

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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. _____

**REQUEST BY AFILIAS DOMAINS NO. 3 LIMITED
FOR INDEPENDENT REVIEW**

14 November 2018

Arif H. Ali
Alexandre de Gramont
Ethan E. Litwin
Rose Marie Wong
Jennifer Cilingin

DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
ethan.litwin@dechert.com
rosey.wong@dechert.com
jenn.cilingin@dechert.com

Counsel for Claimant

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1. Afilias Domains No. 3 Limited (“**Afilias**”) submits this Request for Independent Review (“**Request**”) pursuant to Article 4, Section 4.3 of the “**Bylaws**”¹ of the Internet Corporation for Assigned Names and Numbers (“**ICANN**”),² the International Arbitration Rules of the International Centre for Dispute Resolution, and ICANN’s Interim Supplementary Procedures for Independent Review Process. Afilias has suffered direct harm as a result of ICANN’s breaches of its Articles of Incorporation³ (“**Articles**”) and Bylaws.⁴

2. This Independent Review Process (“**IRP**”) arises out of ICANN’s breaches of its Bylaws and Articles as a result of the ICANN Board’s and staff’s failure to faithfully enforce the rules for, and underlying policies of, ICANN’s New Generic Top-Level Domain (“**gTLD**”) Program, including the rules, procedures, and policies set out in the New gTLD Applicant Guidebook⁵ (“**AGB**”) and the Auction Rules for New gTLDs: Indirect Contentions Edition⁶ (“**Auction Rules**”) (collectively the “**New gTLD Program Rules**” or “**Rules**”).⁷

3. As discussed in further detail below, Afilias was one of seven entities that submitted an application for the .WEB gTLD registry pursuant to the rules and procedures set forth in the AGB.⁸ Under the New gTLD Program Rules, unless resolved privately amongst the various applicants, ICANN “breaks the tie” and determines the winning applicant via an ICANN-administered auction. In advance of the ICANN-administered auction for .WEB (the “**.WEB Auction**”), a special purpose vehicle called NU DOT CO LLC (“**NDC**”) entered into an undisclosed agreement with VeriSign Inc. (“**VeriSign**”), which allowed VeriSign to secretly participate in the .WEB Auction, and NDC to present the winning bid using VeriSign’s funds; Afilias presented the second-highest bid. VeriSign—the dominant registry thanks to its historic control over the .COM and .NET registries—had not submitted an application for the .WEB gTLD and its intention to acquire .WEB had not been subjected to the various levels of review,

evaluation, and examination provided for by the AGB. Accordingly, VeriSign was not eligible to participate in the .WEB Auction. By effectively selling, assigning, and/or otherwise transferring rights or obligations in connection with its application to VeriSign, NDC violated the New gTLD Program Rules by failing to notify ICANN of these material changes in its application. But, despite NDC's clear violations of the Rules, ICANN has refused to disqualify NDC's application for the .WEB gTLD registry or to otherwise disqualify the bids NDC submitted in the .WEB Auction. As a result, ICANN has breached the obligation contained in its Bylaws to make decisions by applying its documented policies (*i.e.*, the New gTLD Program Rules) "neutrally, objectively, and fairly." Furthermore, by failing to implement faithfully the New gTLD Program Rules, ICANN is enabling VeriSign to acquire the .WEB gTLD, the next closest competitor to VeriSign's monopoly,⁹ and in so doing has eviscerated one of the central pillars of the New gTLD Program: to introduce and promote competition in the Internet namespace in order to break VeriSign's monopoly.

1. THE PARTIES

1.1 Afilias

4. Afilias Domains No. 3 Limited is organized under the laws of the Republic of Ireland, with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several TLD registries.¹⁰

1.2 ICANN

5. ICANN is a not-for-profit corporation organized under the laws of the State of California. ICANN functions as the global regulator¹¹ of the Internet's addressing system (the "DNS"). Although a private organization in form, ICANN has extraordinary powers and regulatory responsibilities to governments and stakeholders throughout the world.

6. ICANN's Articles stipulate that it must "operate in a manner consistent with these

Articles and its Bylaws for the benefit of the Internet community as a whole[.]”¹² ICANN is required to carry out its activities “in conformity with relevant principles of international law and applicable international conventions and local law,” and “through open and transparent processes that enable competition and open entry in Internet-related markets.”¹³ ICANN must also conduct itself in accordance with the “Core Values” and “Commitments” stated in its Bylaws, which include “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest,”¹⁴ and “[m]ak[ing] decisions by applying documented policies consistently, neutrally, objectively, and fairly”¹⁵ The Bylaws expressly prohibit ICANN from “apply[ing] its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”¹⁶ The Bylaws “are intended to apply in the broadest possible range of circumstances” and “are intended to apply consistently and comprehensively to ICANN’s activities.”¹⁷

2. SUMMARY OF SALIENT FACTS

2.1 History of the New gTLD Program

7. A key driver underlying ICANN’s creation in 1998 was to promote competition in the DNS by introducing new gTLDs and encouraging new registries to compete with VeriSign’s dominant .COM registry.¹⁸ Following two successful test-bed rounds in 2000 and 2003, ICANN began developing the New gTLD Program.

8. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”)¹⁹ commenced a policy development process to determine the principles that should govern the introduction of new gTLD registries to the Internet namespace.²⁰ In its final report, the GNSO emphasized that ICANN’s “evaluation and selection procedure for new gTLD registries should

respect the principles of fairness, transparency and non-discrimination.”²¹ The GNSO further directed that new gTLDs should be introduced “to promote competition in the provision of registry services ... to add to consumer choice, market differentiation and geographical and service-provider diversity.”²² The ICANN Board approved the GNSO’s recommendations in 2008, launching the most comprehensive and ambitious expansion of gTLDs in the DNS’ history.²³ The Board’s Rationales for the Approval of the Launch of the New gTLD Program emphasized that the New gTLD Program “represents ICANN’s continued adherence to its mandate to introduce competition in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved.”²⁴

9. In June 2011, ICANN’s Board of Directors approved the AGB, describing it as “the implementation of [a] Board-approved consensus policy concerning the introduction of new gTLDs.”²⁵ The AGB is a detailed 338-page set of policies, rules, and procedures that provides a “step-by-step procedure for new gTLD applicants.”²⁶ ICANN is required to interpret and enforce the New gTLD Program Rules strictly in accordance with its Bylaws and Articles. The requirement in the Articles and Bylaws that ICANN “carry[] out its activities in conformity with relevant principles of international law”²⁷ requires at a minimum that ICANN interpret and apply the New gTLD Program Rules in good faith.²⁸

2.2 Overview of the AGB Application Process

2.2.1 The Application

10. A central feature of the New gTLD Program Rules is the significant emphasis that they place on the requirement of transparency. The AGB thus requires applicants to answer a series of detailed questions describing their business plan for the proposed gTLD; to demonstrate the requisite financial, technical, and operational capabilities needed to operate a registry; and to provide documentation substantiating the claims made in the application.²⁹ Further, the AGB

requires “applicant[s] (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on [their] behalf)” to provide extensive background information in their applications, including the identity of all persons responsible for managing and operating each applicant.³⁰ Applicants are directed to maintain the accuracy and truthfulness of their applications at all times.³¹ Applications must be amended via submission of a “**change request**” form, which is available on the ICANN website.

11. Again, consistent with the importance placed on transparency, non-confidential sections of each application are published on ICANN’s website. These non-confidential sections, which form the bulk of an application, are sufficient to identify to the public, *inter alia*, the specific entity applying for a given gTLD; the primary individuals at the entity responsible for the application; the names and positions of the directors, officers, and/or partners of the entity; the names and positions of all shareholders holding at least 15% of the entity; the “mission/purpose” of the proposed gTLD; and how the applicant expects the proposed gTLD to “benefit registrants, Internet users, and others.”³²

12. A sixty-day comment period follows the submission of an application, in order to allow the global Internet community a meaningful opportunity to review the applications and submit comments for ICANN’s consideration.³³ The AGB states that “all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications.”³⁴ The comment period is also designed to allow governments to comment on applications in order to satisfy their concern that the proposed gTLD “add to the current space, in terms of competition, differentiation, or innovation.”³⁵

13. These various levels of public and ICANN review are only effective to the extent

that applicants comply with the New gTLD Program Rules and provide complete, accurate, and truthful information, and, further, maintain the completeness, accuracy, and truthfulness of that information at all times. Indeed, as discussed in further detail in **Section 3.1** below, the AGB requires applicants to warrant that “the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects,”³⁶ and “to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.”³⁷ The specified penalty for failing to disclose all required information, or otherwise failing to correct any misrepresentations or false information, including omissions of material information, is disqualification³⁸ or rejection of the application.³⁹

14. Applicants that pass the evaluation and objections process proceed to execute registry agreements with ICANN. In this regard, *inter alia*, applicants are invited to confirm that they will “operate the registry for the TLD in compliance with all commitments, statements of intent and business plans stated in the ... Registry Operator’s application to ICANN for the TLD, which commitments, statements of intent and business plans are hereby incorporated by reference”⁴⁰ in its “**Registry Agreement**” with ICANN.

