

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

**ALTANOVO DOMAINS LIMITED,**  
*Claimant*

v.

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

**ICDR Case No. \_\_\_\_\_**

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**REQUEST FOR INDEPENDENT REVIEW PROCESS**

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## GLOSSARY OF DEFINED TERMS

Abbreviation	Description
<b>Afilias</b>	Afilias Domains No. 3 Limited
<b>Afilias’ Response to Amici’s Briefs</b>	Afilias’ Response to the <i>Amicus Curiae</i> Briefs (24 July 2020), submitted in the First IRP [Exhibit C-50]
<b>AGB</b>	ICANN, gTLD Applicant Guidebook (4 June 2012) [Exhibit C-5]
<b>Altanovo</b>	Altanovo Domains Limited (Altanovo was previously known as Afilias Domains No.3 Limited. <i>See</i> Section 2.1 <i>infra</i> .)
<b>Articles</b>	Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016) [Exhibit C-24]
<b>Auction Rules</b>	Power Auctions LLC, Auction Rules for New gTLDs: Indirect Contentions Edition (24 Feb. 2015) [Exhibit C-3]
<b>BAMC</b>	The ICANN Board’s Board Accountability Mechanisms Committee
<b>Bidder</b>	A “Qualified Applicant” or a “Designated Bidder” under the New gTLD Program Rules
<b>Bidder Agreement</b>	ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) [Exhibit C-4]; the agreement between members of the .WEB Contention Set and ICANN’s third-party auction manager, Power Auctions LLC
<b>Board or ICANN Board</b>	ICANN’s Board of Directors
<b>Board Rationales</b>	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011) [Exhibit C-8]
<b>Bylaws</b>	Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 2 June 2022) [Exhibit C-14]
<b>Change Request Criteria</b>	ICANN, New Generic Top-Level Domains, New gTLD Application Change Request Process and Criteria, <a href="https://newgtlds.icann.org/en/applicants/global-support/change-requests">https://newgtlds.icann.org/en/applicants/global-support/change-requests</a> (last visited 26 May 2023) [Exhibit C-29]
<b>Cramton Report</b>	The accompanying Expert Report of Peter Cramton on Verisign and NDC’s Conduct regarding the ICANN Auction for .WEB (24 May 2023)
<b>CEP</b>	ICANN’s Cooperative Engagement Process, described in the Bylaws <sup>1</sup>
<b>DAA or Acquisition Agreement</b>	Domain Acquisition Agreement between VeriSign and NDC (25 Aug. 2015) [Exhibit C-2]
<b>Designated Bidder</b>	“A party designated by a Qualified Applicant to bid on its behalf in an Auction” <sup>2</sup>

<b>Abbreviation</b>	<b>Description</b>
<b>DNS or Domain Name System</b>	The Internet’s addressing system
<b>First IRP</b>	The proceedings styled <i>Afilias Domains No. 3 Limited v. International Corporation for Assigned Names and Numbers</i> , ICDR Case No. 01-18-0004-2703
<b>GNSO</b>	Generic Names Supporting Organization
<b>GNSO Report</b>	ICANN, GNSO, Final Report, Part A (8 Aug. 2007), <a href="https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm">https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm</a> (last visited 21 June 2023) <b>[Exhibit C-18]</b>
<b>gTLD</b>	Generic Top-Level Domain
<b>ICANN</b>	The Internet Corporation for Assigned Names and Numbers
<b>ICANN’s Opposition</b>	ICANN’s Opposition to Afilias’ Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), submitted in the First IRP <b>[Exhibit C-45]</b>
<b>ICANN’s PHB</b>	ICANN’s Post-Hearing Brief (12 Oct. 2020), submitted in the First IRP <b>[Exhibit C-49]</b>
<b>ICANN’s Response to Amended IRP</b>	ICANN’s Response to Afilias’ Amended Request for Independent Review Process (31 May 2019), submitted in the First IRP <b>[Exhibit C-44]</b>
<b>ICDR</b>	The International Centre for Dispute Resolution
<b>ICDR Rules</b>	ICDR, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (1 Mar. 2021) <b>[Exhibit C-19]</b>
<b>Interim Procedures</b>	The Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process
<b>IRP</b>	ICANN’s Independent Review Process described in the Bylaws <sup>3</sup>
<b>Livesay Witness Statement</b>	Witness Statement of Paul Livesay in Support of ICANN’s Rejoinder and Amici’s Briefs (1 June 2020), submitted in the First IRP <b>[Exhibit C-10]</b>
<b>NDC</b>	Nu DotCo, LLC
<b>NDC .WEB Application</b>	New gTLD Application Submitted to ICANN by NU DOTCO LLC, Application ID: 1-1296-36138, String: WEB (13 June 2012) <b>[Exhibit C-16]</b>
<b>Neuman Report</b>	The accompanying Expert Report of Jeffrey J. Neuman (3 July 2023)
<b>New gTLD Program Rules, or Rules</b>	The AGB, the Auction Rules, the Bidder Agreement, and other rules related to the New gTLD Program
<b>Qualified Applicant</b>	“An entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction.” <sup>4</sup>

<b>Abbreviation</b>	<b>Description</b>
<b>Resolution</b>	Approved Board Resolution, Regular Meeting of the ICANN Board, Board Resolution No. 2023.04.30.12 (unredacted) (30 Apr. 2023) [ <b>Exhibit C-17</b> ]
<b>Ruby Glen</b>	Ruby Glen, LLC
<b><i>Ruby Glen v. ICANN</i></b>	The proceedings styled <i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505 (C.D. Cal.)
<b>Verisign</b>	VeriSign, Inc.
<b>.WEB</b>	The .WEB gTLD registry
<b>.WEB Auction or ICANN Auction</b>	The ICANN-administered Auction for .WEB
<b>.WEB Contention Set</b>	The group of applicants for the .WEB gTLD, consisting of Altanovo (as Afiliias); Google (through Charleston Road Registry Inc.); Donuts (through Ruby Glen); Radix (through DotWeb Inc.); InterNetX GmbH (Schlund Technologies GmbH); Web.com Group. Inc.; and NDC
<b>Willett Declaration</b>	Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's <i>Ex Parte</i> Application for Temporary Restraining Order (with Exhibits A–H), submitted in <i>Ruby Glen v. ICANN</i> [ <b>Exhibit C-31</b> ]

## **1. INTRODUCTION**

1. Altanovo submits this Request for IRP pursuant to Section 4 of the Bylaws,<sup>5</sup> the International Arbitration Rules of the ICDR,<sup>6</sup> and the Interim Procedures.<sup>7</sup>

2. This is the second IRP between Altanovo and ICANN relating to the .WEB gTLD.<sup>8</sup> It arises out of ICANN's breaches of its Articles and Bylaws by failing to enforce the rules and underlying policies of ICANN's New gTLD Program, which require ICANN to award the rights to operate the registry for the .WEB gTLD to Altanovo. Instead, in a resolution dated 30 April 2023,<sup>9</sup> the ICANN Board decided to grant the registry rights to NDC, a different applicant for .WEB, despite NDC's clear and material violations of the New gTLD Program Rules.

