are not established as a matter of law."[99]

80. Finally, it is doubtful that equitable estoppel ever can apply to extend a claim beyond the period of repose. California courts have not addressed this issue,[100] but federal courts have held that equitable estoppel has no application to statutes of repose because the purpose of such a period "is to set an outer limit unaffected by what the plaintiff knows."[101] While limitations periods operate to prevent unfairness to a defendant caused by having to

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actually and reasonably induced [plaintiff] to forbear suing" within the statutory period) (citation omitted), RLA-19; *Yeager v. Bowlin*, No. CIV. 2:08-102 WBS JFM, 2010 WL 95242, at *16 (E.D. Cal. Jan. 6, 2010) ("Plaintiffs have presented no evidence that indicates they reasonably relied on any representations by defendants that induced them to delay from filing this action until the statute of limitations had run . . . Accordingly, equitable tolling and estoppel are inappropriate."), RLA-20.

[98] R-40 (Mr. Ali's CV); C-49 (8 Aug. 2016 letter from Afilias); C-103 (16 Sept. 2016 letter from Afilias).

[99] *Romero v. Cty. of Santa Clara*, 3 Cal. App. 3d 700, 705 (1970), RLA-18; *Republic Ins. Co. v. Great Pac. Ins. Co*., 261 Cal. Rptr. 863, 867 (Cal. Ct. App. Aug. 31, 1989) (unpublished), RLA-17; *Lara v. Willows Joint Venture*, No. B145113, 2002 WL 705962, at *5 (Cal. Ct. App. Apr. 24, 2002) (unpublished), RLA-14.

[100] *McHenry v. Lukasko*, 2018 2112411, at *3 n.9 (Cal. Ct. App. May 8, 2018) ("The parties dispute whether equitable tolling and equitable estoppel apply to statutes of repose. We need not decide the issue because we affirm the trial court's findings that the 4-year statutes of limitations bar the claims and (as discussed *post*) that Plaintiff has not established an entitlement under either doctrine."), RLA-55.

[101] *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 451 (7th Cir. 1990), RLA-46; *First United Methodist Church v. U.S. Gypsum Co.,* 882 F.2d 862, 865–66 (4th Cir. 1989), RLA-50; Restatement (Second) of Torts § 899, cmt. g (1979) (statutes of repose "set a designated event for the statutory period to start running and then provide that at the expiration of the period any cause of action is barred regardless of usual reasons for 'tolling' the statute."), RLA-73. United States courts applying state law are divided on whether equitable estoppel can ever apply to the statute of repose. *Compare Oldenburg Group Inc. v. Sherwin Williams Co.*, No. 07-C-0596, 2009 WL 10711834, at *2 (E.D. Wis. Aug. 31, 2009) ("equitable estoppel is generally considered inconsistent with periods of repose[.]"), RLA-62; *Rosenberg v. Falling Water, Inc.*, 709 S.E.2d 227, 230 (Ga. 2011) (same), RLA-65; *Beals v. Breeden Bros., Inc.*, 833 P.2d 348, 350 (Or. Ct. App. 1992) (same), RLA-42; *with Wood v. BD&A Construction, L.L.C.*, 601 S.E.2d 311, 314 (N. Car. Ct. App. 2004) ("Equitable estoppel may also defeat a defendant's statute of repose defense."), RLA-70.

defend stale claims, periods of repose serve the interests of the public as a whole by providing that rights and liabilities in respect of particular events are certain and cannot be disturbed beyond a given date. Accordingly, "a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason[.]"[102]

E. The Repose and Limitations Periods Apply Retroactively.

81. The Panel's Question No. 3 asks the parties to state their views on "the effect on the claims in issue in this case of the timing of the adoption of Rule 4 of the Interim Supplementary [P]rocedures (25 October 2018), as it affects the timing of bringing the claims that have been advanced in this proceeding (4 months and 12 months repose period)".

82. The timing of the adoption of Rule 4 is relevant only in that it occurred before Afilias commenced this IRP. As a consequence, Rule 4 applies to all of Afilias' claims, regardless of whether they arose before or after 25 October 2018.

83. Once the Interim Supplementary Procedures came into effect, they expressly applied to all subsequently filed IRPs regardless of when the claims at issue arose. Rule 2 states that the Interim Supplementary Procedures "will apply . . . in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect."[103] No exception is made to the compulsory application of Rule 4. Accordingly, the limitations and repose periods established by Rule 4 must be applied in all IRPs initiated after the Interim Supplementary Procedures came into force, without regard to when the claims arose.

84. But even if Afilias' claims concerning conduct in 2016—*i.e.*, ICANN's failure to satisfy its alleged obligation to disqualify NDC in August 2016 and its investigations, first in

[102] *First United Methodist Church of Hyattsville*, 882 F.2d at 866, RLA-50.
[103] Interim Supplementary Procedures at 2, C-59.

July and then in August-September 2016—were evaluated under the limits in force at the time those claims arose, they would still be barred. At that time, an IRP could not be brought to challenge action or inaction of the ICANN staff. The method of challenging such action or inaction was to bring a Reconsideration Request, which would have been considered by the Board Governance Committee.[104] If the Board had denied the Reconsideration Request, then the Board's denial could have been challenged in an IRP. A Reconsideration Request was required to be brought within 15 days after the Claimant "concluded, or reasonably should have concluded, that the action would not be taken in a timely manner,"[105] and an IRP was required to be filed within 30 days of the publication of the denial of the Reconsideration Request.[106] This is precisely how the applicants in the *Dot Registry* IRP – represented by Mr. Ali – brought an IRP.[107] However, Afilias never filed a Reconsideration Request in September 2016 (or anytime thereafter) asserting that ICANN violated its Articles or Bylaws or any other established policy or process by not disqualifying NDC's .WEB application.

85. Finally, if Afilias wished to challenge Rule 4 of the Interim Supplementary Procedures, it could have brought such a claim in this IRP, as it has done with Rule 7. Afilias chose not to do so. Indeed, Afilias did not raise any complaint regarding Rule 4 in its Amended IRP Request or at any time prior to the Hearing. Accordingly, Afilias has waived any challenge to the validity and application of Rule 4.[108]

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[104] Hearing Tr. at 742:10-23; 769:9-770:16 (Willett).

[105] ICANN Bylaws (as amended 11 February 2016), Art. IV, § 2.5(c).

[106] *Id*., Art. IV, § 3.3 .

[107] *See generally*, CA-4.

[108] Footnote 3 of the Interim Supplementary Procedures states that, if the time for filing adopted in the final Supplementary Procedures is more permissive than the Interim Supplementary Procedures, then ICANN "will include transition language that provides potential claimants the benefit of that additional time[.]" Interim Supplementary Procedures at 5 n.3, C-59. This footnote is not relevant in this IRP because final Supplementary

III. ICANN WAS NOT REQUIRED TO DISQUALIFY NDC BASED ON ICANN'S CORE VALUES REGARDING COMPETITION OR NDC'S ALLEGED VIOLATIONS OF THE GUIDEBOOK AND AUCTION RULES.

86. A central tenet of Afilias' claims leading up to the Hearing was that ICANN's Core Values regarding competition mandated that ICANN block Verisign's potential operation of .WEB, allegedly "the most promising new gTLD."[109] This claim formed the cornerstone of Afilias' narrative, which asserted not just that NDC and Verisign engaged in a series of highly technical violations of the Guidebook and Auction Rules, but that these alleged violations were done for the nefarious purpose of preserving Verisign's alleged monopoly and thus threatened the purported *raison d'etre* of ICANN's existence. Afilias, however, has essentially abandoned its competition claim.

87. Afilias' opening presentation made no mention of its competition claim or the evidence Afilias would present regarding that claim. Likewise, Afilias chose not to cross-examine Mr. Kneuer, whose expert report demonstrated that ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator. While Afilias did cross-examine Ms. Burr, that examination focused on Ms. Burr's experiences as a Board member, ICANN's Accountability Mechanisms, and ICANN's Bylaws; Afilias asked virtually no

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Procedures have not been completed or adopted, and no determination has been made as to whether the final Supplementary Procedures will provide potential claimants with additional time.

[109] Afilias' Reply Memorial ¶ 130 ("Worse still, ICANN's decision to ignore NDC's willful process violations would allow .WEB, the most promising new gTLD, to fall under the control of the entity that controls .COM. ICANN's decision to exercise its discretion to benefit Verisign is a complete perversion of ICANN's Bylaws, the Board's stated intention for adopting the New gTLD Program, and the entire purpose of the Program itself."), *id*. ¶ 11 ("ICANN's exercise of any discretion it has to remedy NDC's breaches must be consistent with ICANN's mandate to promote competition."), *id*. ¶ 124 ("Any exercise of ICANN's discretion that would result in Verisign controlling the .WEB registry is wholly inconsistent with ICANN's affirmative mandate to promote competition."); Amended IRP Request ¶ 5 ("Furthermore, by failing to implement faithfully the New gTLD Program Rules and thereby enabling VeriSign eventually to acquire the .WEB gTLD, ICANN has eviscerated one of the central 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."), *id*. ¶ 83 ("By violating its Commitments and Core Values in its Bylaws, thereby enabling VeriSign to gain control over .WEB, ICANN has all but destroyed the last best chance to create a truly competitive environment within the DNS–*i.e.*, one of the principal purposes of the New gTLD Program, and indeed, of ICANN's existence.").

questions about the conclusions in her witness statement that ICANN is not permitted to act as competition regulator and does not have the authority or expertise to block potentially anticompetitive transactions the way a government regulator would. And, finally, Afilias also chose not to cross-examine Dr. Carlton, ICANN's economic expert, or Dr. Murphy, Verisign's economic expert, both of whom issued unrebutted expert reports that included empirical analyses concluding that .WEB is not the competitive juggernaut Afilias made it out to be. In other words, Afilias did not pursue its competition claim at the Hearing and failed to address, much less rebut, the testimony and the evidence establishing that ICANN is not empowered or equipped to act as a competition regulator or that Verisign's potential operation of .WEB is not a competitive threat.

88. The Panel is thus left with the uncontroverted conclusion that ICANN was never under any mandated duty to disqualify NDC because of competitive issues associated with the possibility that Verisign might one day operate .WEB. And to the extent any such competition concern lingered, it was allayed by DOJ's year-long investigation and ultimate decision not to take action to block Verisign from operating .WEB.

89. Also left unrebutted by Afilias at the Hearing is the principle that the unambiguous provisions of the Guidebook and Auction Rules vest in ICANN substantial discretion to determine whether an applicant has violated the terms of either and, if so, what action to take. Indeed, Afilias did not examine a single ICANN witness regarding the Guidebook and Auction Rules provisions that bestow this discretion on ICANN, the scope of ICANN's discretion, the manner in which ICANN exercised this discretion or the policy reasons behind this discretion.

90. Moreover, the testimony at the hearing established that there is a good-faith and

fundamental dispute between *Amici* and Afilias about whether the DAA violates the Guidebook or Auction Rules, meaning that reasonable minds could differ on whether NDC is in breach of either and, if so, whether disqualification is the appropriate remedy. Accordingly, Afilias' additional argument that ICANN can only exercise its discretion reasonably by disqualifying NDC must be rejected.

91. ICANN was never under a duty – let alone an immediate, absolute duty – to disqualify NDC because of NDC's alleged Guidebook and Auction Rules violations.

A. The Unrebutted Evidence Confirms That ICANN's Core Values Regarding Competition Did Not Require ICANN to Disqualify NDC.

92. To succeed on its competition claim, Afilias needed to establish two fundamental elements. First, Afilias had to prove that ICANN's Core Values regarding competition require ICANN to regulate the DNS to halt any anticompetitive conduct or transaction. Second, Afilias had to prove that .WEB is so competitively unique that Verisign's potential operation of .WEB would somehow be anticompetitive and thereby require ICANN to block any transfer of .WEB to Verisign.[110] Afilias failed on both fronts.

1. ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator of the DNS.

93. Afilias' assertion that ICANN's Core Values regarding competition require ICANN to block Verisign's possible operation of .WEB has been upended by testimony from witnesses involved in ICANN's creation and operation, ICANN's foundational documents and Bylaws, and Afilias' own statements. As Ms. Burr and Mr. Kneuer both explained, ICANN

[110] As ICANN pointed out in its Rejoinder, another fundamental flaw in Afilias' competition claim is that it is not ripe for evaluation by this Panel. To the extent that Afilias is correct and ICANN has a duty to act like a competition regulator, that duty has not yet been triggered because NDC has not yet sought approval from ICANN to transfer .WEB to Verisign.

obtained all of its authority through an express transfer of power from the United States government.[111] That transfer did not give ICANN the power to act as a competition regulator, for good reason.[112] According to Ms. Burr, who was involved in ICANN's creation when she was with the U.S. government,[113] "[w]hile this express transfer included the powers and authority necessary to oversee the secure and stable operation of the Internet's DNS, the transfer did not include the power, authority, or expertise to act as a competition regulator by challenging or policing transactions and conduct that could be deemed anticompetitive. That power and authority remains with the relevant government authorities."[114] Mr. Disspain agreed with this explanation in his Witness Statement.[115] Ms. Burr confirmed these points in her testimony during the hearing: "ICANN is not a regulator, and ICANN does not have the competition law competence, whether it is the U.S. or otherwise."[116]

94. According to Mr. Kneuer, who was responsible for overseeing the agreements between the U.S. government, ICANN and Verisign when he was with the Department of Commerce,[117] the U.S. government "did not delegate to ICANN responsibility for policing or regulating competition in the domain name marketplace. That was not ICANN's mission and it

[111] Burr Witness Stmt. ¶ 18 ("When it was first created, ICANN obtained its authority through a series of agreements with NTIA, under which NTIA empowered ICANN to exercise certain authority over the DNS."), *id*. ¶ 25 ("Finally, ICANN was created through an express transfer of powers and authority from the United States government."); Kneuer Expert Report ¶ 29 ("ICANN is not, and was never intended to be, an economic or competition regulator and has neither the expertise or resources to perform such functions."), *id*. ¶ 34 ("ICANN was not intended, and has never served, as an economic regulator, as Afilias claims. ICANN lacks the necessary congressional authorization, expertise or resources for such a role.")

[112] *Id*.

[113] Burr Witness Stmt. ¶¶ 4-5.

[114] *Id*. ¶ 25.

[115] Disspain Witness Stmt. ¶ 14 ("ICANN is not a regulator.").

[116] Hearing Tr. at 350:6-8.

[117] Kneuer Expert Report ¶ 2.

lacked the expertise and resources necessary to fulfill such a regulatory function."[118]

95. This testimony is fully consistent with the text of ICANN's Bylaws. For instance, the Bylaws mandate that ICANN "shall not regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide. . . . For the avoidance of doubt, ***ICANN does not hold any governmentally authorized regulatory authority***."[119] Likewise, ICANN's Bylaws are clear that ICANN "shall not act outside its Mission,"[120] which is limited to ensuring "the stable and secure operation of the Internet's unique identifier systems."[121] Moreover, the text of the Core Values regarding competition confirms that ICANN's mandate with respect to competition is narrow in that ICANN should "depend[] on market mechanisms," "[w]here feasible and appropriate" and "where practicable."[122] ICANN's Commitment regarding competition is similarly narrow: It states that ICANN will carry out its activities "through open and transparent processes that enable competition and open entry into Internet-related markets,"[123] not that ICANN will act as a competition regulator.

96. On this point, Ms. Burr explained in her testimony that:

> ICANN's mission is enumerated, not exemplary. So if ICANN doesn't have the authority, it is not articulated in here, ICANN doesn't have the authority to do it. And ICANN shall not regulate in certain circumstances, and it specifically says [in the Bylaws] that for the avoidance of doubt, ICANN does not hold any governmentally-authorized regulatory authority. ICANN's role is policy -- coordination of policy development and implementation.[124]

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[118] *Id*. ¶ 18.
[119] Bylaws, Art 1, §§ 1.1(a), (b), (c); 1.2(b)(iii) (emphasis added); Burr Witness Stmt. ¶ 25.
[120] *Id*., Art 1, § 1.1(b).
[121] *Id*., Art 1, § 1.1(a).
[122] *Id*., Art 1, §§ 1.2(b)(iii), (iv).
[123] *Id*., Art 1, § 1.2(a).
[124] Hearing Tr. at 386:16-25.

97. The Bylaws are fully consistent with ICANN's foundational documents, such as the White Paper, created in 1997. The White Paper was the U.S. Government's "policy statement with respect to the process to transition coordination management of the Domain Name System out of the government into the global private sector."[125] The White Paper emphasized that, with respect to competition in the DNS, ICANN should rely on market mechanisms and leave regulation to the regulators. The White Paper is the source for the Bylaws' direction that ICANN should rely on market mechanisms to promote competition, stating "[w]here possible, market mechanisms that support competition and consumer choice should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction."[126] At the same time, the White Paper emphasized that private management of the DNS would not supplant existing legal regimes applicable to the Internet, including antitrust regulation: "[T]his policy is not intended to displace other legal regimes (international law, ***competition law***, tax law and principles of international taxation, intellectual property law, etc.) that may already apply."[127] Notably, because the White Paper envisioned ICANN acting in the technical role of coordinating the DNS, rather than a regulatory role, the White Paper affirmatively rejected the suggestion that ICANN should be granted the type of antitrust immunity that governments may enjoy.[128]

98. Prior to this IRP, Afilias took the exact same view that ICANN lacked the authority and expertise to act as a competition regulator. In 2006, Afilias and several other registry operators posted a public statement to an ICANN forum regarding community objections

[125] *Id*. at 395:24-397:12.
[126] Burr Witness Stmt., Ex. A, at 18; Burr Witness Stmt. ¶ 29; Kneuer Expert Report ¶ 16.
[127] Burr Witness Stmt., Ex. A, at 7; Burr Witness Stmt. ¶ 29; Kneuer Expert Report ¶ 16.
[128] Burr Witness Stmt., Ex. A, at 14; Burr Witness Stmt. ¶ 29; Kneuer Expert Report ¶ 16.

to the amended .COM registry agreement.[129] On ICANN's general mission, Afilias stated that:

> ICANN was conceived from the beginning as an organization with a limited charter. This understanding is reflected in ICANN's by-laws, which contemplate policy development only on issues within ICANN's mission statement. As specifically set forth in the ICANN by-laws, for example, only mission-related issues are properly the subject of a [policy development process].[130]

With respect to ICANN's role in promoting competition, Afilias asserted the view that:

> 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.[131]

99. At the Hearing and in its briefs, Afilias completely ignored its previous statements regarding ICANN's limited mandate and its role as an administrator, rather than a regulator, of the DNS. But there is no question that Afilias' views on these issues – before this IRP – are fully consistent with the testimony of Ms. Burr, Mr. Disspain and Mr. Kneuer, the text of the Bylaws and ICANN's foundational documents.

