

INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

*Amicus Curiae.*

ICDR CASE NO: 01-18-0004-2702

**VERISIGN, INC.'S PRE-HEARING BRIEF (PHASE II)**

**26 June 2020**

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## I. INTRODUCTION

*Amicus* VeriSign, Inc. (“Verisign”) submits this Brief in opposition to the claims of Afilias Domains No. 3 LTD (“Afilias”) in this Independent Review Process (“IRP”). Verisign further specifically joins in Sections II and III.A of the Brief of *amicus* NU DOTCO, LLC (“NDC”), respectively, setting forth (i) the background facts to this IRP and (ii) the scope of this Panel’s authority, including the issues properly presented to the Panel for decision.

As set forth in NDC’s Brief, Section 4.3(o) of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“ICANN”) defines the scope of this Panel’s authority, as pertinent here, as follows: “Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”<sup>1</sup> According to ICANN, the Board exercised its business judgment to defer a decision on Afilias’ objections to the .WEB auction pending the outcome of accountability and other proceedings.<sup>2</sup> Thus, the only question properly before the Panel here is whether ICANN violated its Bylaws when it decided to defer a decision on Afilias’ objections. It is not within the Panel’s authority to determine the merit or lack of merit of Afilias’ objections or to order that NDC be disqualified and .WEB awarded to Afilias.

To the extent the Panel were to consider the merits of Afilias’ objections to the delegation of .WEB to NDC -- an issue that ICANN has stated it has *not* considered<sup>3</sup> and that ICANN and *Amici* submit cannot properly be decided in the first instance by this Panel -- this Brief addresses, in order, the reasons why (1) the Domain Acquisition Agreement between Verisign and NDC (“DAA”) fully complies with the Guidebook for the new gTLD program, and (2) there is no basis for refusing to delegate .WEB based on ICANN’s mandate to promote competition.

If the Panel considers Afilias’ objections to the potential delegation of .WEB to NDC, in Section II of the Brief, we explain (i) the proper interpretation of the Guidebook’s limitations on transfers under the new gTLD program, (ii) that the DAA complies with the Guidebook, (iii) that

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<sup>1</sup> Afilias C-1 (ICANN Bylaws, § 4.3(o), available at <https://www.icann.org/resources/pages/governance/bylaws-en>).

<sup>2</sup> ICANN Rejoinder Memorial, ¶ 3.

<sup>3</sup> *Id.*, ¶ 117.



the DAA is fully consistent with industry practices under the new gTLD program, and (iv) that Afiliias' arguments of improper transfer or failure to amend NDC's application are without merit and contrary to Afiliias' own conduct. In Section III of the Brief, we explain that (v) ICANN has no regulatory authority, including over matters of competition, and (vi) there is no threat or injury to competition by Verisign's potential operation of the .WEB registry.

## **II. THE DAA DOES NOT CONSTITUTE A RESALE, ASSIGNMENT OR TRANSFER OF RIGHTS OR OBLIGATIONS UNDER THE APPLICATION**

### **A. Summary of Argument**

1. It is clear from the explicit terms of the DAA that it does not constitute a resale, assignment or transfer of rights or obligations with respect to NDC's .WEB Application. Afiliias' argument to the contrary ignores the plain language of the DAA, misstates governing contract law, and misconstrues the Guidebook. As set forth below, the DAA is fully compliant with the Guidebook and also consistent with common industry practices under the new gTLD program.

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. "In determining whether an assignment has been made, 'the intention of the parties as manifested in the instrument is controlling.'" AA-9 (*Cal. Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1335 (2012)).<sup>6</sup>

3. *Second*, the rights and obligations established under the DAA ***are inconsistent***

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<sup>4</sup> Livesay Ex. H (Domain Acquisition Agreement Supplement ("DAA Supplement") (July 26, 2016), ¶ D).

<sup>5</sup> Livesay Ex. D (DAA (Aug. 25, 2015) § 7(a), Ex. A, § 1(k)); Sect. II.D.1, *infra*.

<sup>6</sup> In addressing the DAA, Afiliias repeatedly fails to address the DAA Supplement executed between Verisign and NDC, pursuant to express provisions of the DAA, in response to false rumors of a sale of NDC spread by Afiliias and those acting in concert with it. (Sect. II.D, *infra*). Afiliias thus ignores contractual terms that form a part of the DAA, undoubtedly because, like the original DAA, the DAA Supplement is a clear contradiction of Afiliias' claims.

*with an assignment or transfer* of rights or obligations under the Application.<sup>7</sup> A fundamental principle of applicable law is that “[o]nce an assignment has been made, ‘the assignor no longer has a right to enforce the interest because the assignee has obtained *all* rights to the thing assigned.’”<sup>8</sup> Following execution of the DAA, NDC retained all rights to enforce its interests under the Application, and remained fully obligated to comply with it. If, as Afilias contends, NDC had assigned or transferred rights under the Application to Verisign, Verisign would instead hold all rights and obligations under the Application -- which it does not.

4. *Third*, the only resale, assignment or transfer contemplated in the DAA is a ***possible future and conditional*** assignment ***of an as yet unexecuted registry agreement, not the Application***. Specifically, the DAA provides that, in the event NDC were to prevail in the auction and to sign a registry agreement with ICANN, NDC ***thereafter*** would apply to ***ICANN for its consent*** to assign the “registry agreement” to Verisign.<sup>9</sup> Thus, the DAA provides nothing more than an expectation of a possible future assignment of the registry agreement -- not a present transfer of the rights and obligations under the Application. If the DAA constituted an assignment or transfer of rights under the Application, Verisign currently would possess the right to execute the registry agreement in its own name upon the auction award.<sup>10</sup> Verisign does not possess that right, nor is it alleged to possess that right by any party in the IRP.

5. *Fourth*, the interpretation of the Guidebook that is urged by Afilias as the basis for its claim ***is contrary to common industry practices and completely divorced from reality***. There exists a robust secondary marketplace with respect to the new gTLD program.<sup>11</sup> Registry agreements for new gTLDs regularly are assigned pursuant to pre- and post-delegation contracts, including as part of pre-delegation financing contracts. Afilias’ interpretation of the Guidebook

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<sup>7</sup> As discussed *infra* (Section II.C), the Guidebook uses the terms resell, assignment and transfer interchangeably, as in common usage. *E.g.*, AA-27 (*Restatement (Second) of Contracts* § 316 (1981) at *infra* note 21).

<sup>8</sup> AA-24 (*One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. Dist. Ct. App. 2015) (quoting AA-11 (*Continental Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008) (emphasis added))). *See also* note 23.

<sup>9</sup> Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 3).

<sup>10</sup> *See, e.g.*, AA-19 (*Merchants Serv. Co. v. Small Claims Court of City & Cty. of San Francisco*, 35 Cal. 2d 109, 114 (1950)); AA-21 (*Modern Law of Contracts* § 21:6), *infra* at note 23.

<sup>11</sup> Afilias itself has long been active in the New gTLD Program secondary market – buying and selling new gTLDs and providing services necessary to the preparation and performance of new gTLD applications (Sect. II.D.3, *infra*).

cannot be reconciled with these common transactions, and would render highly uncertain the meaning of relevant Guidebook provisions. If adopted by the Panel, it would put in question numerous gTLD applications and past delegations -- which could be subject to collateral attack -- and could significantly damage the New gTLD Program. Indeed, under Afiliias' interpretation, it would be difficult to imagine how there could be a successful new gTLD program at all. Either ICANN would have to re-write the Guidebook to establish new disclosure requirements and a regime to approve all applicants; third party contracts, which would be infeasible, *or* countless new gTLD applications and delegations potentially would be subject to collateral attack.

6. *Fifth*, in drafting the Guidebook, ICANN rejected proposed limits on post-delegation assignments proposed by Microsoft, which argued that “[t]he possibility of an active secondary market in gTLDs raises significant concerns.”<sup>12</sup> In doing so, ICANN explained that the existing assignment provisions in the new gTLD registry agreement were sufficient to address any post-delegation assignment of registry agreements to new operators.<sup>13</sup> Afiliias' argument here is essentially the same as Microsoft's proposal – *i.e.*, that the Guidebook should be read to include limitations on future assignments of new gTLDs. The Panel should not read into the Guidebook a limitation rejected by ICANN during the Guidebook drafting process.

7. *Sixth*, as Afiliias itself has argued, ***any attempted transfer would, by operation of law, be of no force or effect*** because the Guidebook does not grant applicants transfer rights. As Afiliias states, “VeriSign's interest in the VeriSign/NDC Agreement could not give VeriSign any rights” in NDC's Application, and thus all rights in the Application remain with NDC.<sup>14</sup>

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<sup>12</sup> AC-35 (ICANN, “New gTLDs Applicant Guidebook April 2011 Discussion Draft, Public Comment Summary and Analysis” (April–May 2011), at 89, available at <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv6-30May11-en.pdf>).

<sup>13</sup> *Id.*

<sup>14</sup> Afiliias' *Amici* Opposition, ¶ 85; see AA-36 (International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (2016) at 314 (“The assignment of a right . . . is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment.”)). Afiliias also states:

VeriSign has no rights in NDC's .WEB application, nor can it: the application's Terms and Conditions specifically prohibit NDC from reselling, assigning, or transferring ***any*** of NDC's rights or obligations in connection with its application to any third party . . . VeriSign appears to rely on its interest in its wholly separate agreement with NDC . . . . VeriSign's interest in the VeriSign/NDC Agreement could not give VeriSign any rights in either NDC's .WEB application (which, as noted above, is prohibited by the terms and conditions of that application) or in any future registry agreement that NDC might conclude with ICANN. (Afiliias' *Amici* Opposition, ¶¶ 83–85 (emphasis added)).

8. *Finally*, in a common refrain by Afilias in this IRP, Afilias attacks provisions of the DAA as sinister, much as Afilias has attacked ICANN's actions before and after the auction as sinister and in furtherance of various conspiracies.<sup>15</sup> Afilias offers no evidence to support its conspiracy theories -- because none exists. The DAA provisions that Afilias attacks mean what they say, and not what Afilias alleges them to mean. They are common contractual undertakings in anticipation of Verisign's financing of NDC's bid and a possible future transfer of the .WEB registry agreement. Afilias' insinuations about secret alliances or partiality in the interactions between ICANN and Verisign similarly are unfounded. There were never any communications between ICANN and Verisign or NDC in relation to .WEB for any purpose other than responding to ICANN's requests for information in its investigations of Afilias' claims.<sup>16</sup>

**B. Afilias Misapprehends The Guidebook's Assignment and Resale Limitations**

**1. New gTLDs Are Commonly Transferred by Applicants**

9. Hundreds of new gTLDs have been transferred from original applicants to new registry operators. As explained more fully in Section II.D.3 *infra*, these transfers have included assignments pursuant to both pre- and post- delegation agreements, including pre-delegation agreements to finance auction bids in exchange for post-delegation assignments if the bids are successful. These transactions have been reported following resolution of the contention sets and ICANN has approved the registry agreement assignments. Accordingly, the DAA contemplates nothing more than that which has occurred many times before under the new gTLD program.

10. Disregarding these common industry practices, Afilias rests its complaints about the DAA on a non-sensical interpretation of a single phrase in the Guidebook that limits the resale, assignment or transfer of an application -- *not* transfer of future rights under a registry

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The DAA itself expressly states that NDC has not and cannot assign or transfer its rights to the .WEB Application to any party (including Verisign). *See, e.g.*, Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ C (NDC has not and "will not in the future sell, assign or transfer any . . . rights or obligations" in the Application)).

<sup>15</sup> *See* AC-48 (Jonathan Robinson, ".WEB Is ICANN's First Test of Accountability" (Oct. 28, 2016), *available at* <https://afilias.info/blogs/web-icanns-first-test-accountability>); AC-70 (Paul Livesay, Circle ID, "Afilias' Cynical Attempt to Secure a Windfall at Community Expense" (Nov. 7, 2016), *available at* [http://www.circleid.com/posts/20161107\\_afilias\\_cynical\\_attempt\\_to\\_secure\\_a\\_windfall\\_at\\_community\\_expense/](http://www.circleid.com/posts/20161107_afilias_cynical_attempt_to_secure_a_windfall_at_community_expense/)).

<sup>16</sup> Redacted - Third Party Designated Confidential Information

agreement. Notwithstanding ICANN's approval of hundreds of post-delegation transfers of new gTLDs, this sentence of the Guidebook (to *amici's* knowledge) has never been applied by ICANN to find a violation of the Guidebook or to challenge the transfer of a new gTLD.

## 2. The Language of Section 10 Does Not Support Afilias' Claims

11. Section 10 of Module 6 of the Guidebook is intended to limit -- or, if taken literally, to exclude -- the acquisition of rights by an applicant by virtue of its gTLD application. It provides that an applicant would only acquire rights with respect to the subject gTLD upon execution of a post-delegation registry agreement with ICANN. Section 10 provides in full:

10. *Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN*, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). *Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.*<sup>17</sup>

12. The last sentence of Section 10 adds that the applicant may not resell, assign or transfer the applicant's rights or obligations with respect to an application. There is no other reference to these terms in the hundreds of pages of the Guidebook or related documentation. Nor has this provision ever been applied to disqualify an application for a new gTLD.

13. Neither Section 10, nor any other section of the Guidebook, relevant ICANN policy, Bylaw, or other documentation, defines the terms "resell, assign or transfer."<sup>18</sup> The Guidebook also does not specify what, if any, rights an applicant has that could possibly be subject to a resale, assignment or transfer, at least prior to the execution of a registry agreement. Indeed, the first sentence of Section 10 expressly states that the applicant has *no rights* in

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<sup>17</sup> Afilias C-3 (ICANN Guidebook, at Module 6, § 10 (emphasis added)).

<sup>18</sup> The terms "resell," "assign" and "transfer" are not separately used or defined anywhere in the Guidebook. Both in the Guidebook and common usage, the terms are used interchangeably without any distinction among them. They also are used interchangeably in this brief for the reasons explained in more detail in Section II.C, *infra*.

connection with a gTLD until a registry agreement has been executed, and even then, an applicant shall have only those rights expressly granted in the registry agreement. There is no dispute that a registry agreement was never executed with respect to .WEB. Taken literally, it is unclear under the language of Section 10 that NDC had any rights subject to the prohibition on transfer, except possible ownership of rights that may exist in the Application itself.<sup>19</sup>

14. Nevertheless, it is this limited phrase at the end of Section 10 -- that applicant shall not “resell, assign or transfer” its application rights -- upon which Afiliás bases this IRP. As explained below, Afiliás’ claims that the DAA violates this provision are meritless.<sup>20</sup>

**C. The Terms “Resell, Assign or Transfer” Refer to a Present (*Not Future*) Transfer of the Ownership of Rights and Obligations Under an Application**

15. Common usage, the context here, industry practice and well settled principles of contract interpretation each requires that the phrase “resell, assign or transfer” be interpreted to mean the present transfer in ownership of rights or obligations under an application, divesting the applicant of those rights or obligations, and vesting them in a third party. A different construction of these terms would create significant uncertainties in the interpretation of the Guidebook while failing to serve any of the purposes sought to be achieved by the Guidebook.