15. The AGB strictly prohibits applicants from reselling, assigning, or transferring “any of applicant’s rights or obligations in connection with the application.”⁴¹

2.2.2 Multiple Applicants and Contention Set Resolution

16. Where multiple applicants seeking the same gTLD are approved, as was the case with .WEB,⁴² all “**Qualified Applicants**” are placed into a “**contention set**” for resolution.⁴³

17. The AGB “encourage[s]” contention set members to negotiate and resolve their competing claims without the need for ICANN’s intervention,⁴⁴ such as through joint ventures or

royalty or revenue sharing agreements.⁴⁵ Alternatively, contention set members can resolve their competing claims by an auction administered by the contention set, provided that all members agree to do so. The vast majority of contention sets have been resolved through such “**private auctions.**”⁴⁶

18. If a contention set is not resolved by an ICANN-set deadline, the AGB provides for the “tie-breaking mechanism” of an ICANN-administered auction of last resort.⁴⁷ The ICANN Board justified resolution via auction on the basis that an auction “is an objective test; other means are subjective and might give unfair results, are unpredictable, and might be subject to abuses.”⁴⁸ Further, according to the Board, resolution via auction “provide[s] objectivity and transparency: ‘Auctions rely on relatively simple and transparent rules that apply to all participants. As such they are fair and transparent.’”⁴⁹ In selecting an auction mechanism, ICANN sought to avoid scenarios where winners “flipped” or “resold” the acquired gTLD to “larger entities at substantial profit without ever delivering service to a single customer.”⁵⁰ For this reason, ICANN stressed that it “intend[ed] to use auctions in the new gTLD process as a tie-breaking mechanism ... for the resolution of string contention **among competing new gTLD applicants** for identical or similar strings.”⁵¹ The Rules thus made it clear that the ICANN-administered auction was not open for all comers, but only for the competing approved applicants for the same new gTLD.

19. A detailed set of rules govern the ICANN-administered auction, which provides that only Qualified Applicants or their “**Designated Bidders**” may participate in the auction.⁵² Consistent with the transparency requirement, the Auction Rules require disclosure of the Designated Bidder’s identity. The winning bidder is required to execute a registry agreement with ICANN for the gTLD. If the winner defaults, the rules provide that “the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exit

bids.”⁵³

20. For financial reasons, applicants have generally preferred to resolve contention sets short of an ICANN-administered auction,⁵⁴ as the losing bidders in a private auction divide the proceeds paid by the winner amongst themselves.⁵⁵ By contrast, in an ICANN-administered auction, the auction proceeds are paid in full to ICANN and the losing bidders receive nothing.⁵⁶

2.3 The .WEB Contention Set

21. The .WEB gTLD is one of the—if not the—crown jewels of the New gTLD Program.⁵⁷ It is a unique gTLD due to properties inherent in its name and is widely viewed as the one potential new gTLD with a sufficiently broad and global appeal to compete with VeriSign’s monopoly.⁵⁸ Some of the largest players in the domain name business applied for .WEB.

22. ICANN ultimately included seven applicants in the .WEB contention set: Afilias; Google, Inc. (through Charleston Road Registry Inc.); Donuts, Inc. (“**Donuts**”) (through Ruby Glen, LLC (“**Ruby Glen**”)); Radix FZC (through DotWeb Inc.); InterNetX GmbH (Schlund Technologies GmbH); Web.com Group, Inc.; and NDC.⁵⁹

23. NDC is a small player in the registry space that was established as a special purpose vehicle to acquire gTLDs in the New gTLD Program. NDC also applied for twelve other gTLDs, losing every auction it entered other than the .WEB Auction. NDC’s application does not identify or include any information about VeriSign. To the contrary, NDC represented that NDC itself would aggressively market .WEB as an alternative to .COM in order to increase competition and fight “congestion” in a market for “commercial TLD names [that] fundamentally advantages older incumbent players,” and that it would be utilizing a VeriSign competitor to provide the necessary technology to operate the .WEB registry.⁶⁰

24. ICANN set 27 July 2016 as the date for the ICANN-administered auction for .WEB

if the contention set was not voluntarily resolved by that date.⁶¹ By mid-May 2016 all of the contention set members had apparently agreed to participate in a private auction.⁶² However, days before the private auction was to take place, NDC pulled out, despite having repeatedly signaled to the other contention set members that it was “in” on resolving the contention set via private auction.⁶³ Today, it is clear that NDC withdrew from the private auction because of the agreement that it had with VeriSign. At the time, however, NDC’s about-turn was perplexing, especially as NDC stood to make a handsome profit from the private auction proceeds, which were expected to (and did) shatter all previous records.⁶⁴

25. The day following NDC’s withdrawal from the private auction, Afilias’ John Kane contacted Jose Ignacio Rasco III, who is one of NDC’s three founders, one of its three managers, its CFO, and the primary contact identified in its .WEB application, to ascertain why NDC had withdrawn.⁶⁵ As Kane summarized in an email shortly thereafter, Rasco informed him that his “board [had] instructed [him] to skip [the private auction] and proceed to [the] ICANN [auction].”⁶⁶ Other contention set members received similar responses from Rasco. For example, Rasco informed Ruby Glen:

The three of us are still technically the managers of the LLC, but the decision goes beyond just us.... I’m still running our program and Juan sits on the board with me and several others. Based on your requests, I went back to check with all the powers that be and there was no change in the response....⁶⁷

26. Based on Rasco’s reply, Ruby Glen complained to ICANN that “there have been changes to [NDC’s] Board of Directors and potential control of [NDC]” and that, by failing to amend its application, NDC had violated the AGB.⁶⁸ Market rumors at the time suggested that NDC was secretly being backed by either VeriSign or NDC’s designated back-end registry services provider, Neustar Inc.⁶⁹ Ruby Glen therefore argued that NDC now had an “unfair competitive advantage” and asked ICANN to postpone the .WEB auction until ICANN could fully

investigate whether NDC had breached its obligations under the AGB.⁷⁰

27. ICANN thereupon undertook to investigate this issue, writing to NDC's Rasco:⁷¹

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 changes that occur as part of regular business operations (e.g., changes to officers or directors, application contacts).⁷²

Rasco's response was carefully crafted and answered only part of ICANN's inquiry: "I can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN."⁷³ Notably missing was a response to ICANN's request that NDC "confirm that there have not been changes to your application ... that need to be reported to ICANN."⁷⁴

28. On 8 July 2016, ICANN's Christine Willett (Vice President, gTLD Operations, Global Domains Division) asked Rasco to call her on her cell phone.⁷⁵ Rasco thereafter sent Willett an email purportedly confirming the content of their conversation, in which he stated that, as an LLC, NDC had members and managers, not a board of directors, and that neither the members nor the managers of NDC had changed since NDC's application was submitted in 2012.⁷⁶ However, as noted above, Rasco had told other members of the contention set that his "board" had instructed him to skip the private auction and proceed to the ICANN auction. There is nothing indicating that any part of the Willett-Rasco discussion even remotely touched upon the prevailing rumors that NDC had entered (or perhaps soon would be entering) in to an agreement to assign .WEB to VeriSign. Confidential Information Redacted

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29. Willett then wrote to the contention set on 13 July 2016, stating that ICANN intended to proceed with the .WEB Auction, as scheduled, on Wednesday 27 July 2016.⁷⁸ She stated: "in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request or postpone this auction."⁷⁹

ICANN's decision to proceed with the .WEB Auction as scheduled guaranteed that ICANN would receive the multi-million dollar proceeds of the auction. Confidential Information Redacted

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30. At the .WEB Auction, most of the contention set members dropped out early, with only four bidders surviving until the USD 71.9 million mark. Thereafter, only Afilias and one other bidder continued to bid. Due to its financing arrangements, Afilias was able to bid up to USD 135 million, which was more than four times higher than the record bid in any previous ICANN auction and more than double what its valuations and market research indicated was the value of the .WEB gTLD.⁸¹ Ultimately, as the bidding progressed, Afilias reached its bidding cap.⁸² ICANN then announced that NDC had won the auction.

2.4 VeriSign's Secret Agreement with NDC

31. When the New gTLD Program application window opened in 2012, VeriSign applied only for non-Latin character versions of .COM and .NET, as well as two gTLDs associated with its trademarks. Had it also applied for other gTLDs (and, especially, .WEB), VeriSign would have faced significant public criticism, given that one of the primary objectives of the New gTLD Program was to break VeriSign's monopoly.⁸³

32. Hours after the .WEB Auction closed, VeriSign filed its quarterly report with the U.S. Securities and Exchange Commission, wherein VeriSign reported: "Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent."⁸⁴ A flurry of media reports immediately appeared, speculating that VeriSign had acquired .WEB. And, indeed, on 1 August 2016, VeriSign disclosed its deal with NDC for the first time. VeriSign stated that it had

“entered into an agreement with [NDC] wherein [VeriSign] provided funds for [NDC’s] bid for the .web TLD We anticipate that [NDC] will execute the .web Registry Agreement with [ICANN] and will then seek to assign the Registry Agreement to Verisign upon consent from ICANN.”⁸⁵

33. VeriSign has subsequently reported that it is involved in the delegation process for .WEB. During an earnings call on 8 February 2018, VeriSign CEO D. James Bidzos reported that “[w]e are now engaged in ICANN’s process to move the delegation of .web forward.”⁸⁶ Bidzos made similar comments on 23 April 2018 and 26 July 2018.⁸⁷

2.5 Afilias Complains to ICANN

34. On 8 August 2016, Afilias wrote to ICANN, stating that VeriSign’s agreement with NDC violated the New gTLD Program Rules and demanding that ICANN disqualify NDC’s bid and, in accordance with the Rules, award .WEB to the next highest bidder, Afilias.⁸⁸ Afilias also lodged a complaint with the ICANN Ombudsman. Having received no response to its earlier letter, on 9 September 2016, Afilias again wrote to ICANN, requesting ICANN to specify what steps it had taken to disqualify NDC’s bid and to confirm that ICANN would not enter into a Registry Agreement with NDC for .WEB until the Ombudsman had completed its investigation, the ICANN Board had reviewed the matter, and any ICANN accountability mechanisms had been completed.⁸⁹

35. On 16 September 2016, instead of responding to the substance of Afilias’ earlier letters, ICANN sent Afilias, VeriSign and NDC a questionnaire asking it to address how NDC’s conduct should be assessed under the AGB, even though Afilias had already done this in its 8 August and 9 September letters.⁹⁰ Nonetheless, Afilias responded to ICANN’s request by letter dated 7 October 2016.⁹¹ To this day, Afilias has received no response to the correspondence it sent to ICANN in August and September 2016, or any explanation regarding what ICANN intended by

asking Afilias to address NDC’s conduct or what ICANN did with the information it received.