100. Afilias may argue that the 2008 letter from the DOJ's Deborah Garza to NTIA regarding the Program is somehow relevant to whether ICANN has a competition regulation role. It is not, the letter is a red herring. Ms. Garza's letter was written as she was leaving government service "in 2008, at the very beginning of the new gTLD process, based on the very first applicant guidebook."[132] Moreover, as Ms. Burr explained, the letter was "largely about trademark concerns and the implications for consumers and trademark holders through the

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[129] R-21 at 1.
[130] *Id*. at 2 (emphasis in original).
[131] *Id*. at 8 (emphasis added).
[132] Hearing Tr. at 376:20-377:25 (Burr), 361:20-362:12 (Burr) (the letter contained "the Justice Department's observations regarding the very earliest version of the policy.").

introduction of new top-level domains."[133] And as Ms. Burr testified "before the new gTLD Program launched, there were any number of steps taken to address" the trademark issue, "such as the Trademark Clearinghouse," and "ICANN went through eight more versions of the Applicant Guidebook, a lot of policy development and practice around protecting consumers and trademark holders."[134] Ms. Burr also confirmed that ICANN commissioned a number of economic studies before launching the Program to evaluate some of the issues set forth in Ms. Garza's 2008 letter.[135] The letter says nothing about how ICANN complies with its Core Values regarding competition.

101. In fact, ICANN complies with its Core Values regarding competition, as Ms. Burr explained in her witness statement and at the Hearing, not by taking affirmative actions to block potentially anticompetitive conduct and transactions,[136] but by "carrying out its DNS security mission . . . in a way that creates opportunities for competition and innovation," a prime example of which is the New gTLD Program.[137] Or, as further described by Ms. Burr at the Hearing:

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[133] *Id*. at 366:11-367:14 (Burr), 371:12-372:23 ("To me this letter is really about pressures on trademark owners who will feel compelled to register in new gTLDs and that ICANN should analyze that issue, the trademark issue, and proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD. To me this letter is about is -- it's possible that new top-level domain operators will be able to impose costs on trademark owners who feel compelled to protect their marks, and you need to do this analysis before you proceed with new gTLDs.").

[134] *Id*. at 367:8-11 (Burr), 381:3-25 (Burr).

[135] *Id*. at 395:10-23 (Burr).

[136] *Id*. at 397:16-398:9 ("ICANN's obligation with respect to competition is to create a table in which -- and to coordinate the development of policy under which competition can emerge. But I am not aware of ICANN blocking something . . . There's a lot we don't know about these markets, and the view always was that competition law and competition authorities would provide a check on the behavior of the organization and the players that were valuable."); Burr Witness Stmt. ¶ 30 ("Additionally, ICANN's Core Value regarding competition does not require, or even suggest, that ICANN take affirmative actions to block potentially anticompetitive transactions or conduct the way a government regulator would."), *id*. ¶ 32 ("No policy, precedent, or authority permits ICANN, based on competition concerns, to block Verisign from acquiring the rights to operate .WEB or to second-guess the judgment of the DOJ – the ultimate competition regulator in the United States – in determining not to act following its own expert and thorough investigation.").

[137] *Id*. at 347:1-12, 374:6-25 ("I would read this also in the context of other provisions of ICANN's bylaws that require [ICANN] to rely on market mechanisms in the same -- you just can't take this out of -- I mean, yes, foster competition. Does that mean that ICANN should act like a regulator? No. But it should make a choice to allow

"ICANN's role is setting a table where competition can take place."[138] Mr. Disspain agreed with this explanation.[139] Ms. Burr also explained that, when faced with potential competition issues in the DNS, ICANN "reserve[s] the right to refer things to appropriate antitrust competition authority."[140] Mr. Kneuer's unrebutted testimony on these same points similarly confirms that ICANN is an administrator whose mandate "is to allow an environment in which competition can take place,"[141] not a competition regulator.

2. The unrebutted economic evidence establishes that .WEB will not be competitively unique such that Verisign's operation of .WEB would be anticompetitive.

102. A separate and independent flaw in Afilias' competition claim is that – even if ICANN had a mandate to block potentially anticompetitive activity – Afilias failed to establish that .WEB is so competitively unique that it would be anticompetitive for Verisign to operate it.

103. The only support Afilias has offered for its claim that .WEB is competitively unique are the reports of Mr. Zittrain and Dr. Sadowsky.[142] The conclusions they reach,

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competitive forces to go out and battle it out and introduce innovation."), *id*. at 375:1-16 ("But basically this is consistent with my view that in all cases, the point is to allow an environment in which competition can take place."); Burr Witness Stmt. ¶ 31 ("Taken together, the provisions in ICANN's Bylaws that address competition require ICANN to use the bottom-up, multistakeholder processes to enact policies – such as the community-developed New gTLD Program – that enable market-driven competition '[w]here feasible and appropriate.'").

[138] Hearing Tr. at 349:6-350:8.

[139] Disspain Witness Stmt. ¶ 14.

[140] Hearing Tr. at 357:11-359:2; Burr Witness Stmt. ¶ 23 ("A final example of how ICANN has addressed potential competition concerns is ICANN's occasional referral of competition issues to relevant competition regulators, such as the United States Department of Justice, Antitrust Division ("DOJ")."), *id*. ¶ 24 ("While these types of referrals to competition regulators have been relatively rare, this is how ICANN has dealt with potentially anticompetitive situations involving the DNS."), *id*. ¶ 31 ("Furthermore, ICANN appropriately defers to the authority and expertise of relevant government regulators on questions about alleged anticompetitive conduct in the DNS, as I note above."); Burr Witness Stmt., Ex. B, at 3.

[141] Hearing Tr. at 375:1-16.

[142] Amended IRP Request ¶ 26 ("As set out in greater detail in Dr. George Sadowsky's Expert Report, .WEB is a unique gTLD because of properties inherent in its name, and it is widely viewed as the one potential new gTLD with a sufficiently broad and global appeal to compete with VeriSign's .COM."); Response to *Amici Curiae Briefs* ¶ 200 ("the *Amici* (and ICANN) dismiss .WEB as "just another gTLD," suggesting that adding .WEB to Verisign's stable would not impact competition. As explained by Drs. George Sadowsky and Jonathan Zittrain, there are compelling

however, are not based on any empirical analysis of competition among TLDs, domain name registrations, domain name pricing or any other scientifically valid method. Instead, their conclusions are based on their own subjective views and cherry-picked anecdotes. For example, Mr. Zittrain – who is not an economist – claims that ".WEB is the strongest potential competitor of all new gTLDs" because ".WEB has a unique association with the Internet."[143] Likewise, Dr. Sadowsky – who has an economics degree, but is not a practicing economist – claims that "the only new domain that is likely to compete strongly with .com is .web, due to the properties inherent in its name."[144] Mr. Zittrain and Dr. Sadowsky also base their conclusions on speculative statements made by various .WEB applicants and others about the success they envisioned for .WEB.[145] And Dr. Sadowsky draws the conclusion that the "magnitude of the winning bid for .web provides strong evidence that Verisign regarded it as a significant competitive threat if [it] were controlled by another registry operator."[146]

104. These conclusions were exposed as wholly unreliable in the unchallenged expert reports of Dr. Carlton and Dr. Murphy, which provided independent and scientifically valid analyses that contradict Messrs. Zittrain's and Sadowsky's opinions. Both Dr. Carlton and Dr. Murphy performed their assignments as economists should – by evaluating empirical data to address the question of whether .WEB will be a unique, competitive force against .COM. And both answered this economic question with a resounding "no" – the economic evidence establishes that .WEB, even if successful, will not create meaningful competition for .COM

reasons to believe why this is not true."). Afilias' Reply made no argument and provided no evidence as to why .WEB is competitively unique.

[143] Zittrain Expert Report ¶ 46.

[144] Sadowsky Expert Report ¶ 39.

[145] Zittrain Expert Report ¶¶ 47, 49; Sadowsky Expert Report ¶¶ 43-44.

[146] Sadowsky Expert Report ¶ 46.

beyond the competition it already faces from more than a thousand existing TLDs, as well as other competitors, such as social media and search-based navigation.[147]

(i) The economic evidence establishes that .WEB will not exert a unique competitive constraint on .COM based on its name.

105. As to the claim that .WEB will be successful because of an apparent association with the Internet, both Dr. Carlton and Dr. Murphy explain that "the available economic evidence demonstrates that the word 'web' is unlikely to convey any particular competitive advantage."[148] To reach this conclusion, Dr. Carlton and Dr. Murphy evaluated data on domain name registrations in various TLDs and observed that other new gTLDs that are generic and evocative of the Internet, such as .SITE, .ONLINE and .WEBSITE "have not had a meaningful competitive impact on .COM's pricing or share of domain registrations."[149] In fact, according to the data, "[w]hile .ONLINE, .SITE and .WEBSITE are among the new gTLDs with the most registered domain names, they collectively account for just 2.5 million registrations," which is ***less than 2%*** of the domain names registered in .COM.[150]

106. In addition, Dr. Murphy observed in the registration data that "[m]any of the most successful new gTLDs – including .top, .xyz, .loan, .club, .vip, .shop, .work, and .ltd – have no obvious association with the Internet."[151] In fact, Dr. Murphy observed in the data that "of the largest ten new gTLDs as of the end of 2018, only two – .online and .site – were 'Internet sounding,' and they ranked only number five and six in terms of domain base. Thus, eight of the top ten new gTLDs were NOT 'Internet sounding.'"[152]

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[147] Murphy Expert Report ¶¶ 31-34.
[148] Murphy Expert Report ¶ 40; Carlton Expert Report ¶ 36.
[149] Carlton Expert Report ¶¶ 36-37; Murphy Expert Report ¶¶ 40-41.
[150] Carlton Expert Report ¶ 37; Murphy Expert Report ¶ 41.
[151] Murphy Expert Report ¶ 41.
[152] *Id*.

Table 4: Domain Base in the Largest New gTLDs (Dec. 31, 2018)[153]

TLD	Domain Base	Launch Date (General Availability)
.top	3,857,410	Nov. 2014
.xyz	2,268,847	June 2014
.loan	2,087,415	Aug. 2015
.club	1,613,435	May 2015
.online	1,114,252	Aug. 2015
.site	944,419	July 2015
.vip	856,302	May 2016
.shop	637,941	Sept. 2016
.ltd	622,587	June 2016
.work	520,229	Feb. 2015

107. Dr. Murphy confirmed that the data bore out the same trends in 2020. "As of April 2020, .site and .online were still only two of the top ten new gTLDs with 'internet sounding' names. The other new gTLDs in the top ten are .icu, .xyz, .vip, .wang, .club, .shop, and .live."[154] If the most-popular new gTLDs are ***.ICU***, ***.XYZ*** and ***.VIP***, which have no association with the Internet, there is no basis to conclude that a new gTLD that has an association with the Internet will have some competitive advantage.

108. Accordingly, Drs. Carlton and Murphy have demonstrated, through empirical analysis, that Messrs. Zittrain and Sadowsky's hunch that .WEB will be the crown jewel of new gTLDs because of its connection to the Internet is unsupported by the data. Thus, "[t]here is no economic basis for the claim that the potential association of the term 'web' with the Internet places the .web TLD in a unique position to compete for registrations or that this potential association provides any significant competitive advantage to .web whatsoever."[155]

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[153] *Id*. at Table 4.

[154] *Id*. ¶ 41 n.33.

[155] Murphy Expert Report ¶ 3(c). Dr. Murphy further concludes that the economic evidence demonstrates that "web" is not uniquely associated with the Internet. *Id*. ¶¶ 45-48.

(ii) Speculative statements by .WEB applicants and others regarding .WEB are not reliable and are contradicted by the economic evidence.

109. As to Messrs. Zittrain and Sadowsky's reliance on statements made by .WEB applicants and others regarding .WEB's competitive potential, these statements amount to nothing more than hopeful speculation and are contradicted by existing economic evidence.[156] Dr. Carlton points out in his expert report that a number of applicants for other new gTLDs also made statements in their applications characterizing them as strong competitors to .COM. With respect to .ONLINE, for example, an applicant claimed that ".online is essentially a better alternative to existing generics such as .com or .net."[157] Likewise, an applicant for .SITE asserted that ".SITE is a perfect fit among today's top TLDs and is a viable alternative to current generic TLDs."[158] And an applicant for .WEBSITE claimed that "[t]he .Website registry will be a new direct and formidable competitor to the current group of global generic TLDs." But according to Dr. Carlton's analysis, these new gTLDs "have not had a major competitive impact on .COM."[159] Puffery from applicants for new gTLDs is not valid economic evidence.

110. The stock Mr. Zittrain and Dr. Sadowsky put in news articles and other industry statements about the .WEB's potential is similarly misplaced. Neither Mr. Zittrain nor Dr. Sadowsky even attempt to show that these types of statements come from reliable or competent sources. Nor do they account for the fact that there have been similar, mistaken claims about

[156] Mr. Zittrain also claims that .WEB is unique because "[i]n 2012, .WEB again attracted the most applications …" (Zittrain Expert Report ¶ 49). This is incorrect. There were seven applications for .WEB, which is tied for the 12th most. The TLDs that attracted the most applications were .APP (with 13 applications), .HOME (with 11 applications), .INC (with 11 applications) and .ART (with 10 applications). Carlton Expert Report ¶ 36.
[157] Carlton Expert Report ¶ 36.
[158] *Id*.
[159] *Id*. ¶ 37.

other new gTLDs.[160] They also ignore the fact that subjective views expressed in news articles and industry sources on the likely success of .WEB vary significantly, as many have stated the belief that .WEB will not be competitively significant.[161]

(iii) Dr. Sadowsky misinterprets the .WEB auction results.

111. Dr. Sadowsky's final assertion is that the .WEB winning bid of $135 million is indicative of the "competitive significance of .WEB."[162] Dr. Sadowsky, however, did not conduct any economic analysis about what this auction value actually implies about .WEB's likely competitive impact. But Dr. Carlton and Dr. Murphy did this economic analysis, and each independently concluded that the $135 million auction price actually suggests that .WEB will ***not*** be a particularly significant competitor.[163]

112. As Dr. Carlton and Dr. Murphy both point out in their expert reports, there have been other transactions in which similar amounts of money were spent to operate TLDs that had not established that they could reduce .COM's share. For example, Neustar acquired the company that operated the .CO ccTLD for $118.1 million in April 2014. At the time, .CO had roughly 1.6 million domain name registrations, or just a 0.6% share of all domain name registrations.[164] Neustar also acquired the operator of the .AU ccTLD for approximately $110.6 million in July 2015. At the time, .AU had approximately three million domain name registrations, or only a 1% share of all domain name registrations.[165] And Afilias purchased

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[160] *Id*. ¶ 40.

[161] Murphy Expert Report ¶ 38 n.32; KM-26 (".Web is a good extension but the future of New gTLDs does not depend on .web and .web is not going to be a game changer.... The New gTLD program is about more options and better left right combinations. I would prefer credit.cards over creditcards.web any day of the year."); Carlton Expert Report ¶ 41.

[162] Sadowsky Expert Report ¶¶ 42, 45-47.

[163] Carlton Expert Report ¶¶ 42-45; Murphy Expert Report ¶¶ 39-64.

[164] Murphy Expert Report ¶ 60; Carlton Expert Report ¶ 43.

[165] Murphy Expert Report ¶ 61.

.IO's operator for $70 million in 2017. At the time, .IO had approximately 270,000 domain name registrations, or less than .2 % of all domain name registrations.[166]

113. If acquisition cost is indicative of a TLD's competitive importance – as Dr. Sadowsky claims in his report – then the higher combined value of .CO, .AU and .IO (approximately $298.7 million) would imply that they are collectively more than twice as important as .WEB despite accounting for less than 1% of all registered domain names.[167] Accordingly, if the .WEB winning bid suggests anything it is that .WEB is likely to garner less than 1% market share when it is launched, hardly a strong competitive presence.

114. The .WEB bid price is also lower than the cumulative purchase price of other new gTLDs. As described by Dr. Carlton, ICANN reported that new gTLD applicants spent a total of $294.6 million in new gTLD application fees and paid another $240.6 million for winning public auctions (including the .WEB auction).[168] Many more millions were spent in privately-resolved contention sets with one publicly-traded registry operator alone receiving over $50 million from losing private auctions.[169] The cumulative purchase price of other new gTLDs is thus much larger than the individual price paid for .WEB. Hence, if auction money and fees paid are indicators of competitive might, as Dr. Sadowsky suggests, then .WEB is much less competitively important than all of the other gTLDs combined, which certainly have increased

[166] Carlton Expert Report ¶ 43; Murphy Expert Report ¶ 63. To the extent that Afilias' $70 million valuation of .IO was based on the assumption that .IO would grow its share, that further undermines Afilias' claim that .WEB is a uniquely significant competitor to .COM. As Dr. Murphy has explained, .IO is a ccTLD for the British Indian Ocean Territory that Afilias has marketed globally based on "I/O" being an abbreviation in technology circles for "input/output." Murphy Expert Report ¶ 64. "If such an insignificant TLD is worth $70 million, then that suggests there are many other TLDs likely worth as much or more than $70 million. That further undermines Afilias's argument that .web being worth $135 million means .web is a uniquely significant competitor to .com." *Id*.
[167] Carlton Expert Report ¶ 43.
[168] *Id*. ¶ 44.
[169] *Id*.

competition, but in fact have not had a major impact on .COM's share of total registrations.[170]

115. Finally, Dr. Murphy performed an NPV analysis to evaluate the implications of the $135 million winning bid for the likely competitive significance of .WEB. NPV is a standard tool used to discount the value of a series of future profits to a net present value using a discount rate.[171] NPV analysis is a form of intrinsic valuation and is used extensively across economics, finance and accounting for determining the value of a business, investment or new venture.