16. As in common usage, the Guidebook uses the terms resell, assign or transfer interchangeably, and does not make any distinction among them.<sup>21</sup> They are found only in the

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<sup>19</sup> The Guidebook provides even further limits on an applicant’s rights, at the same time providing substantial discretion, or business judgment, for ICANN under the Guidebook:

3. Applicant acknowledges and agrees that *ICANN has the right to determine not to proceed with any and all application* for new gTLDs . . . . The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is *entirely at ICANN’s discretion*. ICANN reserves the right to reject any application that ICANN is prohibited from considering under law or policy . . . .” (*Id.* at Module 6, § 3 (emphasis added)).

<sup>20</sup> Afiliás has added a claim that NDC improperly failed to update its Application, a claim that ultimately depends on Afiliás’ claims that the DAA constitutes an unauthorized transfer under Section 10. Sect. II.F.3, *infra*.

<sup>21</sup> “If you want to *transfer* your contractual rights to another person, you will need to make an *assignment* . . . . After an assignment takes place, full contractual rights will be *transferred* to the *assignee*. These will be the exact same rights as enjoyed by the original contracted party.” AA-38 (Upcounsel, “Transfer of Rights Contract: Everything You Need to Know,” available at <https://www.upcounsel.com/transfer-of-rights-contract> (emphasis added)); *see, e.g.*, AA-27 (*Restatement (Second) of Contracts* § 316, cmt. c (1981) (“In this Chapter rights are said to be ‘assigned’; duties are said to be ‘delegated.’ . . . ‘Assignment’ is the *transfer* of a right by the owner (the obligee or assignor) to another person (the assignee).” (emphasis added))); AA-7 (*Brewer Corp. v. Point Ctr. Fin., Inc.*, 223 Cal. App. 4th 831, 842 (2014), *as modified on denial of reh’g* (Feb. 27, 2014) (“An *assignment* is defined as a ‘*transfer* of rights or property.’” (quoting AA-6 (Black’s Law Dict. (9th ed. 2009), at 136 (emphasis added))); AA-16 (*Johnson v. J.G. Wentworth Originations, LLC*, 391 P.3d 865, 868–69 (Or. App. 2017) (“[W]e conclude that Met Tower was entitled to enforce the anti-*assignment* clause in the structured settlement agreement, barring the *transfer*” (emphasis added)); *see also* AA-15 (*In re Foreman*, 850 N.E.2d 387, 389–90 (Ill. App. 2006)).

single phrase at the end of Section 10 and, as noted above, are not separately defined or used. While not defined by ICANN, the terms resell, assign and transfer do have an established legal meaning with corresponding legal requirements. Importantly, to resell, transfer or assign a right requires a *present* transfer of the ownership of a right.<sup>22</sup> Once a transfer has occurred, the transferor is divested of ownership of the right, and the transferee stands in the shoes of the transferor.<sup>23</sup> The terms of the DAA are inconsistent with these requirements. Section II.C, *infra*.

17. Afilias' position in this IRP is based on an untenable interpretation of the term "transfer." It takes the view that even where a contract expressly disclaims a transfer or assignment of rights, the contract nevertheless violates Section 10 if it includes among its terms an obligation of the applicant, or a right in a third party, that may affect or indirectly limit the performance by the applicant of any of its obligations or rights with respect to the application. Afilias equates such a third party contract with an actual resale, assignment or transfer of the new gTLD application itself in contravention of Section 10.<sup>24</sup> Were Afilias correct, Section 10 would make it impossible for new gTLD applicants to enter into a wide range of important and necessary contracts such as financing arrangements, contracts for services, and security agreements, ***without creating a risk of invalidating their gTLD application***. Under Afilias' construction, such contracts would create obligations to third parties that could indirectly limit or affect an applicant's exclusive control over rights or obligations under its gTLD application, and therefore amount to a conveyance of that application in violation of the Guidebook.<sup>25</sup>

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<sup>22</sup> AA-31 (*Springfield Int'l Rest., Inc. v. Sharley*, 44 Or. App. 133, 140 (1980) ("A contract to assign a right in the future is not an assignment." (citing AA-26 (*Restatement (First) of Contracts*, § 166(1) (1932))). "To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person." AA-18 (*McCown v. Spencer*, 8 Cal. App. 3d 216, 225 (1970) (emphasis added) (internal citation omitted)).

<sup>23</sup> See Authorities at note 8, *supra*; AA-19 (*Merchants Serv. Co.*, 35 Cal. 2d at 114 (an assignment contemplates that the former "extinguished his right . . . and this right was transferred to the company, so that it thereafter stood in the place of" the assignor)); AA-21 (*Modern Law of Contracts* § 21:6 ("An assignor must show an intention to divest himself of a property interest and to vest indefeasible title to that property interest in an assignee . . . . Once the assignment is made, the assignee stands in the shoes of the assignor and may assert rights under the contract the same as the assignor. The assignor no longer has the right or power to enforce the assigned interest.")); AA-29 (*Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1227 (S.D. Fla. 2009) ("An assignment is a transfer of all the interests and rights to the thing assigned. Following an assignment, the assignee 'stands in the shoes of the assignor' and the 'assignor retains no rights to enforce the contract' at all.")).

<sup>24</sup> Afilias' Amended IRP Request, ¶¶ 64–67.

<sup>25</sup> *Id.* Section II.D.3, *infra*.

18. As described in detail in Section II.D.3, *infra*, Afilias’ interpretation of the Guidebook limitations on transfers is contrary to industry practice, including Afilias’ own conduct. It is also contrary to provisions of the Guidebook, among others, that expressly recognize that contention set members may at any time (other than during the Blackout Period) consider “post-auction ownership transfer arrangements” (Afilias C-4, Auction Rules for New gTLDs (Feb. 24, 2015), § 68) and may form joint ventures with respect to the gTLD while an application is pending (Afilias C-3, ICANN Guidebook, at Module 4, § 4.1.3).

19. Afilias’ attempt to interject uncertainty regarding the term “transfer” is also contrary to the Guidebook’s purposes. As ICANN has explained, the Guidebook’s limitation on an applicant’s transfer of rights is meant to ensure that the gTLD operator has the technical and financial ability to operate the registry.<sup>26</sup> ICANN also has explained that this same criteria is used to approve a post-delegation request for assignment of a registry agreement -- specifically, whether the applicant possesses the financial and technical ability to operate the gTLD.<sup>27</sup>

20. It is well-established that restrictions on the assignment or transfer of contract or property rights are to be narrowly construed consistent with the purposes of the contract or, here, the Guidebook.<sup>28</sup> It is likewise settled that such terms should be construed narrowly to avoid a forfeiture, such as the forfeiture that Afilias seeks to achieve through this IRP.<sup>29</sup>

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<sup>26</sup> ICANN Response to Amended IRP Request, ¶¶ 21, 27, 29.

<sup>27</sup> *Id.*, ¶ 26; Willett Stmt. (May 31, 2019), ¶ 38; *see also* Section II.D.5, *infra* (ICANN rejection of Guidebook limits on post-delegation assignments because ICANN’s right to consent to any assignment under the standard form registry agreement is sufficient to protect the community’s interests). It was specifically on this basis that ICANN approved – for Afilias – the post-delegation transfer of .MEET from Afilias to Google and the transfers to Afilias of .PROMO, .ARCHI, .BIO and .SKI. (ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection, ¶¶ 27–30). It is beyond dispute that Verisign has the technical and financial ability to operate the .WEB registry.

<sup>28</sup> *See, e.g.*, AA-12 (*Creditors Adjustment Bureau, Inc. v. IBT Media Inc.*, 2019 WL 3082845, at \*2 (N.D. Cal. July 15, 2019) (court narrowly construed the contractual prohibitions on the assignment of “rights,” holding that it did not prohibit an assignment of the right to assign a claim for damages for a breach of contract)); AA-5 (*Benton v. Hofmann Plastering Co.*, 24 Cal. Rptr. 268, 273 (Ct. App. 1962) (“The area of limitations on assignments is, of course, one in which the courts strictly construe such restrictions just as they jealously guard the right to transfer property in general.”)); AA-16 (*J.G. Wentworth Originations*, 391 P.3d at 868–69 (“[P]ublic policy strongly favors the free transferability of property”)); AA-30 (*Spingola v. Whitewater Mountain Resorts of Connecticut, Inc.*, 2002 WL 31894720, at \*4 (Conn. Super. Ct. Dec. 10, 2002) (“[A]nti-assignment clauses are construed narrowly whenever possible”)); AA-39 (*Wonsey v. Life Ins. Co. of N. Am.*, 32 F. Supp. 2d 939, 943 (E.D. Mich. 1998) (“As the latest Restatement makes clear, the *modern trend* with respect to contractual prohibitions on assignments is to interpret these clauses narrowly, as barring only the delegation of duties, and not necessarily as precluding the assignment of rights from assignor to assignee” (emphasis in original))).

<sup>29</sup> AA-20 (*Milenbach v. Comm’r*, 318 F.3d 924, 936 (9th Cir. 2003) (“Forfeitures are not favored, however, and courts must strictly construe forfeiture provisions against the party on whose behalf they are invoked.”)); AA-17



**D. The Express Terms of the DAA Establish that It Does Not Transfer Rights or Obligations with Respect to the Application**

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

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(iii) if NDC prevailed as the winner of the Contention Set and ultimately entered into a registry agreement with ICANN for the .WEB gTLD, then NDC would apply to ICANN for its consent to assign the registry agreement to Verisign Redacted - Third Party Designated Confidential Information<sup>32</sup>

22. The DAA is explicit and unambiguous that the parties contemplated only a possible contingent, future assignment of the registry agreement following (i) resolution of the contention set, (ii) execution of a registry agreement, and (iii) ICANN's consent to the assignment.<sup>33</sup> Rights and obligations under the Application were never assigned by the DAA.

23. Redacted - Third Party Designated Confidential Information

The false rumors were spread by AfiliAs and other Contention Set members in an effort to coerce NDC to agree to a private auction or otherwise interfere with a

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(*Maples v. SolarWinds, Inc.*, 50 F. Supp. 3d 1221, 1228 (N.D. Cal. 2014) (“[A] court has a duty to construe a contract to avoid a forfeiture, if at all possible.” (citing AA-8 (Cal. Civ. Code § 1442))); AA-3 (*Ballard v. MacCallum*, 15 Cal. 2d 439, 444 (1940) (“We have two possible constructions, one of which leads to a forfeiture and the other avoids it. In such a case the policy and rule are settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible.”))).

<sup>30</sup> Livesay Ex. D (DAA, *supra* note 5, at 1).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Livesay Ex. H (DAA Supplement, *supra* note 4).

<sup>35</sup> Redacted - Third Party Designated Confidential Information

public auction of .WEB. *See* NDC Brief at § II.B.5.

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**1. The DAA Provides Only for Financing and a Contingent Future Assignment of the Registry Agreement Upon ICANN's Consent**

24. The DAA did not sell, assign, or transfer the Application or its rights or obligations. The DAA provides only for a possible future assignment of a registry agreement upon ICANN's prior consent, Redacted - Third Party Designated Confidential Information

NDC remains the applicant today.

25. The provisions of the DAA regarding a potential future assignment of the registry agreement are clear and unambiguous:

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Contrary to Afiliás' claims, the DAA provides only for a future, conditional assignment of the *registry agreement* -- **not** the Application -- upon consent by ICANN.

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<sup>36</sup> Livesay Ex. H (DAA Supplement, *supra* note 4, ¶¶ A & C).

<sup>37</sup> Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 3(c) (emphasis added)).

<sup>38</sup> *Id.* at Ex. A, § 3(h) (emphasis added).

<sup>39</sup> *Id.*, § 3 (emphasis added).

<sup>40</sup> *Id.*, § 5(a)(iv) (emphasis added).

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27. Redacted - Third Party Designated Confidential Information

28. Redacted - Third Party Designated Confidential Information

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<sup>41</sup> *Id.*, § 4(c).

<sup>42</sup> *Id.*, § 4(a)(i).

<sup>43</sup> *Id.*, § 9.

<sup>44</sup>

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<sup>45</sup> *Id.* at Ex. A, § 3(b).

<sup>46</sup> *Id.* at Ex. A, § 3(c)-(d).

<sup>47</sup> Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ C).

<sup>48</sup> Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 9).

<sup>49</sup> Contrary to Afiliás' argument, NDC remained the applicant and the DAA could terminate according to its terms and NDC end up as the registry operator for .WEB. *See* Livesay Stmt. (June 1, 2020), ¶ 23; Sect. II.D.6, *infra*.

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30. Redacted - Third Party Designated Confidential Information

31. None of these terms would have been necessary if NDC's rights or obligations in the Application had been resold, assigned or transferred to Verisign by virtue of the DAA. Stated differently, the DAA's numerous contingencies, default, and termination provisions were antithetical to a present assignment or transfer of the Application. Section II.D, *supra*.

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**2. The DAA Supplemental Agreement Confirms that There Was No Assignment or Transfer**

32. Afilias' attempt to interfere with the public auction of .WEB began before the auction, before Afilias knew that Verisign was providing financing to NDC, and before Afilias knew of the DAA. As explained in more detail in the NDC Brief at Section II.B.5, Afilias worked in concert with other Contention Set members to force a "private auction" that would fix the results of the auction before it occurred, including by offering to "guarantee" the payment of \$17.02 million to NDC for losing the auction. Afilias tried further to prevent a public auction by

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<sup>50</sup> Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 1(k) (emphasis added)).

<sup>51</sup> *Id.* at Ex. B.

falsely claiming to ICANN that there had been a change in ownership or management of NDC.<sup>52</sup>

33. As a result of Afilias' pre-auction conduct, rumors began circulating that NDC had sold or transferred control of the company to an unknown third party -- rumors that were later proven untrue.<sup>53</sup> As noted above, on becoming aware of these rumors, Verisign requested assurances of performance by NDC under the terms of the DAA entitling it to such assurances at any time.<sup>54</sup>

34. Redacted - Third Party Designated Confidential Information

### **3. The DAA is Fully Consistent with Industry Practices Under the Guidebook, Including Assignments of gTLDs Approved by ICANN**

35. The DAA is consistent with industry practices in acquiring and assigning gTLDs

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<sup>52</sup> Rasco Stmt. (June 1, 2020), ¶¶ 75–81.

<sup>53</sup> Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ A).

<sup>54</sup> *Id.*; Livesay Ex. D (DAA, *supra* note 5, at § 4(k)).

<sup>55</sup> *Id.*, ¶ C (emphasis added).

<sup>56</sup> *Id.*, ¶ D (emphasis added).