3. In August 2015, NDC entered into a "Domain Acquisition Agreement" with Verisign, a party that had not applied for .WEB, to enable Verisign to secretly pursue the rights to .WEB using NDC as a puppet. Despite express provisions in the Rules limiting the application process to approved applicants, requiring transparency at every step of the process, and imposing strict restrictions on the sale, transfer, and/or assignment of an applicant's rights and obligations in connection with its application, ICANN intends to enter into a registry agreement with NDC and hence Verisign, which also happens to be ICANN's largest source of revenue.

4. ICANN remains in violation of its Articles and Bylaws by failing to enforce the New gTLD Program Rules for the benefit of Verisign and NDC. As foreseen by the First IRP Panel, the consequences thereof are to be determined by this Panel if it agrees with Altanovo.<sup>10</sup>

## **2. THE PARTIES**

### **2.1. Altanovo**

5. Altanovo is organized under the laws of the Republic of Ireland. Its principal place of business is in Ireland. Prior to 23 December 2020, Altanovo operated as Afilias.<sup>11</sup> The change did not affect Afilias'—now Altanovo's—application for the .WEB gTLD; ICANN approved the

requisite changes to Altanovo's .WEB application.<sup>12</sup>

## 2.2. ICANN

6. ICANN is a not-for-profit corporation organized under the laws of the State of California. It is the gatekeeper to the Internet's DNS.<sup>13</sup> In that capacity, it alone decides which companies will serve as *exclusive* registries for gTLDs, such as .COM, .NET, .ORG, and .WEB.<sup>14</sup> Exclusive registry rights often bring huge financial and other benefits to the companies that ICANN selects to hold them.<sup>15</sup> That is indisputably the case for .WEB.

7. ICANN was created in 1998 and tasked to promote competition in the DNS by introducing new gTLDs and encouraging new registries to compete with Verisign, which, for the past quarter-century, has held the exclusive registry rights for .COM and .NET. It has thereby dominated the registry market.<sup>16</sup> As testified in the First IRP by an ICANN Board member involved with ICANN's formation, "ICANN's role is setting a table where competition can take place."<sup>17</sup> ICANN should act in "a way that creates opportunities for competition and innovation."<sup>18</sup>

8. ICANN must "operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole[.]"<sup>19</sup> Quite uniquely, these instruments require ICANN to carry out activities "in conformity with relevant principles of international law and international conventions and applicable local law[.]"<sup>20</sup> The relevant principles of international law include the obligation of good faith.<sup>21</sup> Additionally, ICANN's Bylaws require it, *inter alia*, "to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness"<sup>22</sup> and to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment..."<sup>23</sup> The Bylaws "are intended to apply in the broadest possible range of circumstances" and "to apply consistently and comprehensively to ICANN's activities."<sup>24</sup>



### **3. SUMMARY OF FACTS UNDERLYING THE DISPUTE**

#### **3.1. The New gTLD Program and New gTLD Program Rules<sup>25</sup>**

9. In June 2011, following a multi-year consultative process with the Internet Community consistent with ICANN’s bedrock multi-stakeholder, bottom-up policy- and rule-making requirements, ICANN’s Board approved the New gTLD Program to introduce new gTLDs into the DNS.<sup>26</sup> According to the Board, the Program “represents ICANN’s continued adherence to its mandate to introduce competition in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved.”<sup>27</sup>

10. In keeping with the foregoing, the ICANN Board simultaneously approved the AGB.<sup>28</sup> ICANN considers the AGB to effectively constitute a contract between ICANN and New gTLD Program applicants.<sup>29</sup> The AGB’s Preamble describes the New gTLD Program as “an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”<sup>30</sup> Consistent with the policy premise that the New gTLD Program should reflect the “principles of fairness, transparency and non-discrimination,”<sup>31</sup> the AGB was drafted with the objective of ensuring that “[a]ll applicants for a new gTLD registry ... be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”<sup>32</sup>

11. ICANN is required to interpret and implement the New gTLD Program Rules in accordance with the obligations stated in its Articles and Bylaws.<sup>33</sup>

#### **3.2. Deadline for and Contents of Applications**

12. The filing deadline for New gTLD applications in the 2012 round was 20 April 2012. Of all the potential new gTLDs, .WEB is considered by many as one of the only registries with a sufficiently broad appeal to challenge the DNS’s dominant TLD: .COM—the registry for

which is run by Verisign.<sup>34</sup> Some of the largest players in the domain name business applied for .WEB: Altanovo (as Afilias); Google (through Charleston Road Registry Inc.); Donuts (through Ruby Glen); Radix (through DotWeb Inc.); InterNetX GmbH (Schlund Technologies GmbH); and Web.com Group. Inc.<sup>35</sup> In addition, NDC—a special purpose vehicle, the ultimate owners of which Altanovo has not been able to ascertain<sup>36</sup>—also applied for .WEB.

### **3.3. Application Publication and Public Comment Period**

13. The AGB requires applicants to provide general information about themselves;<sup>37</sup> answer a series of detailed questions describing their business plan for the proposed gTLD;<sup>38</sup> to demonstrate their capability to operate a registry;<sup>39</sup> to disclose extensive background information, including the identity of persons and entities in control of the applicant;<sup>40</sup> and to provide documentation substantiating the claims made in the application.<sup>41</sup> Applicants are required to maintain the accuracy and truthfulness of their applications at all times,<sup>42</sup> and to submit change requests to ICANN in this regard.<sup>43</sup> The public portion of NDC’s application made no mention of Verisign.

14. As required by the Rules, and in line with ICANN’s obligations to “promot[e] competition” and transparency to the maximum extent feasible,<sup>44</sup> ICANN published the non-confidential portions of applications for public review and comment for a 60-day comment period to ensure that the public (including other applicants) learned the identities of all the applicants and why they were applying for a specific gTLD.<sup>45</sup>

### **3.4. The .WEB Contention Set**

15. Where multiple applicants applied for the same gTLD, as with .WEB,<sup>46</sup> all approved applicants were placed into a single “contention set.”<sup>47</sup> The applicants listed in paragraph 12 above constituted the .WEB Contention Set.<sup>48</sup>

16. The AGB encouraged contention set members to resolve their competing claims

among themselves without the need for ICANN’s intervention.<sup>49</sup> Where contention sets contained more than two applicants, they were generally resolved through private auctions amongst contention set members. Absent private resolution, the New gTLD Program Rules required contention set resolution via an ICANN-administered auction.<sup>50</sup>

### 3.5. Verisign and NDC’s Secret Agreement to Enable Verisign to Obtain .WEB

17. Once the application period for the 2012 gTLD round had closed, according to a Verisign witness in the First IRP, Verisign decided <sup>Redacted - Third Party Designated Confidential Information</sup>

<sup>51</sup> The only TLD opportunity Verisign pursued after the deadline was .WEB.<sup>52</sup> Accordingly, in August 2015, it entered into the Acquisition Agreement with NDC.<sup>53</sup> Verisign did not make a regulatory announcement and NDC did not disclose the agreement to ICANN or the other .WEB Contention Set members. Nor did it submit a change request.