116. Redacted - Third Party Designated Confidential Information

[174]

117. This is yet another indicator – based on data and empirical analysis, rather than subjective speculation – that if the $135 million winning bid is indicative of competitive significance, it indicates that .WEB is not likely to be a unique competitive presence in the DNS.

[170] *Id*.; Murphy Expert Report ¶ 63; Sadowsky Expert Report ¶ 17 (concluding that the introduction of approximately 1,500 new gTLDs have failed to "[show] the degree of popularity needed to compete with .com or net in a meaningful way.").
[171] Murphy Expert Report ¶ 52.
[172] *Id*. ¶ 53.
[173] *Id*. ¶ 54.
[174] *Id*. ¶ 57 n.53 ("[A]s of December 2018, the largest two new gTLDs, .top and .xyz, have domain bases of 3.9 million and 2.3 million respectively, or about 1.1% and 0.6% of the overall market.").

(iv) The independent economic analyses of Dr. Carlton and Dr. Murphy confirm that .WEB will not be a unique competitive check on .COM.

118. In addition to evaluating the conclusions of Mr. Zittrain and Dr. Sadwosky, Dr. Carlton and Dr. Murphy performed their own, independent economic analyses and both concluded that .WEB's entry into the DNS will not create meaningful competition for .COM. They also each independently concluded that there is evidence that Verisign may be the most efficient operator of .WEB. Neither Afilias nor its experts addressed (much less rebutted) these core conclusions from two of the world's most-renowned economists. Moreover, Afilias chose not to challenge these conclusions when it opted not to submit responsive expert reports or cross examine Dr. Carlton or Dr. Murphy.[175]

119. As explained by Dr. Carlton, in order to assess the claim that .WEB is competitively unique, "one needs to determine whether competitive pressure from an Afilias-operated .WEB would cause Verisign to reduce its .COM prices or otherwise improve the quality of the .COM offering."[176] Both Dr. Carlton and Dr. Murphy concluded that Verisign is not likely to reduce its prices in response to an Afilias-operated .WEB because the .COM price is already lower than it otherwise would be due to government-mandated price caps, and because the .COM price is far lower than prices charged for other TLDs, including those run by Afilias.

120. Since 2000, the Department of Commerce has imposed a cap on the price Verisign can charge for .COM domain names.[177] Amendment 35 to the Verisign Cooperative

[175] Afilias' counsel claimed in his opening statement that Afilias would not cross examine Dr. Murphy because his conclusions were duplicative of Dr. Carlton, Hearing Tr. at 28:5-9, but Afilias subsequently decided to not cross examine Dr. Carlton either, despite having plenty of time to do so.
[176] Carlton Expert Report ¶ 28; Murphy Expert Report ¶ 35 ("Afilias's core assertion is that if Verisign had not acquired .web, .com's prices would be lower because of the competitive constraint provided by .web.").
[177] Murphy Expert Report ¶ 37.

Agreement with the Department of Commerce sets a maximum price of $7.85 through 2020.[178] After 2020, the maximum allowable rate increases by 7% per year until 2024 when the current term of the Cooperative Agreement ends.[179] After 2024, the Cooperative Agreement – with the existing price caps – will automatically renew for another six-year term unless the Department of Commerce chooses not to renew the agreement with Verisign.[180]

121. The empirical evidence that Dr. Carlton and Dr. Murphy examined "indicates that Verisign has consistently set .COM prices equal to the maximum level allowed under existing price caps."[181] "The fact that Verisign has consistently charged the maximum-allowable price for .COM domain name registrations indicates that regulation is a binding constraint and that Verisign would set a higher price for .COM absent the regulation."[182] In addition, Dr. Murphy observed that .COM's "wholesale prices are generally lower than the wholesale prices of both other legacy TLDs and many new gTLDs, again suggesting .com's price is artificially constrained below competitive levels."[183] Dr. Carlton reached the same conclusion.[184]

122. These points – that price caps constrain .COM pricing and that the regulated .COM price is low compared to prices charged in other TLDs – both "indicate that Verisign is not likely to reduce its already low, regulated .COM prices in response to an Afilias-operated .WEB."[185] On this "key economic question," neither Afilias nor its experts "offer any contrary

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[178] Carlton Expert Report ¶ 29 n.41.
[179] *Id*.
[180] *Id*.
[181] Carlton Expert Report ¶ 30; Murphy Expert Report ¶ 35.
[182] Carlton Expert Report ¶ 30; Murphy Expert Report ¶ 35 ("Verisign has consistently set the wholesale price for .com at the price cap, suggesting that .com's price is artificially constrained below the competitive levels.").
[183] Murphy Expert Report ¶¶ 35-36.
[184] Carlton Expert Report ¶ 31 ("Also of relevance is the fact that the maximum-allowable .COM price is lower than the price typically charged to registrars for domain name registrations in other TLDs.").
[185] Carlton Expert Report ¶ 32; Murphy Expert Report ¶¶ 35-36.

evidence suggesting that an Afilias-operated .WEB would in fact force .COM's pricing below the regulated rates, even if one accepts their assumption that .WEB is special."[186]

123. Likewise, Afilias and its experts ignore the economic evidence identified by Dr. Murphy suggesting that Verisign may be more aggressive and efficient than Afilias in promoting .WEB, an advantage that inures to the benefit of consumers.

124. First, the higher prices Afilias charges in its existing TLDs is evidence of its likely approach with .WEB pricing. "As of April 2020, Afilias charges wholesale prices of $11.92 for .info, $12.09 for .pro, $14.25 for .mobi, and $10.99 to $50 for its new gTLDs."[187] If .WEB is as valuable as Afilias has claimed, "it is unlikely that Afilias would charge less for .web than it charges for these other supposedly less valuable TLDs."[188] Second, Verisign has every incentive to aggressively grow .WEB given the name congestion in .COM. "There is a widespread perception that the most attractive names in .com and .net are already taken, and competing TLDs promote their superior name availability," leading to declining growth in .COM and .NET.[189] Thus, Verisign is incentivized to grow .WEB in order "to participate in this new gTLD growth, and to counteract the declining growth that it is experiencing in .com and .net."[190] Indeed, Mr. Livesay confirmed that this was Verisign's intent in entering into the DAA, stating – "And this was an opportunity to grow and sell more domains."[191] Third, "Verisign is also an efficient, low-cost operator of TLDs," according to Dr. Murphy.[192] "These advantages will

[186] Carlton Expert Report ¶ 32.
[187] Murphy Expert Report ¶ 69.
[188] *Id*.
[189] *Id*. ¶ 74.
[190] *Id*. ¶ 75.
[191] Hearing Tr. at 1263:20-1264:11.
[192] Murphy Expert Report ¶ 78.

allow Verisign to procompetitively grow .web more rapidly than another operator could."[193]

125. In short, the economic evidence analyzed by Dr. Carlton and Dr. Murphy does not show that .WEB is uniquely positioned to become a significant competitor. To the contrary, it shows that .WEB is merely one of many competitors and is highly unlikely to capture a significant portion of domain name registrations or compete meaningfully with .COM.[194]

(v) DOJ's closure of its investigation of Verisign is dispositive of Afilias' competition claim.

126. To the extent there remains any question about whether Verisign's possible operation of .WEB may be anticompetitive, and whether ICANN should have taken steps to prevent it, this was answered by the DOJ's decision not to take any action to block Verisign's potential operation of .WEB. As explained by Dr. Carlton, who served as Deputy Assistant Attorney General for Economic Analysis for the DOJ's Antitrust Division, the "Antitrust Division, which has a large staff of Ph.D. economists in addition to attorneys, is one of the world's leading venues for applying economics to real world questions of competition. The economic issues most often analyzed by the Antitrust Division include the competitive effect of mergers, acquisitions and various alleged restraints of trade."[195]

127. In January 2017, the DOJ launched an investigation of "VeriSign, Inc.'s proposed acquisition of Nu Dot Co LLC's contractual rights to the .web generic top-level domain."[196] Verisign, ICANN, and others involved in the DNS, including presumably Afilias, provided the

[193] *Id*.
[194] Murphy Expert Report ¶ 39; Carlton Expert Report ¶¶ 62-63.
[195] Carlton Expert Report ¶ 59.
[196] AC-31.

DOJ with information and evidence in response to the DOJ's requests.[197] "[T]he focus of the investigation was whether Verisign's operation of .WEB was likely to significantly harm competition through increased prices or reduced quality given Verisign's operation of .COM."[198] The DOJ "has the authority to investigate and challenge mergers, acquisitions and other types of transactions and conduct that significantly harm competition,"[199] and the DOJ "could have taken steps or filed litigation to block Verisign from operating .WEB."[200] Yet in January 2018, the DOJ closed its investigation and decided not to take any action to block or otherwise challenge Verisign's possible operation of .WEB.[201]

128. Thus, any competition concerns regarding .WEB were answered by the fact that the preeminent antitrust regulator in the U.S. evaluated the claims, evidence and economics on this issue and determined not to seek to block Verisign from operating .WEB. Not only is this a matter of common sense, but as Dr. Carlton concluded, based on his personal involvement in DOJ investigations, the DOJ's "decision to allow the transaction to proceed indicates to me that the Antitrust Division concluded—likely based on much more information than is available to me, Professor Zittrain or Dr. Sadowsky—that Verisign's operation of .WEB is not likely to harm competition."[202]

129. As the evidence at the Hearing confirmed, had ICANN been concerned about competition issues with Verisign operating .WEB, ICANN would have referred the issue to the

[197] Hearing Tr. at 269:22-270:2 (Neustar received a CID); AC-31; Carlton Expert Report ¶ 60 ("I expect that Afilias, and others, would have had the opportunity to raise their competitive concerns about a Verisign-operated .WEB with the Antitrust Division.").
[198] Carlton Expert Report ¶ 60.
[199] *Id*. ¶ 58.
[200] *Id*. ¶ 61.
[201] AC-67.
[202] Carlton Expert Report ¶ 61.

DOJ.[203] Inasmuch as the DOJ declined to block Verisign's operation of .WEB, there is nothing further for ICANN to do to prevent Verisign from operating .WEB on competition grounds.

3. ICANN does not share Verisign's stated concern that private resolutions of contention sets involve collusion.

130. The Panel's Question No. 5 asked the parties to "comment on VeriSign's stated concern that private resolution of contention sets may involve collusion, in light of ICANN's stated preference for the private resolution of contention sets." Notwithstanding Verisign's purported concern, ICANN's view is that the type of private resolutions that ICANN envisioned and is aware of (*i.e.*, private auctions) are not collusive.

131. As a general matter, unlawful collusion occurs when competitors agree with one another on the prices they will charge customers, the bids they will submit to customers or the customers they will or will not pursue, all to the detriment of consumers.[204] These types of collusive arrangements are unlawful because they always increase prices, reduce output or diminish choice to consumers, who the antitrust laws are primarily aimed at protecting.[205]

132. While a private resolution of a contention set may be an agreement among competitors, it is not the type of collusive agreement that the antitrust laws prohibit, for several reasons. First, a private resolution does not fit into the type of agreements that courts have said are "inherently anticompetitive" because prices and output to consumers are not contemplated or

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[203] Hearing Tr. at 358:1-10.

[204] *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, . . . or to divide markets."), RLA-53; *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused."), RLA-49; *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) ("price fixing, horizontal output restraints, and market-allocation agreements, are illegal *per se*."), RLA-47.

[205] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486, n.10 (1977), RLA-45.

affected by a private resolution.[206] Instead, consumers may benefit from private resolution because all disputes among contention set members, which can delay entry of new gTLDs and increase costs to gTLD operators and therefore to consumers, are fully and finally resolved.[207]

133. Second, given that only one entity can operate a particular gTLD, a contention set must be resolved in order for the gTLD to become available to consumers. As the United States Supreme Court has explained, agreements among competitors do not violate the antitrust laws when they "are essential if the product is to be available at all" or "the integrity of the 'product' cannot be preserved except by mutual agreement" among competitors.[208] Thus, resolution of a contention set is far different from a scenario in which there is some sort of collusive agreement among entities that are all able to offer a product to consumers in competition with one another.

134. Third, antitrust regulators and private parties have been aware of private resolutions of contention sets since the beginning of the Program, yet they have never moved to block or challenge them under the antitrust, competition or consumer protection laws. Indeed, to the extent DOJ was not previously aware of the concept of private resolutions of contention sets, which is highly unlikely, DOJ was certainly made aware of them in connection with its

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[206] *Broad. Music, Inc. v. CBS Inc.*, 441 U.S. 1, 19-20 (1979) (only when a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output" rather than "one designed to 'increase economic efficiency and render markets more, rather than less, competitive,'" is it considered "per se illegal.") (Citation omitted), RLA-44; *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."), RLA-61; *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) ("To be judged anticompetitive, the agreement must actually or potentially harm consumers."), RLA-67.

[207] Even Mr. Livesay, who claimed to have concerns with private resolutions, noted in his testimony that this is the premise behind ICANN's preference for private resolutions of contention sets. Hearing Tr. at 1276:14-20 ("I appreciated why ICANN would want the contention set to resolve itself, because at that point in theory all the potential antagonists have agreed, great solution.").

[208] *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 101-102 (1984), RLA-59; *see also Nat'l Bancard Corp. v. Visa U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir. 1986) (interchange fee agreement among competitors was "a necessary element in the creation of efficiency creating integration" and therefore not unlawful), RLA-58.

investigation of the DAA and the .WEB auction.

135. Finally, there is no claim in this IRP that private resolutions of contention sets are collusive, and there is no record evidence about the terms, participants or scope of any particular private resolution. Yet, except for the narrow categories of agreements among direct competitors that are automatically deemed collusive, such as price fixing and output restrictions, any antitrust analysis of whether a particular transaction is collusive requires an in-depth evaluation of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable."[209] This type of critical analysis cannot be performed on this record or in this IRP, and therefore should not be attempted.

B. ICANN's Articles And Bylaws Did Not Require ICANN To Automatically Disqualify NDC For The Alleged Guidebook And Auction Rules Violations

136. Afilias' remaining claim is that ICANN was required to disqualify NDC based on a series of highly technical alleged violations of the Guidebook and the Auction Rules. In its Amended IRP Request and other pre-hearing briefings, Afilias contended that Verisign and NDC committed these alleged violations for the purpose of preserving Verisign's alleged monopoly. Having effectively abandoned its competition claim during the Hearing, Afilias' case now boils down to the contention that the letter of the Guidebook and Auction Rules – as Afilias contends those documents should be read – must be strictly enforced to "require" ICANN to disqualify NDC's application.

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[209] *Board of Trade v. United States*, 246 U.S. 231, 238 (1918), RLA-43; *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) ("the [fact-finding] weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."), RLA-48; *Nat'l Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978) (an analysis of whether a restraint is collusive "focuses directly on the challenged restraint's impact on competitive conditions."), RLA-60.

137. Specifically, Afilias alleges in its Amended IRP Request that ICANN violated its Bylaws by failing to apply ICANN policies "neutrally, objectively, and fairly" in not automatically disqualifying NDC for its alleged violations of the Guidebook and Auction Rules.[210] However, other than this conclusory assertion, Afilias has never explained how not disqualifying NDC results in the application of ICANN policies in a way that is non-neutral, non-objective or unfair. In its Reply, Afilias tweaked this claim to argue that "ICANN was required to disqualify NDC's application and bid in August 2016 when ICANN first learned of NDC's violations, whether as a matter of automatic disqualification pursuant to the applicable standards or as a matter of the reasonable exercise of ICANN's discretion pursuant to those same standards."[211] Once again, however, Afilias does not identify the "applicable standards" or explain how they require ICANN to disqualify NDC, or why ICANN purportedly could reasonably exercise its discretion only by doing so.

138. In any event, Afilias is wrong. The Guidebook and Auction Rules grant ICANN significant discretion to determine whether a breach of their terms has occurred, and if so, the appropriate remedy, and Afilias presented no evidence or argument at the Hearing contesting ICANN's discretion or the fact that it is limited only by the requirement that it must be exercised "consistently, neutrally, objectively, and fairly[.]"[212] The testimony at the hearing confirmed that there is a good-faith dispute between the *Amici* and Afilias about whether the DAA violates the Guidebook or Auction Rules. Thus, it is not a foregone conclusion that NDC is or is not in breach. And ICANN's witnesses confirmed that ICANN has not determined whether the DAA violates the Guidebook or Auction Rules due to the enduring hold on .WEB.

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[210] Amended IRP Request ¶ 78.
[211] Afilias' Reply Memorial ¶ 20.
[212] Bylaws, Art. 1, § 1.2(a)(v).

1. ICANN has discretion to determine whether a violation of the Guidebook or Auction Rules has occurred and the appropriate remedy for any such violation.

139. At the Hearing, Afilias made no effort to challenge the fact that the Guidebook and Auction Rules do not require ICANN to automatically disqualify an applicant that breaches their terms. In fact, the very sections of the Guidebook and Auction Rules that Afilias claims to have been breached are explicit in giving ICANN discretion to determine whether their terms have been violated and to determine the appropriate remedy for any violations.