<sup>57</sup> *Id.*, ¶ F (emphasis added).

as part of the new gTLD program, including assignments pursuant to pre- and post- auction agreements. Many of these transactions have been publicly reported following resolution of the relevant contention sets, and post delegation assignments have been approved by ICANN. As explained in the Livesay and Rasco Witness Statements, Verisign and NDC were aware of these transactions before they executed the DAA.<sup>58</sup>

36. According to ICANN, approximately 1,200 new gTLDs have been delegated and are operational under the New gTLD Program. *Hundreds* of these gTLDs have been assigned or transferred by the original applicant to a new operator for financial gain or other reasons. In many instances, the gTLDs were assigned prior to being operated by the original applicant and with the intent that they be operated for purposes other than those specified by the original applicants in their applications. ICANN has approved these transfer requests so long as the assignee has the requisite financial and technical capability to operate a TLD.<sup>59</sup>

37. Transactions like the DAA are commonplace. ICANN has never rejected a transfer request on the ground that the assignment agreement was executed prior to resolution of the contention set or because the purpose of the TLD would change following the assignment.<sup>60</sup>

38. **Afilias’ Own Purchases and Sales of .MEET, .PROMO, .ARCHI, .BIO, .SKI and other New TLDs.** As ICANN has described:

Afilias Limited applied for .MEET in 2012, stating that it planned to make it “the most popular, accessible, and innovative destination on the Internet where people seeking online dating and companionship services can learn about dating, companionship services and registrars that offer .MEET domain names.” On 16 January 2014, ICANN and Afilias Limited entered into a .MEET Registry Agreement. But before launching .MEET -- *i.e.*, before serving a single customer -- Afilias Limited sought to transfer the .MEET Registry Agreement to Charleston Road Registry Inc. d/b/a/ Google Registry (“Google”) in October 2014. According to the transfer application, Google planned on converting .MEET from a dating platform to a gTLD that provided “web-based business meetings.” ***Because ICANN determined that Google had the technical and financial ability to operate .MEET, ICANN approved the transfer even though the new objective for the gTLD was radically different than that expressed in the Afilias application.***

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<sup>58</sup> Livesay Stmt. (June 1, 2020), ¶¶ 8–10; Rasco Stmt. (June 1, 2020), ¶¶ 42–45.

<sup>59</sup> ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection, ¶¶ 25–30; *supra* at Section II.D.3.

<sup>60</sup> Willett Stmt. (May 31, 2019), ¶ 18.

29. Likewise, in 2015, the entity that entered into a Registry Agreement with ICANN to operate .PROMO requested that ICANN approve a transfer of .PROMO to Afilias plc prior to delegation of .PROMO. ***Although Afilias did not originally apply to operate .PROMO, ICANN approved the transfer based on a demonstration that Afilias was qualified to operate the gTLD.***

30. Finally, as described on its own corporate website, “Afilias has an active program for acquiring new Top Level Domains.” For instance, in 2016, Afilias plc announced its acquisition of StartingDot, which had become the registry operator for .ARCHI, .BIO and .SKI through the Program. In Afilias plc’s words, “[t]he acquisition agreement is part of Afilias’ ongoing program of acquiring new TLDs to add to its portfolio.” ***ICANN approved the transfer of those TLDs to Afilias plc based on its technical and financial ability to operate them.***<sup>61</sup>

39. **Afilias’ “We Buy Any Car” Campaign to Acquire New gTLDs.** At roughly the same time that the DAA was signed, Afilias was promoting “an overt campaign to snap up struggling new gTLDs at bargain basement prices.”<sup>62</sup> According to Afilias’ Chief Marketing Officer, Afilias could potentially buy tens of gTLDs during 2015, comparing its strategy “to the ‘We Buy Any Car’ business model.”<sup>63</sup> Afilias’ interest in acquiring new gTLDs was promoted in ICANN meeting halls and advertised in industry journals.<sup>64</sup> Afilias’ claims here stand in stark contrast to its own practices in acquiring and assigning new gTLDs outside this proceeding.

40. **Assignment of .BLOG in Exchange for Pre-Delegation Financing.** Afilias participated in the contention set for the .BLOG gTLD. WordPress, another registry operator, acquired rights to the .BLOG gTLD based on an application submitted by Primer Nivel S.A.<sup>65</sup> The parties waited until after Primer Nivel prevailed in the auction for .BLOG, and had executed the .BLOG registry agreement, before requesting assignment to WordPress.<sup>66</sup> According to press reports, ***WordPress financed Primer Nivel’s winning auction bid but “wanted to stay***

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<sup>61</sup> ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection, ¶¶ 28–30 (emphasis added).

<sup>62</sup> AC-64 (Kevin Murphy, Domain Incite, “Afilias Wants to Buy Your Failed gTLD” (July 7, 2015), available at <http://domainincite.com/18898-afiliias-wants-to-buy-your-failed-gtld>).

<sup>63</sup> *Id.* (“There are entrants in the market who . . . for whatever other reason they’re coming to the conclusion this isn’t the business they should be in and they’re looking for options,” [Afilias Chief Marketing Officer] LaPlante said.”).

<sup>64</sup> *Id.* Examples of Afilias’ advertisements are Exhibits AC-45, AC-46, and AC-47 hereto.

<sup>65</sup> AC-1 (.blog Registry Agreement ICANN-Primer Nivel, available at <https://www.icann.org/sites/default/files/tlds/blog/blog-agmt-pdf-14may15-en.pdf>); AC-2 (.blog Assignment and Assumption Agreement Primer Nivel-WordPress, available at <https://www.icann.org/sites/default/files/tlds/blog/blog-assign-pdf-29apr16-en.pdf>).

<sup>66</sup> *Id.*

*stealth while in the bidding process and afterward in order not to draw too much attention.*<sup>67</sup>

WordPress financed Primer Nivel's bid in exchange for an assignment of the .BLOG gTLD following the auction. Primer Nivel did not disclose the terms of its financing from WordPress prior to the auction. ICANN consented to the assignment.<sup>68</sup> Afilias, as part of the contention set, did not object. There was no claim of any violation of the Guidebook.

41. **Assignments by Donuts in Exchange for Pre-Delegation Financing.** Donuts is another very active player in the new gTLD program and secondary market, and a member of the .WEB Contention Set. It entered into an agreement with RightSide Media Group Limited ("Rightside"), pursuant to which Rightside provided financing for Donuts' acquisitions of multiple gTLDs in exchange for the right to an assignment of those gTLDs to Rightside in the event Donuts were to succeed in obtaining rights to them.<sup>69</sup> Numerous new gTLDs acquired by Donuts subsequently were transferred to Rightside with ICANN's consent.<sup>70</sup>

42. **Acquisition of .TECH Contingent on Successful Auction.** There are countless variations in pre-delegation contracts to acquire new gTLDs post-auction. Radix acquired the rights to the .TECH gTLD by means of a pre-auction agreement with one of the applicants, Dot Tech, LLC ("Dot Tech"), contingent upon Dot Tech subsequently prevailing in an auction for the TLD.<sup>71</sup> Dot Tech won the auction and thereafter Dot Tech's application was updated to add

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<sup>67</sup> Livesay Ex. F (Alan Dunn, NameCorp, "Knock Knock WordPress Acquires Blog for 19 Million" (May 15, 2016), available at <https://namecorp.com/knock-knock-wordpress-acquires-blog-for-19-million/> (emphasis added)). Verisign believes that neither Primer Nivel nor WordPress disclosed the financing of Primer Nivel's auction bid to ICANN or others before the auction. ICANN's gTLD application does not require applicants to disclose the source(s) of funds for their bids. Thus, an applicant securing a new source of funding can hardly be characterized as a "change[] in financial position" necessitating an update to a pending application under Section 1.2.7, which clearly is intended only to ensure that ICANN is made aware of reasons why an applicant may no longer be financially capable of carrying out its obligations as registry provider.

<sup>68</sup> Livesay Ex. G (.blog Registry Agreement ICANN-Primer Nivel (webpage), available at <https://www.icann.org/resources/agreement/blog-2015-05-14-en>) ("On 14 May 2015, ICANN and PRIMER NIVEL S.A., entered into a Registry Agreement under which PRIMER NIVEL S.A., operated the .blog top-level domain. Effective 29 April 2016, the Registry Agreement was assigned by PRIMER NIVEL S.A. to Knock Knock WHOIS There, LLC which now operates the .blog top-level domain.").

<sup>69</sup> AC-50 (Demand Media SEC Filing (May 10, 2013), at 19).

<sup>70</sup> For example, under the Rightside/Donuts pre-delegation agreements, multiple TLDs were assigned in exchange for financing auction bids. The pre-delegation agreements were reported in the press and SEC filings and the subject of specific correspondence to ICANN from Eric Stoler. *Amici* believe that ICANN approved all of the assignments. AC-50 (Demand Media SEC Filing (May 10, 2013), at 19); AC-51 (Rightside SEC Filing (2014)); Rasco Stmt. (June 1, 2020), ¶ 43.

<sup>71</sup> Livesay Stmt. (June 1, 2020), ¶ 14; Rasco Stmt. (June 1, 2020), ¶ 44.



Radix personnel and to substitute Radix for Dot Tech’s former parent company.<sup>72</sup> To *amici*’s knowledge, these transactions were not disclosed to ICANN or the .TECH contention set.

43. **Other Contracts Regarding New gTLD Applications.** Afilias contends that third-party contracts that may affect or limit the sole and exclusive control over rights or obligations of an applicant are a violation of Section 10.<sup>73</sup> This argument is inconsistent with the practices of numerous providers of services -- including Afilias -- in support of applicants. For example, Afilias advertises on its website that “[a]s one of the leaders in TLD registry services, we’d be happy to *help you with the application and technology needed for the next round*” of gTLD applications.<sup>74</sup> In this IRP, however, Afilias claims that entering into such contracts violates the Guidebook.<sup>75</sup> Valideus advertises a range of services, including advice and assistance in “the preparation of the required Financial, Technical and Operational plans,” “draft[ing] answers and prepar[ing] supporting documents” for the gTLD application, and providing advice on “strategies for bidding” in gTLD auctions.<sup>76</sup> (*Compare with Afilias’ claims at Section II.D.6, infra*). CentralNic specifically advertises financing services for new gTLD applicants wishing to participate in auctions.<sup>77</sup> (*Compare with Afilias’ claims at Section II.D.6, infra*). FairWinds Partners advertises that, among other services, it “[I]iaises with ICANN to document and report the results of clients’ pre-delegation testing . . .”.<sup>78</sup> (*Compare with Afilias’ claims at Section II.D.6, infra*).

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<sup>72</sup> Rasco Stmt. (June 1, 2020), ¶ 44; Rasco Ex. E (.TECH Application (Revised) (Oct. 23, 2014)); Livesay Stmt. (June 1, 2020), ¶ 14.

<sup>73</sup> Afilias Reply Memorial, ¶ 54.

<sup>74</sup> AC-44 (Afilias, “New TLDs: Top Level Domain Registry Services,” available at <https://afilias.info/global-registry-services/new-tlds> (emphasis added)).

<sup>75</sup> An entire industry of service providers has built up around the new gTLD application process, with third-party companies providing applicants with services addressing every step of the process, including filling out the initial application, arranging financing for the gTLD, providing backend registry services, and even assisting applicants to respond to follow-up questions from ICANN regarding a filed application. See AC-63 (Kevin Murphy, Domain Incite, “You might be surprised how many new gTLDs have changed hands already” (July 1, 2015), available at <http://domainincite.com/18849-you-might-be-surprised-how-many-new-gtlds-have-changed-hands-already>); AC-64 (“Afilias Wants to Buy Your Failed gTLD,” *supra* note 62); AC-44 (“New TLDs: Top Level Domain Registry Services,” *supra* note 74).

<sup>76</sup> AC-55 (Valideus, “New gTLD Application Management,” available at <http://www.valideus.com/services/new-gtld-application-management>).

<sup>77</sup> AC-56 (CentralNic, “A Different Take on New TLDs from the CEO of a Well Established Company With a Big Footprint in Both .Com AND New TLD Camps” (May–June 2012), available at <https://www.centralnic.com/company/news/2012/a-different-take-on-new-tlds-from-a-company-with-a-big-footprint-in-both-dotcom-and-new-tld-camps>).

<sup>78</sup> AC-54 (FairWinds Partners, “Services,” available at <https://www.fairwindspartners.com/services/>).

44. None of these contractual arrangements violate the Guidebook. Under such arrangements, the applicant remains the party ultimately responsible to ICANN for fulfilling any application obligations. The service provider is not substituted as the applicant and has no rights with respect to the application. The same is true with respect to the DAA.

45. Likewise, Afilias' attack on Verisign's financing of NDC's bid cannot be squared with Afilias' admission that it used undisclosed third party financing in its own bid for .WEB and that its lenders exercised their control to limit the amount Afilias could bid at the auction, resulting in its loss of the auction and the award of .WEB to NDC. This bid limitation in Afilias' financing agreement appears to be the reason why, during the Blackout Period, Afilias tried to bribe NDC to agree to a private auction, and to *lose the auction*, for the specific amount of \$17.02 million.<sup>79</sup>

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46. There is no way around the fact that, under the DAA, NDC must seek ICANN's consent to any assignment of .WEB. By entering the DAA, NDC and Verisign did not gain any advantage or avoid any scrutiny in the auction's administration, the award, or the execution of a registry agreement for .WEB. (Section II.D.6, *infra*.) It would be fundamentally unfair and a violation of the equal treatment required under ICANN's Bylaws if ICANN or this Panel were to adopt a new interpretation of the anti-assignment provision of the Guidebook that, contrary to industry practice, would render the DAA subject to collateral attack by Afilias.<sup>80</sup>

**4. “Fundamental Principles” of the New gTLD Program do not Prohibit Post-Application Assignments of Applications, as Afilias Contends**

47. Although there was not an assignment of NDC's Application, Afilias argues in its Reply that the public comment period for New gTLD applications requires that Rule 10 be interpreted as imposing an absolute bar against the resale, transfer, or assignment of an

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<sup>79</sup> The proposed auction agreement specified that the auction proceeds would be shared among losing bidders. See NDC Brief at Sect. II.B.5. The financing agreement undoubtedly placed numerous restrictions on Afilias with respect to its application and security for the lender. Section II.F.3, *infra*. Afilias' Amended IRP Request, ¶ 35 (“Under the terms of its bank financing agreements, Afilias was able to bid up to USD 135 million for .WEB . . . short of the USD 142 million needed to progress to the next round.”).

<sup>80</sup> Afilias C-1 (Bylaws, *supra* note 1, § I.1(a)(v) (ICANN will “[m]ake decisions . . . without singling out any particular party for discriminatory treatment . . .”).

application.<sup>81</sup> Afilias’ argument rests on the assumption that the public comment period allows objections to New gTLD applications based on the identity of the applicant or its alleged market position,<sup>82</sup> and that such comments would have an impact on the evaluation process. In fact, the Guidebook provides to the contrary.

48. While anyone may submit a comment regarding a new gTLD application, only comments that are relevant to *evaluation criteria* may be considered in evaluating an application. There is no prohibition on Verisign participating in the New gTLD Program, and competition is not an evaluation criteria in the Guidebook. *See infra* at III.A.4. Thus, comments Afilias assumes would have been lodged with respect to NDC’s application, had Verisign’s role been known, would have had no relevance to ICANN’s evaluation of NDC’s application.<sup>83</sup>

### **5. The Drafting History of the Guidebook Contradicts Afilias’ Claims**

49. In drafting the Guidebook, ICANN declined to include proposed limits on post-delegation assignments of registry agreements, choosing instead to rely on ICANN’s right, upon a post-delegation request for assignment of a registry agreement, to approve such assignment. Microsoft, for example, submitted a comment to the April 2011 Discussion Draft of the Guidebook arguing that “[t]he possibility of an active secondary market in gTLDs raises significant concerns.”<sup>84</sup> To address its concern, Microsoft argued that “ICANN should revise section 7.5 of the Registry Agreement to prohibit assignments within a defined period (12-18 months) after delegation, which would decrease ‘gTLD flipping’” and that “ICANN should develop ‘Assignment Guidelines’ that set forth the conditions and criteria that a proposed gTLD

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<sup>81</sup> Afilias Reply Memorial (May 4, 2020), ¶¶ 31–32.