36. Afilias understands that sometime in June 2018, ICANN began to negotiate a registry agreement with NDC/VeriSign. Accordingly, on 18 June 2018 Afilias initiated a Cooperative Engagement Process (“CEP”)—an ICANN accountability mechanism intended to allow the parties to amicably resolve their dispute or narrow the issues in dispute.⁹² As a result of Afilias’ initiation of CEP, on 20 June 2018, ICANN placed the .WEB contention set “on-hold.”⁹³ Given that the parties have not been able to resolve their dispute, ICANN terminated the CEP on 13 November 2018.⁹⁴ As of the date of this filing, the .WEB contention set remains on hold.

3. NDC VIOLATED THE NEW GTLD PROGRAM RULES

37. Below we set out and briefly discuss (i) the AGB’s requirements that applicants for a new gTLD maintain the accuracy, completeness, and truthfulness of their applications at all times (**Section 3.1**); (ii) how NDC violated the AGB by omitting material information from and failing to correct material information in its .WEB application (**Section 3.2**); and (iii) how NDC violated the AGB by assigning its rights and obligations in its .WEB application to VeriSign, a party that never even applied for the gTLD (**Section 3.3**).

3.1 The AGB Requires gTLD Applicants to Provide Complete, Accurate, and Truthful Disclosure of, and Timely Updates to, Any and All Application-related Information

38. The AGB is an ICANN promulgated set of principles and rules designed to implement and reflect ICANN policy. In clear and plain terms it requires applicants to notify ICANN promptly of any changes in circumstances that would cause any information contained in an application to become untrue or inaccurate, including by omission of material information.

39. AGB Section 1.2.7 states that:

If at **any time** during the evaluation process information previously submitted by an applicant becomes **untrue or inaccurate**, the applicant must **promptly notify ICANN** via submission of the appropriate forms. This includes applicant-specific information such as changes in financial

position and changes in ownership or control of the applicant. ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. *Failure to notify ICANN of **any change in circumstances** that would render **any information** provided in the application **false or misleading** may result in **denial of the application**.*⁹⁵

40. AGB Module 6 further clarifies the scope of this obligation, providing that:

Applicant warrants that the **statements and representations** contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are **true** and **accurate** and **complete** in **all material respects**, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that **any material misstatement or misrepresentation** (or **omission of material information**) may cause ICANN and the evaluators to **reject the application** without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of **any change in circumstances** that would render any information provided in the application **false or misleading**.⁹⁶

41. The obligation to ensure the completeness, truthfulness, and accuracy of the disclosures provided in the application extends throughout the process and is ultimately reflected in the Registry Agreement between ICANN and the prospective registry operator.⁹⁷ ICANN's standard form Registry Agreement, which is incorporated into the AGB states as follows:

Registry Operator represents and warrants to ICANN ... [that] **all material information** provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and **such information or statements continue to be true and correct in all material respects** as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN.⁹⁸

42. The above obligations on applicants to maintain the completeness, truthfulness, and accuracy of the disclosures in their applications, as well as the completeness, accuracy, and timeliness of any updates to those disclosures, throughout the AGB process are intended to (i) protect the interests of other stakeholders, in particular other members of a contention set, and (ii) ensure a fair and transparent application and evaluation process by which registry rights are

awarded—as originally envisioned by the GNSO.⁹⁹

43. ICANN’s recognition that the requirement of transparency protects against other applicants’ interests from being compromised is reflected in ICANN’s published criteria for determining whether to accept or reject a request by an applicant to amend its application.¹⁰⁰ According to ICANN, these “criteria were carefully developed to enable applicants to make necessary changes to their applications **while ensuring a fair and equitable process for all applicants.**”¹⁰¹ The criteria therefore recommend rejection of change requests that would “**affect other third parties materially,**”¹⁰² “**particularly other applicants,**”¹⁰³ or put the applicant in a position of advantage or disadvantage compared to other applicants. They state that if a change request would “**materially impact other third parties,** it will likely be found to cause issues of unfairness,” therefore militating in favor of rejection of the request.¹⁰⁴ The relevant focus of these criteria is to assess whether “the change [would] affect **string contention.**”¹⁰⁵ As ICANN’s explanatory notes state: “This criterion assesses how the change request will impact the status of the application and **its competing applications,** the string, [and] **the contention set.**”¹⁰⁶ In short, the criteria for change request evaluations confirm that an applicant has an obligation to disclose developments that might impact the interests of string contention or of other applicants. Stated differently, if failing to disclose new information would result in a process that is unfair or inequitable for other applicants, that information must be disclosed (and, indeed, ICANN should reject any such change request).

44. The requirement for applicants to provide true, accurate, and complete information is also necessary to ensure a fair and transparent application process. As previously mentioned, under the AGB, all applications are subject to a 60-day public comment period, during which time the GAC, the public, and other interested parties may review and comment on all applications. The

AGB's public comment mechanisms are designed to comply with ICANN's Commitments and Core Values to "promot[e] competition," "achiev[e] broad representation of global Internet communities," and "develop[] policy appropriate to [ICANN's] mission through bottom-up, consensus-based processes."¹⁰⁷ NDC's failure to amend its application to reflect its agreement with VeriSign, and to correct other inaccuracies in its application resulting from its agreement with VeriSign, rendered the prior review and comment period concerning its application meaningless. To state the obvious, no one was offered a meaningful opportunity to comment on VeriSign's acquisition of the rights to .WEB because no one knew that VeriSign was seeking those rights.

45. Further, providing true, accurate, and complete information is essential for the fair and transparent resolution of contention sets. As explained above, if more than one applicant for a particular gTLD passed the evaluation stage, ICANN encouraged the contention set "to resolve string contention cases among themselves"¹⁰⁸ In attempting to negotiate an amicable resolution in good faith, each contention set member must be able to assume that the basic information in the other members' application is, at all times, truthful, accurate, and complete. NDC did not negotiate in good faith with the other members of the .WEB contention set because it was secretly representing the interests of VeriSign. NDC quite likely rejected the private auction in favor of the ICANN auction because it was directed to do so by VeriSign. It also appears that, prior to the ICANN auction, NDC intentionally misled ICANN about who made that decision and why.

46. Finally, the provision of true, accurate, and complete information is critically important for the fair and transparent conduct of the ICANN-administered auction. The ICANN-administered auction is specifically limited to Qualified Applicants: *i.e.*, applicants who have undergone the evaluation process—including the public comment period; the background screening on the applying entity and the individuals named in the application; and the technical,

operational, and financial evaluations—and who on those bases have been deemed qualified to obtain the gTLD for which they applied.¹⁰⁹ For this reason, to safeguard this process from interlopers, the AGB strictly prohibits an applicant from reselling, assigning, or transferring any of its rights in connection with its application.¹¹⁰ Here, too, the terms of the AGB and Auction Rules are clear, as is their purpose: Qualified Applicants who participate in an auction are required to act truthfully, transparently, and in good faith. They are also entitled to assume that the other qualified bidders are acting in the same manner and to formulate their bidding strategy accordingly. If a Qualified Applicant like NDC is permitted to act secretly on behalf of a much larger and better-funded non-applicant like VeriSign—notwithstanding all of the disclosure and transparency rules set forth in the AGB and its related documents—the result is, as happened here, an auction that is neither transparent nor fair.

3.2 NDC Failed to Disclose Material Information Regarding its Application and Failed to Amend its Application

47. The information that NDC failed to disclose—in short, that it was being paid by VeriSign to submit bids funded by and on behalf of VeriSign at the .WEB Auction—was material to its application, to the fairness and integrity of the resolution-by-auction process, and ultimately to the objectives of the New gTLD Program itself. NDC’s failure to disclose and to seek to amend its application following its agreement with VeriSign constitute breaches of the AGB requiring disqualification of NDC’s .WEB application or of its bids in the .WEB Auction.

48. There can be little debate that NDC’s failure to disclose its agreement with VeriSign was an omission of material information, as its obligation to immediately assign .WEB to VeriSign fundamentally changed the nature of NDC’s application. VeriSign has long enjoyed a monopoly as a result of its control over the .COM and .NET gTLDs, and a fundamental purpose of the New gTLD Program was to break VeriSign’s monopoly. Afilias and the other applicants sought to

acquire .WEB for exactly this purpose: to compete with VeriSign. It would be patently absurd that NDC did not consider that its agreement with VeriSign would not be materially relevant to the other applicants, the Internet community, and indeed to ICANN.