140. For example, Afilias alleges that the Guidebook required ICANN to disqualify NDC for failing to provide ICANN with "identifying information necessary to confirm the identity" of the true applicant – which Afilias contends was Verisign, not NDC – and for failing to notify ICANN of NDC's "change in circumstances."[213] But the "applicant" for .WEB was NDC—not Verisign—both before and after the DAA, and no testimony suggested otherwise.[214] And, in any event, Section 1.2 of the Guidebook, which sets forth the information applicants are required to provide ICANN and which Afilias claims NDC violated, states that a "[f]ailure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading ***may result*** in denial of the application."[215]

141. Likewise, Afilias alleges that ICANN was required to reject NDC's application because NDC violated the Guidebook Terms and Conditions by omitting "material information . . . namely that it was obligated to assign .WEB to VeriSign."[216] But the term "material information" is not defined anywhere. And, in any event, the Terms and Conditions state that

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[213] Amended IRP Request ¶ 78 (first and third bullet points).

[214] Indeed, Afilias' argument to the contrary is internally inconsistent. Afilias' contention that NDC violated its obligation to update its application presupposes that NDC remained the applicant for .WEB.

[215] Guidebook, § 1.2.7 (emphasis added), C-3.

[216] Amended IRP Request ¶ 78 (second bullet point).

"any material misstatement or misrepresentation (or omission of material information) ***may cause*** ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant."[217] The Terms and Conditions also state elsewhere that ICANN's "decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely ***at ICANN's discretion***."[218]

142. Finally, Afilias alleges that ICANN was required to disqualify NDC because NDC's bids did not comply with "all aspects of the auction rules."[219] The Auction Rules, however, also grant ICANN significant discretion to interpret and enforce the rules and to determine the appropriate remedy in the event of their violation. Specifically, the Auction Rules make clear that "[i]f any dispute or disagreement arises in connection with these Auction Rules, including the interpretation or application of these Auction Rules, or the form, content, validity or time of receipt of any Bid, ***ICANN's decision shall be final and binding***."[220] And the Bidders Agreement expressly states that an applicant "acknowledges that it ***may be subject to a penalty*** of up to the full amount of the Deposit and forfeiture of its Applications or termination of its registry agreements for a ***serious violation*** of the Auction Rules or Bidder Agreement."[221] Thus, there is no question that ICANN has the discretion of determining whether a "serious violation"—or any violation—of the Auction Rules has taken place and, if so, what the appropriate penalty or remedy should be.

143. In sum, the alleged Guidebook and Auction Rules violations that Afilias levels at NDC do not "require" ICANN to disqualify NDC's application or reject NDC's bids, even if

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[217] Guidebook, § 6, Terms and Conditions 1 (emphasis added), C-3.
[218] *Id*. § 6, Terms and Conditions 3 (emphasis added), C-3.
[219] Amended IRP Request ¶ 78 (seventh bullet point) (citation omitted).
[220] C-4 ¶ 72.
[221] C-5 § 2.10.

ICANN agreed with Afilias' interpretation of the Guidebook and Auction Rules. Rather, the Guidebook and Auction Rules provide ICANN with the discretion whether to determine if a breach occurred and, if ICANN makes such a determination, to determine the appropriate remedy. There is no basis for the Panel to interfere with this discretion.

2. The reasonable exercise of ICANN's discretion does not require ICANN to disqualify NDC.

144. In what can only be seen as a concession that the Guidebook and Auction Rules vest ICANN with significant discretion to address alleged violations of their terms, Afilias now argues that ICANN's discretion can only be "reasonably exercised" consistent with ICANN's Articles and Bylaws by disqualifying NDC's application.[222] But Afilias never explains how any specific provision of the Articles or Bylaws plausibly could compel this result. The Articles and Bylaws do not mandate any particular interpretation or application of the Guidebook and Auction Rules. The Bylaws merely require that ICANN apply its "documented policies" – including the Guidebook and Auction Rules – "consistently, neutrally, objectively and fairly." Yet Afilias has never even attempted to explain why reading the Auction Rules in the manner advocated for by the *Amici*, or determining that any potential violation may not warrant disqualification, would be inconsistent, non-neutral, non-objective or unfair. Reasonable minds can differ on whether there was a violation of the Guidebook or Auction Rules and, if so, what the penalty should be.

145. The Hearing made clear that Afilias and the *Amici* have diametrically different interpretations of the Guidebook, Auction Rules and the DAA, and ICANN expects that the closing briefs of the *Amici* and Afilias will amplify on those differing interpretations. For

[222] Amended IRP Request ¶ 78.

example, Mr. Rasco testified that, despite the DAA, NDC "always maintained the ability to make sure that our application was in compliance with ICANN rules."[223] Mr. Livesay agreed with this notion,[224] but Afilias has claimed the opposite.[225] Mr. Rasco testified that "[n]othing in [NDC's] application changed that would require any kind of disclosure to ICANN" under the Guidebook,[226] and Mr. Livesay expressed the same view,[227] but Afilias disagrees.[228] Mr. Rasco testified to his belief that "NDC remained the bidder and in control" during the .WEB auction in compliance with the Auction Rules,[229] but Afilias has claimed that Verisign was the bidder and was in control.[230] Mr. Rasco testified that the DAA did not transfer NDC's right in its application to participate in a private auction because NDC had decided unilaterally that it would not,[231] but Afilias claims that NDC did give up such a right.[232] In fact, Mr. Rasco testified that NDC "maintained all our rights in the application in .WEB and obviously NDC throughout"[233] ICANN's evaluation process, but Afilias takes the opposite position.[234]

146. In addition, Mr. Rasco's witness statement provides specific responses to Afilias' allegations and describes why he believes the DAA complies with the Guidebook and Auction Rules. For instance, Mr. Rasco claims that the "mission/purpose" portion of NDC's application merely calls for NDC's "general vision of new gTLDs in the marketplace and its general strategy

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[223] Hearing Tr. at 813:5-21, 826:6-25.
[224] *Id*. at 1241:5-19, 1244:3-17
[225] Amended IRP Request ¶¶ 63-68
[226] Hearing Tr. at 863:15-864:10, 895:24-898:10
[227] *Id*. at 1148:9-1149:9, 1150:22-1151:8, 1158:16-1159:22.
[228] Amended IRP Request ¶¶ 54-62.
[229] Hearing Tr. at 828:1-829:25, 859:1-8; *see also* Rasco Witness Stmt. ¶ 98.
[230] Amended IRP Request ¶ 73.
[231] Hearing Tr. at 833:7-834:22, 855:22-857:10, 868:5-869:24; *see also* Rasco Witness Stmt. ¶ 65.
[232] Amended IRP Request ¶ 65.
[233] Hearing Tr. at 837:1-15.
[234] Amended IRP Request¶ 63-68.

at the time as to how .WEB might be successfully and productively introduced and used to benefit consumers,"[235] "not binding commitments of future actions."[236] Mr. Rasco also states that NDC's mission/purpose statement did not need to be updated in light of the DAA because of the Guidebook's statement that the mission/purpose statement is not part of the evaluation process,[237] because NDC's view of how .WEB might benefit consumers did not change "irrespective of who operates .WEB" and because NDC's stated marketing and other business plans "were not final and were subject to market conditions."[238] Mr. Rasco further states that the terms of the DAA make clear that "NDC remained the applicant and did not agree to assign anything related to its Application, let alone the Application itself."[239] Mr. Rasco also contends that the DAA "did not substitute Verisign as the applicant for .WEB and did not change the owners or managers of NDC."[240]

147. Mr. Livesay also responds to Afilias' allegations in his witness statement. For example, Mr. Livesay states that Redacted - Third Party Designated Confidential Information

[241]

Mr. Livesay concludes that Redacted - Third Party Designated Confidential Information

[242] Moreover, Mr. Livesay states that the "Guidebook does not require an applicant to reveal the existence of, sources or amounts of any

[235] Rasco Witness Stmt. ¶ 14.
[236] *Id*. ¶ 15.
[237] *Id*. ¶¶ 16, 18-20.
[238] *Id*. ¶ 16; *see also id*. ¶¶ 58-62
[239] *Id*. ¶¶ 47-50.
[240] *Id*. ¶ 52.
[241] Livesay Witness Stmt. ¶¶ 19, 21-22.
[242] *Id*. ¶ 23.

funding for a public or private auction for a new gTLD or other resolution of a contention set."[243]

148. Thus, this is not a situation in which all reasonable minds would agree that the DAA violates the Guidebook and/or the Auction Rules. Accordingly, it is not a foregone conclusion that any reasonable exercise of ICANN's discretion would lead to the conclusion that the DAA violates the Guidebook and Auction Rules.

149. Nor is it a foregone conclusion that, if NDC is found to be in breach of the Guidebook or Auction Rules, NDC must be disqualified. As set forth above, ICANN has discretion to determine an appropriate remedy for a violation of its rules. There are a range of remedies or penalties – including but not limited to disqualification – that ICANN could employ if it were to find that NDC did violate the Guidebook or the Auction Rules. It is not, as Afilias suggests, simply a choice between disqualifying NDC or condoning the DAA. Selecting the appropriate remedy would involve the balancing of competing interests and policies as well as ICANN's Commitments and Core Values.[244]

150. Further, because it has the "ultimate responsibility" for the Program, the ICANN Board has reserved the right to "individually consider" any application to "***determine whether*** approval would be in the best interest of the Internet community."[245] In other words, even if ICANN were to conclude that NDC violated the Guidebook or the Auction Rules, ICANN's Board would still have the discretion to decide whether approval of NDC's (or any other applicant's) application is appropriate or not.

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[243] *Id*. ¶ 25.

[244] *See* Hearing Tr. at 981:1-7 (Disspain) ("You know, there are two -- without wishing to place any weight on either side in this matter, there are two sides. There are the Afilias side, who are bringing this IRP; and then there are others on the other side who believe that they are entitled to the TLD. So both sides need to be treated fairly by ICANN.").

[245] Guidebook, § 5.1, C-3.

3. ICANN has not determined whether the DAA violated the Guidebook or Auction Rules, but ICANN would be in the best position to do so.

151. Testimony during the Hearing confirmed that ICANN has not taken a position on whether NDC violated the Guidebook or the Auction Rules due to pending Accountability Mechanisms and the DOJ's investigation.[246] Ms. Burr's and Mr. Disspain's testimony also explained that ICANN would be best suited to decide this issue because of its far-ranging implications, but also because a unique familiarity with ICANN, the Guidebook and the Program are critically important to making any such decision.

152. For example, Ms. Burr explained: "it was never the intention of the CCWG, in my hearing, that the Panel could prescribe a remedy. And that totally makes sense in the context of ICANN IRPs, because often there are many, many parties who are affected by this. There are a lot of moving parts."[247] Ms. Burr reiterated this point later in her testimony:

> [the] Panel, by making a finding that ICANN has violated its articles, ICANN must take -- then take appropriate action to remedy the breach. That is not the same as saying that the Panel has the authority to say what the appropriate action is to remedy the breach. And the reason is there are so many moving parts and parties here, imagine if this Panel said "ICANN violated the bylaws, and you must award this to, you know, X, Y or Z." There are going to be two or three parties who then have a cause of action. So ICANN must -- ICANN has an obligation to take appropriate action, but the CCWG did not contemplate that the Panel, the IRP Panel would decide what that appropriate action was.[248]

153. Even if the Panel were to consider the CCWG's Supplemental Final Proposal in construing the scope of its authority as Afilias has suggested (*see supra* ¶¶ 37-45), the Supplemental Final Proposal is fully consistent with Ms. Burr's testimony. It states that "the

[246] Hearing Tr. 748:12-749:3, 720:21-723:4; *id*. at 938:8-939:11, 950:3-11 ("The Board has, to my recollection, not considered the merits of Afilias' complaint."); *id*. at 976:9-977:3, 980:17-981:16; 984:3-8.
[247] *Id*. at 324:8-13.
[248] *Id*. at 334:5-20.

limitation to the type of decision made [by an IRP Panel] is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties."[249]

154. In his testimony, Mr. Disspain explained his view that the propriety of the DAA "is a matter for the Board," rather than this Panel.[250] And although Mr. Disspain could not bind the Board to a particular action, Mr. Disspain testified that "[a]ll I can tell you is that pursuant to the decision of this Panel, the Board will meet and the Board will consider what this Panel has to say."[251] Mr. Disspain also made clear that any thoughts or recommendations the Panel may have for ICANN will be taken "very seriously by the Board."[252]

155. ICANN has the unique knowledge, expertise, and experience required to interpret the Guidebook and Auction Rules. Importantly, ICANN would approach this type of analysis with an eye towards the potential impact a decision on these issues might have on the global Internet community, as required by the Bylaws.[253] As set forth in ICANN's Response as well as the witness statements of Mr. Livesay and Mr. Rasco, there have been other arrangements in the secondary market for new gTLDs that appear to be similar to the DAA, including transactions involving Afilias, Donuts and other registry operators.[254] Any analysis of the DAA must take into account these previous arrangements and their impact.[255]

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[249] C-122 ¶ 16.
[250] Hearing Tr. at 984:9-987:24.
[251] *Id*. at 991:4-16; *see also id*. at 989:4-990:23 (testifying that the Board will take any recommendations from the Panel very seriously).
[252] *Id*. at 985:22-988:19.
[253] Bylaws, Art. 7, § 7.3(b).
[254] ICANN's Response to Amended IRP Request ¶¶ 25-29; Livesay Witness Stmt. ¶¶ 8-10, 26; Rasco Witness Stmt. ¶¶ 42-45.
[255] Likewise, the Auction Rules seem to foresee the possibility of "post-Auction ownership transfer arrangements" being in place prior to an auction. (C-4, at Rule 68(a), (b).) ICANN is best suited to interpret this provision of the Auction Rules and determine whether it is relevant to the DAA.

156. In short, any ultimate decision regarding whether the DAA is compliant with the Guidebook and Auction Rules could be properly made only by ICANN.

4. ICANN's commitment to transparency and accountability is not relevant to Afilias' contention that NDC violated the Guidebook and Auction Rules.

157. In its Question No. 6, the Panel asked the parties to "comment on the fact that NDC and Verisign deliberately sought to keep the DAA confidential until after the auction, and that Verisign's support was essential to NDC winning the auction, in light of ICANN's commitment to transparency and accountability."

158. Afilias has repeatedly referenced the concepts of transparency and accountability, but these concepts as set forth in ICANN's Bylaws apply to ICANN, not new gTLD applicants. New gTLD applicants are bound to act in accordance with the terms of the Guidebook and the Auction Rules, which do not have similar transparency and accountability requirements beyond what applicants were required to disclose – and update – in their applications. Thus, the fact that ICANN has undertaken commitments to transparency and accountability is irrelevant to Afilias' contention that NDC and Verisign violated the Guidebook and Auction Rules.

IV. THE ICANN BOARD COMPLIED WITH ICANN'S ARTICLES AND BYLAWS BY DECIDING NOT TO TAKE ANY ACTION REGARDING THE .WEB CONTENTION SET WHILE ACCOUNTABILITY MECHANISMS WERE PENDING, AND THE PANEL SHOULD DEFER TO THIS REASONABLE BUSINESS JUDGMENT.

159. Afilias' claim that ICANN violated its Articles and Bylaws by failing to disqualify NDC, in 2016, after ICANN learned of the DAA is without merit. At the time ICANN received Afilias' 8 August 2016 letter complaining about the .WEB auction, ICANN, pursuant to its longstanding practice, had already placed the .WEB contention set "on hold" as a result of a pending Accountability Mechanism instituted by another .WEB applicant, and all applicants had been so informed. Therefore, in November 2016, when the ICANN Board

received a briefing from ICANN's counsel as to the status of .WEB, the Board chose to continue to follow its longstanding practice and not take any action regarding the .WEB contention set while an Accountability Mechanism – and, later, the one-year DOJ investigation – was pending. Not only was that decision consistent with ICANN's Articles and Bylaws, it was also consistent with ICANN's notice to Afilias that the contention set was on hold due to a pending Accountability Mechanism. Moreover, the Board's decision to refrain from taking action while Accountability Mechanisms were pending was within the Board's reasonable business judgment, and the Panel should not supplant that judgment.

A. ICANN Has A Longstanding Practice Of Keeping Contention Sets "On Hold" While Accountability Mechanisms Are Pending.

160. Every ICANN witness questioned on the topic confirmed that ICANN has a longstanding practice of placing applications and contention sets on hold while related Accountability Mechanisms are pending.[256] This practice applies to Requests for Reconsideration under Article 4, Section 4.2 of the Bylaws, complaints made to ICANN's Ombudsman under Article 5 (if ICANN was aware of such complaints), and CEPs under Article 4, Section 4.3.[257] This practice does not necessarily apply to IRP Requests because, unlike other Accountability Mechanisms, the IRP rules specifically afford Claimants the ability to seek emergency relief, or interim measures of protection to stay the processing of a gTLD application.[258] ICANN urges IRP Claimants to make use of these interim measures and thus

[256] Hearing Tr. at 296:4-11 (Burr) (describing ICANN's "usual practice of not intervening once an accountability mechanism has been invoked so as to respect the accountability mechanisms themselves"); *id*. at 721:12-722:13 (Willett) (the general practice within the New gTLD Program "was to keep contention sets or applications on hold until accountability mechanisms had been resolved"); *id*. at 938:14-18 (Disspain) (ICANN has a longstanding practice of not interfering with an application or contention set "when there is an outstanding Accountability Mechanism").
[257] *Id*. at 678:4-21, 982:10-983:5.
[258] *Id*. at 678:4-21, 982:10-983:5; Interim Supp. Proc. Rule 10, C-59; Bylaws, Art. 4, § 4.3(p).

does not automatically place an application or contention set on hold when an IRP is instituted.[259]

161. ICANN adopted this practice because it considers its Accountability Mechanisms to be fundamental to ensuring that its bottom-up, consensus-driven, multistakeholder model remains effective.[260] ICANN's practice of placing applications and contention sets on hold respects the integrity of the Accountability Mechanisms and Claimants' rights under those Accountability Mechanisms.