<sup>82</sup> *Id.*, ¶ 31 (“The AGB’s public comments section underscores the fundamental requirement that the identity of each applicant – and its intentions for obtaining rights to the gTLD in question – be disclosed to the public . . .”).

<sup>83</sup> Afilias also argues that NDC’s purported transfer or assignment of its Application render other “key elements of the application process . . . meaningless,” including (i) the evaluation criteria concerning the applicant’s business plan; (ii) applicant’s ability to engage in private auctions; and (iii) the requirement that “Qualified Applicants” bid on their own behalf. (*Id.*, ¶ 63). None of these are “key elements” of the application process. As discussed *infra* at Section II.F.4, the “Mission/Purpose” of a new gTLD is not part of ICANN’s evaluation criteria. There is no fundamental right to participate in a private auction; each applicant has an unfettered right to refuse to participate in a private auction. *See* Afilias C-3 (Guidebook, *supra* note 17, at Module 4, § 4.1.3). And the qualified bidder language misconstrued by Afilias is in the Bidder Agreement, applicable *only* after the evaluation process has been completed. In short, there is nothing “key” about any of the supposed program requirements identified by Afilias.

<sup>84</sup> AC-35 (“New gTLDs Applicant Guidebook April 2011 Discussion Draft, Public Comment Summary and Analysis,” *supra* note 12, at 89).

Assignee must satisfy to obtain ICANN’s approval of the proposed assignment.”<sup>85</sup> Microsoft added that “[such] conditions and criteria at a minimum must be the equivalent of the full range of evaluation for new gTLD applicants.”<sup>86</sup> Microsoft’s concern was, *inter alia*, that the Guidebook be revised to ensure that “participants do not successfully evade the examination and objection process.”<sup>87</sup>

50. ICANN rejected Microsoft’s proposal ***based on the assignment provisions of the registry agreement***, stating that “Section 7.5 of the Registry Agreement provides that Registry Operator must give certain notices and obtain ICANN’s written consent in connection with an assignment or change of control transaction,” and the ***“criteria and Qualifications [for evaluating assignments of the Registry Agreement] would include the evaluation criteria for new gTLD applicants.”***<sup>88</sup> ICANN concluded “[t]here is no compelling reason, ***given ICANN’s ability to evaluate and approve assignment transactions***, to impose an initial time-based complete bar on such transactions.”<sup>89</sup>

51. The position Afiliás takes in this IRP is a variation on the Microsoft proposal that was rejected by ICANN. Like Microsoft, Afiliás asks the Panel to read into the Guidebook a limitation on agreements for future assignments of new TLDs and to impose other limiting conditions on future assignments. The Guidebook rejects such proposals. Also like Microsoft, Afiliás’ rationale for such restrictions is that an applicant otherwise would “evade the examination and objection process.”<sup>90</sup> The Guidebook similarly rejects this rationale for limiting registry agreement assignments. As ICANN explained, its ability to approve or disapprove assignments under Section 7.5 of the Registry Agreement is sufficient to protect the community’s interests. Under basic principles of legal construction, the Panel may not read a requirement into the Guidebook that ICANN expressly considered and rejected.<sup>91</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (emphasis added).

<sup>89</sup> *Id.* (emphasis added).

<sup>90</sup> *Id.*

<sup>91</sup> See AA-1 (*Avila v. Spokane School Dist.*, 852 F.3d 936, 943–44 (9th Cir. 2017) (holding statute should be interpreted to adopt “discovery rule” instead of “occurrence rule” where occurrence rule appeared in initial draft of

**6. The Provisions of the DAA Cited by Afilias Do Not Manifest a Transfer of Rights or Obligations Under the Application**

52. In an attempt to contrive support for its contention that NDC sold the Application to Verisign, Afilias takes out of context select obligations of NDC in the DAA to protect Verisign's loan of funds to NDC for the auction. However, such provisions of the DAA: (i) do not assign or transfer NDC's rights or obligations under the Application, and (ii) are expressly limited by any action required of NDC to comply fully with the Guidebook, Application, or requests of ICANN. Discussed below in turn are each of the specific obligations in the DAA that Afilias mischaracterizes as evidence of improper assignment of the Application to Verisign.<sup>92</sup>

*At AR 64, Afilias complains that NDC agreed that it*  
Redacted - Third Party Designated Confidential Information <sup>93</sup>

53. Redacted - Third Party Designated Confidential Information

The subject provision was not an assignment of rights.

*At AR 65, Afilias complains that NDC* Redacted Third Party Designated Confidential information

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statute but was removed from final draft)); AA-14 (*Edwards v. Symbolic Int'l Inc.*, 414 F. App'x 930, 931 (9th Cir. 2011) (holding pre-contract negotiations rejecting a lengthy time period for payment refuted defendant's interpretation that time was not of the essence in contract)).

<sup>92</sup> Afilias' claims are referenced by the numbered paragraphs in the Amended IRP Request ("AR") and Reply in which they are made.

<sup>93</sup> Afilias' Amended IRP Request, ¶ 64.

<sup>94</sup> Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 1(k) (emphasis added)).

<sup>95</sup> Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ F).

<sup>96</sup> Afilias' Amended IRP Request, ¶ 65.

54. Redacted - Third Party Designated Confidential Information

Equally fundamental, as explained more fully in the Livesay and Rasco Witness Statements, the Guidebook allows every applicant the unqualified right to participate in a public auction.<sup>97</sup> There is no requirement that an applicant agree to a private auction because other members of the contention set want a private auction.

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Private

auctions among competitors can raise significant legal issues, especially where, as here, competitors propose secret agreements as to who may win and who will lose the auction, and guarantee payments to pre-selected competitors to lose the auction, as Afilias and other competitor-members of the contention set proposed for a .WEB private auction.<sup>98</sup>

*At AR 66, Afilias complains that Verisign had a right under the DAA to participate in “ICANN’s process to move the delegation of .web forward.”<sup>99</sup>*

55. The claim that Verisign’s participation in moving the process forward constitutes an assignment of the Application in violation of the Guidebook is absurd on its face. Any support by Verisign to move the delegation forward necessarily and obviously could only be done with ICANN’s knowledge and consent.

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<sup>97</sup> Rasco Stmt. (June 1, 2020), ¶ 66; Livesay Stmt. (June 1, 2020), ¶ 31.

<sup>98</sup> The U.S. Department of Justice has refused to provide a “no action letter” for private auctions, raising the specter of an antitrust violation by such a private auction. See AC-57 (Kevin Murphy, Domain Incite, “DOJ Says New gTLD Private Auctions Might Be Illegal” (Mar. 19, 2013), available at <http://domainincite.com/12308-breaking-doj-says-new-gtld-private-auctions-might-be-illegal>).

<sup>99</sup> Afilias’ Amended IRP Request, ¶ 66.

<sup>100</sup> Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 1(k)).

<sup>101</sup> Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ F). Numerous companies -- like Afilias -- are in the business of providing support services to develop and process new gTLD applications, such as Valideus and FairWinds Partners, both of whom contract with applicants to provide all of these services, including serving as liaison with ICANN. (Section II.D.3, *supra*).

*At AR 67, Afilius complains that* Redacted - Third Party Designated Confidential Information

56. Redacted - Third Party Designated Confidential Information

57. Contrary to Afilius' argument, in the event of termination of the DAA, including if that were to occur today, NDC would remain the applicant with the right to pursue the Application. Redacted - Third Party Designated Confidential Information

. The Guidebook does not preclude NDC from entering other transactions following the auction to raise money to repay Verisign (e.g., a joint venture or a loan). And the Guidebook does not address, let alone dictate, the terms upon which a registry operator, which NDC would be at that point, might transfer its interest in a new gTLD.<sup>105</sup>

*At AR 70, Afilius contends that because NDC's bid was*  
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58. This claim is based on a misconstruction of both the Guidebook and DAA. NDC made the bids for itself as applicant as required by the auction rules. Verisign participated in the

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<sup>102</sup> Afilius' Amended IRP Request, ¶ 67.

<sup>103</sup> Livesay Ex. D (DAA, *supra* note 5, at Ex. A, §§ 9–10).

<sup>104</sup> *Id.*, at Ex. A, § 9.

<sup>105</sup> Redacted - Third Party Designated Confidential Information

<sup>106</sup> Afilius' Amended IRP Request, ¶ 70.

auction because it was funding the bids. Redacted - Third Party Designated Confidential Information

NDC

always has owned all rights under its .WEB Application.

*At AR 71, Afilias separately complains that NDC's bid was invalid*  
Redacted - Third Party Designated Confidential Information .<sup>109</sup>

59. Redacted - Third Party Designated Confidential Information

60. Redacted - Third Party Designated Confidential Information

The auction

process itself was very complex, including numerous rounds of bidding across two auction days.<sup>111</sup> Redacted - Third Party Designated Confidential Information

The provisions about which Afilias complains would be reasonably required to protect any lender in such a bidding process.

61. Of course, in a private auction, there are no preset bidding rules and neither the

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<sup>107</sup> Rasco Stmt. (June 1, 2020), ¶ 99.

<sup>108</sup> *Id.*, ¶ 100. Indeed, rumors were spread before the auction by Afilias and Donuts that NDC had transferred control over the company, resulting in the execution of the assurances of performance. (Sect. II.D, *supra*).

<sup>109</sup> Afilias' Amended IRP Request, ¶ 71.

<sup>110</sup> Livesay Stmt. (June 1, 2020), ¶¶ 32–33. NDC is a small company and was seeking to bid substantial funds, over \$100 million as it turned out, and Verisign was loaning money for the bid. The terms regarding the conduct of the auction and the payment of any award were included as protections for the financing.

<sup>111</sup> In an ICANN public auction, a price is set in each round and applicants must enter a bid amount that is equal to or greater than the set price to continue to the next round. Although applicants know how many parties are participating in each round, they do not know which parties remain at any time or the limits of each party's financing or interest in the gTLD. Afilias C-3 (Guidebook, *supra* note 17, at Module 4, §§ 6–7).



Guidebook nor ICANN provides oversight. ICANN’s interest is only to ensure that the resulting registry operator -- by public or private auction or post-auction assignment -- is financially and technically capable of operating the registry. (Section II.C, *supra*.)

*At Reply 56, Afilias contends that NDC*  
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62. There is no requirement in the Guidebook or Application that NDC disclose Verisign’s support in the resolution of the Contention Set. (Section II.F.3, *infra*.) Confidentiality in such matters is common (section II.F.3, *supra*) and certainly does not represent a resale, assignment, or transfer of the Application, as Afilias contends. Afilias never disclosed who was financing its bid.<sup>113</sup> Nor did Afilias complain when Wordpress financed the winning bid for .BLOG as part of a pre-auction agreement to assign the registry agreement. (Section II.D.3, *supra*.) Afilias’ complaint was invented for this IRP and this IRP alone.

\* \* \*

63. Redacted - Third Party Designated Confidential Information

**E. There Could Not Be a Violation of the Guidebook Because Any Attempted Resale, Assignment, or Transfer Would Have Been a Nullity**

64. The Guidebook excludes any right of an Applicant to assign or transfer the Application. As Afilias itself has argued in this IRP, any attempt by NDC to assign the Application to Verisign would be void and a nullity purely by operation of law. Thus, the DAA

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<sup>112</sup> Afilias’ Reply Memorial, ¶ 56.

<sup>113</sup> See Section II.F.3, *supra*.

<sup>114</sup> Livesay, Ex. D (DAA, *supra* note 5, §§ 4(b)(iii)–(iv), (g), (h), and 7(a)).

could not possibly effectuate an assignment or transfer of rights from NDC to Verisign.<sup>115</sup>

**F. Afilias' Arguments of Non-Disclosure in the Application Have No Merit**

**1. The Guidebook Requires an Amendment Only When *Previously Submitted Information* Becomes “*Untrue or Inaccurate*”**

65. Afilias claims that NDC violated the disclosure requirements of Section 1.2.7 of the Applicant Guidebook. That Section provides that “[i]f at any time during the evaluation process *information previously submitted by an applicant becomes untrue or inaccurate*, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.”<sup>116</sup> Section 1.2.7 further provides that “[f]ailure to notify ICANN of any change of circumstances that would render any information provided in the application false or misleading *may result* in denial of the application.”<sup>117</sup> Afilias also cites to Guidebook Module 6 (Terms and Conditions) which sets forth a warranty by applicants that “the statements and representations in the application . . . are true and accurate and complete in all material respects” and that “Applicant agrees to notify ICANN in writing of any change in circumstances that would *render any information provided in the application false or misleading*.”<sup>118</sup>

66. Afilias contends that NDC’s application was “incomplete” or “untrue or misleading” because NDC did not amend it to disclose the DAA.<sup>119</sup> Afilias identifies three previously provided responses by NDC that Afilias alleges became “untrue” or “inaccurate”

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<sup>115</sup> See AA-36 (UNIDROIT Principles of International Commercial Contracts at 314 (“The assignment of a right . . . is ineffective if it is contrary to an agreement between the assignor and the obligor limited or prohibiting the assignment.”)); AA-35 (*Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 273 (Minn. 2004) (“When a contract prohibits assignment in very specific and unmistakable terms, any purported assignment is void.”)); AA-32 (*STS Refills, LLC v. Rivers Printing Sols., Inc.*, 896 F. Supp. 2d 364, 373 (W.D. Pa. 2012) (“[W]here contractual language restricts or prohibits assignment, any assignment made contrary to that language is ineffective and void”)); AA-23 (*Neuroaxis Neurosurgical Assocs., PC v. Costco Wholesale Co.*, 919 F. Supp. 2d 345, 352 (S.D.N.Y. 2013) (“[U]nambiguous contract provisions that limit a party’s ability to assign its rights under the contract render any purported assignment void” (internal citations omitted))); AA-4 (*Bank of Am., N.A. v. Moglia*, 330 F.3d 942, 948 (7th Cir. 2003) (“[T]he modern view, expressed in *Restatement (Second) of Contracts* § 322(2) (1981), that an anti-assignment provision in a contract is unenforceable against an assignee ‘unless a different intention is manifested.’ Magic words are not required. . .” (citing AA- 28 (*Restatement (Second) of Contracts* § 322(2) (1981)))).

<sup>116</sup> Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2.7 (emphasis added)).

<sup>117</sup> *Id.* (emphasis added). In fact, ICANN has *never* disqualified an application because of a change in control. Willett Stmt. (June 1, 2020), ¶ 18.

<sup>118</sup> *Id.* at Module 6, Terms and Conditions, ¶ 1 (emphasis added).

<sup>119</sup> Afilias’ Amended IRP Request, ¶ 56.

following NDC’s entry into the DAA: (i) the name of the “applicant” for .WEB; (ii) the names and positions of the officers and directors, and shareholders, for the applicant entity; and (iii) the “Mission/Purpose” for .WEB.<sup>120</sup> But Afilias never engages the applicable standard set out in Section 1.2.7, which requires amendment only *to the extent* that information *previously submitted* by an applicant *becomes untrue or inaccurate*.<sup>121</sup> Contrary to Afilias’ claims, none of NDC’s responses were rendered false or misleading by the DAA. (Section II.F.2, *infra*).