49. As discussed previously, the AGB requires applicants to answer a series of detailed “mandatory” questions concerning, *inter alia*, the specific entity applying for a given gTLD; the primary individuals at the entity responsible for the application; the names and positions of the directors, officers, and/or partners of the entity; the names and positions of all shareholders holding at least 15% of the entity; the “mission/purpose” of the proposed gTLD; and how the applicant expected to use the gTLD to “benefit registrants, Internet users, and others.”¹¹¹ The information that NDC provided in response to several of these mandatory questions however, became untrue, inaccurate, false, and/or misleading when NDC entered into its agreement with VeriSign (*i.e.*, a “change in circumstance”).¹¹²

50. However, NDC ignored the required AGB procedure for amending its application. Instead, NDC concealed basic information that completely changed the nature of its application. Indeed, NDC concealed that VeriSign—a non-applicant who had not gone through the public comment or evaluation periods, and whose monopoly the New gTLD Program was designed to challenge—had now become the real party-in-interest behind its application. By concealing VeriSign’s involvement, NDC misled everyone into believing that it was continuing to seek .WEB for itself in order to compete against .COM (as stated in the Mission/Purpose statement of NDC’s application). Following its agreement with VeriSign, this was simply false.

51. Once NDC entered its agreement with VeriSign, NDC’s application was no longer true, accurate, or complete. For example, NDC was required, at Section 18 of its application, to describe the “Mission/Purpose” of its proposed .WEB registry. Here, ICANN required NDC to

detail its business plan for .WEB, including how the .WEB registry would “benefit registrants” and “add to the current space, in terms of competition, differentiation, or innovation.”¹¹³ For NDC’s “application to be considered complete, answers to this section must be fulsome and sufficiently quantitative.”¹¹⁴

52. Answers provided in response to Section 18 are included in the non-confidential version of applications posted to ICANN’s website, so that members of the public could understand who was applying for which gTLDs and for what purpose. NDC’s application contained a detailed response to Section 18, repeatedly noting that .WEB would follow the marketing path that NDC’s management used with .CO. For example, NDC wrote:

Prospective users benefit from the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD’s (e.g., .CO targeting innovative businesses and entrepreneurs). ... The experienced team behind this application initially launched and currently operates the .CO ccTLD. The intention is for .WEB to be added to .CO’s product portfolio, where it can benefit from economies of scale along with the firm’s experience and expertise in marketing and branding TLD properties.¹¹⁵

53. Further, NDC justified its pursuit of .WEB on the basis, *inter alia*, that it was seeking to challenge the dominance of “older incumbent players” (e.g., VeriSign—the oldest and most incumbent of the players).¹¹⁶ The only reasonable interpretation of NDC’s business plan was that it intended to acquire .WEB for itself, to operate .WEB itself, and to market .WEB itself. As of the date of NDC’s agreement with VeriSign, none of these things were true. NDC’s business plan for .WEB as of July 2016 was reduced to one singular objective: to assign its rights in .WEB to VeriSign.

54. Other parts of NDC’s application were also at best misleading. For example, in Section 1 of its application, NDC continued to identify itself as the “applicant,” that is, the “entity that would enter into a Registry Agreement with ICANN.”¹¹⁷ As of July 2016, this was all but

fiction except in the most superficial sense: NDC intended to act as VeriSign’s proxy at the .WEB Auction and to immediately assign the Registry Agreement to VeriSign upon signing, without serving a single customer.

55. By failing to submit the necessary change requests to fully detail its agreement with VeriSign, NDC flouted both the letter and the spirit of the numerous transparency and disclosure requirements contained in the New gTLD Program Rules. NDC’s provision of false, misleading, and incomplete information violated the rules set forth in the New gTLD Program Rules—and require ICANN to disqualify NDC from pursuing the registry rights to .WEB.

3.3 NDC Violated the AGB’s Prohibition Against the Resale, Transfer, or Assignment of NDC’s Application

56. In addition to its failure to disclose material information relevant to its application, NDC also breached the AGB’s prohibition against an applicant reselling, transferring, or assigning its application. The AGB states in unambiguous terms that an “[a]pplicant may not resell, assign, or transfer any of the applicant’s rights or obligations in connection with the application.”¹¹⁸

57. While Afiliias is unaware of the details of the agreement struck between NDC and VeriSign, including the date of their agreement, based on the information that is currently public,¹¹⁹ NDC appears to have actually or effectively sold, assigned, or transferred its rights and obligations in its .WEB application to VeriSign prior to the .WEB Auction. This conclusion is supported by the fact that in its 28 July 2016 SEC filing VeriSign stated that it had “incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights.”¹²⁰ In a press release a few days later, VeriSign revealed that it had “provided funds for [NDC’s] bid for the .web TLD” and that NDC would “seek to assign the Registry Agreement [for .WEB] to VeriSign.”¹²¹ It is further supported by the fact that VeriSign’s CEO has admitted on at least three occasions that VeriSign is “engaged in ICANN’s process in .web to move the delegation

forward.”¹²² As the purported winner of the .WEB auction, it is NDC that has the obligation under the AGB to negotiate and execute a Registry Agreement for .WEB with ICANN. VeriSign has no standing to be at the negotiating table in any capacity regarding the delegation of .WEB. VeriSign’s participation in the “ICANN process” for the delegation of .WEB reflects NDC’s impermissible transfer of its obligation to negotiate and conclude a registry agreement with ICANN and participate in the pre-delegation testing for .WEB.

58. Even though NDC mechanically inputted bids during the .WEB auction, it was VeriSign that was the true bidder-in-interest. Unlike situations where applicants obtained financing to fund their bids, NDC incurred no financial risk associated with winning a bid. It was VeriSign that was “committed” to paying the winning amount and it was VeriSign that bears the associated risk of a winning bid—not NDC. Yet, it is NDC’s obligation as an applicant to negotiate and execute the .WEB Registry Agreement and conduct pre-delegation testing, not VeriSign’s. VeriSign’s improper participation in this process demonstrates that NDC breached the Terms and Conditions of its application by transferring its rights and obligations as an applicant to VeriSign, an entity that is not identified as NDC’s back-end registry services provider nor in any other way in NDC’s application.

59. NDC’s sale, assignment, and/or transfer of its .WEB application to VeriSign constitutes a violation of the AGB. This act requires ICANN to disqualify NDC’s application or the bids that it submitted in the .WEB auction. ICANN’s failure to do so constitutes a clear breach of ICANN’s Articles and Bylaws.

4. ICANN’S FAILURE TO DISQUALIFY NDC’S APPLICATION OR ITS BIDS IN THE AUCTION BREACHES ICANN’S OBLIGATION TO APPLY DOCUMENTED ICANN POLICIES NEUTRALLY, OBJECTIVELY, AND FAIRLY

60. The Bylaws obligate ICANN to “[m]ake decisions by applying its documented

policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.”¹²³ ICANN is permitted to “single out [a] party for disparate treatment” if this is “justified by substantial and reasonable cause, such as the promotion of effective competition.”¹²⁴ Even where the AGB grants ICANN the discretion whether or not to take action, ICANN cannot refrain from acting where the neutral, objective and fair application of its policies require it to act.

61. The GNSO, ICANN’s policy making body, promulgated the policy that the New gTLD Program must be administered pursuant to “a clear and pre-published application process using objective and measurable criteria.”¹²⁵ This policy was referenced in the ICANN Board’s Resolutions that approved the New gTLD Program.¹²⁶ In so doing, the Board observed that the AGB satisfies the GNSO’s policy by mapping out the various phases of the application process, from submission through transition to delegation.

62. Moreover, the ICANN Board determined that ICANN would administer an auction as a method of last resort for resolving contention where “contending applications have not resolved the contention among themselves.”¹²⁷ In explaining its decision to adopt the auction method for this purpose, the ICANN Board explained that compared with other methods of resolution, auctions are “fair and transparent.”¹²⁸ As the auction administrator, ICANN is further obligated to act in good faith.

63. ICANN failed to apply these policies “neutrally, objectively, and fairly”¹²⁹ in this case.

- The AGB required ICANN to “disqualify” NDC because it “fail[ed] to provide ICANN with the identifying information necessary to confirm the identity” of the true applicant, namely VeriSign.¹³⁰
- The AGB required ICANN to “reject” NDC’s application for the omission of material information from its application, namely that it was obligated to assign

.WEB to VeriSign without serving a single customer.¹³¹

- The AGB required ICANN to “deny” NDC’s application for “fail[ing] to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading.”¹³²
- ICANN failed to fully investigate rumors that NDC has reached an agreement with VeriSign prior to the .WEB auction. Although ICANN specifically asked NDC to confirm that “there have not been changes to your application ... that need to be reported to ICANN,”¹³³ NDC declined to do so and ICANN failed to obtain a response. ICANN further violated its policy of transparency by refusing to update Afilias as to the status of its investigation, the details of its findings, and its intentions in that regard for over 18 months.
- ICANN also failed administer the .WEB Auction “neutrally, objectively, and fairly.”¹³⁴ First, ICANN allowed VeriSign to participate in the .WEB Auction despite not being either a Qualified Applicant or NDC’s Designated Bidder as identified on its ICANN Registration Form. Second, ICANN accepted NDC’s bid, which did not “represent a price[] which [NDC] is willing to pay to resolve string contention within a Contention Set in favor of its Application.”¹³⁵

5. ICANN’S DECISION TO FINALIZE A REGISTRY AGREEMENT WHILE KNOWING OF NDC’S ARRANGEMENT WITH VERISIGN VIOLATES ICANN’S MANDATE TO PROMOTE COMPETITION

64. The harm to Afilias caused by ICANN’s failure to enforce its policies, rules, and procedures is compounded by the fact that NDC’s and VeriSign’s subterfuge subverts another one of ICANN’s Core Values, and indeed, one of the principal purposes for the New gTLD Program’s creation: to introduce and promote competition, including, specifically, competition that could break VeriSign’s monopoly.