162. This practice is published on ICANN's website, which explains that an application or a contention set is placed on hold:

> if there are pending activities (e.g., ***ICANN accountability mechanisms***, ICANN public comment periods on proposed implementation plans for Program-related activities, Board decisions, or other outstanding unresolved issues) that may impact the status of the application. The application is active but cannot complete certain Program processes such as Auction, Contracting, and Transition to Delegation until the On-Hold status is cleared.[261]

ICANN also advised applicants of this practice during the monthly updates regarding the New gTLD Program, as Ms. Willett testified.[262] And here, Afilias was informed by ICANN, in September 2016, that the .WEB contention set was placed on hold due to an Accountability Mechanism filed by another .WEB applicant (and not because of Afilias' letters).[263]

B. The Board's Decision To Adhere To Its Normal Practice of Not Taking Action While a Related Accountability Mechanism Is Pending Was Well Within The Board's Reasonable Business Judgment And Is Entitled To Deference.

163. The .WEB contention set became mired in legal proceedings as the date for the

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[259] For this reason, ICANN encouraged Afilias to apply for emergency relief in this IRP to halt the processing of NDC's .WEB application, as provided for in the Bylaws and the Interim Supplementary Procedures. *See* Bylaws, Art. 4, § 4.3(p), C-1; Interim Supp. Proc., Rule 10, C-59.
[260] Burr Witness Stmt. ¶ 12; Disspain Witness Stmt. ¶ 5.
[261] R-33.
[262] Hearing Tr. at 676:13-677:2.
[263] C-61.

auction approached. Ruby Glen, a .WEB applicant, submitted a Request for Reconsideration to ICANN, seeking to halt the .WEB auction, which was denied. Ruby Glen then filed a complaint against ICANN in Los Angeles federal court days before the auction and immediately sought a temporary restraining order enjoining the auction, which the court denied. Ruby Glen's lawsuit was ultimately dismissed as a result of the covenant not to sue undertaken by all applicants as a condition of their participation in the Program,[264] and that decision was subsequently upheld on appeal to the Ninth Circuit.[265]

164. Within days of concluding the .WEB auction and before ICANN received Afilias' 8 August 2016 letter complaining about NDC's arrangement with Verisign, Donuts, the parent company of Ruby Glen, initiated a CEP, which was pending at the time of the 3 November 2016 Board workshop.[266]

165. At the 3 November 2016 Board workshop, the ICANN Board acted consistently with ICANN's practice of not taking action with respect to a matter that was the subject of an ongoing Accountability Mechanism. The Board was briefed by ICANN's in-house counsel regarding the issues being raised by members of the .WEB contention set, including Afilias, and received materials provided by, and asked questions of, ICANN's in-house counsel. The Board, however, made no decision regarding the various challenges to NDC's application and winning bid for .WEB based on its arrangement with Verisign. As Ms. Burr, who attended the workshop, explained at the hearing:

> The Board in November . . . continued to follow its usual practice of not intervening once an accountability mechanism has been invoked so as to respect

[264] As described above, the covenant not to sue is a provision in the Guidebook that requires new gTLD applicants to forego pursuing any claims related to their applications in court, and instead pursue any such claims through one of the Accountability Mechanisms provided for in ICANN's Bylaws. *See* Guidebook, § 6.6, C-3.
[265] C-106; R-14.
[266] RE-11.

> the accountability mechanisms themselves. That is what the Board typically does. That is what org typically does.[267]

166. Mr. Disspain testified similarly:

> It was a decision to – a choice, if you will, to do what we would usually do, normally do with a longstanding practice of not interfering when there was an outstanding accountability mechanism.[268]

167. Weeks later, in January 2017, the DOJ's Antitrust Division initiated an investigation of Verisign's potential operation of .WEB, during which it asked ICANN not to take any action regarding .WEB. That investigation continued until January 2018, when DOJ closed the investigation without taking further action. The Donuts CEP also closed in January 2018, and Donuts elected not to initiate an IRP. However, in February and April 2018, Afilias submitted two DIDP Requests and a Request for Reconsideration. Throughout the course of these various proceedings, the ICANN Board made no material decisions regarding .WEB.

168. Conceding that this longstanding ICANN practice actually exists, Afilias suggested at the Hearing that ICANN violated its "no action" practice because ICANN took certain actions after Donuts initiated its CEP on 2 August 2016. Specifically, Afilias questioned Ms. Willett as to why ICANN sent NDC a CIR on 5 August 2016.[269] As Ms. Willett explained, however, a notice of CEP is not directed to Ms. Willett or her team; it is directed to ICANN's in-house counsel, and it typically takes a few days for Ms. Willett's team to receive notice of a

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[267] Hearing Tr. at 296:4-11.

[268] *Id*. at 935:16-20. In its response to Afilias' request for interim measures of protection, ICANN stated that it had already evaluated Afilias' complaints. This was inartfully drafted to the extent that it could be construed to suggest that ICANN had made a determination on whether NDC violated the Guidebook and Auction Rules, which ICANN did not do. ICANN's next submission—and each submission since then—stated unequivocally that ICANN had made no such determination. Further, ICANN ultimately agreed to keep .WEB on hold, which mooted Afilias' request for interim measures of protection.

[269] *Id*. at 683:16-687:5. A CIR is a set of questions that the New gTLD Program team sends to an applicant once the contention set has been resolved. It is essentially an invitation to begin contracting discussions, and is "one of the very first steps in a multi-week, multi-month process." *Id*.

CEP.[270] Ms. Willett recalls that she received notice of Donuts' CEP later on 5 August or shortly thereafter,[271] and that her team halted the contracting process for .WEB at that time.

169. Afilias has also suggested that ICANN deviated from its practice of not taking action while a contention set was on hold when it sent a letter to NDC, Verisign, Afilias, and Ruby Glen in September 2016, asking them to provide their views on a series of questions relevant to the issues raised by Donuts and by Afilias.[272] Afilias is wrong. Putting a contention set on hold does not mean that all work ceases, as Ms. Willett testified; what it means is that a contention set will not "move to the next phase of work," such as "send[ing] a Registry Agreement to [NDC] for execution," "[b]ut, you know, in order to resolve a variety of matters and to get information to assist in the CEP, [ICANN was trying] to gather information."[273] Ms. Willett's explanation is logical: ICANN's decision to gather information does not mean that ICANN deviated from its practice of refraining from deciding matters that were subject to a pending Accountability Mechanism. Moreover, the collected information could assist ICANN if it was called on to address the matters in the future.

170. The Board's decision not to make any material decisions regarding .WEB while an Accountability Mechanism was pending was undoubtedly a reasonable business judgment made in the exercise of the Board's fiduciary duties. Accordingly, that decision is entitled to deference.[274] The Bylaws are clear that where, as here, "Claims aris[e] out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable [business]

[270] *Id*.
[271] *Id*.
[272] *See, e.g.*, Afilias' Response to the *Amici* Briefs ¶¶ 52–55.
[273] Hearing Tr. at 697:15-698:10 (Willett).
[274] Bylaws, Art. 4, § 4.3(i)(iii).

judgment with its own."[275] Ms. Burr, who was one of the individuals responsible for drafting the new Bylaws, confirmed as much during the IRP Hearing.[276]

171. At the 3 November 2016 workshop, the Board committed to follow "its usual practice of not intervening once an Accountability Mechanism had been invoked," as Ms. Burr and Mr. Disspain testified.[277] The Board maintained that position throughout subsequent Accountability Mechanisms regarding .WEB and the related DOJ investigation. The Board's decision respects the purpose and integrity of the Accountability Mechanisms, which is fundamental to ensuring that ICANN's unique model remains effective.[278]

172. Indeed, had the Board taken action, that action could have interfered with ongoing Accountability Mechanisms. Further, the outcome of pending Accountability Mechanisms and the DOJ investigation could have had a material impact on any eventual analysis ICANN might be called to make. For instance, if the DOJ had decided to block Verisign's potential acquisition of .WEB, the DOJ's action likely would have rendered Afilias' concerns moot. Similarly, this IRP could have an impact on the scope of any remaining issues to be resolved (as would an IRP brought by Donuts, had Donuts chosen to file an IRP in early 2018, as ICANN had expected). Therefore, taking action on Afilias' claims would not have been prudent, as Mr. Disspain testified, because it would have interfered with the pending accountability mechanisms and DOJ investigation, and the Board would have acted without the benefit of input from an IRP Panel or

[275] *Id*., Art. 4, § 4.3(i)(iii).
[276] Hearing Tr. at 338:19-340:1 (testifying that the Panel cannot substitute its judgment for the Board's reasonable judgment, and it does not have the authority to say that the Board should have pursued an alternate course of action, if "failing to do it a different way does not amount to a violation of the Bylaws").
[277] *Id*. at 296:4-11 (Burr); *see also id*. at 388:8-12 (Burr) (The ICANN Board "did not deviate from the standard practice, which was once there is an Accountability Mechanism . . . the process goes on hold, pending resolution."); *id*. at 935:16-20 (Disspain) (The Board decided to adhere to its "longstanding practice of not interfering when there was an outstanding Accountability Mechanism.").
[278] Burr Witness Stmt. ¶ 12; Disspain Witness Stmt. ¶ 5.

the DOJ, respectively.[279]

C. Afilias' Arguments That The Board's Decision Is Not Protected By The Business Judgment Rule Lack Merit.

173. Afilias made a number of arguments at the Hearing and in its Response to the *Amici* Briefs that the Board's decision was not a reasonable business judgment entitled to deference under Section 4.3(i)(iii) of the Bylaws. First, Afilias argues that its claims do not relate to the Board's exercise of its fiduciary duties.[280] However, as shown above (*supra* ¶¶ 53-55), the Board has a fiduciary duty with respect to all activities that it conducts on behalf of ICANN, which Ms. Burr confirmed during the Hearing and is a matter of law.[281]

174. Second, Afilias argues that the Board's decision is not entitled to deference because it was made at a "workshop" rather than a formal meeting or by a formal resolution, and because the decision was not publicly posted. But there was no reason for the Board to call a formal meeting or pass a formal resolution to decide to follow its normal practice of refraining from taking action while an Accountability Mechanism was pending, and the Board certainly had no obligation to publish a decision that it was not taking any action.

175. As shown above (*supra* ¶¶ 56-57)the business judgment rule set forth in Section 4.3(i)(iii) is not limited to resolutions adopted and duly published by the Board after formal meetings. Indeed, under Section 4.3(i)(iii), the business judgment rule applies not only to Board "action" but also to the Board's decision not to take action.[282]

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[279] Hearing Tr. at 942:13-18; Disspain Witness Stmt. ¶ 11.

[280] Afilias' Response to *Amici* Briefs ¶ 167.

[281] Hearing Tr. at 336:17-25 (testifying that she cannot imagine a circumstance where the Board acts without respect to its fiduciary duties); *id*. at 392:5-393:3 (The Board's fiduciary obligations to ICANN extend to everything Board members do related to ICANN).

[282] Bylaws, Art. 4, § 4.3(i)(iii) ("[T]he 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.") (emphasis added).

176. Additionally, the Bylaws do not require the Board to call a formal meeting to decide to follow its normal practice of not taking action while an Accountability Mechanism is pending. The Board can and regularly does conduct various types of business at informal meetings, including Board workshops, as Ms. Burr testified.[283] Board workshops "are essentially working sessions for the Board."[284] They are a way for the Board "to work together, exchange information, get up to speed on what's going on in the community, take care of various housekeeping matters and the like."[285] But because these are not formal meetings, and because the Board is not taking or passing formal resolutions, there are no formal meeting requirements, such as quorum requirements.[286] Even so, the majority of the Board typically attends Board workshops.[287] Ms. Burr explained that, outside of a formal meeting, including at Board workshops, the Board "can decide to follow procedures that it typically follows,"[288] which is exactly what occurred at the November 2016 Board workshop. And in doing so, the Board was exercising its fiduciary duties to ICANN, and its resulting "action or inaction" is entitled to deference under the business judgment rule.

177. Nor was the ICANN Board required to conduct a formal written vote under Article 7, Section 7.19 of the Bylaws. This provision reflects the procedure by which the Board can take formal action *outside* of a formal meeting.[289] But Ms. Burr and Mr. Disspain both testified that the November 2016 decision was not a formal action, thereby rendering Section

[283] Hearing Tr. at 281:22-285:23.
[284] *Id*. at 283:1-2.
[285] *Id*. at 284:17-285:12.
[286] *Id*. at 282:24-283:6.
[287] *Id*. at 282:24-283:6.
[288] *Id*. at 285:19-286:10.
[289] Bylaws, Art. 7, § 7.19.

7.19 inapplicable. Instead, it was a commitment to adhere to ICANN's usual practice of not taking action that could interfere with a pending Accountability Mechanism. As Ms. Burr testified, "it is complicated because we are referring to this as a decision, where what I observed was a confirmation to continue to follow the standard practice, which was that the contention set was on hold."[290] Mr. Disspain testified similarly:

> The Board made a choice to follow its longstanding practice of not doing anything when there is an outstanding Accountability Mechanism. I cannot say that the Board proactively decided, proactively agreed, proactively chose . . . to not pursue Afilias' complaints. We just decided that it was our standard practice not to do anything because there were outstanding Accountability Mechanisms.[291]

178. Ms. Burr further explained that it would be impractical to require the Board to take a formal vote in this context: "If you're suggesting that every time the Board decides to follow a practice that it has always followed, it has to take a formal vote, then we would be voting constantly. . . . [I]t is just not practical to insist that every time the Board makes a decision, including a decision to follow its standard practice, that it has to have a formal vote. I don't understand that to be typical of any organization of any Board of Directors."[292] This is especially true for ICANN, which has a "very active Board."[293]

179. ICANN was also not required to publicly post its decision after the 3 November 2016 workshop. To be clear, ICANN ***did inform Afilias*** (and all other contention set members) that .WEB had been placed on hold and that it would be notified when that status changed, as discussed in Section IV.D below. Thus, Afilias knew that .WEB was on hold before and after the November 2016 meeting. No purpose would have been served by announcing on ICANN's

[290] Hearing Tr. at 388:13-389:19; *id*. (The Board simply "agreed to continue to abide by the standard practice.").
[291] *Id*. at 938:8-25; *see also id*. at 939:1-11 (the issue was not before the Board "for a formal decision").
[292] *Id*. at 287:1-288:4.
[293] *Id*. at 291:2-19.

website that the Board had decided at its workshop not to lift the hold, nor was the Board required to make such an announcement.[294]

180. Article 3, Section 3.5(c) of the Bylaws requires actions taken by the Board at a formal meeting to be published in a preliminary report on ICANN's website.[295] Section 3.5(c) applies only to "the formal decisions that the Board makes by resolution during Board meetings," which Ms. Burr explained is "the way this has always been interpreted from the beginning of time."[296] It does not apply to informal decisions taken at Board workshops.[297] Any contrary interpretation would paralyze the Board's ability to operate, as Ms. Burr explained: "If you read this to say anything the Board thinks about, [or] decides to move on" must be contained on ICANN's website, or in a "preliminary report seven days later, the Board would spend all of its time approving these preliminary reports."[298]

181. Third, Afilias argues that the Panel cannot defer to the Board's reasonable business judgment because it does not have access to the transcript of the Board's privileged discussion with counsel, or the written briefings provided to the Board by counsel.[299] But Afilias has not offered any authority or logic to support its argument that the Panel must have access to such privileged information in order to conclude that the decision was within the realm of reasonable business judgment. To the contrary, case law confirms: "it is the existence of legal advice that is material to the question of whether the board acted with due care, not the substance

[294] In ICANN's 30 September 2016 letter to Afilias (C-61), Mr. Atallah advised that "the primary contact for Afilias's application will be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms," which is exactly what occurred, as explained in more detail below.
[295] Bylaws, Art. 3, § 3.5(c).
[296] Hearing Tr. at 289:7-291:1.
[297] *Id*. at 289:7-291:1, 993:1-4.
[298] *Id*. at 291:11-19.
[299] Afilias Response to *Amici* Briefs ¶¶ 176–178.

of that advice."[300] In order to apply the deferential standard contemplated by the Bylaws, it is sufficient that the Panel understands that the ICANN Board was briefed by in-house counsel, received materials on the subject, had a discussion that included counsel, and then elected to adhere to ICANN's usual practice of awaiting the conclusion of a pending Accountability Mechanism.

D. ICANN's Obligations To Act Transparently Did Not Require The Board To Inform Afilias Of Its 3 November 2016 Decision.

182. ICANN's commitments in its Articles and Bylaws to operate through "open and transparent processes"[301] and "to operate to the maximum extent feasible in an open and transparent manner"[302] do not require ICANN to publish every decision it makes or every informal meeting it conducts. Ms. Burr confirmed that:

> [The] ICANN Board has to have the opportunity to meet in workshops, for example, to get its work done. From time to time we'll provide information to the community before or after about the general topics that we are looking at during our workshop, but I have never understood the requirement to act in an open and transparent way to mandate that every single interaction of the Board and every Board discussion be public.[303]

183. This is yet another point with which Afilias agreed before this IRP. In its 2006 public statement regarding the .COM registry agreement, Afilias took the view that:

> The job of the ICANN Board is to serve the community by exercising its informed judgment based on the best available information. Some of that important information may be proprietary, and not on the public record. ***Some of that information may relate to the fiduciary obligations of the ICANN Board and properly not on the public record***.[304]

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[300] *See Wynn Resort, Ltd. v. Eighth Judicial Dist. Ct. in & for Cty. of Clark*, 133 Nev. 369, 379 (2017) (citation omitted), RLA-38.
[301] Articles of Incorporation, § III, C-2.
[302] Bylaws, Art. 3, § 3.1.
[303] Hearing Tr. at 275:4-276:23; *see also id*. at 293:22-294:4 (ICANN is required to operate openly and transparently to the maximum extent feasible, which "does not mean it has to do everything in public.").
[304] R-21 at 7 (emphasis added).