67. Afilias’ citation to ICANN’s Change Request Criteria is inapposite.<sup>122</sup> Those criteria are only relevant to ICANN’s review of a change request submitted by an applicant – which presupposes that a change request is required under the Guidebook.<sup>123</sup> Even where those criteria do apply, they do not require, as Afilias asserts,<sup>124</sup> that any change that would “affect other third parties,” “particularly other applicants,” be denied by ICANN.<sup>125</sup> Rather, those criteria consider whether the change would have an impact on another party’s *application*, such as a change to a community-based application, which clearly does not apply here.<sup>126</sup>

## 2. The DAA did not Make Verisign the Owner of the Application

68. Afilias contends that the DAA “fundamentally changed the nature of NDC’s application” because Verisign had “become the real party-in-interest behind its application.”<sup>127</sup> Afilias implies that this “fundamental change” rendered specific answers provided by NDC regarding its owners, principals, and the entity applying for .WEB false or misleading.<sup>128</sup>

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<sup>120</sup> Afilias’ Amended IRP Request, ¶ 56.

<sup>121</sup> Notably, Afilias makes no claim that NDC’s application was “untrue” or “inaccurate” when originally submitted.

<sup>122</sup> *Id.*, ¶ 17.

<sup>123</sup> See AC-36 (ICANN, “Change Request Criteria,” available at <https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en>).

<sup>124</sup> Afilias’ Amended IRP Request, ¶ 17.

<sup>125</sup> The Change Request Criteria also do not override the discretion afforded ICANN to make the ultimate determination whether to deny an application based on a change of circumstances that renders information provided in the application false or misleading. Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2.7).

<sup>126</sup> For example, a change to the community definition in a community-based application is material because it impacts other parties’ decision whether to file a community objection and the basis for determining the merits of a community objection. Or a change to a community application from a standard application would affect the priority of other applications in a contention set. See AC-36 (ICANN, “Change Request Criteria,” *supra* note 123). Such changes affect third party *applications*. The relevant impact on third parties under the change request criteria plainly is not, as Afilias absurdly suggests, the desire of other applicants to know the financial wherewithal of other applicants to bid competitively for the TLD.

<sup>127</sup> Afilias’ Amended IRP Request, ¶¶ 55, 57.

<sup>128</sup> *Id.*, ¶ 55.

69. Afilias’ non-disclosure argument is just a repackaging of its assignment argument. That is, Afilias’ claim that Verisign became the “real party-in-interest” is simply another way of arguing that NDC assigned or transferred the rights in its .WEB Application to Verisign by entering into the DAA. Under U.S. federal law, “real party in interest” refers to the party with the right to bring a claim, which can include a party to whom a claim or the underlying contract or asset has been unequivocally assigned.<sup>129</sup> Thus, Afilias’ “real party in interest” argument would only have merit if NDC had assigned or transferred its rights in its .WEB Application to Verisign.<sup>130</sup> As set forth *supra*, Afilias’ assignment claim is meritless, as Afilias elsewhere has admitted.<sup>131</sup> It’s “real party-in-interest” argument is meritless for the same reasons.

70. Afilias does not – and cannot – claim that NDC’s ownership or corporate structure *actually* changed. NDC remains the applicant for .WEB, with the same owners, principals, directors and officers as identified in its Application.<sup>132</sup>

71. Finally, under Afilias’ disclosure theory, its own .WEB application and those of other members of the .WEB Contention Set also would be “untrue, inaccurate, false, and/or misleading” because they conceal the “real party-in-interest” supporting such applications. Afilias’ operating entity is Afilias, Inc., headquartered in Horsham, Pennsylvania. Yet Afilias chose to file its .WEB application in the name of a special purpose entity, formed solely for the purpose of applying for .WEB, called “Afilias Domains No. 3 Limited.”<sup>133</sup> Afilias then limited its application disclosures regarding officers, directors, etc. to information for Afilias Domains No. 3 Limited, rather than completing the application with information applicable to Afilias, Inc., the entity financially responsible for supporting the application.<sup>134</sup> Afilias’ own application, therefore, cannot withstand the “rationale” of its claims against NDC, which further

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<sup>129</sup> See AA-13 (*Dubuque Stone Prods. Co. v. Fred L. Gray Co.*, 356 F.2d 718, 723 (8th Cir. 1966)).

<sup>130</sup> See AA-34 (*Thomas-Bonner Co. v. Hooven, Owens & Rentscheller*, 284 F. 377, 383 (S.D. Ohio 1920) (an alleged assignee becomes the “real party in interest” only when “a thing in action . . . is absolutely assigned, so that the ownership interest passes to the assignee, without conditions or reservations . . .”).

<sup>131</sup> Afilias’ *Amici* Opposition, ¶¶ 82–85 (quoted at note 14, *supra*).

<sup>132</sup> Rasco Stmt. (June 1, 2020), ¶¶ 11, 78.

<sup>133</sup> Afilias JMR-12 (Afilias Domains No. 3 Limited, New gTLD Application (.web) (June 13, 2012)).

<sup>134</sup> *Id.* Similarly, Donuts Inc. applied for .WEB in the name of “Ruby Glen LLC” and further obscured its ownership by forming “Covered TLD Inc.” as Ruby Glen’s parent company. AC-22 (Ruby Glen, LLC, New gTLD Application (.web) (June 13, 2012)).

demonstrates the lack of merit to its allegations.

### 3. NDC Was Not Required to Disclose the DAA with Verisign

72. Afilias contends that NDC violated Section 1.2.7 by failing to disclose the DAA, because the DAA purportedly represents a change in financial position that NDC was required to report to ICANN. Afilias also complains that it was not fair to other applicants for NDC to arrange financing for its auction bid and not disclose that information to the Contention Set.<sup>135</sup>

73. Afilias misrepresents Verisign's and NDC's Agreement, and misstates NDC's obligations under Section 1.2.7. First, there is no requirement that auction financing be disclosed in ICANN's application form for new gTLDs. Second, all application financial disclosures are confidential and *not disclosed* by ICANN publicly or to other members of the contention set.

74. As explained above, the new information -- here, Verisign's Agreement to fund NDC's participation in an auction for .WEB -- would need to render *prior financial disclosures untrue or inaccurate* for an obligation to disclose the Agreement to arise. ICANN's new gTLD application requires applicants to provide certain financial information to ICANN.<sup>136</sup> ICANN's Evaluation Procedures<sup>137</sup> make clear that these requests for financial information all relate to an applicant's financial ability to *operate* a gTLD registry, *not* its ability to bid to win an auction to *acquire* a gTLD registry. As Section 2.2.2.2 of the Guidebook explains, "[i]n its application, the applicant will respond to a set of questions (see questions 45-50 in the Application Form) intended to gather information about the applicant's financial capabilities for *operation of a gTLD registry* and its financial planning in preparation for long-term stability of the new gTLD."<sup>138</sup> A future loan of funds to use at an auction is not a required financial disclosure and

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<sup>135</sup> See Afilias' Amended IRP Request, ¶ 55 ("It would be absurd to suggest that NDC believed that its agreement with Verisign would not be material relevant to other applicants, the Internet community, and, indeed, to ICANN."); Kane Decl. (Oct. 15, 2018), ¶ 38 (arguing that NDC's financing arrangement with Verisign needed to be disclosed under the Guidebook). This contention was explicit in Afilias' original IRP. (Afilias' Original IRP Request, ¶ 46 (asserting that other applicants were entitled to know about the DAA because Verisign was "larger and better-funded" than NDC)).

<sup>136</sup> See Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2.2 (All applicants must submit "audited or independently certified financial statements for the most recently completed fiscal year for the applicant . . .").

<sup>137</sup> *Id.*, at Module 2.

<sup>138</sup> *Id.*, at Module 2, § 2.2.2.2 (emphasis added). The emphasis on an applicant's financial condition for *operation* of a gTLD registry, rather than its financial ability to bid to *acquire* a new gTLD, is consistent with the purpose of ICANN's evaluation process, which is to ensure that applicants have the technical and operational capabilities to operate a secure and stable registry. An applicant's financial ability to meet these operational criteria is relevant to

does not render any of NDC’s previously given financial information untrue or inaccurate.

75. Further, **all** of the financial disclosures required by ICANN in Questions 45–50 are designated as confidential and **not subject** to public posting.<sup>139</sup> Thus, even if it is assumed that auction financing is a disclosure item in the new gTLD application form (which it is not), none of the Contention Set members, including Afilias, were entitled to see that information.<sup>140</sup>

76. Afilias’ own actions demonstrate its awareness that the Guidebook does not require disclosure -- let alone public disclosure -- of auction financing arrangements. In its original IRP, Afilias admits that it arranged outside financing for the .WEB auction. (Afilias’ Original IRP Request, ¶ 30 (“Due to its financing arrangements, Afilias was able to bid up to USD 135 million” for .WEB)). Yet Afilias never submitted an application change request to ICANN to update its financial disclosures, and certainly did not advise the other Contention Set members that it had obtained third-party financing. As Afilias recognizes, changes to an applicant’s financial condition that do not negatively reflect on an applicant’s qualifications to operate the gTLD are not subject to disclosure under the new gTLD application process.

#### **4. NDC Was Not Required to Amend the “Mission/Purpose” of .WEB**

77. Afilias claims that NDC’s Agreement with Verisign required NDC to amend its description of the “Mission/Purpose” of .WEB in NDC’s application. According to Afilias, “NDC’s business plan was that it intended to acquire .web for itself, to operate .web itself, and to market .web itself,” and that “[a]s of [the date of NDC’s agreement with Verisign], none of these

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the application process. An applicant’s ability to win a future auction – that may never take place, depending on the circumstances – to acquire a gTLD is not.

<sup>139</sup> Attachment 2 has a column identifying whether the applicant’s responses would be “[i]ncluded in public posting,” “Y” or “N.” Questions 45-50 are all marked “N.” *Id.*, at Attachment to Module 2, “Evaluation Questions and Criteria,” questions 45–50.

<sup>140</sup> ICANN is aware that changes in an applicant’s relationship with third parties may occur. However, such changes do not require re-evaluation, so long as previously submitted statements do not become inaccurate as a result. For example, ICANN discourages applicants from resolving string contention by forming joint ventures with other applicants, cautioning that “[i]t is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention. However, material changes in applications (for example, combinations of applicants to resolve contention) may require re-evaluation . . . . Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.” *Id.*, at Module 4, § 4.1.3. As discussed *supra*, a post-application funding commitment such as NDC’s Agreement with Verisign is a change that does not require disclosure to ICANN.

things were true.”<sup>141</sup> Afilias is wrong. Unless and until a registry agreement is executed between ICANN and NDC, and ICANN approves a request for assignment to Verisign, NDC’s mission remains the same. Equally fundamental, the Guidebook specifically provides that the Mission Statement is *not* used to evaluate an application, but rather only to support the future consideration of the new gTLD program generally.

78. As set forth in the Rasco Witness Statement, NDC was attempting to acquire .WEB for itself.<sup>142</sup> In the event of a termination of the DAA before the auction --  
Redacted - Third Party Designated Confidential Information -- NDC clearly would remain the applicant entitled to participate in the auction or other resolution of the Contention Set. If a termination occurred following the auction, or ICANN failed to consent to an assignment of the registry agreement, NDC clearly would remain the owner of any rights to operate the TLD, subject to its entry into an alternative transaction.<sup>143</sup>

79. Thus, as of today, NDC’s Mission Statement remains true and accurate. If a requested assignment were to change the registry’s mission -- as is commonplace (Section II.D.3, *supra*) -- ICANN would have an opportunity to consider that change. As Afilias knows, registry agreements are regularly assigned with ICANN’s approval to such changes.

80. Afilias’ position is further undermined by the fact that the Mission Statement is irrelevant to evaluation of a new gTLD application.<sup>144</sup> First, as explained in the Guidebook materials, the Mission Statement had no effect on ICANN’s evaluation of NDC’s .WEB application. NDC’s Mission Statement was provided in response to Question 18 in the

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<sup>141</sup> Afilias’ Amended IRP Request, ¶ 60.

<sup>142</sup> Rasco Stmt. (June 1, 2020), ¶¶ 9, 59, 100.

<sup>143</sup> Section II.D.6, *supra*.

<sup>144</sup> Afilias cites references in the Evaluation Questions and Criteria attached to Module 2 of the Guidebook to ICANN’s alleged desire to “diversify the namespace” and support “different registry business models” as purported support for its contention that the “Mission/Purpose” of a new gTLD is relevant to ICANN’s evaluation. Afilias Reply Memorial (May 4, 2020), ¶ 35 (“By their plain terms, the *Evaluation Questions and Criteria* refute the assertion made at various times by ICANN, Verisign and NDC that ICANN was interested only in an applicant’s financial and technical ability to operate a gTLD.”). Afilias intentionally distorts ICANN’s evaluation criteria to support its argument. Contrary to Afilias’ claims, the sections it cites from the evaluation criteria explicitly are concerned only with an applicants’ technical and financial ability to operate a gTLD. ICANN references “different registry business models” as a reminder to evaluators to be flexible in evaluating technical and financial criteria – *not* for the purpose of identifying the applicant’s business model as an evaluation criteria. Afilias C-3 (Guidebook, *supra* note 17, at Attachment to Module 2).

application form. An attachment to Module 2 of the Guidebook sets forth the new gTLD application questions along with clarifying notes from ICANN explaining the nature or purpose of the questions.<sup>145</sup> The note accompanying Question 18 clearly states that information provided in response to that question will be used only for evaluation of the New gTLD Program itself, **but “[t]his information is not used as part of the evaluation or scoring of the application.”**<sup>146</sup>

81. Thus, even if NDC’s Mission Statement were inaccurate -- which it was not -- any such inaccuracy would be *irrelevant* to ICANN’s evaluation of NDC’s .WEB application. Indeed, it would be a violation of the Guidebook to disqualify NDC on the basis of information that ICANN states would *not* be considered in evaluating gTLD applications.

82. Second, NDC’s responses to the Mission Statement questions were, and remain, accurate statements of NDC’s intent. Question 18(a) of the application asked applicants to “Describe the mission/purpose of your proposed gTLD.”<sup>147</sup> In its response, NDC truthfully described the mission of .WEB, including that it “is to provide the internet community . . . an alternative ‘home domain’ for their online presence.”<sup>148</sup> NDC also predicted that, “through strategic marketing campaigns designed to brand the domain, [.WEB] will become a premium online namespace for a variety of businesses and websites,” and that .WEB “will provide new registrants with better, more relevant alternatives to the limited options remaining for the current commercial TLD names.”<sup>149</sup> As stated in the Rasco Witness Statement, this description was, and still is, accurate: “Regardless of who operates the .web gTLD, NDC’s description of the mission and purpose of .web remains true: .web will be an alternative domain for users; with proper marketing it will become a premium online namespace for many businesses and websites; and it is a better, more relevant alternative than many other currently available gTLDs.”<sup>150</sup>

83. Similarly, Question 18(b) asked applicants to state “How [the] proposed gTLD

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<sup>145</sup> Afiliac C-3 (Guidebook, *supra* note 17, at Attachment to Module 2).

<sup>146</sup> *Id.*, at Attachment to Module 2, Question 18 (emphasis added).