18. By agreeing to the Acquisition Agreement, NDC sold, assigned, and transferred <sup>Redacted - Third Party Designated Confidential Information</sup> virtually all of its rights and obligations in its .WEB application to Verisign.<sup>54</sup>

, it relinquished control of its application to an entity that was not part of the .WEB Contention Set. The terms of the Acquisition Agreement enabled Verisign to control all of NDC’s material decisions and actions regarding its .WEB application, including specifically requiring NDC to participate in the ICANN auction for .WEB <sup>Redacted - Third Party Designated Confidential Information</sup>

55

19. <sup>Redacted - Third Party Designated Confidential Information</sup>

.56

20. In short, as of August 2015, the effective purpose of NDC’s application and participation in the .WEB Contention Set was “for the benefit” of Verisign. NDC was nothing more than Verisign’s sock puppet. The Acquisition Agreement’s key terms pertinent to this dispute are excerpted in **Annex A**.

### **3.6. NDC Misleads ICANN to Conceal the Existence of the DAA**

21. ICANN scheduled 27 July 2016 for the .WEB Auction. Any private resolution among the .WEB Contention Set had to be completed by then.<sup>57</sup> Accordingly, the .WEB Contention Set scheduled a private auction for mid-June.<sup>58</sup> Redacted - Third Party Designated Confidential Information

Because voluntary contention set resolution must be unanimous, NDC’s refusal to participate meant that the competition for .WEB had to be resolved in an ICANN auction—which was precisely what Verisign wanted in order to maximize its chances of winning.<sup>59</sup>

22. The other contention set members asked NDC why it chose not to participate in the private auction. NDC avoided giving them a straight answer. Its evasive explanations led one of the other .WEB Contention Set members (Ruby Glen) to raise a concern with ICANN that NDC’s application had likely undergone an undisclosed “change of circumstances” that rendered the application “false or misleading.”<sup>60</sup>

23. ICANN Staff requested NDC to confirm that “there have not been changes to your application or the [NDC] organization that need to be reported to ICANN.”<sup>61</sup> NDC initially answered only part of ICANN’s inquiry: “[NDC] can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN.” A few days later, NDC informed ICANN that “[t]here have been no changes to the Nu Dotco, LLC Application.”<sup>62</sup> In

fact, despite having several opportunities to disclose to ICANN that it had entered into an agreement with Verisign relating to its application—a matter which both Verisign and NDC have vehemently argued is quite normal and innocuous—NDC repeatedly and unambiguously represented that the decision not to participate in the private auction was made by NDC’s leadership; no mention was made of Verisign.<sup>63</sup> NDC’s representations to ICANN were false, as NDC had, by this time, sold, transferred, and assigned its right to decide whether to participate in a private auction to Verisign. Redacted - Third Party Designated Confidential Information

NDC had no more say

in the matter.

### 3.7. Verisign Secretly Participates in the ICANN Auction

24. The .WEB Auction went forward as scheduled.<sup>64</sup> ICANN’s rationale for adopting an auction mechanism as the final means for contention set resolution was because it “provide[s] objectivity and transparency: ‘Auctions rely on relatively simple and transparent rules that apply to all participants. As such they are fair and transparent. ...’”<sup>65</sup> For this reason, ICANN stressed it “intend[ed] to use auctions in the new gTLD process as a tie-breaking mechanism ... for the resolution of string contention *among competing new gTLD applicants* for identical or similar strings.”<sup>66</sup> The ICANN auction model was not designed to be an open one.

25. The AGB provides that, during the auction, “[t]he auctioneer [will] successively increase[] the prices associated with applications within the contention set, and the respective *applicants* [will] indicate their willingness to pay these prices. As the prices rise, *applicants* will successively choose to exit from the auction.”<sup>67</sup> Altanovo’s highest bid was USD 135 million, which was more than three times the record bid in any previous ICANN auction.<sup>68</sup> NDC, as directed at each round of the auction by Verisign and using Verisign’s funds, was declared the winner of the .WEB Auction with a USD 142 million bid.<sup>69</sup>

26. Evidence from the First IRP shows—reflecting the express requirements of the Acquisition Agreement—that an NDC representative traveled to Verisign’s corporate headquarters in Reston, Virginia for the .WEB Auction;<sup>70</sup> Redacted - Third Party Designated Confidential Information

<sup>72</sup> the final

bid price was paid by Verisign through NDC;<sup>73</sup> and Redacted - Third Party Designated Confidential Information

once NDC received confirmation that it had won the .WEB Auction.<sup>74</sup> In short, the Acquisition Agreement was performed in all material respects.

### **3.8. ICANN’s Biased Investigation of Altanovo’ Complaints**

27. Shortly after winning the ICANN Auction, Verisign disclosed its involvement in NDC’s application in a regulatory filing, but made no mention of the Acquisition Agreement or its contents.<sup>75</sup> Altanovo wrote to ICANN, stating that whatever arrangement Verisign had made with NDC likely violated the New gTLD Program Rules. It asked ICANN to investigate,<sup>76</sup> as did other members of the Contention Set. ICANN confirmed it “would consider, evaluate, and seek informed resolution of the issues” related to the .WEB gTLD.<sup>77</sup> It ultimately did no such thing, but instead bent over backwards to protect Verisign and NDC.

28. In August 2016, without informing Altanovo, ICANN’s litigation counsel at Jones Day reached out to Verisign’s (not the applicant NDC’s) litigation counsel, ostensibly to obtain a copy of the DAA. The agreement was provided soon thereafter—together with a lengthy explanation as to why the agreement did not violate the Rules. Neither document was provided to Altanovo or the other .WEB Contention Set members.<sup>78</sup>

29. A few weeks later, ICANN transmitted a questionnaire to Altanovo, Ruby Glen, Verisign, and NDC. No mention was made of the fact that the questionnaire was based on the DAA and Verisign’s earlier written submission.