184. This is especially true with respect to ICANN's decision to abide by its practice of placing contention sets on hold, and not acting, pending resolution of Accountability Mechanisms.[305] Indeed, that ICANN was adhering to this practice was evident from the fact that .WEB remained on hold throughout the entire time related Accountability Mechanisms were pending, and the fact that the hold was published on ICANN's website and separately disclosed to Afilias.

185. Specifically, Afilias (and all other contention set members) received notice from ICANN that the .WEB contention set was on hold at least as early as 19 August 2016, a fact that was also published on ICANN's website.[306] ICANN then sent Afilias a letter on 30 September 2016 in which ICANN reiterated that the .WEB contention set was on hold.[307] In that letter, ICANN explained that the on hold status "reflect[s] a pending ICANN Accountability Mechanism initiated by another member of the contention set," referring to the Donuts CEP.[308] ICANN assured Afilias that it would "be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms."[309] ICANN also directed Afilias to the link to ICANN's website that explains ICANN's practice of placing applications and contention sets on hold while Accountability Mechanisms are pending.[310] Inconsistent with Afilias' current contention that ICANN kept it in the dark regarding the status of the contention

[305] Afilias' Amended IRP Request does not contain any claims that ICANN violated its obligations to act transparently by failing to inform Afilias of the Board's 3 November 2016 decision, and Afilias confirmed in its opening statement that its claims do not relate to ICANN Board conduct. Hearing Tr. at 81:13-22. These claims, therefore, are not properly before the Panel, but ICANN nonetheless addresses them to the extent the Panel decides to consider them.
[306] C-61.
[307] *Id*.
[308] *Id*.
[309] *Id*.
[310] *Id*.

set, Afilias acknowledged the on-hold status of the .WEB contention set in its 7 October 2016 letter to ICANN, and even recognized that .WEB had been put on hold as a result of the Donuts CEP, and not in response Afilias' letters.[311]

186. The ICANN Board's decision at the 3 November 2016 workshop simply confirmed that the *status quo* would be maintained while the .WEB contention set was on hold in accordance with normal practice. As Ms. Burr testified, the 30 September 2016 letter from ICANN to Afilias "reflects what ICANN org typically does when an Accountability Mechanism has been invoked, and the practice of the Board is to respect and follow that. And that would be the Board deciding in November that it was going to continue to follow this practice."[312] The Board's decision was not some "new action" by ICANN that required an additional notice – the contention set was placed on hold when Donuts initiated the CEP, and the contention set remained on hold until June 2018, after which Afilias was notified of the change in status, as promised in ICANN's 30 September 2016 letter.[313]

187. Importantly, Afilias has not put forward a single piece of evidence suggesting that it would have acted any differently had it known that the Board decided in November 2016 to take no action while the contention set remained on hold. To the contrary, Afilias withdrew all of its witness statements and, thus, there is no evidence whatsoever of what Afilias was thinking

[311] C-51 at 1 ("Mr. Atallah states that, while the .WEB/.WEBS contention set was placed on hold by ICANN on 19 August 2016, such action was taken because of the initiation of an ICANN Accountability Mechanism by another applicant. We are concerned that this statement appears to imply that ICANN is not placing the contention set on hold in order to address the issues raised by Afilias.").

[312] Hearing Tr. at 295:21-297:21.

[313] C-61. Afilias' argument that ICANN should have disclosed the Board's 3 November 2016 decision in response to Afilias' DIDP Requests is meritless for the same reasons. Additionally, the only document that would have been potentially responsive to Afilias' DIDP Requests on this topic is the privileged transcript of the 3 November 2016 Board workshop, which ICANN is not obligated to disclose in response to a DIDP Request (or to any request for that matter). Indeed, one of the enumerated "Conditions for Nondisclosure" of documents is "[i]nformation subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation." C-92.

throughout the entire time period (or why it never filed a Reconsideration Request to force Board action in 2016). Instead, the documentary evidence demonstrates that Afilias knew as early as August 2016 that the .WEB contention set was on hold as a result of the Donuts CEP – which Afilias confirmed in its 7 October 2016 letter to ICANN – but that Afilias waited on the sidelines for nearly two years hoping that Donuts (or the DOJ) would take the laboring oar in challenging the results of the .WEB auction. In sum, Afilias' argument that the Board was required to disclose its decision to adhere to normal practice is a lawyer's invention designed to distract from Afilias' decision to sit on its hands.

188. For these reasons, Afilias' complaint that it did not learn of the Board's decision in November 2016 to maintain the status quo until ICANN submitted its Rejoinder in 2020 is inapposite.[314] It is also wrong, as ICANN has repeatedly stated the position throughout this IRP that the Board took no action on .WEB, including in its Response to Afilias' Amended IRP Request:

- ".WEB has been mired in federal court litigation, a [DOJ] investigation and multiple invocations of ICANN's internal Accountability Mechanisms, which caused ICANN to place .WEB 'on hold' pending their resolution."[315]
- "In connection with the New gTLD Program, ICANN employs a practice, depending on the circumstances, of placing a contention set or a gTLD application on hold if it is the subject of certain ICANN Accountability Mechanisms, including the initiation of a CEP. Thus, on 19 August 2016, ICANN placed the .WEB Contention Set 'on hold' due to the pendency of the Donuts CEP."[316]
- "After a successful gTLD applicant passes initial evaluation and resolves any formal objection and/or contention set proceeding, ***and assuming no ICANN***

[314] This responds to the Panel's Question No. 10, "Please comment, in light of the relevant provisions of the Bylaws, on ICANN's decision not to disclose to Afilias, the *Amici* and the general public its Board's November 2016 decision regarding .WEB. The Respondent is asked to explain the reason why this Board decision was disclosed allegedly for the first time in the Respondent's Rejoinder?"
[315] ICANN's Response to Amended IRP Request ¶ 4.
[316] *Id*. ¶ 44.

> ***Accountability Mechanisms are pending***, the applicant is offered a Registry Agreement with ICANN to become a new gTLD registry operator."[317]

189. The only new fact ICANN disclosed in its Rejoinder is the date of the ICANN Board's workshop and the fact that the Board had a (privileged) discussion regarding the .WEB contention set, but took no further action.

V. AFILIAS HAS NOT PROPERLY CHALLENGED ICANN'S TRANSMITTAL OF A FORM REGISTRY AGREEMENT TO NDC IN JUNE 2018 AND, IN ANY EVENT, ICANN ACTED IN ACCORDANCE WITH GUIDEBOOK PROCEDURES AND THE ARTICLES AND BYLAWS.

190. Afilias asserts at Heading 5 of its Amended IRP Request that ICANN violated its "mandate to promote competition" by sending a draft Registry Agreement to NDC in June 2018 when .WEB was taken off hold. Afilias' Amended IRP Request does not allege that ICANN violated any other Article or Bylaws provision by taking the contention set off hold and sending NDC a form registry agreement in June 2018.[318] As shown above (*supra* Sec. III.A), Afilias' competition claim has been thoroughly refuted, thereby also refuting Afilias' entire claim relating to the June 2018 draft Registry Agreement, as alleged in the Amended IRP Request.

191. In its Reply, Afilias makes a two-sentence reference to transmission of a registry agreement, but Afilias does not argue that this was a violation of the Articles or Bylaws.[319] Then, in its Response to the *Amici* Briefs, Afilias again refers to ICANN sending NDC the form registry agreement, but refers to it as an indication that ICANN "already decided" that the DAA was appropriate.[320] Nowhere in ***any*** of Afilias' briefing has Afilias asserted a claim that, by sending a draft Registry Agreement to NDC, ICANN violated provisions of its Bylaws or

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[317] *Id*. ¶ 23.

[318] Amended IRP Request ¶ 78 (listing alleged breaches of ICANN's Articles and Bylaws).

[319] Afilias' Reply Memorial ¶ 121 ("Instead, on 6 June 2018, ICANN notified Afilias that it had decided to remove the .WEB contention set from its on-hold status—signaling that it intended to proceed with the delegation of .WEB to NDC, and therefore to Verisign. And on 14 June 2018, ICANN in fact sent NDC the .WEB registry agreement—which NDC signed and returned to ICANN.").

[320] Afilias' Response to *Amici* Briefs ¶ 230.

Articles other than its alleged competition mandate. And Afilias elicited no testimony at the Hearing supporting such a claim.

192. The evidence adduced at the Hearing established that taking the contention set off hold and sending NDC a form registry agreement were not indicative of a decision that the DAA was compliant with the Guidebook and Auction Rules. They were ministerial acts taken as part of ICANN's normal processes under the Guidebook once all Accountability Mechanisms had concluded. Moreover, these actions were done with full notice to Afilias and other contention set members, which finally caused Afilias to invoke an Accountability Mechanism (as Afilias had promised in writing only weeks earlier).

193. Ms. Willett testified that, once the Board denied Afilias' Reconsideration Request regarding its DIDP Requests, and no other Accountability Mechanisms were pending, ICANN followed its established practice and Guidebook procedures by taking the .WEB contention set off hold and sending a draft Registry Agreement to the winning bidder.[321] As Mr. Disspain explained, "ICANN was taking the next step in its process . . . without wishing to place any weight on either side in this matter, there are two sides . . . both sides need to be treated fairly by ICANN. The best way for ICANN to do that is to follow its process."[322] At the same time, consistent with its transparency obligations, ICANN staff provided all of the members of the .WEB contention set, including Afilias, with notice of the change of status.[323]

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[321] Hearing Tr. at 721:8-11, 727:21-728:13, 750:3-25 ("So my team was operating within the rules of the applicant guidebook, and we were administering the processes and functions described in the guidebook."); Disspain Witness Stmt. ¶ 13; Guidebook, § 4.1.4, C-3 ("An applicant that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage."); *see also id*. §§ 1.1.2.10, 4.4, 5.1; New Generic Top-Level Domains – Update on Application Status and Contention Sets, R-33 (once on-hold status is cleared, application can proceed to contracting).

[322] Hearing Tr. at 980:17-981:16.

[323] Disspain Witness Stmt. ¶ 13; R-22 at 7 ("Application status updates are part of the New gTLD Program process 'to provide a more complete picture of the current status of applications…[a]s applications complete evaluation and

194. ICANN took these steps knowing full well that Afilias was likely to make good on its written threats to "initiate a CEP and a subsequent IRP against ICANN."[324] As Mr. Disspain explained:

> Prior to the lifting of the hold on the contention set, the matter was discussed in the Board Accountability Mechanisms Committee, I believe as part of its general litigation update, but I am not certain. In that discussion we were told that the next step in the process was for -- should all of the accountability mechanisms be dealt with, was for it to come off hold, but that Afilias had made it abundantly clear that in the event that it did come off hold, that they would file an IRP. And we were also clear as a Board committee that Afilias would be aware that it had come off hold because all of the contention set members would be informed that it had come off hold. So that occurred. And then secondly, a couple of days -- again, I don't know exactly, I can't remember exactly when -- after it had actually come off hold, there was another discussion at which we were told that it had come off hold and that an IRP claim from Afilias was expected -- I am going to paraphrase here -- at any minute, so to speak, because that is what they said they would do . . . We were very clear that our understanding was that Afilias had said categorically that they would launch an IRP in the event that the contention set was taken off hold."[325]

195. According to Ms. Willett:

> I fully expected from 2016 August, I expected Afilias to file a -- a reconsideration request at any day, and I fully expected that as soon as we changed the status of the contention set, taking the contention set off hold, that was staff action, and Afilias would have voiced their objection to that and made a formal -- the way to formally complain is not by writing a letter. It is by initiating a reconsideration request. That's what I had been telling applicants publicly. That was commonly understood since 2013.[326]

196. But as both Mr. Disspain and Ms. Willett explained, taking the contention set off

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proceed to the next phases of the New gTLD Program."). This notice also is posted on ICANN's new gTLD Program web page, which is available to the general public.

[324] C-113 at 5.

[325] Hearing Tr. at 978:5-980:16, 947:16-948:22 ("And [the BAMC] was also briefed that Afilias had written letters, maybe a letter, I can't remember, one or more than one, to say that if that happened, if it came off hold, Afilias was going to launch an accountability mechanism. I can't remember if it says an IRP or not, but launch an accountability mechanism. The BAMC was aware of that."); *id*. at 738:24-740:21 (Willett) (testifying that the Board was informed that the contention set was being taken off hold in June 2018).

[326] *Id*. at 741:21-742:23. Ms. Willett also testified that Afilias could have filed a Reconsideration Request in 2016 challenging the results of the .WEB auction and seeking disqualification of NDC. That would have placed the issues Afilias raises in this IRP squarely before the board for decision in 2016. *See id*. at 769:9-771:24.

hold was in no way a determination by ICANN that the DAA was compliant with the Guidebook or Auction Rules.[327] It was, instead, ICANN remaining true to its normal practices and the Guidebook procedures in order to treat all applicants fairly, and it was done by ICANN in full expectation that the next step would be an Afilias Accountability Mechanism,[328] which is precisely what happened. Mr. Disspain was clear in his testimony that, had Afilias not invoked an Accountability Mechanism, the Board would have been made aware of that fact and may have taken action at that point, although he could not speculate on what might have happened.[329]

197. Afilias has not explained to the Panel how ICANN's actions in June 2018 violated ICANN's Articles or Bylaws. Afilias has also failed to explain how it was harmed in any way by these actions because Afilias was given prompt notice, which resulted in Afilias finally filing the Accountability Mechanism (a CEP) that it had been promising.

VI. AFILIAS' CLAIMS THAT ICANN'S PRE- AND POST-AUCTION INVESTIGATIONS VIOLATED THE ARTICLES AND BYLAWS HAVE NO MERIT AND ARE NOT PROPERLY BEFORE THE PANEL.

198. Afilias asserts at paragraph 78 of its Amended IRP Request that "ICANN failed to fully investigate rumors that NDC had reached an agreement with VeriSign prior to the .WEB Auction" because "[a]lthough ICANN specifically asked NDC to confirm that 'there have not been changes to your application . . . that need to be reported to ICANN,' NDC declined to do so and ICANN failed to pursue a response"[330] (the "Pre-Auction Investigation Claim"). In its later-filed briefs, Afilias shifted focus to a new claim – that ICANN violated its Articles and Bylaws

[327] *Id*. at 980:17-981:16 (Disspain); *id*. at 749:15-750:25 (Willett).
[328] *Id*. at 980:17-981:16 (Disspain).
[329] *Id*. at 981:17-982:9; (Disspain); *see also id*. at 741:16-20 (Willett) ("Q: If Afilias had not filed for CEP, ICANN would have proceeded to contract with NDC; is that your understanding? A: I don't really know what would have happened.").
[330] Amended IRP Request ¶ 78.

in its ***post-auction*** investigation of Afilias' complaints about NDC's relationship with Verisign (the "Post-Auction Investigation Claim").[331]

199. Afilias' Pre-Auction and Post-Auction Investigation Claims are both time-barred pursuant to Rule 4 of the Interim Supplementary Procedures, as shown above at Section II.B. Each claim also fails on several additional grounds.

A. Afilias' Pre-Auction Investigation Claim Lacks Merit.

200. On 27 April 2016, ICANN scheduled an auction of last resort for the .WEB gTLD to be held on 27 July 2016.[332] The Auction Rules allow applicants to request a postponement up to 45 days before an auction.[333] For the scheduled .WEB auction, that deadline expired on 12 June 2016.[334] After that, on Thursday, 23 June 2016, Jon Nevett, the CEO of Donuts, emailed Ms. Willett of ICANN alleging "[u]pon information and belief, there have been changes to the Board of Directors and potential control of Nu Dot Co LLC ("NDC") that has materially changed its application," and that NDC had not updated its Application to reflect these alleged changes.[335] Mr. Nevett requested a postponement to the .WEB auction.[336]

201. On Monday, 27 June 2016, Jared Erwin, a member of ICANN's New gTLD Program team,[337] wrote to Mr. Rasco of NDC to investigate Mr. Nevett's allegations:

> We would like to confirm that there have not been changes to your application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including

[331] Afilias' Reply Memorial ¶¶ 8, 102.
[332] Willett Witness Stmt. ¶ 13.
[333] *Id*. ¶ 14.
[334] *Id*.
[335] Willett Witness Stmt. ¶ 19 & Ex. A, C-36; Hearing Tr. at 608:10-609:1.
[336] Willett Witness Stmt., Ex. A, C-36
[337] Hearing Tr. at 617:18-22.

> changes that occur as part of regular business operations (e.g., changes to officers or directors, application contacts).[338]

Mr. Rasco promptly replied that "there have been no changes to the NU DOTCO LLC organization that would need to be reported to ICANN."[339]

202. Afilias argues that Mr. Rasco intentionally answered only ICANN's question regarding changes to NDC's ownership but did not address whether there were any other changes to NDC's application, and that ICANN should have pressed him on that issue.[340] But because ICANN was investigating claims that NDC had undergone a change in ownership or control (as alleged by Donuts' Mr. Nevett),[341] ICANN's query regarding changes to NDC's application was necessarily focused on whether it would need to be updated to reflect any changes in NDC's ownership or control. This makes perfect sense, as no concerns had been raised about any other aspect of NDC's application, much less the possible involvement of Verisign.[342] As Ms. Willett explained: "[I]f Verisign or any other entity had been shared with me, it would have given my team another direction to pursue and additional questions to ask about, but insomuch [as] it was about control and ownership, we just followed up with NDC about those matters."[343] Thus, after Mr. Rasco indicated that there was no change in the control

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[338] Willett Witness Stmt., Ex. B, C-38.
[339] *Id*.
[340] Afilias' Reply Memorial ¶ 73.
[341] Hearing Tr. at 616:2-616:20.
[342] *Id*.; Willett Witness Stmt. ¶ 20 ("The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought Verisign might be involved with NDC's application and, in fact, did not mention Verisign at all.").
[343] Hearing Tr. at 616:2-616:20 (The full question and answer are as follows: "Q. Sure. So you say, 'The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought VeriSign might be involved with NDC's application,' end of quote. So is there a distinction between the concern that NDC may have gone - - undergone a change of ownership or control from a concern that VeriSign might be involved with NDC's Application? A. I wouldn't say that there was a concern or a distinction. It was more - - it would have been - - if Verisign or any other entity had been shared with me, it would have given my team another direction to pursue and additional questions to ask about, but insomuch it was about control and ownership, we just followed up with NDC about those matters.").

or ownership of NDC, ICANN staff felt comfortable moving forward.[344] Afilias does not argue that Mr. Erwin or Ms. Willett violated the Articles or Bylaws by not pressing Mr. Rasco on matters beyond the scope of the complaints they were investigating. Indeed, Afilias has not even identified any provisions of the Articles or Bylaws that are implicated.