<sup>147</sup> *Id.*

<sup>148</sup> Rasco Ex. A (Nu Dot Co LLC, New gTLD Application (.web) (June 13, 2012), at Question 18(a)).

<sup>149</sup> *Id.*

<sup>150</sup> Rasco Stmt. (June 1, 2020), ¶ 4.



will benefit registrants, Internet users, and others.”<sup>151</sup> Again, NDC’s response truthfully answered that question. NDC described the expected benefits of .WEB for registrants and internet users, including that .WEB would be “a reliable, trusted and secure” gTLD that would “provide an opportunity for new entrants to compete effectively for internet users’ attention.”<sup>152</sup> That description was, and still is, accurate, and Afilias has proffered no evidence to the contrary.

84. Third, Afilias claims that it knew that NDC did not intend to operate .WEB. If Afilias is taken at its word, it could not have been misled by NDC’s statements.<sup>153</sup>

85. Fourth, Afilias itself has made changes to the Mission/Purpose of other TLDs without amending those applications. Yet again, Afilias demands that NDC make disclosures from which Afilias has exempted itself.<sup>154</sup> Afilias’ self-contradictions aside, according to Ms. Willett, ICANN has *never* attempted to block assignment of a TLD registry agreement on the basis that the “Mission/Purpose” in the original application had changed.<sup>155</sup>

86. In any event, contingent upon ICANN’s consent to an assignment of the registry agreement to Verisign, Verisign intends to operate .WEB as a general TLD available worldwide in accordance with ICANN’s policies – just as NDC described in its application. Thus, the DAA could not under any circumstances have rendered NDC’s Mission Statement inaccurate.

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87. For the foregoing reasons, even if the Panel had authority to decide Afilias’

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<sup>151</sup> Afilias C-3 (Guidebook, *supra* note 17, at Attachment to Module 2, Question 18 (emphasis added)).

<sup>152</sup> Rasco Ex. A (NDC, New gTLD Application, *supra* note 148, at Question 18(b)).

<sup>153</sup> According to Afilias, the purported change in mission and purpose was materially relevant to Afilias and the public. Afilias’ Amended IRP Request, ¶ 55. Afilias’ assertions contradict its own declarants, however. According to John Kane, Afilias plc’s Vice President of Corporate Services, *he knew that NDC never intended to operate .web*: “[G]iven my discussion with NDC during the Voluntary Notification Period, *it seemed clear to me that they were in it for the payout*, which necessitated participating in a private auction.” Kane Stmt. (Oct. 15, 2018), ¶ 25 (emphasis added). Afilias’ claims of harm on behalf of “the public” rings hollow. Only Afilias has chosen to file an IRP and claim that it was misled by NDC’s application.

<sup>154</sup> As described in ICANN’s Opposition Memorandum, Afilias has both transferred gTLDs to third parties shortly after delegation (.MEET) and been the recipient of such a transfer request (.PROMO) as part of the new gTLD Program. In neither instance was the “Mission/Purpose” for the gTLD amended to reflect the “Mission/Purpose” of the new operator. Section II.D.3, *supra*; ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection, ¶¶ 29–30; AC-5 (.meet Assignment and Assumption Agreement, Afilias Limited to Charleston Road Registry (Feb. 6, 2015), available at <https://www.icann.org/sites/default/files/tlds/meet/meet-assign-pdf-06feb15-en.pdf>); (.promo Assignment and Assumption Agreement, Play.PROMO Oy to Afilias plc (Dec. 14, 2015), available at <https://www.icann.org/sites/default/files/tlds/promo/promo-assign-pdf-14dec15-en.pdf>).

<sup>155</sup> Willett Stmt. (May 31, 2019), ¶ 18.

claims regarding NDC’s conduct (which is denied), the Panel should conclude that NDC did not violate the Guidebook and that the DAA did not resell, assign, or transfer NDC’s Application.

### **III. THE DAA DOES NOT PROVIDE GROUNDS FOR ICANN TO DISQUALIFY NDC BASED ON ITS COMPETITION MANDATE**

88. Afilias contends that ICANN’s alleged decision to finalize a registry agreement with NDC, while knowing that the agreement may be assigned to Verisign, violates ICANN’s mandate to promote competition.<sup>156</sup> Afilias contends that Verisign intends to acquire .WEB to shut it down and/or limit its competitive potential in order to preserve Verisign’s purported monopoly in the .COM gTLD – a false assertion – and that ICANN must prevent Verisign from operating .WEB on the basis of this purported concern.<sup>157</sup>

89. Afilias’ argument fundamentally misunderstands ICANN’s competition mandate. ICANN is an administrator of the Domain Name System (“DNS”), not a competition regulator, and ICANN has no legal authority to bar Verisign from operating .WEB on competition grounds.

90. The narrow scope of ICANN’s Bylaws’ commitment to promote and enable competition in Internet-related markets is reflected in the New gTLD Program itself. ICANN’s Board approved the New gTLD Program, in part, to enhance competition and improve consumer choice for registry services.<sup>158</sup> At the same time, the Board did not include competition as an evaluation criteria for new gTLD applications.<sup>159</sup> ICANN’s “competition mandate” was fulfilled by the New gTLD Program itself, which has had the desired effect of increasing competition in the domain name market.<sup>160</sup> The Department of Commerce (“DOC”) has recognized that the introduction of new gTLDs has created an increasingly dynamic marketplace.<sup>161</sup>

91. Nonetheless, Afilias asserts that ICANN’s Bylaws require that it bar Verisign

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<sup>156</sup> Afilias’ Amended IRP Request, ¶¶ 79–83.

<sup>157</sup> Afilias’ Reply Memorial, ¶ 130; *see also* Afilias’ Amended IRP Request, ¶ 82.

<sup>158</sup> Burr Stmt. (May 31, 2019), ¶ 27.

<sup>159</sup> *See generally*, Afilias C-3 (Guidebook, *supra* note 17).

<sup>160</sup> *See* Murphy Ex. KM-28 (ICANN 2018 *Competition, Consumer Trust, and Consumer Choice Review* (“CCT”), Final Report, (Sept. 8, 2018), at 5 (“The CCT Review Team found that while the New gTLD Program is quite new and the data are incomplete, on balance the expansion of the DNS marketplace has demonstrated increased competition and consumer choice . . .”). The CCT was convened by ICANN in January 2016 to examine the extent to which the New gTLD Program “has promoted competition, consumer trust and consumer choice . . .”. (*Id.* at 26).

<sup>161</sup> Kneuer Ex. L (Cooperative Agreement, Am. 35, NCR 92-18742, DOC-Verisign, at 1 (Oct. 26, 2018), available at [https://www.ntia.doc.gov/files/ntia/publications/amendment\\_35.pdf](https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf)).

from operation of a new gTLD in order to “break VeriSign’s monopoly.”<sup>162</sup> ICANN’s policies reserve regulatory action of the type that Afilias seeks through this IRP for competition authorities like the United States Department of Justice (“DOJ”). ICANN is a private actor and has neither the legal authority nor the technical competence to act as a competition regulator. ICANN’s policies provide that any competition concerns are to be referred to a competent competition authority.<sup>163</sup> Here, the DOJ Antitrust Division investigated Verisign’s potential acquisition of .WEB<sup>164</sup> and closed that investigation without further action.<sup>165</sup>

92. ***If undertaken at all, this Panel’s competition analysis should end here.***

93. Verisign nevertheless addresses Afilias’ competition allegations in the event that the Panel were to decide to consider them in substance. Afilias’ claims of competitive harm are based on critical yet faulty assumptions that (i) Verisign is a “monopolist”; (ii) .WEB would significantly increase competition in the domain name industry; (iii) .WEB is uniquely well-positioned to compete with Verisign for domain name registrations; and (iv) Verisign seeks to acquire .WEB “to protect its dominant market position”<sup>166</sup> by eliminating a potential strong competitor to .COM. As discussed *infra*, none of these assumptions are supported by Afilias’ evidence and each is contradicted by the economic evidence.

#### **A. ICANN Is Not An Economic Regulator**

94. Afilias contends that ICANN violated a Core Value to promote competition by failing to disqualify NDC from the .WEB contention set.<sup>167</sup> The Core Value to which Afilias refers states that ICANN shall “[w]here feasible and appropriate, depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market.”<sup>168</sup>

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<sup>162</sup> Afilias’ Amended IRP Request, ¶ 79.

<sup>163</sup> See Kneuer Ex. I (Cooperative Agreement, Am. 30, NCR 92-18742, DOC-VeriSign, § 3.1(d)(iv)(E) (Nov. 29, 2006), available at [https://www.ntia.doc.gov/files/ntia/publications/amend30\\_11292006.pdf](https://www.ntia.doc.gov/files/ntia/publications/amend30_11292006.pdf)); Exhibit J (.com Registry Agreement (2006), ICANN-VeriSign, § 3.1(d)(iv)(E)) (Mar. 1, 2006, amended Sept. 22, 2010), available at <https://www.icann.org/resources/unthemed-pages/registry-agmt-com-2010-09-22-en>).

<sup>164</sup> See AC-67 (Andrew Allemann, Domain Wire, “DOJ closes investigation on Verisign running .web” (January 11, 2018), available at <https://domainnamewire.com/2018/01/11/departement-justice-closes-investigation-verisign-running-web/>).

<sup>165</sup> *Id.*

<sup>166</sup> Afilias’ Amended IRP Request, ¶ 82.

<sup>167</sup> *Id.*, ¶ 79.

<sup>168</sup> Afilias C-1 (Bylaws, *supra* note 1, § 1.2(b)(iii) (emphasis added)).

Reduced to its essence, Afilias’ argument is that ICANN is required to act like a government regulator to block transactions that allegedly would impact competition. Nothing in the Bylaws, ICANN’s history, or the New gTLD Program supports Afilias’ position.

**1. ICANN Lacks Authority to Regulate Competition and is Prohibited from Doing So by Its Bylaws**

95. The Bylaws make clear that “ICANN does not hold any governmentally recognized regulatory authority.”<sup>169</sup> The Bylaws are explicit that “ICANN *shall not* regulate (*i.e.*, impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide outside the express scope of Section 1.1(a).”<sup>170</sup> Section 1.1(a), which defines the scope of ICANN’s Mission, does not identify regulation of competition as part of ICANN’s Mission.<sup>171</sup> ICANN’s Bylaws further provide that ICANN “shall not act outside its Mission,” which is limited to ensuring “the stable and secure operation of the Internet’s unique identifier systems.”<sup>172</sup>

96. The limited scope of ICANN’s Mission – and, thus, its authority – derives from the manner of its creation. As explained by ICANN Board Member J. Beckwith Burr, ICANN was created as part of a plan by the United States government to remove itself from direct administration of the DNS and instead to have the technical infrastructure of the DNS administered by a private, non-governmental entity.<sup>173</sup> That plan did not include any transfer of regulatory authority to ICANN, including the authority to act as a competition regulator.<sup>174</sup>

97. ICANN explicitly was not intended to supplant existing legal structures by setting up a new system of Internet governance. ICANN’s more tailored purpose was and is to handle the technical management of Internet names and addresses.<sup>175</sup>

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<sup>169</sup> *Id.*, §§ 1.1(c), 1.2(b)(iii).

<sup>170</sup> *Id.*, § 1.1(c).

<sup>171</sup> *Id.*, § 1.1(a).

<sup>172</sup> *Id.*, § 1.1(b).

<sup>173</sup> Burr Stmt. (May 31, 2019), ¶ 25.

<sup>174</sup> *Id.*

<sup>175</sup> Kneuer, Ex. S (Department of Commerce (“DOC”), Statement of Policy on the Management of Internet Names and Addresses (the “White Paper”), 63 Fed. Reg. 31741, at 6 (June 5, 1998), *available at* <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>) (ICANN was “not intended to displace other legal regimes (international law, *competition law*, tax law and principles of international taxation, intellectual property law, etc.” (emphasis added)).

## 2. The Relationship Among the DOC, ICANN and Verisign Confirms That ICANN Does Not Possess Authority to Police Competition

98. Afiliás' competition argument rests on the false premise that “one of the principal purposes” for ICANN’s formation was to “break VeriSign’s monopoly.”<sup>176</sup> The history of ICANN’s relationship with Verisign, however, demonstrates that authority over competition matters rests with the DOC, and was never vested in ICANN.

99. As discussed in the Kneuer Report, the DOC, not ICANN, has always retained authority over competition matters with respect to the .COM registry.<sup>177</sup> This authority is reflected both in (i) Verisign’s Cooperative Agreement with the DOC (“Cooperative Agreement”) and (ii) Verisign’s .COM registry agreements with ICANN, which dates back to their original 1999 agreement.<sup>178</sup> The 2006 .COM Registry Agreement includes provisions requiring ICANN to refer competition issues relating to registry services to an appropriate competition authority.<sup>179</sup> That provision remains part of the .COM Registry Agreement (as well as the standard gTLD registry agreement<sup>180</sup>) to this day.

100. As discussed *infra*, the DOC and Verisign entered into Amendment 35 to the Cooperative Agreement in October 2018, pursuant to which DOC agreed, among other things, to loosen price caps on .COM registrations and certain other restrictions in light of the substantial changes to the competitive landscape since Verisign acquired NSI in 2000.<sup>181</sup> Amendment 35 also confirms that registry operations by Verisign other than .COM shall not be subject to the restrictions contained in the Cooperative Agreement.<sup>182</sup>

101. Since ICANN was formed, DOC – **and not ICANN** – has exercised direct control over competition matters. In other words, the U.S. government has exercised regulatory

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<sup>176</sup> Afiliás' Amended IRP Request, ¶ 79.

<sup>177</sup> Kneuer Stmt. (May 29, 2020), ¶ 4.

<sup>178</sup> Kneuer Ex. D (Cooperative Agreement, NCR 92-18742, NSF-NSI, (Jan. 1, 1993), *available at* <https://archive.icann.org/en/nsi/coopagmt-01jan93.htm>) & Ex. F (Registry Agreement (1999), ICANN-NSI, (Nov. 10, 1999), *available at* <https://archive.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm>).

<sup>179</sup> Kneuer Ex. J (.com Registry Agreement (2006), ICANN-VeriSign, § 3.1(d)(iv)(E) (Mar. 1, 2006, amended Sept. 22, 2010), *available at* <https://www.icann.org/resources/unthemed-pages/registry-agmt-com-2010-09-22-en>).

<sup>180</sup> Afiliás C-26 (ICANN, New gTLD Registry Agreement, *available at* <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html>).

<sup>181</sup> Kneuer Ex. L (Cooperative Agreement, Am. 35, *supra* note 161, ¶ 2).

<sup>182</sup> *Id.*, ¶ 3.

authority over Verisign for competition issues, not ICANN, which has no such authority under law or agreement with Verisign. Afilias’ assertion that ICANN’s Bylaws permit – or demand – that ICANN instead exercise regulatory authority contradicts over 20 years of DNS history.

**3. ICANN Promotes a Competitive DNS Market Consistent With Its Mission and the Bylaws – It Does Not Regulate That Market**

102. While ICANN is not a regulator with authority to police competition, it has taken steps to “enable competition and open entry in Internet-related markets.”<sup>183</sup> ICANN has acted on its commitment to enable competition by helping to create the conditions for a competitive DNS, and by referring competition issues to relevant competition authorities, such as the DOJ.