30. In November 2016, the ICANN Board held a workshop session at which the ICANN Board “chose to not take any action at that time regarding .WEB because an Accountability Mechanism was pending regarding .WEB” (*i.e.*, Ruby Glen’s CEP with ICANN).<sup>79</sup> This course of action was not communicated to *any* of the involved entities.<sup>80</sup>

### **3.9. ICANN Proceeds to Delegate .WEB to NDC**

31. Beginning in February 2018, Altanovo repeatedly requested updates from ICANN regarding the disposition of its complaints.<sup>81</sup> ICANN provided none. Then, on 6 June 2018, out of the blue, ICANN notified Altanovo it had decided to take the .WEB Contention Set “off hold”—signaling that it intended to delegate .WEB to NDC<sup>82</sup> and, in light of the Acquisition Agreement (which by this time was in ICANN’s possession, but still unknown to Altanovo), to Verisign. Apparently considering Altanovo’s complaints to be nothing more than “sour grapes” for having lost the ICANN Auction,<sup>83</sup> ICANN Staff proceeded to effectuate the transfer, acquiring a signed Registry Agreement for .WEB from NDC and approving ICANN’s execution of the agreement.<sup>84</sup>

### **3.10. The First IRP**

32. Altanovo invoked CEP on 18 June 2018, thereby causing ICANN to freeze the delegation process. The purpose of CEP is to allow ICANN and a claimant to resolve or narrow the dispute. The process was destined for failure. Unbeknownst to Altanovo, ICANN, together with Verisign, were already preparing for an IRP.

33. While CEP was underway, ICANN Legal, working hand in glove with a Verisign employee who was chairing the IRP rules revision committee, redrafted the rules to enable Verisign and NDC to participate in the First IRP as *amici*. There is ample evidence from the First IRP, confirming that in October 2018 certain 11th-hour rule amendments pushed by the Verisign employee and supported by ICANN Legal violated the drafting procedures adopted by the committee, and that the ICANN Board adopted the rules without full information.<sup>85</sup> As a result,

NDC and Verisign participated in the First IRP in a manner that goes far beyond typical *amici*—including presenting fact and expert witness testimony and participating at the merits hearing and oral argument. The same individuals also pushed through the retroactive application of a statute of repose, which would have barred Altanovo from pursuing its claims—a move that the First IRP Panel found “inherently problematic” and a violation of Altanovo’s due process rights.<sup>86</sup>

34. Throughout the proceedings, ICANN, supported NDC and Verisign’s litigation position in every material respect and in terms demonstrating outright hostility towards Altanovo beyond the limits of vigorous advocacy. The following example suffices to illustrate the point:

The *hypocrisy and inequity of Afilias’ claims* against ICANN are palpable. Having done nothing to prosecute its claims for over two years while ICANN worked to resolve the host of legal proceedings and Accountability Mechanisms surrounding .WEB, *Afilias now shamelessly seeks to use this proceeding* to acquire .WEB based on ICANN’s supposed failure to take the action that Afilias only now requests. Afilias is in no position to make such claims, but *appears tone-deaf to how fundamentally unfair and self-serving its accusations against ICANN are.*<sup>87</sup>

35. The First IRP Panel issued its Final Decision on 20 May 2021, finding Altanovo to be the prevailing party. It found “that the preparation and issuance of [ICANN’s] Questionnaire in the circumstances ... violated [ICANN’s] commitment, under the Bylaws, to operate in an open and transparent manner and consistent with procedures designed to ensure fairness.”<sup>88</sup> ICANN’s actions placed Altanovo at a “significant disadvantage” because “while [ICANN,] NDC and Verisign had knowledge of the terms of the DAA at that time, Afilias and Ruby Glen did not.”<sup>89</sup>

36. Regarding the Board’s inaction in November 2016, it found that ICANN violated its “commitment to operate ‘in an open and transparent manner and consistent with procedures to ensure fairness’ for [ICANN] to have failed to communicate the Board’s decision to [Altanovo].... Since the Board’s decision to defer consideration of these issues contradicted [ICANN’s] representations, it was incumbent upon [ICANN] to communicate that decision to [Altanovo].”<sup>90</sup>



37. And it found that ICANN Staff’s “decision to move to delegation without having pronounced on the questions raised in relation to .WEB” “violated its commitment to make decisions by applying documented policies objectively and fairly”<sup>91</sup> and “to operate in an open and transparent manner and consistent with procedures to ensure fairness[.]”<sup>92</sup>

38. Regarding Altanovo’s request for a finding that ICANN had breached its Articles and Bylaws by failing to determine that NDC had violated the New gTLD Program Rules, and by not disqualifying NDC’s application, the Panel determined that this issue should be addressed “in the first instance” by ICANN’s Board.<sup>93</sup>

### **3.11. The ICANN Board’s Resolutions**

39. On 16 January 2022, the Board considered the First IRP Final Decision. It directed the BAMC to “review, consider, and evaluate the [First IRP Final Decision], and to provide the Board with its findings to consider and act upon....”<sup>94</sup> Altanovo, Verisign, and NDC made various written submissions to the Board and BAMC.

40. On 30 April 2023, the Board adopted several resolutions. In the Resolution, it “determine[d] that NDC did not violate the Guidebook or the Auction Rules, either through entering into the [Acquisition Agreement] or through its participation in the .WEB auction;” and directed ICANN Staff “to continue processing NDC’s .WEB application[.]”<sup>95</sup>

41. The resolutions and accompanying discussion are notable for the degree to which they omit key parts of Altanovo’s case, over-emphasize NDC and Verisign’s case, and use language, concepts and logic that are almost the mirror image of that used by NDC and Verisign in the First IRP.<sup>96</sup> As shown by the examples in **Annex B**, the Resolution largely parrots ICANN’s litigation positions from the First IRP.

## **4. THE BOARD’S VIOLATION OF THE BYLAWS**

### **4.1. Relevant Bylaws Provisions**

42. By resolving that NDC did not violate the New gTLD Program Rules, and that ICANN Staff should proceed to contract with NDC (and hence Verisign) for the .WEB Registry, the ICANN Board violated its obligations, amongst others and at a minimum, to: (i) “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly[;]”<sup>97</sup> (ii) not apply ICANN’s “standards, policies, procedures, or practices inequitably[;]”<sup>98</sup> (iii) “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness[;]”<sup>99</sup> and (iv) carry out its activities “in conformity with relevant principles of international law...,” including the duty of good faith.<sup>100</sup>

### **4.2. Determination that an Arrangement Like the Acquisition Agreement Is not Covered by the AGB**

43. As a threshold matter, the Board considered that “there is no Guidebook or Auction Rules provision that directly addresses arrangements such as the [Acquisition Agreement].”<sup>101</sup> Thus, it determined that “the [Acquisition Agreement] falls into a gray area that the Guidebook and Auction Rules do not specifically address.”<sup>102</sup> The Board thus gave itself free reign to disregard completely the New gTLD Program Rules, and in so doing breached its obligation to apply the Rules, which ICANN has repeatedly stated reflect ICANN “documented policies”<sup>103</sup> developed by the ICANN community through the multistakeholder process. As discussed in the sections that follow, the Rules contain provisions that explicitly apply to the Acquisition Agreement; and the Board should easily have found as much based on a neutral, objective, fair, and good faith interpretation and application of the Rules—which it chose not to do.