203. Afilias suggested through its questioning at the Hearing that Mr. Rasco's statement in an email to Mr. Nevett that he had "check[ed] with all the powers that be" and confirmed that NDC would not agree to postpone the .WEB auction[345] should have been some type of red flag to ICANN that NDC had undergone a change in ownership or control.[346] But Ms. Willett was not a recipient of this email and did not "recall having this email at that time."[347] Moreover, Ms. Willett explained that, even if she had seen the email during the investigation, she would not have necessarily concluded that it suggested a change in ownership or control of NDC because applicants frequently have advisory boards or other bodies that participate in decisions

[344] Willett Witness Stmt. ¶ 23 ("I informed Mr. Nevett that my team had already investigated the alleged management changes with NDC's representative, and that NDC asserted that no such changes had occurred. I further informed Mr. Nevett that, based on the fact that ICANN had found no evidence of such a management change, ICANN was continuing to proceed with the Auction as scheduled. At no time did Mr. Nevett mention Verisign."); ICANN's Opposition to *Ex Parte* Application for Temporary Restraining Order, Declaration of Christine Willett ¶¶ 15, 19, C-40; ICANN's Response to Amended IRP Request ¶ 35.

[345] Rasco Witness Stmt., Ex. I.

[346] *See* Hearing Tr. at 610:13-16 ("Mr. De Gramont: So, Ms. Willett, just reading Mr. Rasco's email, you can understand why Mr. Nevett had raised a concern about the change of ownership or control in NDC, can't you?"); *see also id*. at 610:24-611:24 (Mr. De Gramont asked: "Well, [Mr. Rasco] says the decision as to whether to participate in an ICANN auction or a private auction, quote, 'goes beyond just us,' unquote. He says that there are now additional Board members beyond those identified in the application. He says that in order to be able to answer whether he can participate in a private auction or in an ICANN auction, he has to check with all of the powers that be. In your view, that doesn't indicate that someone else is – now has an ownership or control interest in NDC?").

[347] *Id*. at 633:18-634:14 ("Again, I don't recall having this email at that time. You asked me the question how could I have had the conversation with Mr. Rasco. But I was having a conversation with Mr. Rasco based on my conversation with Mr. Nevett in Helsinki and based on Mr. LaHatte's general practice and request that I provide him with information that I had. That was the basis of my, again, reaching out to Mr. Rasco."). *See also id*. at 633:13-17 ("Q. And by this time, you had seen Mr. Rasco's email to Mr. Nevett. Do I understand that correctly? A. I may have. Again, I don't - - I don't recall when I specifically saw that email exchange."); *id*. at 638:9-13 (Q. Do you know if you or anyone else at ICANN asked [Mr. Rasco] who the several new Board members were? A. Again, I don't recall having this email in this time frame, so I don't believe that I would have asked him about that.").

without having ownership or control of the entity.[348]

204. After ICANN staff concluded its investigation, Ms. Willett met with Mr. Nevett at an ICANN meeting in Helsinki and informed him that ICANN's investigation had found no evidence of a change in ownership or control of NDC and that ICANN therefore would not be postponing the auction.[349] She also told him that, if he was not satisfied with this conclusion, he could use one of ICANN's Accountability Mechanisms to challenge it.[350] Mr. Nevett did just that and filed a complaint with ICANN's Ombudsman.[351]

205. Resort to the Ombudsman is another important means for members of the ICANN community to have their complaints investigated and resolved.[352] As part of his investigation of Mr. Nevett's complaint, the Ombudsman reached out to Mr. Rasco to ask whether there had been any changes to the ownership or control of NDC or to NDC's Application.[353] Mr. Rasco again confirmed that there had been no changes, writing: "There have been no changes to the [NDC] application. Neither the governance, management nor the ownership in [NDC] has changed."[354] As Ms. Willett testified, the Ombudsman had also reached out to ICANN staff to request any

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[348] *Id*. at 612:2-13 ("A. So I can speak to my – does this raise an issue for me. Since it says that Mr. Rasco was still managing, running the program, managing the application, the fact that he had to check with other individuals, that was sort of common practice amongst applicants. They often had dozens of people on a Board of Directors, maybe a governing Board, an advisory Board. They had all sorts of other executives they would have to check with. So it wouldn't surprise me that an individual like Mr. Rasco would have to check with others.").

[349] *Id*. at 620:9-622:8; Willett Witness Stmt. ¶ 23.

[350] Hearing Tr. at 620:9-622:8; Willett Witness Stmt. ¶ 24 ("During my meeting with Mr. Nevett at the ICANN56 Public Meeting in Helsinki, I suggested to Mr. Nevett that if he was not satisfied with ICANN's course of action he had the option to invoke one of ICANN's accountability mechanisms. Mr. Nevett indicated that he intended to contact ICANN's then Ombudsman, Mr. Chris LaHatte ("Ombudsman") while in Helsinki. He did so. . .").

[351] *Id*.

[352] Bylaws, Art. 5, § 5.2(a) ("The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that ICANN staff, Board or an ICANN constituent body has treated them unfairly." The Ombudsman is to collect all relevant facts, independently investigate the complaint, and resolve the complaint. To do this, among other things, the Ombudsman considered information from Mr. Nevett, Mr. Rasco, and the ICANN staff.).

[353] Willett Witness Stmt., Ex. E.

[354] *Id*.

additional evidence that might inform his investigation.[355] To assist the Ombudsman, Ms. Willett spoke to Mr. Rasco by telephone, and he once again confirmed that there had been no change of control and that the decision to proceed with an ICANN-administered auction had been made by him alone.[356] Ms. Willett emailed the Ombudsman on 9 July 2016 summarizing her conversation with Mr. Rasco.[357]

206. As Ms. Willett testified, it is consistent with the Bylaws and ICANN's common practice for the Ombudsman to gather information from a variety of sources to inform his investigation.[358] The Ombudsman followed this practice in response to the Donuts complaint: he independently and objectively considered the evidence and reached the same conclusion as ICANN's staff, *i.e.*, that there was no credible evidence of a change of ownership or control of NDC and thus no reason to delay the auction.[359] Once the Ombudsman concluded his investigation, ICANN informed the members of the .WEB contention set that the auction would proceed as scheduled in accordance with the Guidebook.[360]

207. Then, prior to the .WEB auction, ICANN's Board Governance Committee

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[355] Hearing Tr. at 629:15-631:7 ("A. Mr. LaHatte had - - in this matter, as in many other matters, had asked me to provide information - - the program team that I might have to help inform his investigation so he could pursue that independent investigation. So he gathered information - - it is a common practice. My understanding is he gathered information from a variety of sources, including asking me to provide information on certain matters."); *id*. at 639:2-19, 780:6-781:16.

[356] *Id*. at 876:4-877:16; *see also id*. at 634:6-14 (". . . You asked me the question how could I have had the conversation with Mr. Rasco. But I was having a conversation with Mr. Rasco based on my conversation with Mr. Nevett in Helsinki and based on Mr. LaHatte's general practice and request that I provide him with information that I had. That was the basis of my, again, reaching out to Mr. Rasco.").

[357] Willett Witness Stmt., Ex. D, C-75; Hearing Tr. at 628:25-631:7.

[358] Hearing Tr. at 628:25-631:7, 634:6-14; *see also id*. at 639:7-16 (". . . [M]y general recollection is that the ombudsman asked me to provide whatever information we had about the matters he was investigating pertaining to new gTLD applicant disputes. So it was a matter of gathering that information, fact-finding where we could to support to provide that information in support of his investigation.").

[359] ICANN's Response to Amended IRP Request ¶ 36; Willett Witness Stmt. ¶ 29 ("On 12 July 2016, the Ombudsman informed me that he had determined there was no reason to postpone the Auction because he found to evidence of a change to the ownership or control of Nu Dotco.").

[360] VRSN-10.

evaluated whether ICANN staff conducted a proper investigation of Donuts' claims in connection with the emergency Reconsideration Request filed by Donuts and another .WEB applicant.[361] The Board Governance Committee found that "ICANN ***did*** diligently investigate the claims regarding potential changes to [NDC's] leadership and/or ownership."[362]

208. In sum, ICANN properly investigated Donuts' pre-auction allegation that there had been a change to the ownership and control of NDC that required an update to NDC's application and postponement of the .WEB auction. ICANN found no evidence of any change to NDC's ownership and control, the Ombudsman reached the same conclusion through his own independent investigation, and the Board Governance Committee came to the same conclusion, as did the Federal District Court, which denied Ruby Glen's application to enjoin the auction.[363] ICANN's investigation was prompt, thorough and complied in every respect with its Articles and Bylaws.

B. Afilias' Post-Auction Investigation Claim Also Lacks Merit.

209. Afilias' separate claim that ICANN violated its Articles and Bylaws in its ***post-auction*** investigation of Afilias' complaints must also be rejected.[364]

210. First, in addition to being time barred, Afilias' Post-Auction Investigation Claim was not properly pled and is therefore outside the Panel's jurisdiction. As explained above in

[361] R-6.

[362] *Id*. at 9 (emphasis in original).

[363] In Ruby Glen's lawsuit to enjoin the auction, the court found, based on ICANN's evidence, including primarily Ms. Willett's declaration, that Ruby Glen was not likely to prevail on the merits of its case. Specifically, the court wrote that: "Based on the strength of ICANN's evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims." *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers*, No. CV 16-5505 PA (ASX), 2016 WL 10834083, at *3 (C.D. Cal. July 26, 2016), RLA-66.

[364] Afilias' Reply Memorial ¶¶ 8, 102.

paragraphs 18-22, the Panel has jurisdiction only over the claims pled in the Amended IRP Request, *i.e.*, the "Claim" as defined by Section 4.3(d) of the Bylaws. The Amended IRP Request asserted a claim that ICANN violated its Bylaws in connection with its pre-auction investigation of allegations concerning changes to NDC's ownership and control. The contention in Afilias' later submissions that ICANN violated its Bylaws in its post-auction investigation is a fundamentally different claim arising from a different investigation of different allegations occurring at a different time. That claim is not fairly encompassed by, or presented in, the Amended IRP Request and therefore is outside the Panel's jurisdiction.

211. Second, Afilias' belated contention – raised for the first time in its Reply Memorial – that ICANN's post-auction investigation was "biased and inadequate"[365] lacks merit and is internally contradictory. As an initial matter, the Hearing testimony confirmed that ICANN was not aware of Verisign's involvement in the .WEB auction until Verisign issued a press release, on 1 August 2016.[366] Afilias' suggestion that Ms. Willett knew of Verisign's involvement a day earlier when Mr. Rasco informed her that Verisign was going to issue a press release regarding .WEB was undermined by Ms. Willett's testimony that she did not know what the press release was going to say and that she thought the release could have related to a post-delegation transaction.[367] And Ms. Willett's testimony dispelled the unsupported claim made by NDC's counsel that when Ms. Willett congratulated Mr. Rasco on winning the auction she was somehow indicating that she knew and approved of Verisign's funding of NDC's bids.[368] Ms. Willett, like all others at ICANN, learned of Verisign's involvement only when Verisign issued

[365] *Id*. ¶ 8.
[366] Hearing Tr. at 673:18-675:10 (Willett); *id*. at 873:3-9 (Rasco); *id*. at 1252:8-20 (Livesay).
[367] *Id*. at 672:10-21 (Willett).
[368] *Id*. at 673:18-675:10 (Willett).

its press release, on 1 August 2016.[369]

212. Once that happened, Donuts initiated a CEP on 2 August 2016, and Afilias contacted ICANN on 8 August 2016 to allege for the first time that NDC violated the Guidebook through its arrangement with Verisign.[370] ICANN, through its counsel, promptly reached out to Verisign to request a copy of the DAA and other information relevant to Ruby Glen's and Afilias' complaints.[371] In response, Verisign sent ICANN's counsel a letter dated 23 August 2016 responding to Ruby Glen's and Afilias' allegations, as well as providing a copy of the DAA, the 26 July 2016 letter agreement between Verisign and NDC, and documents supporting Verisign's contention that Afilias violated the auction Blackout Period.[372] Despite Afilias' arguments to the contrary, nothing about this communication from ICANN's counsel to Verisign's counsel was "sinister."[373] Instead, ICANN was, through its counsel, collecting evidence it knew was in Verisign's control that was relevant to complaints that had been raised.

213. ICANN then wrote to Afilias, Ruby Glen, NDC, and Verisign inviting them to answer a questionnaire designed to give each an opportunity to fully set out their allegations and positions.[374] The questionnaire was used as a tool to gather information to assist ICANN in evaluating the parties' respective positions.[375] Afilias, NDC, and Verisign each accepted ICANN's invitation (Ruby Glen did not), providing a total of 59 single-spaced pages of

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[369] *Id*. (Willett).
[370] C-49.
[371] R-29, at 20:9-15.
[372] R-18.
[373] Hearing Tr. at 53:10 (Afilias' Opening Statement).
[374] C-50.
[375] Hearing Tr. at 695:10-696:20 (Willett) (Responding to a question about what it meant that the responses to the questionnaire would facilitate an "informed resolution" of the questions raised, Willett testified: "So asking questions to gather information, to resolve the questions raised. So there was the Ruby Glen CEP. There was the Afilias request to the ombudsman. So we were endeavoring to gather information.").

analysis.[376] Although Afilias asserts that ICANN's investigation was "biased and inadequate,"[377] Afilias does not identify any additional information that ICANN should have gathered.

214. Afilias also claims that the questionnaire itself was biased because ICANN had a copy of the DAA and used it to draft questions designed to elicit answers that would not only help Verisign's cause, but also protect ICANN from the type of concerns raised by Afilias in its letters.[378] Afilias alleges that Verisign and NDC purportedly knew "the substantive motivations behind the questions" and, Afilias did not, when they responded to the questionnaire .[379] Afilias argues that ICANN should have informed Afilias that it had the DAA and, because it did not, somehow "the deck was stacked" against Afilias.[380]

215. The problem with Afilias' rhetoric is that Afilias did not present a shred of evidence to demonstrate that ICANN was "favoring" Verisign or had somehow drafted a set of questions that were designed to "protect" Verisign (in some fashion that is completely unclear). Thus, Afilias does not explain why the fact that ICANN did not advise Afilias that it had obtained the DAA "stacked" the deck or how giving Afilias this information would have changed Afilias' responses. Nor does Afilias explain how sending the questions – some of which reflected the exact allegations Afilias and Ruby Glen had been making – amounted to a "cover-up." Significantly, Afilias ignores the fact that Verisign provided the DAA to ICANN on the express condition that it was confidential business information that could ***not*** be disclosed by

[376] C-51 (Afilias response); C-109 (Verisign response); C-110 (NDC response).
[377] Afilias' Reply Memorial ¶ 8.
[378] *Id*. at ¶¶ 113-115.
[379] *Id*. ¶ 113.
[380] *Id*.

ICANN.[381] ICANN properly respected this condition while considering the substance of the DAA in crafting the questions that it put to Afilias, Ruby Glen, NDC and Verisign.

216. Afilias' contention in its Reply Memorial that the manner in which ICANN investigated Afilias' allegations violated the Articles and Bylaws is also internally contradictory. On the one hand, Afilias claims that ICANN did not adequately investigate its claims.[382] On the other hand, Afilias asserts that "[b]y August 2016, ICANN had all the information it needed to determine that NDC's application and bid had to be disqualified."[383] Afilias cannot plausibly contend that ICANN did not gather sufficient facts to make a determination on the DAA, while simultaneously arguing that ICANN had all the facts that it needed to make that determination.

217. Finally, Afilias requests no relief in connection with this issue. No further investigation is possible, and Afilias' own allegations establish that none is warranted. And, as mentioned, Afilias has not identified any Article or Bylaws provision that was allegedly violated by the manner in which ICANN conducted its post-auction investigation.

VII. AFILIAS' RULE 7 CLAIM MUST BE REJECTED.

218. The Panel's Question No. 9 asked Afilias "to clarify what is left to be decided in connection with the Claimant's Rule 7 claim given the disposition of those issues in the Decision on Phase I and the conduct of the IRP in accordance with that ruling." The Panel also asked Afilias "to identify the source of its alleged entitlement to a cost award for the expenditure of effort because of VeriSign and NDC's participation in the IRP, on account of the alleged 'wrongful' adoption of Rule 7."

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[381] C-102 ("CONFIDENTIAL BUSINESS INFORMATION: DO NOT DISCLOSE"). When information is provided to ICANN on a confidential basis, it is crucial that ICANN respect and maintain its confidentiality. ICANN Documentary Information Disclosure Policy, R-41. Any other approach would discourage individuals and companies from communicating openly with ICANN.
[382] Afilias' Reply Memorial ¶ 8.
[383] *Id*. ¶ 16

219. With regard to the latter issue, as shown above (*supra* Sec. I.B) and below (*infra* Sec. VIII), the Panel's remedial authority is defined by Section 4.3(o) of the Bylaws and its authority to shift costs is defined by Section 4.3(r). Under those provisions, the Panel has no power to grant a monetary award, and it can shift costs only on finding that the Claim or defense is frivolous or abusive. Accordingly, there is no valid basis for Afilias' request for an order shifting costs on the grounds of Rule 7's alleged wrongful adoption.