65. When ICANN was established, its Memorandum of Understanding with the United States Government tasked ICANN with privatizing the management of the DNS “in a manner that increases competition” by adopting “market mechanisms to support competition and consumer choice ... [to] promote innovation, preserve diversity, and enhance user choice and satisfaction.”¹³⁶ ICANN’s first generation of leaders understood plainly ICANN’s purpose: according to Esther Dyson, ICANN’s first chairman, “our ... mission was to break the [NSI/VeriSign] monopoly.”¹³⁷

Thus, one of the Core Values stated in ICANN's Bylaws is to introduce and promote competition.¹³⁸ Indeed, the Bylaws state at the outset that ICANN "must operate ... through open and transparent processes **that enable competition and open entry in Internet-related markets.**"¹³⁹ ICANN's mandate to introduce and promote competition must inform all of its decision-making.¹⁴⁰

66. The ICANN Board launched the New gTLD Program "in fulfillment of a core part of ICANN's Bylaws: the introduction of competition and consumer choice in the DNS."¹⁴¹ This is consistent with the intent of the GNSO, ICANN's primary policy-making organ. As the GNSO stated in its 2007 Final Report recommending the Board to adopt the New gTLD Program, one of the "key drivers for the introduction of new top-level domains" is to "stimulate competition at the registry service level which is consistent with ICANN's Core Value 6."¹⁴²

67. As discussed in the Witness Statement of Jonathan Robinson, .WEB is widely seen as the next best potential competitor for VeriSign.¹⁴³ In recognition of its competitive potential, the members of the .WEB contention set bid a record amount to secure the rights to .WEB. Afilias bid more than three times what any gTLD had auctioned for in history in its efforts to acquire .WEB to compete with VeriSign. VeriSign—bidding secretly through NDC—outbid Afilias in what was plainly an effort to protect its dominant market position.

68. ICANN's failure to apply its documented policies consistently, neutrally, objectively, and fairly—and its failure to carry out its activities through open and transparent processes—have also resulted in the violation of ICANN's mandate to introduce and promote competition. .WEB remains the last, best hope of creating a competitive environment at the wholesale registry level of the DNS and ending VeriSign's market power, which, to date, has been regulated through price controls. By violating its Commitments and Core Values in its Bylaws,

thereby allowing 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.

6. RELIEF REQUESTED

69. Reserving its rights to amend the relief requested below, *inter alia*, to reflect document production and further witness evidence, Afilias respectfully requests the IRP Panel, in a binding Declaration:

- (1) to declare that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
- (2) to declare that, in order to comply with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the rules set forth in the AGB and Auction Rules;
- (3) to order that ICANN proceed with contracting the registry agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
- (4) to specify the bid price to be paid by Afilias;
- (5) to declare Afilias the prevailing party in this IRP and award it the costs of these proceedings; and
- (6) to grant such other relief as the Panel may consider appropriate in the circumstances.

Respectfully submitted,



Arif H. Ali (Arif.Ali@dechert.com)

DECHERT LLP
1900 K Street NW
Washington, DC 20006

Counsel for Claimant

LIST OF EXHIBITS

Exhibit No.	Description
C-1	ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), <i>available at</i> https://www.icann.org/resources/pages/governance/bylaws-en (last accessed on 21 Sep. 2018)
C-2	ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016), <i>available at</i> https://www.icann.org/resources/pages/governance/articles-en (last accessed on 29 July 2018)
C-3	ICANN, <i>gTLD Applicant Guidebook</i> (4 June 2012)
C-4	Power Auctions LLC, <i>Auction Rules for New gTLDs: Indirect Contentions Edition</i> (24 Feb. 2015)
C-5	ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014)
C-6	ICANN, Supplement to New gTLD Auctions Bidder Agreement (22 June 2016)
C-7	ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board (6 Nov. 2018), <i>available at</i> https://www.icann.org/resources/board-material/resolutions-2018-11-06-en (last accessed on 13 Nov. 2018)
C-8	ICANN, New gTLD Application Submitted to ICANN by Afiliis Domains No. 3 Limited, Application ID: 1-1013-6638 (13 June 2012)
C-9	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011)
C-10	Letter from Senators T. Cruz, M. Lee and S. Duffy (United States Senate) to R. Hesse (Acting Assistant Attorney General, United States Department of Justice) (12 Aug. 2016)
C-11	M. Hargrave, “Profit from a ‘Monopoly on the Internet’ with 45% Upside,” <i>StreetAuthority</i> (6 Nov. 2013), <i>available at</i> https://www.streetauthority.com/profit-monopoly-internet-45-upside-30422763 (last accessed on 14 Mar. 2018)
C-12	B. Katz, “VeriSign Is Brian Katz’s Highest Conviction Holding - Here’s Why,” <i>Seeking Alpha</i> (29 Dec. 2009), <i>available at</i> https://seekingalpha.com/article/180092-verisign-is-brian-katzs-highest-conviction-holding-heres-why (last accessed on 14 Mar. 2018)
C-13	“Verisign: Time To Make Some Real Money,” <i>Seeking Alpha</i> (29 Jun. 2016)
C-14	Verisign, “Fourth Quarter 2017 Domain Report,” 15(1) <i>The Domain Name Industry Brief</i> (Feb. 2018)

Exhibit No.	Description
C-15	VeriSign, <i>Verisign Statement on .com Registry Agreement Renewal</i> (1 Nov. 2012), available at https://www.sec.gov/Archives/edgar/data/1014473/000101447312000024/statementnovember12012.htm (last accessed on 22 Feb. 2018)
C-16	United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (29 Nov. 2012)
C-17	D. Dayen, “Special Investigation: The Dirty Secret Behind Warren Buffett’s Billions,” <i>The Nation</i> , available at https://www.thenation.com/article/special-investigation-the-dirty-secret-behind-warren-buffetts-billions/ (last accessed on 15 Feb. 2018)
C-18	VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018)
C-19	Afilias, <i>About Us</i> , available at https://afilias.info/products-services (last accessed on 14 Feb. 2018)
C-20	ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017), available at https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm (last accessed on 13 Mar. 2018)
C-21	ICANN, Adopted Board Resolutions (26 June 2008), available at https://www.icann.org/resources/board-material/resolutions-2008-06-26-en (last accessed on 28 Sep. 2018)
C-22	ICANN, <i>News & Media: New gTLD Frequently Asked Questions</i> , available at https://newgtlds.icann.org/en/applicants/global-support/faqs/faqs-en (last accessed on 21 Sep. 2018)
C-23	ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), available at https://www.icann.org/resources/pages/bylaws-2016-02-16-en (last accessed on 10 Oct. 2018)
C-24	ICANN, New gTLD Application Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012)
C-25	ICANN, New gTLD Explanatory Memorandum, Discussion Draft: Market & Economics Impacts (15 Apr. 2011)
C-26	ICANN, Registry Agreement (as of 31 July 2017), available at https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf (last accessed on 24 Sep. 2018)
C-27	ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008)
C-28	ICANN, Program Statistics (as of 31 Aug. 2018), available at https://newgtlds.icann.org/en/program-status/statistics (last accessed on 20 Sep. 2018)

Exhibit No.	Description
C-29	Peter Lamantia, “.WEB Acquired for \$135 Million. To much? How does it compare?,” <i>Authentic Web</i> (undated), available at https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/ (last accessed on 12 Oct. 2018)
C-30	K. Murphy, “Verisign likely \$135 million winner of .web gTLD,” <i>Domain Incite</i> (1 Aug. 2016), available at http://domainincite.com/20820-verisign-likely-135-million-winner-of-web-gtld (last accessed on 22 Feb. 2018)
C-31	Cybele Negris, “How a \$135 million auction affects the domain name industry and your business,” <i>BIV</i> (10 Aug. 2016), available at https://biv.com/article/2016/08/how-135-million-auction-affects-domain-name-indust (last accessed on 11 Sep. 2018)
C-32	“The Next Big Domain Extension,” <i>Supremacy SEO</i> (undated) available at https://supremacyseo.com/TWS60 (last accessed on 12 Oct. 2018)
C-33	Email Communications between .WEB Applicants (various dates)
C-34	Email from J. Kane (Afilias) to H. Lubsen (7 July 2016)
C-35	Email Communications between J. Nevett (CEO, Donuts, Inc.) and J. I. Rasco (Chief Financial Officer, NDC) (6 & 7 June 2016)
C-36	<i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit A to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s <i>Ex Parte</i> Application for Temporary Restraining Order (25 July 2016)
C-37	<i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit C to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s <i>Ex Parte</i> Application for Temporary Restraining Order (25 July 2016)
C-38	<i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit B to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s <i>Ex Parte</i> Application for Temporary Restraining Order (25 July 2016)
C-39	<i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505 (C.D. Ca.), Declaration of Jose Ignacio Rasco III in Support of ICANN’s Opposition to Plaintiff’s <i>Ex Parte</i> Application for Temporary Restraining Order (25 July 2016)
C-40	<i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505 (C.D. Ca.), Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s <i>Ex Parte</i> Application for Temporary Restraining Order (25 Jul. 2016)