### **4.3. Determination that the Acquisition Agreement Is Similar to Other TLD Assignment Agreements**

44. The Board opined that the arrangement reflected in the Acquisition Agreement is

no different from other types of TLD assignment agreements, stating that “Registry Agreements for new gTLDs have been assigned dozens of times, if not more, following contracting and/or delegation of the gTLD and that, generally, there have been no formal objections regarding possible pre-contracting agreements that provided for a post-delegation transfer subject to ICANN approval.”<sup>104</sup>

45. Altanovo is unaware whether any other formal objections have been raised regarding TLD transfer arrangements. However, the Resolution does not provide any examples of agreements remotely similar to the Acquisition Agreement—that is, an agreement entered into prior to contracting or delegation (*i.e.*, pre-contention set resolution by auction), between a contention set member and party not part of the contention set, as a result of which the non-applicant was enabled to participate <sup>Redacted - Third Party Designat</sup> <sup>105</sup> in the contention set and the nominal applicant agreed to participate in the contention set <sup>Redacted - Third Party Designated Confidential Information</sup>

<sup>106</sup> Indeed,

nowhere in the Resolution are the implications of this contractual language addressed.

46. By failing to take into consideration the specific terms of the Acquisition Agreement and failing to demonstrate specifically how the Acquisition Agreement falls within the ambit of permissible assignment agreements, the Board violated its obligation to apply the Rules consistently, neutrally, objectively, fairly, equitably, transparently, and in good faith.

#### **4.4. The Board’s Determination that NDC Did Not Violate the Prohibition Against Sale, Transfer or Assignment of Rights and Obligations in Its Application**

47. The AGB states in unambiguous terms that an “[a]pplicant may not resell, assign, or transfer any of the applicant’s rights or obligations in connection with the application.”<sup>107</sup> The Board acknowledged that NDC “agreed that the [Acquisition Agreement] grants Verisign various rights with respect to how NDC proceeds, including with respect to a possible private or ICANN

auction[.]”<sup>108</sup> Nevertheless, it determined that NDC did not breach the prohibition against transferring “*any*” rights or obligations “in connection with the application” because it did not sell, assign, or transfer its entire application to Verisign.<sup>109</sup>

48. The Resolution neither reflects the plain language of the Rules, nor a good faith interpretation. Instead, it constitutes an impermissible re-writing of the anti-transfer provision by substituting the word “any” for “all” and construing “rights or obligations in connection with the application” as the application in its entirety.<sup>110</sup> The Resolution guts both the plain language of the anti-transfer provision *and* its fundamental purpose, thereby violating various Bylaws obligations.

49. Pursuant to the terms of the Acquisition Agreement, NDC sold, assigned, or transferred the following rights and obligations to Verisign, among others:

- Redacted - Third Party Designated Confidential Information

.<sup>111</sup>

- Redacted - Third Party Designated Confidential Information

<sup>112</sup>

- Redacted - Third Party Designated Confidential Information

<sup>113</sup>

- Redacted - Third Party Designated Confidential Information

<sup>114</sup>

- Redacted - Third Party Designated Confidential Information

<sup>115</sup>

50. Verisign’s control over NDC in all matters regarding its .WEB application is further demonstrated by the Verisign CEO’s repeated statements that Verisign is “engaged in ICANN’s process to move the delegation of .web forward”—despite the fact that ICANN has yet to approve an assignment of the .WEB registry agreement to Verisign.<sup>117</sup>

51. The Board’s determination that NDC did not violate the anti-transfer requirements cannot be reconciled with the New gTLD Program Rules and, therefore, with its obligations to make decisions by applying documented policies consistently, neutrally, objectively, fairly, equitably, and in good faith; or to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures to designed to ensure fairness.

#### **4.5. The Board’s Determination that NDC Did Not Violate the AGB’s Disclosure and Change Request Requirements**

52. The Board determined that NDC’s application was not rendered false or misleading by entering into the Acquisition Agreement because “NDC is still the applicant; that has not changed. And, if NDC enters into a Registry Agreement with ICANN, NDC will become the Registry Operator for .WEB.”<sup>118</sup> This determination reflects pure pretense over substance, and completely disregards the AGB’s very specific rules on disclosure, transparency and application change requests.<sup>119</sup> Furthermore, ICANN determined that these rules were not applicable to portions of NDC’s application that were affected as a result of its deal with Verisign, and in any event no meaningful consequences resulted from failing to comply with them.<sup>120</sup> The Board’s disregard of the AGB’s very clear rules violates the Bylaws.

53. The AGB’s disclosure and transparency requirements are clear, broad, and categorical. Specifically, AGB Section 1.2.7 states:

If at ***any time*** during the evaluation process information previously submitted by an applicant becomes ***untrue or inaccurate***, the applicant ***must promptly notify ICANN*** via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant. ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. ***Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.***<sup>121</sup>

54. The AGB’s Terms and Conditions (Module 6) provide that:<sup>122</sup>

Applicant warrants that the ***statements and representations*** contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are ***true*** and ***accurate*** and ***complete in all material respects***, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that ***any material misstatement or misrepresentation (or omission of material information)*** may cause ICANN and the evaluators to ***reject the application*** without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of ***any change in circumstances*** that would render any information provided in the application ***false or misleading.***<sup>123</sup>

55. In short, the AGB mandates that applicants “must” notify ICANN “promptly,” in accordance with the change request procedures, if information provided to ICANN becomes not just “untrue” (*i.e.*, outright false) but also “inaccurate” (*i.e.*, imprecise). The notification obligation is broad. It applies to “***any change in circumstances***” rendering “***any information***” provided in the application “false” or “misleading,” as well as “any material misstatement or misrepresentation” or “omission of material information.” These disclosure obligations are so significant that applicants were warned that non-compliance could result in an application’s denial or rejection. These rules and standards were intended to reflect the Internet Community’s policy imperative

that ICANN’s “evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.”<sup>124</sup>

56. The Resolution does not contain a word of explanation as to how NDC’s failure to disclose that it was acting for the Redacted - Third Party Designated Confidential Information

Redacted - Third Party Designated Confidential Information was not material information that required disclosure or a material omission. It does not address why NDC’s entry into the DAA did not constitute a “change in circumstances” rendering information in the application false, inaccurate, or misleading. The information that NDC failed to disclose—that it was being paid by Redacted - Third Party Designated Confidential Information Verisign to submit bids on Verisign’s behalf at the .WEB Auction for Verisign’s Information

—was material to its application, to the fairness and integrity of the resolution-by-auction process, and ultimately to the objectives of the New gTLD Program itself—to introduce competition in the DNS and erode Verisign’s market dominance. NDC’s failures to disclose these facts and to amend its application following its agreement with Verisign breached the AGB and the Board should have easily found as much. The Board’s failure to do so breaches its obligations under its Bylaws to make decisions by applying documented policies consistently, neutrally, objectively, fairly, equitably, and in good faith; and operate to the maximum extent feasible in an open and transparent manner and consistent with procedures to designed to ensure fairness.