220. With regard to the former issue, the only part of Afilias' Rule 7 claim that survived the Panel's Decision on Phase I consists of the contention that ICANN staff (specifically ICANN's Samantha Eisner) knowingly assisted Verisign in "exploit[ing] its leadership position on the IOT to secure an absolute right to participate in this IRP."[384] The Panel concluded in its Phase I Decision that the remainder of Afilias' claim, which impugned the actions of the IOT, fell outside the Panel's jurisdiction.[385]

221. It is not clear whether Afilias continues to press its Rule 7 claim. Afilias stated at the 4 March 2020 Case Management Conference that it was continuing to maintain its Rule 7 claim as "a vehicle for us to present evidence on the relationship between ICANN and VeriSign."[386] The testimony at the Hearing certainly did not provide evidence of any inappropriate relationship between ICANN and Verisign.

222. In any event, Afilias' Rule 7 claim is meritless. There is no evidence supporting Afilias' contentions that anyone within ICANN knowingly assisted Verisign in exploiting its leadership position on the IOT to secure a right to participate as *amicus* (or otherwise) in this IRP. On the contrary, the evidence contradicts Afilias' claim.

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[384] Decision on Phase I ¶ 132 (citing Amended IRP Request ¶ 84).
[385] *Id*. ¶¶ 111-133.
[386] Case Management Conference Tr. (4 March 2020) at 11.

223. The fundamental predicate of Afilias' claim is that revisions made in October 2018 to the draft Rule 7 were engineered by Verisign to give itself the right to participate in this IRP. However, Verisign already would have had a right to participate as an *amicus* under the draft Interim Supplementary Procedures regardless of any of the changes at issue.

224. The draft Interim Supplementary Procedures circulated at the end of September 2018 stated that "[a]ny person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL[.]"[387] The Procedures Officer had discretion to determine whether a proposed *amicus* had a material interest relevant to the dispute.[388] If the Procedures Officer found that a proposed *amicus* had such an interest, the Procedures Officer had no discretion to disallow participation.[389] Verisign clearly has a material interest relevant to this IRP, and therefore would have had a right to participate as an *amicus* pursuant to the September 2018 version of Rule 7.

225. On 11 October 2018, David McAuley – the Chair of the IOT and a Senior International Policy & Business Development Manager for Verisign – proposed amending the ***intervention*** section of Rule 7 to allow any person that "claims a significant interest" in the IRP to intervene as a Claimant.[390] ICANN ***rejected*** those proposed changes: at a meeting of the IOT later that day, Ms. Eisner opposed Mr. McAuley's amendments on the basis that they conflicted with standing requirements imposed by the Bylaws that require a Claimant to have suffered an

[387] C-256; *see also* Hearing Tr. at 437:6-16.
[388] *Id*. ("If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she ***shall*** allow participation by the *amicus curiae*.") (Emphasis added).
[389] *Id.*
[390] C-258; C-259.

injury as a result of the alleged violation at issue in an IRP.[391] Ms. Eisner also objected that the standard proposed by Mr. McAuley was unduly vague and would allow a party to confer standing on itself simply by claiming a significant interest, regardless of whether it actually had any such interest.[392]

226. At that same IOT meeting, Malcolm Hutty – a member of the IOT not associated with any party or the *Amici* in this IRP – suggested that the Interim Supplementary Procedures should specify categories of persons, groups, or entities entitled as a matter of right to participate as *amicus curiae*.[393] Following that meeting, Ms. Eisner drafted proposed revisions to Rule 7 to implement Mr. Hutty's proposal. Ms. Eisner circulated her revisions on 16 October 2018. Those revisions added two categories of persons who would be deemed to have a material interest entitling them to participate as *amici*: (a) in an IRP relating to an application arising out of ICANN's New gTLD Program, a person that was part of the contention set for the string at issue; and (b) a person external to the Dispute whose actions are "significantly refer[red] to in the briefings before the IRP Panel."[394]

227. These revisions did not expand the scope of *amicus* participation. Entities that participated in a contention set at issue in an IRP or whose actions were significantly at issue invariably would have a material interest related to the IRP entitling them to participate under the September 2018 version of Rule 7. By deeming such entities to have a material interest, the 16 October 2018 revisions sought merely to eliminate the unnecessary procedural step of requiring

[391] Transcript of 11 October 2018 IRP-IOT meeting, at 12-13, https://community.icann.org/display/IRPIOTI/IOT+Meeting+%2343+%7C+11+October+2018+@+19%3A00+UTC?preview=/95094963/96210667/ICANN-10112018-FINAL-en_IOT.pdf.; see also Bylaws, Art. 4, Sec. 4.3(b)(i).
[392] E-mail from S. Eisner to D. McAuley, B. Turcotte and L. Le dated 12 October 2018.
[393] Eisner Decl. ¶ 5.
[394] *Id*., Ex. 2.

the Procedures Officer to grant an application for leave to participate in circumstances where a proposed *amici* clearly satisfied the material interest requirement.[395] Thus, the October 2018 revisions to Rule 7 did not create a right for Verisign to participate as *amicus curiae* in this IRP.

228. The evidence also shows that neither Ms. Eisner nor Mr. McAuley were aware at the time of the October 2018 revisions that Afilias intended to initiate an IRP, much less that the changes were made for the purpose of securing Verisign's right to participate in such an IRP. Ms. Eisner testified in her witness statement that she was not aware of Afilias' draft IRP Request when she proposed revisions to Rule 7.[396] Ms. Eisner confirmed this at the Hearing.[397] Ms. Eisner further testified that she does not recall being aware that Afilias had initiated a CEP[398] and had no information regarding the progress or status of the CEP.[399] Ms. Eisner was working to finalize a set of Interim Supplementary Procedures for approval by the Board so that a coherent process would be in place in case any IRP was filed.[400] Her sense of urgency had to do with completing her work and had nothing to do with Afilias' planned IRP.[401] The IRP procedures that were in place prior to that time had been developed under a version of the Bylaws that had been significantly revised and superseded two years earlier.[402] As a result, the operative IRP procedures did not harmonize with the new Bylaws, which could have caused problems if an IRP were to be filed before revised procedures were in place.

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[395] Hearing Tr. at 460:9-13 (Eisner) ("And we had already started using that tool of identifying if there was anyone who might come in as of right – as a matter of reducing the level of briefing and streamlining the IRP proceedings."); *id*. at 473:10-14 ("I was thinking about how this could present and what would make sense in terms of allowing an IRP to move forward and not get bogged down in briefing . . .").
[396] Eisner Decl. ¶ 7.
[397] Hearing Tr. at 414:24-415:6, 415:24-416:2.
[398] *Id*. at 411:13-19.
[399] *Id*. at 414:24-415:6, 456:13-19.
[400] *Id*. at 449:18-450:25, 453:1-25.
[401] *Id*.
[402] *Id*.

229. Mr. McAuley states in his declaration that in October 2018 he "was not aware that Afilias had filed a Cooperative Engagement Process ("CEP") on any subject, including with respect to the .web gTLD."[403] Mr. McAuley confirmed this in response to cross-examination at the Hearing.[404] Mr. McAuley also testified that he was not aware that NDC had applied for .WEB or that Verisign had an interest in NDC's application through the DAA.[405] He further testified that "[n]one of my proposed edits or comments in the Interim Supplementary Procedures were made because of a CEP or IRP by Afilias with respect to .web."[406]

230. Ms. Eisner and Mr. McAuley testified that the two categories of entities deemed to have a material interest that were added in October 2018 were drafted by Ms. Eisner alone, with no input from Mr. McAuley.[407] Ms. Eisner and Mr. McAuley were both forthcoming and credible witnesses, and Afilias did not attempt to challenge their testimony on this issue. Afilias suggested at the Hearing that Ms. Eisner and Mr. McAuley may have had a telephone conversation on 15 October 2018, before Ms. Eisner circulated her draft revisions to Rule 7 the next day. Neither Ms. Eisner nor Mr. McAuley recalled such a conversation.[408] But even if

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[403] McAuley Decl. ¶ 32.

[404] Hearing Tr. at 1093:17-25 ("**Q.** Were you aware in October 2018 that Afilias had filed a CEP with ICANN? **A.** I believe that I was not. I don't – I don't pay attention to CEP. I don't pay attention to IRP, really. **Q.** And in October of 2018, were you aware that Afilias had threatened to file an IRP against ICANN with respect to .WEB? **A.** I was not.").

[405] *Id*. at 1067:23-1068:13.

[406] McAuley Decl. ¶ 32.

[407] Eisner Decl. ¶ 6 ("I understand that Afilias Domains No. 3 Ltd. ("Afilias") has suggested in letters to the ICDR and the ICANN Board dated 8 December 2018 and 21 December 2018 (respectively) that the provisions of Rule 7 stating that a member of the contention set for a new gTLD that is the subject of an IRP and/or a person, group, or entity whose actions are significantly referred to in the IRP briefing have material interests sufficient to participate as amici were added by David McAuley in response to a draft IRP Request that Afilias provided to ICANN's in-house counsel on 10 October 2018 in conjunction with the confidential Cooperative Engagement Process. That is incorrect. Those Rule 7 provisions were drafted by me; and I was not aware of Afilias' draft IRP Request when I drafted them and proposed them to the IRP-IOT."); McAuley Decl. ¶ 26 ("This language was developed by Ms. Eisner alone. I never suggested to Ms. Eisner that she should add these two categories of persons who would be deemed to have a material interest for purposes of *amicus* participation.").

[408] Neither Ms. Eisner nor Mr. McAuley had any recollection of such a conversion. *See* Hearing Tr. at 511:4-512:16 (Eisner), *id*. at 1080:8-19 (McAuley).

some sort of conversation had occurred, that would not belie Ms. Eisner's and Mr. McAuley's testimony that the two categories deemed to have a material interest were drafted by Ms. Eisner alone, without input from Mr. McAuley.

231. In sum, the evidence unequivocally contradicts Afilias' claim that Mr. McAuley exploited his position as chair of the IOT to ensure Verisign's right to participate in this IRP, or that Ms. Eisner somehow knowingly assisted such conduct. Therefore, what little remains of Afilias' Rule 7 claim must be rejected.

VIII. COSTS.

232. The Bylaws and Interim Supplementary Procedures authorize the Panel to shift costs only on a finding that, when viewed in its entirety, a Party's case is frivolous or abusive. While this is an uncommonly high standard for international arbitration, it is more permissive than the "American Rule" under which legal fees ordinarily cannot be shifted to the non-prevailing party. Although ICANN contends that Afilias has deployed certain tactics and arguments that may well be frivolous or abusive, ICANN does not view the whole of Afilias' case as frivolous or abusive. Nor can Afilias plausibly argue that ICANN's case has been frivolous or abusive. Even if Afilias prevails on parts of its Claim (and it should not, for the reasons stated above), many of Afilias' individual causes of action, and nearly all of its requests for relief, must be rejected as clearly beyond the Panel's authority. Accordingly, the Panel's cost shifting power is not triggered.

233. Specifically, Section 4.3(r) of the Bylaws provides that (1) "ICANN shall bear all the administrative costs of maintaining the IRP mechanisms, including compensation of Standing Panel members" and (2) "each party to an IRP proceeding shall bear its own legal expenses;" but (3) 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."[409] Rule 15 of the Interim Supplementary Procedures contains substantially identical provisions.[410]

234. Pursuant to Section 4.3(r) of the Bylaws and Rule 15 of the Interim Supplementary Procedures, ICANN agreed to bear all administrative costs of maintaining this IRP, including the fees and expenses of the Panelists and the ICDR (with the exception of the initial filing fee), and the parties have borne their own legal expenses.

235. Section 4.3(r) allows the Panel to re-allocate fees and costs only if it "identifies the losing party's Claim or defense as frivolous or abusive." "Claim" is a defined term: it means the "written statement of a Dispute" that initiates the IRP.[411] Thus, administrative costs and legal expenses may be shifted onto the Claimant only when the Request for IRP as a whole is frivolous and abusive; they cannot be shifted where only particular aspects of the Request for IRP are frivolous and abusive. It follows that the same standard applies to the Panel's authority to shift legal expenses onto ICANN, the Respondent. This is reinforced by the fact that Section 4.3(r) requires a finding that "***the*** . . . Claim or defense [is] frivolous or abusive." (Emphasis added.) It is not sufficient to find that a particular cause of action or defense is frivolous or

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[409] Bylaws, Art. 4, § 4.3(r).

[410] Article 34 of the ICDR Rules states that "the Tribunal may allocate costs among the parties if it determines that allocation is reasonable." This provision of Article 34 directly conflicts with Section 4.3(r) of the Bylaws and Rule 15 of the Interim Supplementary Procedures and is therefore superseded pursuant to Rule 2 of the Interim Supplementary Procedures and Article 1(1) of the ICDR Rules.

[410] Rule 15 states:

> "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."

[411] Bylaws, Art. 4, § 4.3(d).

abusive. That the Panel may shift costs only where the Claim or defense as a whole is frivolous or abusive is also consistent with the overall structure of Rule 4.3(r), which establishes a default rule that each party "shall bear" its own legal expenses and then a narrow carve-out permitting fee-shifting in only the most exceptional cases.

236. The Bylaws do not define "frivolous or abusive," but those terms have a well-established meaning under California law. Section 128.5 of the California Code of Civil Procedure, which deals with fee shifting for improper litigation tactics, defines "frivolous" as "totally and completely without merit or for the sole purpose of harassing an opposing party."[412] This is an objective standard that is met only when "[a]ny reasonable attorney would agree" that the Claim or defense "is totally and completely without merit."[413] Although Section 128.5 does not use the term "abusive," it imposes the analogous requirement that litigation tactics must be found to have been "in bad faith" before fees can be shifted. This standard requires "a showing of an improper purpose, *i.e.,* subjective bad faith on the part of the attorney or party to be sanctioned."[414]

237. Afilias has employed abusive tactics in this IRP from time to time and has taken positions that clearly have no merit. For example, Afilias sought to have Rule 7 invalidated in a baseless and staggeringly inequitable attempt to preclude NDC and Verisign from being heard even though their conduct and rights are directly at issue. That effort led directly to the bifurcation of these proceedings, which substantially increased this IRP's length and cost. After the Panel rejected the principal basis for Afilias' Rule 7 cause of action in Phase I—finding that it improperly sought to challenge conduct of the IOT, which is outside the Panel's jurisdiction—

[412] Cal. Civ. Proc. Code § 128.5(b)(2), RLA-71.
[413] *In re Marriage of Reese & Guy*, 73 Cal. App. 4th 1214, 1220-21 (1999), RLA-52.
[414] *Id*. at 1221.

Afilias continued to press the remainder of its Rule 7 cause of action for an abusive and improper purpose. Indeed, Afilias admitted as much at the 4 March 2020 Case Management Conference, stating that it was persisting in litigating the remaining rump of that cause of action for the purpose of digging for prejudicial and otherwise inadmissible evidence to be used to support its other contentions. (*Supra* at ¶ 221). Afilias has also asserted certain allegations and requests for relief that would be understood by any reasonable attorney to be without merit, such as Requests for Relief Nos. 2, 3, 4, 5 and 7, which are unquestionably beyond the authority of the Panel to grant. And Afilias' competition cause of action directly contradicts not only the outcome of a year-long DOJ investigation, but also its own prior statement that "[n]either ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators."[415]

238. Nevertheless, ICANN does not view Afilias' Claim as a whole to be frivolous or abusive. Accordingly, in recognition of the standard established by Section 4.3(r) of the Bylaws, ICANN does not contend that Afilias' Claim triggers the Panel's authority to allocate administrative costs and legal expenses in ICANN's favor, and ICANN therefore does not seek an award of such costs.

239. Nor can Afilias plausibly argue that ICANN's defense triggers the Panel's authority to allocate legal expenses in Afilias' favor.[416] ICANN prevailed in Phase I on the lion's share of Afilias' Rule 7 cause of action and, as shown above (Sec. VII), ICANN must prevail in Phase II on the remainder of that cause of action. ICANN also must prevail in its defense to Afilias' Requests for Relief Nos. 2, 3, 4, 5 and 7, which are clearly outside the Panel's jurisdiction; its defense to the competition cause of action, which Afilias has essentially

[415] Amended IRP Request ¶ 8.

[416] As noted above, ICANN has borne all administrative costs of maintaining the IRP mechanisms. Therefore, any possible re-allocation of such costs could only be in ICANN's favor, not Afilias' favor.

abandoned; and its defenses to Afilias' Pre- and Post-Auction Investigation Claims and Afilias' contention that ICANN violated the Bylaws by not disqualifying NDC's .WEB application in August 2016, which are unequivocally barred by the repose and limitations periods established by Rule 4 of the Interim Supplementary Procedure. In short, even if Afilias prevails on some narrow aspect of its case, the great bulk of Afilias' allegations, causes of action and requests for relief can be readily rejected.

240. For these reasons, the Panel's cost-shifting authority under Section 4.3(r) of the Bylaws and Rule 15 of the Interim Supplementary Procedures has not been triggered, and the parties therefore must bear their own legal expenses. Likewise, ICANN will continue to honor its responsibility to bear the administrative costs of maintaining the IRP mechanism, including the Panel's fees.

CONCLUSION

241. In sum, ICANN has acted consistent with its Articles and Bylaws in overseeing and dealing with the numerous disputes over .WEB and the .WEB auction. ICANN, therefore, respectfully requests that the Panel deny each of Afilias' causes of action and all of its requested relief.

Respectfully submitted,
JONES DAY

Dated: October 12, 2020

By: */s/ Jeffrey A. LeVee*
Jeffrey A. LeVee

Counsel for Respondent ICANN