Exhibit No.	Description
C-41	<i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit F to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s <i>Ex Parte</i> Application for Temporary Restraining Order (25 July 2016)
C-42	Kevin Murphy, “Is Verisign .web applicant’s secret sugar daddy?,” <i>Domain Incite</i> (14 July 2016), available at http://domainincite.com/20748-is-verisign-web-applicants-secret-sugar-daddy (last accessed on 9 May 2018)
C-43	K. McCarthy, “Someone (cough, cough VeriSign) just gave ICANN \$135m for the rights to .web,” <i>The Register</i> (28 July 2016), available at https://www.theregister.co.uk/2016/07/28/someone_paid_135m_for_dot_web/ (last accessed on 27 July 2018)
C-44	Letter from A. Willett (ICANN) to Members of the .WEB/.WEBS Contention Set (13 July 2017)
C-45	Verisign Inc., <i>Form 10-Q (Quarterly Report)</i> (28 July 2016)
C-46	Verisign, <i>Verisign Statement Regarding .Web Auction Results</i> (1 Aug. 2016)
C-47	Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018)
C-48	VeriSign (VRSN) Q1 2018 Results - Earnings Call Transcript. (26 Apr. 2018)
C-49	Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (8 Aug. 2016)
C-50	Letter from C. Willett (Vice President, ICANN’s gTLD Operations) to J. Kane (Vice President, Afilias’ Corporate Services) (16 Sep. 2016)
C-51	Letter from J. Kane (Vice President, Afilias’ Corporate Services) to C. Willett (Vice President, ICANN’s gTLD Operations) (7 Oct. 2016)
C-52	Letter from A. Ali (Counsel for Afilias) to ICANN (18 June 2018)
C-53	Email from ICANN to A. Ali (Counsel for Afilias) (20 June 2018)
C-54	Email from ICANN Independent Review to A. Ali and R. Wong (Counsel for Afilias) (13 Nov. 2018)
C-55	ICANN, Updates Change Request Process (30 Sept. 2014), available at https://newgtlds.icann.org/en/announcements-and-media/announcement-20sep14-en (last accessed Oct. 10, 2018)
C-56	ICANN, New gTLD Application Change Request Process and Criteria, available at https://newgtlds.icann.org/en/applicants/global-support/change-requests (last accessed on 10 Oct. 2018)

Exhibit No.	Description
C-57	ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1999), <i>available at</i> https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en (last accessed on 14 Feb. 2018)
C-58	S. Hrg. 112-394, ICANN’s Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112 th Congress, First Session (8 Dec. 2011), <i>available at</i> https://www.gpo.gov/fdsys/pkg/CHRG-112shrg74251/html/CHRG-112shrg74251.htm (last accessed on 11 Sep. 2018)

LIST OF LEGAL AUTHORITIES

Authority No.	Description
CA-1	<i>ICM Registry, LLC v. ICANN</i> , ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010)
CA-2	<i>Vistaprint Ltd. v. ICANN</i> , ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015)
CA-3	Bin Cheng, <i>General Principles of Law as Applied by International Courts and Tribunals</i> (2006)

ENDNOTES

- ¹ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 4, Sec. 4.3.
- ² ICANN has argued that the Independent Review Process (“**IRP**”) is the only third-party dispute resolution process available to gTLD applicants for independent review of ICANN’s actions. **Afilias reserves its right to challenge ICANN’s conduct in any court of competent jurisdiction worldwide.**
- ³ ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016), *available at* <https://www.icann.org/resources/pages/governance/articles-en> (last accessed on 29 July 2018), [Ex. C-2].
- ⁴ Afilias requests that it be granted the right to supplement the submissions contained herein in order to allow it to take in to consideration ICANN’s compliance with its Documentary Information Disclosure Policy, customary document production in the course of these proceedings, further witness evidence, and ICANN’s submissions.
- ⁵ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3].
- ⁶ Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015), [Ex. C-4]. The Auction Rules are binding upon bidders in an ICANN auction. ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), [Ex. C-5], p. 1 (“ICANN has published an auction rules document (‘Auction Rules’) on its website which is binding upon Bidders in the Auction.”); *see* ICANN, Supplement to New gTLD Auctions Bidder Agreement (22 June 2016), [Ex. C-6].
- ⁷ This Request for IRP encompasses the ICANN Staff’s improper refusal to disclose documents relevant to the ICANN-administered auction for .WEB to Afilias under ICANN’s Documentary Information Disclosure Policy, a decision that was upheld by the ICANN Board on 6 November 2011. ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board (6 Nov. 2018), *available at* <https://www.icann.org/resources/board-material/resolutions-2018-11-06-en> (last accessed on 13 Nov. 2018), [Ex. C-7], pp. 1-12.
- ⁸ *See* ICANN, New gTLD Application Submitted to ICANN by Afilias Domains No. 3 Limited, Application ID: 1-1013-6638 (13 June 2012), [Ex. C-8] (Afilias’ application for .WEB to ICANN).
- ⁹ Since 2000, VeriSign has controlled the exclusive rights to the .COM and .NET registries. This market dominance has endured, leading the ICANN Board to opine in 2011 that “[t]o date, ICANN has not created meaningful competition at the registry level.” ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 27. Members of the United States Senate opined in 2016 that “Verisign’s government-approved control of the .com registry allows it to operate as a monopoly—a fact that has not gone unnoticed in the financial services industry and the stock market.” Letter from Senators T. Cruz, M. Lee and S. Duffy (United States Senate) to R. Hesse (Acting Assistant Attorney General, United States Department of Justice) (12 Aug. 2016), [Ex. C-10], p. 2. Financial analysts who have studied VeriSign agree, describing it as having “a virtual monopoly on Internet domains” that gives it “unrivalled power” in “the fastest-growing industry in the world - the Internet.” M. Hargrave, “Profit from a ‘Monopoly on the Internet’ with 45% Upside,” *StreetAuthority* (6 Nov. 2013), *available at* <https://www.streetauthority.com/profit-monopoly-internet-45-upside-30422763> (last accessed

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on 14 Mar. 2018), [Ex. C-11], p. 1. Industry observers have likewise concluded that VeriSign “holds a legal monopoly on the DNS industry” (B. Katz, “VeriSign Is Brian Katz’s Highest Conviction Holding - Here’s Why,” *Seeking Alpha* (29 Dec. 2009), available at <https://seekingalpha.com/article/180092-verisign-is-brian-katzs-highest-conviction-holding-heres-why> (last accessed on 14 Mar. 2018), [Ex. C-12], p. 2.) and that its “exclusive contract with [ICANN] gives the company a significant barrier to entry for competitors.” “Verisign: Time To Make Some Real Money,” *Seeking Alpha* (29 Jun. 2016), [Ex. C-13], p. 1. Today, VeriSign continues to control more than 78% of all gTLD registrations. Verisign, “Fourth Quarter 2017 Domain Report,” 15(1) *The Domain Name Industry Brief* (Feb. 2018), [Ex. C-14], p. 2.

To protect consumers, the U.S. government has required that ICANN contractually impose price caps on the wholesale prices of .COM registrations. VeriSign, *Verisign Statement on .com Registry Agreement Renewal* (1 Nov. 2012), available at <https://www.sec.gov/Archives/edgar/data/1014473/000101447312000024/statementnovember12012.htm> (last accessed on 22 Feb. 2018), [Ex. C-15], p. 1; United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (29 Nov. 2012), [Ex. C-16], p. 3. Price controls have had scant effect on VeriSign’s profitability: VeriSign’s operating margin exceeds 60%, which is among the highest of any S&P 500 company. D. Dayen, “Special Investigation: The Dirty Secret Behind Warren Buffett’s Billions,” *The Nation*, available at <https://www.thenation.com/article/special-investigation-the-dirty-secret-behind-warren-buffetts-billions/> (last accessed on 15 Feb. 2018), [Ex. C-17], p. 10; VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), [Ex. C-18], p. 4. If its margins continue to grow at the current rate, within the next decade VeriSign will “post the highest rate of profitability of any public company on earth.” D. Dayen, “Special Investigation: The Dirty Secret Behind Warren Buffett’s Billions,” *The Nation*, available at <https://www.thenation.com/article/special-investigation-the-dirty-secret-behind-warren-buffetts-billions/> (last accessed on 15 Feb. 2018), [Ex. C-17], p. 10.

- ¹⁰ Afilias, *About Us*, available at <https://afilias.info/products-services> (last accessed on 14 Feb. 2018), [Ex. C-19], p. 1 (“Afilias is a global leader in advanced registry services that power successful domains.”).
- ¹¹ *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), [Ex. CA-1], ¶¶ 1-2, 10; *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), [Ex. CA-2], ¶ 125.
- ¹² ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016), available at <https://www.icann.org/resources/pages/governance/articles-en> (last accessed on 29 July 2018), [Ex. C-2], ¶ 2(III); see ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), available at <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a) (containing the same language).
- ¹³ ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016), available at <https://www.icann.org/resources/pages/governance/articles-en> (last accessed on 29 July 2018), [Ex. C-2], ¶ 2(III); see ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), available at

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- <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a) (containing the same language).
- ¹⁴ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(b)(iv).
- ¹⁵ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a)(v).
- ¹⁶ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 2, Sec. 2.3.
- ¹⁷ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(c).
- ¹⁸ Expert Report by Jonathan Zittrain (26 Sep. 2018), ¶¶ 21-24, 41-45; Witness Statement of Jonathan M. Robinson (27 Sep. 2018), ¶¶ 12-24.
- ¹⁹ The GNSO is ICANN’s main policy-making body.
- ²⁰ Witness Statement of Ram Mohan (1 Nov. 2018), ¶¶ 13-14.
- ²¹ ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017), *available at* <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (last accessed on 13 Mar. 2018), [Ex. C-20], p. 13.
- ²² ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017), *available at* <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (last accessed on 13 Mar. 2018), [Ex. C-20], p. 12.
- ²³ ICANN, Adopted Board Resolutions (26 June 2008), *available at* <https://www.icann.org/resources/board-material/resolutions-2008-06-26-en> (last accessed on 28 Sep. 2018), [Ex. C-21].
- ²⁴ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 7.
- ²⁵ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-2.
- ²⁶ ICANN, *News & Media: New gTLD Frequently Asked Questions*, *available at* <https://newgtlds.icann.org/en/applicants/global-support/faqs/faqs-en> (last accessed on 21 Sep. 2018), [Ex. C-22], p. 9; Witness Statement of John L. Kane (15 Oct. 2018), ¶ 7.
- ²⁷ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a); ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016), *available at* <https://www.icann.org/resources/pages/governance/articles-en> (last accessed on 29 July 2018), [Ex. C-2], ¶ 2(III).