57. NDC’s application repeatedly noted that .WEB would follow the marketing path that NDC’s management used with the .CO country code TLD. NDC justified its pursuit of .WEB on the basis, *inter alia*, that it was seeking to challenge the dominance of “older incumbent players” (*i.e.*, Verisign).<sup>125</sup> The only possible reading of NDC’s business plan was that NDC wanted to operate and market .WEB itself. As of August 2015, NDC had no independent business plan for .WEB that it intended to implement. Its sole purpose in applying for .WEB was to obtain it for the

oldest of the incumbent players, not to market .WEB itself in any way or to compete in the market. Beyond a perfunctory statement that ICANN does not use the mission and purpose section to evaluate an application, the Resolution also says nothing about why NDC’s application was not rendered false, untrue, or misleading. No one in the Internet Community, including the other .WEB Contention Set members, had any clue that, as of August 2015, they were competing with Verisign and not NDC. The Resolution does not explain how this was not material or was not a change in circumstance pertaining to NDC’s application that called for—at a minimum—the submission of a change request or disclosure. Again, the Board’s failure to apply the AGB faithfully constitutes a violation of the Bylaws.

#### **4.6. The Board Ignored that NDC Hid Information From and Misled ICANN**

58. The Board overlooked that NDC misled ICANN in connection with its application, both by what it said and the information it intentionally chose not to disclose. As mentioned above, applicants were required to affirm the truthfulness, accuracy, and completeness of their applications in all material respects; and acknowledge that “any material misstatement or misrepresentation (or omission of material information)” could result in an application’s rejection.<sup>126</sup>

59. But when ICANN asked NDC about changes to its application or changes of control over the company, NDC was not candid. It had multiple opportunities to let ICANN know that it had entered into an agreement with Verisign, pursuant to which Verisign would be participating “indirectly” in the .WEB Contention Set. According to NDC and Verisign, they kept their arrangement from the other Contention Set members and the ICANN Community quiet to avoid criticism.<sup>127</sup> But why hide the arrangement from ICANN—particularly, as Verisign and NDC now argue the Acquisition Agreement reflects TLD transfer arrangements that are commonplace in the industry? It would have been simple for NDC to clarify confidentially with ICANN—perhaps even



before entering into the Acquisition Agreement—whether an arrangement such as the Acquisition Agreement would require the filing of a change request, reevaluation, and public comment.

60. Verisign and NDC chose not to pursue this route because they did not want to risk that the Acquisition Agreement would be deemed impermissible under a proper application of the application change control criteria.<sup>128</sup> These criteria “were carefully developed to enable applicants to make necessary changes to their applications *while ensuring a fair and equitable process for all applicants.*”<sup>129</sup> The criteria therefore recommend rejection of change requests that would affect “*other applicants*”<sup>130</sup> and “*materially impact other third parties* [because] it will likely be found to cause issues of unfairness.”<sup>131</sup> The relevant focus of the criteria is to assess whether “the change [would] affect *string contention*,”<sup>132</sup> which clearly happened here as a result of Verisign’s secret participation in the .WEB Auction.

61. By overlooking NDC’s lack of candor, failing to apply the transparency and disclosure rules clearly set out in the AGB, and ignoring NDC’s plain disregard for the application change request procedures and the consequences thereof on the .WEB Contention Set, the ICANN Board violated its obligations under the Bylaws to make decisions by applying documented policies consistently, neutrally, objectively, fairly, equitably, and in good faith.

#### **4.7. The Board’s Determination that NDC Did Not Violate the Auction and Bidding Rules**

62. The Board determined that NDC did not violate the Auction Rules or Bidder Agreement because it considered that NDC “always remained the bidder, the bids that it submitted were legitimate, and NDC was in fact able to fulfil its bid when it became the prevailing party at the auction.”<sup>133</sup> This determination also reflects pretense over substance, ignoring very specific language in the DAA.

63. The Auction Rules and Bidder Agreement unambiguously state eligibility rules, which are expressly incorporated by reference into the AGB. Here, too, their purpose is to promote

fairness and transparency, and to ensure that only applicants who have been placed in a contention set—and whose identity is known to other contention set members (and indeed, the entire Internet community)—can bid for a gTLD.<sup>134</sup> The Resolution reads these key provisions out of the Rules.

64. *First*, NDC enabled Verisign’s participation in the .WEB Auction, even though the Auction Rules provide that “[p]articipation in an Auction is limited to Bidders.”<sup>135</sup> A “Bidder” is either: (1) a “Qualified Applicant” or (2) a “Designated Bidder” of a Qualified Applicant.<sup>136</sup> Verisign was not a Bidder: it did not submit an application for .WEB, did not receive any approvals from ICANN, was not part of the .WEB Contention Set, and was not designated by NDC as its Designated Bidder. Nonetheless, Verisign participated secretly and impermissibly in the .WEB Auction through the DAA.<sup>137</sup>

65. *Second*, the Acquisition Agreement required NDC to participate in the ICANN Auction for .WEB <sup>Redacted - Third Party Designated Confidential Information</sup>

<sup>138</sup>—language that the Board completely ignored. But Auction Rule 13 stipulates that a Bidder may only “*bid on its behalf*,” not on behalf of a third party. Consistent with these rules, the standard Bidder Agreement provides that “the Qualified Applicant will *place bids in the Auction on its own behalf* or may designate an agent (‘Designated Bidder’) to enter bids at the Auction *on the Qualified Applicant’s behalf*.”<sup>139</sup> The bids that NDC submitted at the .WEB Auction were made on *Verisign’s* behalf in contradiction to the Rules.<sup>140</sup>

66. *Third*, NDC’s submitted bids reflected the amounts that Verisign agreed to pay for the .WEB gTLD, even though the Auction Rules provide that all bids must reflect “a price[] which [the] *Bidder* is willing to pay to resolve string contention within a Contention Set in favor of its Application.”<sup>141</sup> Pursuant to the DAA, <sup>Redacted - Third Party Designated Confidential Information</sup>

was willing to pay for .WEB since Verisign was <sup>Redacted - Third Party Designated C</sup> to paying the winning amount and it was Verisign alone that bore the financial consequences of prevailing at auction.<sup>143</sup>

67. NDC thus only submitted invalid bids during the .WEB Auction because each and every bid violated the Auction Rules, which were designed to ensure that *only* Qualified Applicants exercised their exclusive right to bid for a string in an ICANN auction.<sup>144</sup> Bids at an ICANN-administered auction are invalid if they do not comply with the Rules. The AGB expressly states that “[o]nly bids that comply with *all aspects* of the auction rules will be considered valid.”<sup>145</sup> All invalid bids *must* be treated by ICANN as “exit bid[s] at the start-of-round price for the current auction round.”<sup>146</sup> All of NDC’s bids during the .WEB Auction must consequentially be treated as exit bids—not valid or “winning” bids—because *all* of NDC’s bids during the ICANN Auction failed to comply with the Rules.<sup>147</sup> NDC therefore must be treated by ICANN as having exited the ICANN Auction in the first round of the auction, and not as having won the auction.