**a. Facilitating a Competitive DNS**

103. Consistent with its Bylaws Commitments, ICANN has focused on facilitating new entry in Internet-related markets in the DNS. In particular, beginning in 2000, and continuing through the New gTLD Program launched in 2012, ICANN has approved the introduction of well over 1,000 new gTLDs.<sup>184</sup>

104. By any measure, the New gTLD Program has been a success. Since the launch of the New gTLD Program in 2013, it has resulted in the delegation of over 1,200 new gTLDs that are now available to consumers for registration of domain names.<sup>185</sup> These new gTLDs rapidly have become a substantial presence in the domain name market, accounting for 30% of new domain name registrations since 2013.<sup>186</sup> This level of consumer choice, in addition to the competition from legacy gTLDs and ccTLDs, is evidence of a highly competitive market.

**b. ICANN’s Role is Limited to Referring Appropriate Concerns Regarding Competition to the Proper Government Authorities**

105. ICANN historically has referred competition concerns to a competent competition authority. An example of this process is set forth in ICANN’s Registry Services Evaluation Policy (“RSEP”), which is a mechanism registry operators use to request ICANN’s approval to

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<sup>183</sup> Afilias C-1 (Bylaws, *supra* note 1, § 1.2(a)).

<sup>184</sup> See Murphy Ex. KM-28 (CCT Final Report, *supra* note 160, at 29–31).

<sup>185</sup> Carlton Report (May 30, 2019), ¶ 20.

<sup>186</sup> Murphy Report (May 28, 2020), ¶ 28.

change Registry Services.<sup>187</sup> Under the RSEP process, ICANN evaluates a proposed Registry Service “for potential significant security, stability, and competition issues.”<sup>188</sup> While ICANN itself assesses security and stability issues, the same is not true for competition issues.

106. ICANN is authorized to prohibit the introduction of a new Registry Service that ICANN reasonably determines would pose a threat to the stability and security of the DNS.<sup>189</sup> ICANN has no such authority with respect to a service that may pose competition concerns. In such circumstances, ICANN’s authority is limited to a referral of the issue to an appropriate competition authority.<sup>190</sup> The Guidebook similarly provides for a referral to a competition authority in the event that an ICANN accredited registrar’s potential operation of a new gTLD registry raises competition concerns, stating that “ICANN reserves the right to refer any application to the appropriate competition authority relative to any cross-ownership issues.”<sup>191</sup> Nothing in the Guidebook authorizes ICANN to assess competition issues itself.

107. ICANN’s established policies demonstrate that it *does not* act as a competition regulator or make determinations regarding the potential competitive impact of specific transactions or services, and instead defers to governmental authorities in such matters.

#### **4. Verisign Is Not Barred from Participating in the New gTLD Program**

108. Afilias asserts that one of the principal purposes of the New gTLD Program was to “introduce and promote competition, including, specifically, competition that would break VeriSign’s monopoly.”<sup>192</sup> If Afilias’ contention were true, one would expect that the New gTLD Guidebook would prohibit or say something regarding Verisign’s participation in the New gTLD Program. *But it does not even mention Verisign.* Instead, the New gTLD Program expressly is

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<sup>187</sup> See Kneuer Ex. AA (ICANN, “Registry Services Evaluation Policy,” available at <https://www.icann.org/resources/pages/registries/rsep/policy-en>). ICANN’s New gTLD Registry Agreement describes “Registry Services” in Section 2.1 of Specification 6 to that agreement. See Afilias C-26 (New gTLD Registry Agreement, *supra* note 180).

<sup>188</sup> ICANN, “RSEP Process,” <https://www.icann.org/resources/pages/rsep-2014-02-19-en>; see also Burr Stmt. (May 31, 2019), ¶ 24.

<sup>189</sup> See Kneuer Ex. AA (“Registry Services Evaluation Policy,” *supra* note 187, § 2.7).

<sup>190</sup> *Id.*, § 2.5 (ICANN “shall refer the issue to the appropriate governmental competition authority with jurisdiction over the matter . . .”); Burr Stmt. (May 31, 2019), ¶ 24.

<sup>191</sup> Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2.1); see also *id.* at Module 5, §5.1(4) (“ICANN retains the right to refer an application to a competition authority prior to entry into the registry agreement if it is determined that the registry-registrar cross-ownership arrangements might raise competition issues.”).

<sup>192</sup> Afilias’ Amended IRP Request, ¶ 79; Sadowsky Report (Mar. 20, 2019), ¶ 17.

open to *all applicants* who qualify to apply for a new gTLD, including Verisign.<sup>193</sup>

109. The Guidebook and its associated application form set forth a discrete list of objective information required from new gTLD applicants.<sup>194</sup> Missing from this list is *any criteria* based on the impact on competition from the new registry or operation of the registry by the applicant. Moreover, while the Guidebook allows ICANN to refer competition concerns arising from registrar-registry cross-ownership to a competition authority, the Guidebook contains *no other reference to competition and certainly no references to potential exclusion from the Program based on competition concerns.*

110. In fact, Verisign has participated in the New gTLD Program. Verisign applied for and has been delegated 13 new gTLDs, most of which are internationalized variants of .COM or .NET (*e.g.*, the Korean equivalent of .COM).<sup>195</sup> Verisign also is the registry infrastructure backend services provider for more than 130 new gTLDs operated by third parties.<sup>196</sup> To Verisign's knowledge, neither ICANN nor any other party objected to Verisign's participation.

## **5. The DOJ Investigated Verisign's Potential Operation of .WEB and Closed the Investigation Without Action**

111. The DOJ Antitrust Division investigated the DAA transaction and closed its investigation without action. The DOJ focused on the potential competitive effects of Verisign's operation of .WEB.<sup>197</sup> Having evaluated the very concerns raised by Afilias, the DOJ's investigation of the DAA and decision not to pursue action against Verisign should conclusively resolve any claim that ICANN's consent to a .WEB assignment would violate its Bylaws.

### **B. Economic Evidence Is Contrary to Afilias' Competition Claims**

112. Afilias has submitted *no economic evidence* to support its claims of competitive

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<sup>193</sup> Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2).

<sup>194</sup> *Id.*, at Attachment to Module 2, "Evaluation Questions and Criteria."

<sup>195</sup> See IANA, "Root Zone Database," available at <https://www.iana.org/domains/root/db>.

<sup>196</sup> See nTLD Stats, "Registry Backend Overview," available at <https://ntldstats.com/backend>.

<sup>197</sup> AC-31 (Letter from Kent Brown, U.S. Department of Justice, Antitrust Division, to Thomas Indelicato, Executive Vice President, Verisign, "Civil Investigative Demand No. 28931," (Jan. 6, 2017) at 13 (defining the "Transaction," under investigation as "the agreement, and all conduct undertaken in furtherance of that agreement, between the Company [Verisign] and Nu Dot [NDC] according to which the Company would provide Nu Dot with the funds for Nu Dot's bid for the .web gTLD and, in return, Nu Dot would assign the .web registry agreement to the Company upon the consent of ICANN.")).



harm. In fact, all economic evidence demonstrates unequivocally that no such harm exists.

### **1. Verisign Does Not Have a Dominant Position in the Market**

Afilias contends that Verisign has a “dominant position” in the industry, and asserts that this supposed “fact” justifies barring Verisign from future operation of .WEB.<sup>198</sup> Afilias focuses heavily on market conditions during the 1990s when there were just seven gTLDs and Verisign’s predecessor NSI was the “sole source of generic domains.”<sup>199</sup> It is indefensible to base assertions about competition, as Afilias does, on decades-old circumstances that have long since changed. Rarely has any industry been as dynamic and rapidly changing as the Internet.

113. Current market conditions – with more than 1,200 gTLDs, globally marketed ccTLDs, and competition from TLD-agnostic channels, such as Google Chrome’s search box, social media platforms, and mobile applications, in addition to the competition from other legacy gTLDs and ccTLDs in the global marketplace – bear no resemblance to the pre-turn-of-the-century DNS on which Afilias focuses. In short, Verisign does not have a dominant market position,<sup>200</sup> and is not a “monopoly,” as alleged by Afilias.<sup>201</sup> Absent evidence of a monopoly – for which Afilias offers no economic support – Afilias’ position entirely collapses.

114. The objective economic evidence in the expert report of Professor Kevin Murphy of the University of Chicago shows that Verisign does not have a dominant position,<sup>202</sup> Verisign does not have the power to raise prices to supra-competitive levels,<sup>203</sup> and Verisign cannot restrict the entry of or drive out competitors.<sup>204</sup>

#### **a. Verisign’s Market Share is Not Dominant**

115. There are two basic ways to establish monopoly power. The first is to prove a

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<sup>198</sup> Sadowsky Report (Mar. 20, 2019), ¶ 32.

<sup>199</sup> Zittrain Report (Sept. 26, 2018), ¶ 22.

<sup>200</sup> “Numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power.” AA-22 (*MRO Commc’ns, Inc. v. Am. Tel. & Tel. Co.*, 2015 F.3d 1351, at \*1 (9th Cir. 1999)).

<sup>201</sup> Afilias’ Amended IRP Request, ¶ 79.

<sup>202</sup> Murphy Report (May 28, 2020), ¶ 14.

<sup>203</sup> *Id.*, ¶ 35. Monopoly power is the power to raise prices to supra-competitive levels or . . . the power to exclude competition . . . by restricting entry of new competitors or by driving existing competitors out of the market.” AA-37 (*U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993) (internal quotation omitted)). In fact, Verisign’s prices are lower than most registries, including Afilias’. Murphy Report (May 28, 2020), ¶ 35.

<sup>204</sup> Murphy Report (May 28, 2020), ¶¶ 25–28.

dominant market share of over 50% plus barriers to entry. The second is to directly prove power over pricing or the ability to exclude competitors.<sup>205</sup> Afilias cannot do either.

116. First, Afilias cannot show that Verisign has a dominant market share or the existence of barriers to entry. Verisign has less than a 50% share<sup>206</sup> of a properly defined relevant market.<sup>207</sup> The relevant market is global and Verisign competes with all ccTLDs, legacy TLDs, and New gTLDs worldwide for new domain name registrations.<sup>208</sup> Verisign's market share is below 50% as a percentage of existing registrations, gross adds (the number of new registrations annually),<sup>209</sup> and net adds (the year over year change in registrations).<sup>210</sup> In 2018, Verisign had only a 35% share of gross adds, versus 65% for competitors.<sup>211</sup> Further, Verisign's share is declining, from 49% of existing domain name registrations in 2012 to 44% in 2018.<sup>212</sup>

117. Even these already modest market share figures overstate Verisign's "ability to reduce the total output in the market," because Verisign does not have the ability to prevent other firms to "enter [or] expand . . . [to] counteract a reduction in output by [Verisign]."<sup>213</sup> Verisign did not block the creation of the more than 1,200 gTLDs that now compete with Verisign.<sup>214</sup> Verisign also cannot block ccTLD from marketing themselves as global alternatives to .COM, such as, for example, the .CO ccTLD which has now captured 2.2 million registrations.<sup>215</sup> Legacy TLDs can also market their domains as an alternative to Verisign's domains.<sup>216</sup> And ICANN could further expand the set of more than 1,200 gTLDs at any time.<sup>217</sup>

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<sup>205</sup> See note 203.

<sup>206</sup> *Id.*, ¶ 17.

<sup>207</sup> A market has both a geographic and product component. "[T]he relevant geographic market, for antitrust purposes, comprises that area within which the sellers of a commodity effectively compete, and in which prospective purchasers are effectively offered a choice as among alternative sources of supply." AA-10 (*City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1306, 1318 (N.D. Ohio 1980)). As to the product component, "the outer boundaries of a relevant market are determined by reasonable interchangeability of use." AA-25 (*Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997) (internal quotation and citation omitted)).

<sup>208</sup> Sadowsky Report (Mar. 20, 2019), ¶¶ 32–33; Murphy Report (May 28, 2020), ¶¶ 15–21, 23, 26–27.

<sup>209</sup> Murphy Report (May 28, 2020), ¶ 16.

<sup>210</sup> Since 2013, Verisign has accounted for only 32% of net adds. *Id.*, ¶ 18.

<sup>211</sup> *Id.*, ¶ 16.

<sup>212</sup> *Id.*, ¶ 17.

<sup>213</sup> AA-2 (*Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986)).

<sup>214</sup> Murphy Report (May 28, 2020), ¶ 28.

<sup>215</sup> *Id.*, ¶ 26.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*, ¶ 30.

118. Second, Afilias cannot show that Verisign has power over price or the power to exclude rivals. Verisign’s pricing is regulated by the DOC and the Cooperative Agreement includes specific provisions as to when and by how much Verisign can raise prices.<sup>218</sup> The wholesale price of .COM domain name registrations is set at the price cap permitted under the Cooperative Agreement, suggesting that .COM pricing is in fact below competitive levels.<sup>219</sup> Moreover, Verisign’s wholesale prices typically are lower than other legacy TLDs and new gTLDs.<sup>220</sup> Also, as discussed *supra*, Verisign does not have the power to exclude existing rivals, prevent the entry of new rivals, or prevent any of these competitors from expanding.

119. Furthermore, Verisign has no power to stop industry trends that compete with TLDs or reduce the significance of a website in a particular TLD. For example, while Afilias focuses on 1990’s era browsers that automatically appended .COM onto entries in the URL bar,<sup>221</sup> most browsers today, like Google’s, combine an integrated URL and search bar.<sup>222</sup> These browsers do not append .COM to terms, and the results of Google searches do not favor .COM websites over other TLD websites.<sup>223</sup> Additionally, businesses and individuals are increasingly relying on social media platforms, blog and website hosting services, and mobile apps, for their online presence.<sup>224</sup> As the DOC stated in loosening restrictions on Verisign in Amendment 35, “new gTLDs, and the use of social media have created a more dynamic DNS marketplace.”<sup>225</sup>

#### **b. The Cooperative Agreement Confirms a Competition DNS**

120. Afilias relies on the United States historically having required ICANN to impose price caps for .COM, and contends that such actions reflect the DOC’s conclusion that Verisign “maintains a dominant position in the supply of registry services.”<sup>226</sup> But, in fact, the U.S. government has taken exactly the opposite position about today’s market.

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<sup>218</sup> Kneuer Ex. L (Cooperative Agreement, Am. 35, *supra* note 161, ¶ 2).

<sup>219</sup> Murphy Report (May 28, 2020), ¶ 35.

<sup>220</sup> *Id.*

<sup>221</sup> Zittrain Report (Sept. 26, 2018), ¶ 17.

<sup>222</sup> Murphy Report (May 28, 2020), ¶ 32.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*, ¶ 33. None of these platforms require a second level domain registration and thus provide a costless or nearly costless alternative to consumers if Verisign ever decided to charge supra-competitive prices for .COM registrations.

<sup>225</sup> Kneuer Ex. L (Cooperative Agreement, Am. 35, *supra* note 161, at 1).

<sup>226</sup> Sadowsky Report (Mar. 20, 2019), ¶ 36.