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- ²⁸ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), [Ex. CA-3], p. 107 (“In short, good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances.”). The version of the Bylaws in effect when the AGB was published and when the ICANN auction for .WEB occurred also included the requirement that ICANN apply documented policies “with integrity and fairness.” See, e.g., ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), available at <https://www.icann.org/resources/pages/bylaws-2016-02-16-en> (last accessed on 10 Oct. 2018), [Ex. C-23], Art. I, Sec. 2(8).
- ²⁹ Witness Statement of John L. Kane (15 Oct. 2018), ¶ 8.
- ³⁰ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 6-2.
- ³¹ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], pp. 1-30, 6-2.
- ³² See, e.g., ICANN, New gTLD Application Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012), [Ex. C-24], p. 6; ICANN, New gTLD Application Submitted to ICANN by Afilias Domains No. 3 Limited, Application ID: 1-1013-6638 (13 June 2012), [Ex. C-8], pp. 6-7.
- ³³ Witness Statement of John L. Kane (15 Oct. 2018), ¶ 9; Witness Statement of Ram Mohan (1 Nov. 2018), ¶ 17.
- ³⁴ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-6.
- ³⁵ ICANN, New gTLD Explanatory Memorandum, Discussion Draft: Market & Economics Impacts (15 Apr. 2011), [Ex. C-25], p. 5; *id.*, p. 1.
- ³⁶ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 6-2.
- ³⁷ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 6-2 (“Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.”); *id.*, p. 1-30 (“If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms.”); Witness Statement of John L. Kane (15 Oct. 2018), ¶ 10.
- ³⁸ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], pp. 1-22 – 1-24.
- ³⁹ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 6-2.
- ⁴⁰ ICANN, Registry Agreement (as of 31 July 2017), available at <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf> (last accessed on 24 Sep. 2018), [Ex. C-26], Specification 11 (at p. 97) (incorporated into the AGB at Module 5).
- ⁴¹ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 6-6.
- ⁴² ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], pp. 1-15 (identifying the lifecycle timeline for an uncomplicated gTLD application).
- ⁴³ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-13; see also *id.*, p. 1-36; Witness Statement of John L. Kane (15 Oct. 2018), ¶ 11.
- ⁴⁴ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-28.

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- ⁴⁵ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 4-6.
- ⁴⁶ Witness Statement of John L. Kane (15 Oct. 2018), ¶¶ 11-13; Annex A.
- ⁴⁷ Witness Statement of John L. Kane (15 Oct. 2018), ¶ 13; ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-28 (emphasis omitted); ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 101.
- ⁴⁸ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 104.
- ⁴⁹ ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), [Ex. C-27], p. 2; Witness Statement of Ram Mohan (1 Nov. 2018), ¶ 21.
- ⁵⁰ ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), [Ex. C-27], pp. 5-6 (“Winners [of lotteries] would often ‘flip’ or resell their licenses to larger entities at substantial profit without ever delivering service to a single customer. ... The disadvantages of comparative evaluations [include] ... IF other than the highest-value applicant wins the comparative evaluation, the winner is likely to ‘flip’ the rights for speculative profits.”).
- ⁵¹ ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), [Ex. C-27], p. 1 (emphasis added).
- ⁵² Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015), [Ex. C-4], pp. 1-3.
- ⁵³ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 4-26.
- ⁵⁴ ICANN, Program Statistics (as of 31 Aug. 2018), available at <https://newgtlds.icann.org/en/program-status/statistics> (last accessed on 20 Sep. 2018), [Ex. C-28], p. 1.
- ⁵⁵ Witness Statement of John L. Kane (15 Oct. 2018), ¶ 13.
- ⁵⁶ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], pp. 4-19, 4-27 (“significant funding” may accrue to ICANN from the public auctions).
- ⁵⁷ Witness Statement of John L. Kane (15 Oct. 2018), ¶¶ 16, 38; Witness Statement of Ram Mohan (1 Nov. 2018), ¶¶ 23-24; Witness Statement of Jonathan M. Robinson (27 Sep. 2018), ¶¶ 25-35.
- ⁵⁸ Peter Lamantia, “.WEB Acquired for \$135 Million. To much? How does it compare?,” *Authentic Web* (undated), available at <https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/> (last accessed on 12 Oct. 2018), [Ex. C-29], p. 2 (“.WEB is a different animal. ... WEB is what we call a ‘super generic’ and arguably the best new TLD alternative to .COM. It is a word that is commonly used with intuitive meaning. .WEB could make a serious dent to .COM over the long run.”); K. Murphy, “Verisign likely \$135 million winner of .web gTLD,” *Domain Incite* (1 Aug. 2016), available at <http://domainincite.com/20820-verisign-likely-135-million-winner-of-web-gtld> (last accessed on 22 Feb. 2018), [Ex. C-30], p. 2 (“[.WEB] is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide a real challenge to .COM.”); Cybele Negriz, “How a \$135 million auction affects the domain name industry and your business,” *BIV* (10 Aug. 2016), available at <https://biv.com/article/2016/08/how-135-million-auction-affects-domain-name-indust> (last accessed on 11 Sep. 2018), [Ex. C-31], p. 2 (“.WEB is widely considered [to be] the gTLD with the most potential out of 1,930 applications for new domain extensions ICANN received to battle .COM and .NET for widespread adoption.”); “The Next Big Domain Extension,” *Supremacy SEO*

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- (undated) available at <https://supremacyseo.com/TWS60> (last accessed on 12 Oct. 2018), [Ex. C-32], p. 2 (“.WEB is the one domain that could unseat .COM.”).
- ⁵⁹ Witness Statement of John L. Kane (15 Oct. 2018), ¶ 15.
- ⁶⁰ ICANN, New gTLD Application Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012), [Ex. C-24], pp. 6-7.
- ⁶¹ Email Communications between .WEB Applicants (various dates), [Ex. C-33], p. 3 (email from J. Kane dated 28 Apr. 2016); Witness Statement of John L. Kane (15 Oct. 2018), ¶ 20.
- ⁶² Email Communications between .WEB Applicants (various dates), [Ex. C-33], p. 2 (email from J. Kane dated 11 May 2016); Witness Statement of John L. Kane (15 Oct. 2018), ¶ 21.
- ⁶³ Witness Statement of John L. Kane (15 Oct. 2018), ¶¶ 20, 24.
- ⁶⁴ Witness Statement of John L. Kane (15 Oct. 2018), ¶¶ 25-26; ¶¶ 30-32.
- ⁶⁵ Witness Statement of John L. Kane (15 Oct. 2018), ¶ 24.
- ⁶⁶ Email from J. Kane (Afilias) to H. Lubsen (7 July 2016), [Ex. C-34]; Witness Statement of John L. Kane (15 Oct. 2018), ¶¶ 24-26.
- ⁶⁷ Email Communications between J. Nevett (CEO, Donuts, Inc.) and J. I. Rasco (Chief Financial Officer, NDC) (6 & 7 June 2016), [Ex. C-35].
- ⁶⁸ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit A to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-36], [PDF] p. 3.
- ⁶⁹ Confidential Information Redacted
- ⁷⁰ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit A to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-36], [PDF] p. 3.
- ⁷¹ Ruby Glen’s complaint was also investigated by ICANN’s Ombudsman. *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit C to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-37] (containing communications with former ICANN Ombudsman Chris LaHatte).
- ⁷² *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit B to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-38], [PDF] p. 4 (emphasis added).
- ⁷³ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit B to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-38], [PDF] p. 3.
- ⁷⁴ Ruby Glen’s complaint was also investigated by ICANN’s Ombudsman. *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit B to Declaration of Christine Willett in Support

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- of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-38], [PDF] p. 4.
- ⁷⁵ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Declaration of Jose Ignacio Rasco III in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-39], ¶ 17; *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 Jul. 2016), [Ex. C-40], ¶¶ 18-20.
- ⁷⁶ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit F to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-41], [PDF] p. 3.
- ⁷⁷ Rumors regarding VeriSign's involvement with NDC's .WEB application had been reported in the industry press by this time. *See, e.g.*, Kevin Murphy, "Is Verisign .web applicant's secret sugar daddy?," *Domain Incite* (14 July 2016), available at <http://domainincite.com/20748-is-verisign-web-applicants-secret-sugar-daddy/> (last accessed on 9 May 2018), [Ex. C-42]; K. McCarthy, "Someone (cough, cough VeriSign) just gave ICANN \$135m for the rights to .web," *The Register* (28 July 2016), available at https://www.theregister.co.uk/2016/07/28/someone_paid_135m_for_dot_web/ (last accessed on 27 July 2018), [Ex. C-43]. Confidential Information Redacted
- ⁷⁸ Witness Statement of John L. Kane (15 Oct. 2018), ¶ 28.
- ⁷⁹ Letter from A. Willett (ICANN) to Members of the .WEB/.WEBS Contention Set (13 July 2017), [Ex. C-44], p. 1.
- ⁸⁰ Confidential Information Redacted
- ⁸¹ *See* Witness Statement of John L. Kane (15 Oct. 2018), Annex A.
- ⁸² Witness Statement of John L. Kane (15 Oct. 2018), ¶¶ 29-30; Witness Statement of Ram Mohan (1 Nov. 2018), ¶ 35.
- ⁸³ Witness Statement of Jonathan M. Robinson (27 Sep. 2018), ¶¶ 36-37.
- ⁸⁴ VeriSign Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. C-45], Note 11 (at p. 13).
- ⁸⁵ VeriSign, *Verisign Statement Regarding .Web Auction Results* (1 Aug. 2016), [Ex. C-46].
- ⁸⁶ VeriSign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), [Ex. C-47], p. 4.
- ⁸⁷ VeriSign (VRSN) Q1 2018 Results - Earnings Call Transcript. (26 Apr. 2018), [Ex. C-48], p. 2 ("And for those who weren't here or aren't familiar with what the status is, we're engaged in ICANN's process to move the delegation forward for .web."); VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), [Ex. C-18], p. 6 ("Well, we're engaged in ICANN's process on .web to move the delegation forward but this is ICANN's process so we can't say exactly when it will conclude.").