68. The Board’s refusal to respect and apply the plain language of the New gTLD Program Rules to disqualify NDC’s auction bids constitutes yet another breach of the Bylaws; specifically, the obligations to make decisions by applying documented policies consistently, neutrally, objectively, fairly, equitably, and in good faith.

#### **4.8. The Board’s Determination that ICANN Proceed with Delegating .WEB to NDC**

69. The Board determined that the Auction Rules and Bidder Agreement were “not intended to disqualify an otherwise qualified applicant in these circumstances[.]”<sup>148</sup> The Board’s views as to the consequences of a violation of the Auction Rules and Bidder Agreement are also incorrect and contrary to the plain language of those instruments.

70. The New gTLD Program Rules identify the consequence of an applicant’s non-compliance. The Auction Rules expressly state that, if the winner of an ICANN-administered

auction for a gTLD is declared in default or determined to be ineligible to proceed with the Registry Agreement, the next-highest bidder will have an opportunity to obtain the auctioned gTLD.<sup>149</sup>

According to Rules 58, 59 and 62 of the Auction Rules,

Once declared in default, any Winner is subject to immediate forfeiture of its position in the Auction and assessment of default penalties.

After a Winner is declared in default, the remaining Applications (that have not withdrawn from the New gTLD Program) which are not in a Direct Contention relationship with any of the non-defaulting Winning Applications will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective final Exit Bid. *In this way, the next Bidder would be declared the winner subject to payment of its Exit Bid. ...*

*If, at any time following the conclusion of an Auction, the Winner is determined by ICANN to be ineligible to sign a Registry Agreement for the Contention String that was the subject of the Auction, the remaining Bidders (with applications that have not been withdrawn from the New gTLD Program) will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective Exit Bid. In this way, the next Bidder would be declared the Winner subject to payment of its Exit Bid.*<sup>150</sup>

Notably, the Auction Rules' language is mandatory. Once an auction winner is declared in default, the next highest bidder "*will*" be offered the gTLD.<sup>151</sup> The New gTLD Program Rules simply do not provide ICANN with discretion over the consequences of a default.

71. Under the plain and unambiguous terms of the Rules, ICANN is required to offer the .WEB gTLD to the second-highest bidder at the .WEB Auction: Altanovo.<sup>152</sup> The Auction Rules expressly state that, if the winner of an ICANN-administered auction for a gTLD is declared in default or rendered ineligible to proceed with the Registry Agreement, next-highest bidder will have an opportunity to obtain the auctioned gTLD.<sup>153</sup> The AGB and the Bidders Agreement contain the same language.<sup>154</sup>

72. The Board’s refusal to respect and apply the plain language of the New gTLD Program Rules to deem NDC ineligible to enter into a registry agreement for .WEB constitutes yet another breach of the Bylaws; specifically, the obligations to make decisions by applying documented policies consistently, neutrally, objectively, fairly, equitably, and in good faith.

#### **4.9. ICANN Failed to Accord Altanovo Equal Treatment**

73. The Resolution is inherently inequitable. As demonstrated above, NDC repeatedly violated the Rules during and before the ICANN Auction. Rather than enforce the Rules against NDC, the Board deliberately ignored NDC’s various violations—and thus ICANN’s own Articles and Bylaws—when it approved the Resolution. The Board has no discretion to treat NDC differently from other gTLD applicants.

74. By allowing Verisign secretly to take over NDC’s application—to “indirectly participat[e]”<sup>155</sup> in the contention set and to seek to become the registry operator for .WEB under the cover of NDC’s application—ICANN has wiped away the years of “carefully deliberated policy development work by the ICANN Community[,]” which had resulted in “an application and evaluation process for new gTLDs that is aligned with the policy recommendations”<sup>156</sup> made by the Internet Community, and which were meant to advance ICANN’s Mission in a manner that is consistent with its Articles and Bylaws (*i.e.*, in a manner that applies standards and documented polices consistently, neutrally, objective, fairly, and in a non-discriminatory manner).<sup>157</sup> Other applicants in the .WEB Contention Set—who followed the “clear roadmap”<sup>158</sup> provided by the Rules for reaching delegation of the .WEB domain—were plainly treated differently from Verisign, who was allowed by ICANN to participate “indirectly” in the .WEB Contention Set without ever having submitted an application, without being subject to the public notice and comment and evaluation process, and without ever being required to disclose even its interest in the .WEB gTLD until *after* the contention set was resolved in favor of its agent, NDC.

75. The ICANN Board is therefore allowing only *two* members of the Internet Community—NDC and Verisign—to violate the New gTLD Program Rules and holding every other applicant—including Altanovo—accountable to those rules. Such disparate treatment defies the expectations of equality established by ICANN through its own Bylaws.

## 5. RELIEF REQUESTED

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

### A. *Issue a binding Declaration:*

- (1) that ICANN has violated its Articles and Bylaws by not finding that NDC and Verisign violated the New gTLD Program Rules;
- (2) that ICANN has violated its Articles and Bylaws by (i) not disqualifying NDC from the .WEB Contention Set, and/or (ii) not deeming invalid NDC's bids in the ICANN Auction for .WEB, and/or (iii) by not determining NDC to be ineligible to sign a Registry Agreement for .WEB, by virtue of its breaches of the New gTLD Program Rules;
- (3) that ICANN has violated its Articles and Bylaws by not offering .WEB to Altanovo;
- (4) that, in adopting the 30 April 2023 Resolutions, the ICANN Board did not act independently and impartially and/or was improperly influenced by ICANN's outside legal counsel and/or ICANN Staff;
- (5) that Altanovo is the prevailing party in this IRP and awarding it the costs of these proceedings; **and**

### B. *Declare or Recommend:*

- (1) that ICANN enter into a registry agreement for .WEB with Altanovo without delay; **and**
- (2) the amount to be transferred by Altanovo to ICANN for .WEB in light of the disqualification of NDC from the Contention Set and of its .WEB application;

- C. ***Grant such other relief*** that the Panel may consider appropriate in the circumstances, including monetary damages to be quantified in the course of the present IRP.