121. The price caps Afiliias cites stem from an amendment entered in 2006 to the Cooperative Agreement between NSI and the DOC.<sup>227</sup> In adopting Amendment 35 to the Cooperative Agreement in October 2018, the DOC confirmed that today’s competitive landscape has changed significantly since 2000<sup>228</sup> and that, as a result of a “more dynamic DNS marketplace . . .[,] it is appropriate to amend the Cooperative Agreement to provide pricing flexibility for the registration and renewal of domain names in the .com registry.”<sup>229</sup>

122. Moreover, the existence of price regulation undercuts Afiliias’ contention that Verisign would seek to “bury” .WEB so as to divert registrations away from .WEB and toward .COM. As noted, Verisign’s wholesale pricing for .COM is below market levels. Thus, Verisign has every incentive to drive registrations to the market priced .WEB rather than to the below market priced .COM, *i.e.*, to do exactly the opposite of what Afiliias asserts would happen.

## **2. .WEB is Unlikely to Have a Significant Impact on Competition**

123. The economic evidence demonstrates that Verisign’s acquisition of .WEB is unlikely to have any substantial impact on competition. The New gTLD Program’s domain base has grown rapidly from 0 in 2013, to 3.6 million in 2014, 10.9 million in 2015, and 23.8 million in 2018.<sup>230</sup> To date, eight new gTLDs have domain name bases of over 1 million registrations.<sup>231</sup> The .top new gTLD by itself has a domain base of over 3.8 million.<sup>232</sup> Since 2013, new gTLDs account for 17% of gross adds and 30% of cumulative net adds.<sup>233</sup>

124. Besides the new gTLDs, legacy TLDs have large domain name bases, including .ORG (10.2 million) and .INFO (4.8 million).<sup>234</sup> The over 300 ccTLDs account for an additional 150 million total global registrations.<sup>235</sup> Moreover, all of those domains must now compete against social media, second-level TLD hosting platforms, and mobile apps as a means to

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<sup>227</sup> Kneuer Ex. D (Cooperative Agreement, *supra* note 178).

<sup>228</sup> Kneuer Ex. L (Cooperative Agreement, Am. 35, *supra* note 161).

<sup>229</sup> *Id.* at 1.

<sup>230</sup> Murphy Report (May 28, 2020), ¶ 28.

<sup>231</sup> *Id.*, ¶ 29.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*, ¶ 28.

<sup>234</sup> *Id.*, ¶ 26.

<sup>235</sup> *Id.*, ¶ 27.

establish an Internet presence.<sup>236</sup> The addition of .WEB into this environment is not likely to generate a significant competitive impact.<sup>237</sup>

### **C. .WEB Is Not Uniquely Positioned To Compete Against .COM**

125. Afilias contends that “.WEB is widely seen as the best potential competitor to .COM.”<sup>238</sup> Afilias’ expert Dr. Sadowsky opines that “the only new domain that is likely to compete strongly with .com is .web, due to properties inherent in its name,”<sup>239</sup> which allegedly are “affinity” and “community” rather than “commercialism” and “business.”<sup>240</sup> Afilias also cites to statements by industry participants touting .WEB and the auction price for .WEB as purported evidence of .WEB’s unique competitive significance.

126. Verisign’s and ICANN’s economists both have concluded that there is no evidence that .WEB will be a particularly significant competitive check on .COM.<sup>241</sup> Afilias’ “evidence”<sup>242</sup> to the contrary is unqualified speculation by industry participants. Likewise, the auction price for .WEB does not prove .WEB is a particularly significant competitor – in fact, it establishes the opposite. (*See infra* at III.C.3).

#### **1. .WEB’s Alleged Characteristics Do Not Distinguish it from Other Available gTLDs**

127. Afilias’ expert Dr. Sadowsky identifies three alleged characteristics of .WEB that he subjectively asserts makes .WEB attractive for future registrants: (i) universality (*i.e.*, .WEB is easy to pronounce and remember); (ii) .WEB domain names will be available while many .COM domain names already have been taken; and (iii) people identify the term “.web” with the Internet.<sup>243</sup> Sadowsky identifies no evidence to support these conclusions, or any educational or professional background that would give him expertise on these matters, and certainly no

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<sup>236</sup> *Id.*, ¶ 33.

<sup>237</sup> Indeed, as discussed in Section III.C.3, *infra*, the \$135 million auction price for .WEB indicates that the market anticipates .WEB will acquire only a 1% share of the market. *Id.*, ¶ 57. This minimal share of the market does not raise competitive concerns. AA-33 (*Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 333 (1961) (20 year contract that captured 1% of the coal market was “quite insubstantial” for antitrust purposes)).

<sup>238</sup> Afilias’ Amended IRP Request, ¶ 82.

<sup>239</sup> Sadowsky Report (Mar. 20, 2019), ¶ 39.

<sup>240</sup> *Id.*

<sup>241</sup> Murphy Report (May 28, 2020), ¶ 46; Carlton Report (May 30, 2019), ¶ 28.

<sup>242</sup> Sadowsky Report (Mar. 20, 2019), ¶ 54.

<sup>243</sup> *Id.*, ¶ 41.

evidence that .WEB is different along these dimensions than many other competitors.

128. Universality: Dr. Sadowsky appears to equate “universality” of a TLD with being comprised of three letters, associated with the Internet, having no semantic limitations, and being memorable and easy to pronounce.<sup>244</sup> .WEB is not unique in having these characteristics. Many TLDs are short and memorable, including legacy TLDs such as .ORG, .INFO, and .BIZ, ccTLDs such as .CO, and new gTLDs such as the top three new gTLDs .XYZ, .ICU and .TOP.<sup>245</sup> Nor is .WEB the only new gTLD that is a “generic” label with no semantic limitations of scope. .XYZ, for example, has no meaning at all, and is the third most popular new gTLD with nearly three million domain name registrations.<sup>246</sup> Afilias further provides no evidence to support its assumption that a “generic” label without semantic limitation is a relevant criteria for gTLD success, and the available evidence contradicts Afilias’ assumption. .ICU, .CLUB, and .WORK all have clear semantic meanings, yet they are in the top ten of new gTLDs.<sup>247</sup> Finally, as discussed in the Murphy Report, there is no economic basis to assume that a TLD is universal – and, thus, likely to be successful – because Afilias believes the TLD relates to the Internet.<sup>248</sup>

129. Availability: Afilias contends that desirable domain names are much more likely to be available in .WEB than .COM because so many names have already been taken by .COM registrants.<sup>249</sup> That may be true, but the availability of domain names compared to .COM hardly is a unique characteristic of .WEB; all new gTLDs possess the same advantage over .COM.<sup>250</sup>

130. Identity and Affinity: Afilias asserts that Internet users will identify with .WEB because .WEB “is more directly and strongly associated with use of the Internet for a wide range of purposes” than .COM.<sup>251</sup> But the fact that .COM is *not* intrinsically associated with the Internet – as Dr. Sadowsky admits<sup>252</sup> – directly contradicts this assertion. It is equally plausible

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<sup>244</sup> *Id.*

<sup>245</sup> Murphy Ex. KM-12 (nTLD Stats, New gTLDs, available at <https://ntldstats.com/tld>).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Murphy Report (May 28, 2020), ¶¶ 41–42; Zittrain Report (Sept. 26, 2018), ¶¶ 17–18.

<sup>249</sup> Sadowsky Report (Mar. 20, 2019), ¶ 41(2).

<sup>250</sup> *Id.*, ¶ 40; Murphy Report (May 28, 2020), ¶ 74.

<sup>251</sup> Sadowsky Report (Mar. 20, 2019), ¶ 41(3).

<sup>252</sup> *Id.*, ¶ 39.

that Internet users will prefer domain names specific to their particular interests (*e.g.*, “Joes.Photography”) rather than a generic TLD.<sup>253</sup> Moreover, as already noted, many new gTLDs have Internet associations, including .ONLINE, .WEBSITE, and .SITE, among others. Some of these TLDs have proven to be quite successful while others have not, suggesting that their success has little to do with any “Internet association” inherent in the particular TLD.<sup>254</sup>

## 2. Industry Participant and Analyst Statements Regarding .WEB

131. In his report, Sadowsky claims that .WEB is uniquely positioned to challenge .COM’s dominance, and quotes statements by industry participants and analysts to bolster his claim.<sup>255</sup> These statements are pure subjective opinion without evidentiary support. Sadowsky also ignores that industry participants and analysts have made similar claims about other TLDs. As discussed in the Carlton Report, industry participants routinely have touted the competitive potential of other gTLDs prior to launch,<sup>256</sup> yet none of these TLDs – according to Afilias’ apparent but unsubstantiated assessment – have become significant competitors to .COM.<sup>257</sup>

## 3. .WEB’s Valuation Disproves its Competitive Significance

132. Afilias and Dr. Sadowsky assert that the \$135 million price for .WEB demonstrates its significance relative to other new TLDs.<sup>258</sup> Neither Afilias nor the Sadowsky Report provide any economic evidence to support this assertion, nor can they. The available economic evidence in fact demonstrates the opposite – the \$135 million price for .WEB shows that it will likely be a small player in the domain name market.

133. The Murphy Report models multiple economic scenarios to assess Afilias’ claim that the \$135 million price shows that .WEB will be a substantial competitor. ***None of these scenarios*** indicate that .WEB is likely to have a significant market share, let alone a share that would pose a substantial competitive threat to .COM.

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<sup>253</sup> Murphy Report (May 28, 2020), ¶¶ 3(c), 45.

<sup>254</sup> *Id.*, ¶ 48; Murphy Ex. KM-12 (nTLD Stats, *supra* note 245).

<sup>255</sup> Sadowsky Report (Mar. 20, 2019), ¶¶ 40–41.

<sup>256</sup> Carlton Report (May 30, 2019), ¶ 36.

<sup>257</sup> *Id.*, ¶¶ 36–37.

<sup>258</sup> Sadowsky Report (Mar. 20, 2019), ¶ 46; Afilias’ Amended IRP Request, ¶ 26.

134. These conclusions are supported by a comparison to other, recent substantial TLD transactions. Redacted - Third Party Designated Confidential Information

This is

further evidence that a \$135 million bid price for .WEB implies only that .WEB could become one of many TLDs with registrations in the low single digit millions and does not in any way suggest that .WEB is a particularly significant competitor to .COM.<sup>262</sup>

#### **D. Verisign Has Every Incentive to Grow .Web Aggressively**

135. Afiliás claims without evidence that Verisign seeks to acquire .WEB for the purpose of eliminating a potential competitor to .COM and that .WEB is more likely to succeed if operated by Afiliás.<sup>263</sup> In fact, Verisign has every incentive and ability to make .WEB a success. By contrast, the evidence suggests Afiliás would be a worse operator of .WEB.

136. Verisign needs a new TLD like .WEB for growth.<sup>264</sup> Verisign's growth rate has declined in recent years, largely due to many names in .COM already having been taken and increased competition from new gTLDs and ccTLDs that have superior name availability.<sup>265</sup>

137. Even Afiliás' own experts concede that the .COM name space effectively is taken.<sup>266</sup> Numerous other industry participants have noted that most of the "good" names in .COM already are taken.<sup>267</sup> The exhaustion of space in .COM contradicts Afiliás' claim that

<sup>259</sup> Murphy Report (May 28, 2020), ¶ 56.

<sup>260</sup> *Id.*, ¶¶ 59–62.

<sup>261</sup> *Id.*, ¶ 62.

<sup>262</sup> *Id.*

<sup>263</sup> Afiliás' Amended IRP Request, ¶ 82.

<sup>264</sup> Murphy Report (May 28, 2020), ¶ 75.

<sup>265</sup> *Id.*, ¶¶ 73–74.

<sup>266</sup> *Id.*, ¶ 74 (citing Zittrain Report (Sept. 26, 2018), ¶ 47; Sadowsky Report (Mar. 20, 2019), ¶ 22).

<sup>267</sup> See, e.g., Murphy Ex. KM-42 (Alan Dunn, Quartz, "The world is running out of domain names – what will we do when they're all gone?" (June 2, 2017), available at <https://qz.com/994698/domain-name-regitrtion-problems-are-going-to-become-a-lot-worse-when-we-run-out-of-names/> ("The world is nearly out of good '.com' domain names . . . As global internet usage rises, .com naming is going to get more and more complicated.")); Murphy Ex. KM-45 (Radix, "Radix Announces .Website Launch Timeline" (June 16, 2014), available at [http://www.circleid.com/posts/20140616\\_radix\\_announces\\_website\\_launch\\_timeline/](http://www.circleid.com/posts/20140616_radix_announces_website_launch_timeline/) ("There are more than 113 million .com domain names registered, according to current market research, making it extremely difficult to secure a first-choice .com domain name. In fact, 65% of all checks for .com domain name availability fail and half of all customers buying a new domain name have to try two or more times to register a name of their choosing. The



Verisign wants to acquire .WEB to “protect” .COM. No value would be obtained from discouraging registrations of “good” names in .WEB when those “good” names are not available in .COM. Verisign needs new name space to grow, and .WEB would provide that.

138. Verisign is well-positioned to maximize .WEB’s potential. Verisign has an unmatched record of security and stability in registry operations – expertise that it can and would bring to .WEB.<sup>268</sup> Verisign also has been consistent regarding its intentions to promote .WEB and the benefits Verisign’s operation would bring to the TLD.<sup>269</sup>

139. Afilias’ recent track record suggests that it is less likely to be able to grow .WEB into a competitive force than Verisign. Afilias operates .INFO, .PRO, and .MOBI, along with several new gTLDs.<sup>270</sup> Afilias’ recent experience with these gTLDs suggests that Afilias would not be an effective operator of .WEB. Afilias has priced these TLDs at levels well above .COM. Afilias’ TLDs have been shrinking, not growing.<sup>271</sup> Afilias is even less likely to be successful with .WEB, which will be competing against over 1,200 new gTLDs, while Afilias’ other TLDs reached their peak market position prior to the introduction of new gTLDs.

### **CONCLUSION**

140. Based on ICANN’s Rejoinder, it is clear that the only question before this Panel is whether ICANN properly exercised its reasonable business judgment to defer a decision on Afilias’ claims regarding the .WEB auction. To the extent, however, that this Panel considers the substance of Afilias’ claims regarding .WEB, for the reasons set forth herein and in NDC’s Brief, those claims are meritless and should be rejected.

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frustratingly limited .com space makes new domain options like .website a top priority in the digital marketplace, and for Radix.”)).

<sup>268</sup> Murphy Report (May 28, 2020), ¶ 78.

<sup>269</sup> See, e.g., Murphy Ex. KM-51 (Verisign, “Verisign Press Release” (Aug. 1, 2016) (“Our expertise, infrastructure, and partner relationships will enable us to quickly grow .web and establish it as an additional option for registrants worldwide in the growing TLD marketplace . . . . And these users, along with our global distribution partners, will benefit from the many new domain name choices .web will offer.”)); Murphy Ex. KM-52 (Verisign, Verisign FQ3 2016 Earnings Call Transcript (Oct. 27, 2016) (“[W]e are excited about the .web opportunity as we believe we are well positioned to make it successful.”)); Murphy Ex. KM-53 (Verisign, Verisign FQ4 2016 Earnings Call Transcript (Feb. 9, 2017) (“We strongly believe Verisign is well positioned to grow and widely distribute .web to provide an additional option to the marketplace given our proven track record of reliability and security.”)); Carlton Report (May 30, 2019), ¶ 57.

<sup>270</sup> Murphy Report (May 28, 2020), ¶ 66.

<sup>271</sup> *Id.*, ¶ 67.

Dated: June 26, 2020

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