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- ⁸⁸ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (8 Aug. 2016), [Ex. C-49]; Witness Statement of John L. Kane (15 Oct. 2018), ¶ 32.
- ⁸⁹ Witness Statement of John L. Kane (15 Oct. 2018), ¶ 33.
- ⁹⁰ Letter from C. Willett (Vice President, ICANN’s gTLD Operations) to J. Kane (Vice President, Afilias’ Corporate Services) (16 Sep. 2016), [Ex. C-50].
- ⁹¹ Letter from J. Kane (Vice President, Afilias’ Corporate Services) to C. Willett (Vice President, ICANN’s gTLD Operations) (7 Oct. 2016), [Ex. C-51]; Witness Statement of John L. Kane (15 Oct. 2018), ¶ 34.
- ⁹² See Letter from A. Ali (Counsel for Afilias) to ICANN (18 June 2018), [Ex. C-52]; Email from ICANN to A. Ali (Counsel for Afilias) (20 June 2018), [Ex. C-53], p. 2.
- ⁹³ Email from ICANN to A. Ali (Counsel for Afilias) (20 June 2018), [Ex. C-53], p. 2.
- ⁹⁴ Email from ICANN Independent Review to A. Ali and R. Wong (Counsel for Afilias) (13 Nov. 2018), [Ex. C-54].
- ⁹⁵ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], Sec. 1.2.7 (emphasis added).
- ⁹⁶ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], Sec. 1 (emphasis added).
- ⁹⁷ See ICANN, Updates Change Request Process (30 Sept. 2014), available at <https://newgtlds.icann.org/en/announcements-and-media/announcement-20sep14-en> (last accessed Oct. 10, 2018), [Ex. C-55].
- ⁹⁸ ICANN, Registry Agreement (as of 31 July 2017), available at <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf> (last accessed on 24 Sep. 2018), [Ex. C-26], Sec. 1.3(a)(i) (emphasis added).
- ⁹⁹ ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017), available at <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (last accessed on 13 Mar. 2018), [Ex. C-20], p. 13 (In its final report, the GNSO emphasized that ICANN’s “evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.”)
- ¹⁰⁰ ICANN, New gTLD Application Change Request Process and Criteria, available at <https://newgtlds.icann.org/en/applicants/global-support/change-requests> (last accessed on 10 Oct. 2018), [Ex. C-56], pp. 1-3.
- ¹⁰¹ ICANN, New gTLD Application Change Request Process and Criteria, available at <https://newgtlds.icann.org/en/applicants/global-support/change-requests> (last accessed on 10 Oct. 2018), [Ex. C-56], p. 3 (emphasis added).
- ¹⁰² ICANN, New gTLD Application Change Request Process and Criteria, available at <https://newgtlds.icann.org/en/applicants/global-support/change-requests> (last accessed on 10 Oct. 2018), [Ex. C-56], p. 3 (emphasis added).
- ¹⁰³ ICANN, New gTLD Application Change Request Process and Criteria, available at <https://newgtlds.icann.org/en/applicants/global-support/change-requests> (last accessed on 10 Oct. 2018), [Ex. C-56], p. 3 (emphasis added).

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- ¹⁰⁴ ICANN, New gTLD Application Change Request Process and Criteria, *available at* <https://newgtlds.icann.org/en/applicants/global-support/change-requests> (last accessed on 10 Oct. 2018), [Ex. C-56], p. 3.
- ¹⁰⁵ ICANN, New gTLD Application Change Request Process and Criteria, *available at* <https://newgtlds.icann.org/en/applicants/global-support/change-requests> (last accessed on 10 Oct. 2018), [Ex. C-56], p. 2.
- ¹⁰⁶ ICANN, New gTLD Application Change Request Process and Criteria, *available at* <https://newgtlds.icann.org/en/applicants/global-support/change-requests> (last accessed on 10 Oct. 2018), [Ex. C-56], p. 2 (emphasis added).
- ¹⁰⁷ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-5.
- ¹⁰⁸ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-13.
- ¹⁰⁹ ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), [Ex. C-5], Art. 1, Sec. 1.1. Pursuant to ICANN’s Auction Rules, a member of a contention set is eligible to participate in the auction if (i) it has passed evaluation, (ii) it has resolved any applicable GAC advice, (iii) there are no pending objections, and (iv) there are no pending change requests. Had NDC complied with the AGB, it would have filed a change request and would not have been eligible to participate in the auction until the change request had been resolved.
- ¹¹⁰ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 6-6.
- ¹¹¹ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. A-12.
- ¹¹² *See* ICANN, New gTLD Application Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012), [Ex. C-24].
- ¹¹³ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. A-12.
- ¹¹⁴ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. A-11.
- ¹¹⁵ ICANN, New gTLD Application Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012), [Ex. C-24], [PDF] pp. 6-7.
- ¹¹⁶ ICANN, New gTLD Application Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012), [Ex. C-24], [PDF] p. 6.
- ¹¹⁷ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. A-5; *see* ICANN, New gTLD Application Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012), [Ex. C-24], [PDF] p. 1. The final section of the public portions of NDC’s application provide a “demonstration of technical and operational capability.” *Id.*, [PDF] p. 13. Virtually all of the information provided in this part of the application is based on information provided by Neustar: “NU DOTCO LLC has partnered with NeuStar, Inc. (‘Neustar’), an experienced TLD registry operator, for the operation of the .WEB Registry.” *Id.*, [PDF] p. 14.
- ¹¹⁸ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 6-6.
- ¹¹⁹ Afiliás will seek disclosure from ICANN of any and all documents that are in ICANN’s possession, custody, or control pertaining to the agreement between NDC and VeriSign.
- ¹²⁰ VeriSign Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. C-45], Note 11 (at p. 13).
- ¹²¹ VeriSign, *Verisign Statement Regarding .Web Auction Results* (1 Aug. 2016), [Ex. C-46].

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- ¹²² VeriSign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), [Ex. C-47], p. 4 (Jim Bidzos); VeriSign (VRSN) Q1 2018 Results - Earnings Call Transcript. (26 Apr. 2018), [Ex. C-48], p. 2 (“And for those who weren’t here or aren’t familiar with what the status is, we’re engaged in ICANN’s process to move the delegation forward for .web.”); VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), [Ex. C-18], p. 6 (“Well, we’re engaged in ICANN’s process on web to move the delegation forward but this is ICANN’s process so we can’t say exactly when it will conclude.”).
- ¹²³ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a)(v).
- ¹²⁴ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 2.3.
- ¹²⁵ ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017), *available at* <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (last accessed on 13 Mar. 2018), [Ex. C-20], pp. 7, 26.
- ¹²⁶ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 12.
- ¹²⁷ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 101.
- ¹²⁸ ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), [Ex. C-27], p. 2.
- ¹²⁹ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a)(v).
- ¹³⁰ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-24.
- ¹³¹ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 6-2.
- ¹³² ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3], p. 1-30.
- ¹³³ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit B to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. C-38], [PDF] p. 3.
- ¹³⁴ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a)(v).
- ¹³⁵ Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015), [Ex. C-4], p. 5.
- ¹³⁶ ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1999), *available at* <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en> (last accessed on 14 Feb. 2018), [Ex. C-57], Secs. II(A), II(C)(2).

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- ¹³⁷ Statement of Esther Dyson (Founding Chairman of ICANN), S. Hrg. 112-394, ICANN’s Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session (8 Dec. 2011), *available at* <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg74251/html/CHRG-112shrg74251.htm> (last accessed on 11 Sep. 2018), [Ex. C-58], p. 46.
- ¹³⁸ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(b)(iii).
- ¹³⁹ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a) (emphasis added).
- ¹⁴⁰ Witness Statement of Ram Mohan (1 Nov. 2018), ¶¶ 8, 10-11.
- ¹⁴¹ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 7.
- ¹⁴² ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017), *available at* <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (last accessed on 13 Mar. 2018), [Ex. C-20], ¶ 13 (iv). In the then-current Bylaws, Core Value 6 was identical to Art. 1, Sec. 1.2(b)(iii) of today’s Bylaws.
- ¹⁴³ Witness Statement of Jonathan M. Robinson (27 Sep. 2018), ¶¶ 25-35.