Respectfully submitted,



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## LIST OF EXHIBITS

Exhibit No.	Description
C-1	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Final Decision (20 May 2021, as corrected)
C-2	Domain Acquisition Agreement between VeriSign Inc. and Nu Dotco LLC (25 Aug. 2015)
C-3	Power Auctions LLC, Auction Rules for New gTLDs: Indirect Contentions Edition (24 Feb. 2015)
C-4	ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014)
C-5	ICANN, gTLD Applicant Guidebook (4 June 2012)
C-6	Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1998), <a href="https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en">https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en</a> (last visited 18 May 2023)
C-7	ICANN, New gTLD Program Explanatory Memorandum: Resolving String Contention (18 Feb. 2009)
C-8	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011)
C-9	ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008)
C-10	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Witness Statement of Paul Livesay in Support of ICANN’s Rejoinder and Amici’s Briefs (1 June 2020)
C-11	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing Transcript (Day 7) (11 Aug. 2020)
C-12	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Witness Statement of Jose Ignacio Rasco III (1 June 2020)
C-13	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing Transcript (Day 5) (7 Aug. 2020)
C-14	Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 2 June 2022), <a href="https://www.icann.org/resources/pages/governance/bylaws-en">https://www.icann.org/resources/pages/governance/bylaws-en</a> (last visited 20 June 2023)
C-15	ICANN, Contention Set Status for .WEB/WEBS, <a href="https://gtdresult.icann.org/applicationstatus/stringcontentionstatus">https://gtdresult.icann.org/applicationstatus/stringcontentionstatus</a> (last visited 21 June 2023)
C-16	ICANN, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012)



Exhibit No.	Description
C-17	Approved Board Resolutions, Regular Meeting of the ICANN Board, Resolutions No. 2023.04.30.12 – 2023.04.30.14 (30 Apr. 2023) (unredacted)
C-18	ICANN, GNSO, Final Report, Part A (8 Aug. 2007), <a href="https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm">https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm</a> (last visited 21 June 2023)
C-19	ICDR, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (1 Mar. 2021)
C-20	Interim Supplementary Procedures for ICANN Independent Review Process (25 Oct. 2018)
C-21	ICANN, Application Update History, Application ID 1-1013-6638 (for .WEB), by Afiliias Domains No. 3 Limited, <a href="https://gtldresult.icann.org/applicationstatus/applicationchangehistory/292">https://gtldresult.icann.org/applicationstatus/applicationchangehistory/292</a> (last visited 8 June 2023)
C-22	<i>Afiliias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Expert Report by Jonathan Zittrain (26 Sep. 2018)
C-23	<i>Afiliias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing Tr. (Day 2) (4 Aug. 2020)
C-24	Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016)
C-25	<i>Ruby Glen v. ICANN</i> , ICANN’s Opposition to Plaintiff’s <i>Ex Parte</i> Application for Temporary Restraining Order, ECF No. 18 (C.D. Cal., 25 July 2016)
C-26	“Brand Top-Level Domains Blog: .WEB Acquired for \$135 Million. Too Much? How Does It Compare?,” <i>AuthenticWeb</i> , <a href="https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/">https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/</a> (last visited 25 May 2023)
C-27	C. Negris, “How a \$135 Million Auction Affects the Domain Name Industry and Your Business,” <i>BIV</i> (10 Aug. 2016), <a href="https://biv.com/article/2016/08/how-135-million-auction-affects-domain-name-indust">https://biv.com/article/2016/08/how-135-million-auction-affects-domain-name-indust</a> (last visited 26 May 2023)
C-28	“The Next Big Domain Extension,” <i>Supremacy SEO</i> (undated), <a href="https://supremacyseo.com/TWS60">https://supremacyseo.com/TWS60</a> (last visited 26 May 2023)
C-29	ICANN, New Generic Top-Level Domains, New gTLD Application Change Request Process and Criteria, <a href="https://newgtlds.icann.org/en/applicants/global-support/change-requests">https://newgtlds.icann.org/en/applicants/global-support/change-requests</a> (last visited 26 May 2023)
C-30	Email Communications between .WEB Applicants (various dates)

Exhibit No.	Description
C-31	<i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505, Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s <i>Ex Parte</i> Application for Temporary Restraining Order (with Exhibits A–H), ECF No. 18-1 (C.D. Cal., 25 July 2016)
C-32	Letter from C. Willett (ICANN) to Members of the .WEB/.WEBS Contention Set (13 July 2016)
C-33	Verisign, Inc., Form 10-Q (Quarterly Report) (28 July 2016)
C-34	Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016)
C-35	Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 Sep. 2016)
C-36	<i>Afilias Domains No. 3 Limited v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Emergency Panelist’s Decision on Afilias’ Request for Production of Documents in Support of Its Request for Interim Measures (12 Dec. 2018)
C-37	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, ICANN’s Rejoinder Memorial (1 June 2020)
C-38	Letter from A. Ali to ICANN Board of Directors (23 Feb. 2018)
C-39	Letter from A. Ali to ICANN Board of Directors (16 Apr. 2018)
C-40	Letter from A. Ali to J. LeVee (1 May 2018)
C-41	Email from ICANN Global Support to J. Kane (Afilias) (7 June 2018)
C-42	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing Transcript (Day 4) (6 Aug. 2020)
C-43	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Decision on Phase I (12 Feb. 2020)
C-44	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, ICANN’s Response to Afilias’ Amended Request for Independent Review Process (31 May 2019)
C-45	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, ICANN’s Opposition to Afilias’ Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018)
C-46	ICANN, Board Activities and Meetings, Approved Board Resolutions, Special Meeting of the ICANN Board (16 Jan. 2022), <a href="https://www.icann.org/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en">https://www.icann.org/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en</a> (last visited 21 June 2023)
C-47	<i>Intentionally Left Blank</i>
C-48	<i>Intentionally Left Blank</i>

<b>Exhibit No.</b>	<b>Description</b>
C-49	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, ICANN's Post-Hearing Brief (12 Oct. 2020)
C-50	<i>Afilias Domains No. 3 Ltd. v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Afilias' Response to the <i>Amicus Curiae</i> Briefs (24 July 2020)
C-51	Verisign, Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018)
C-52	ICANN, GNSO, Final Report, Part B (1 Aug. 2007), <a href="https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm">https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm</a> (last visited 13 June 2023)

**LIST OF AUTHORITIES**

<b>Exhibit No.</b>	<b>Description</b>
CA-1	<i>ICM Registry, LLC v. ICANN</i> , ICDR Case No. 50-117-T-00224-08, Declaration of the Independent Review Panel (19 Feb. 2010)

## ENDNOTES

- 1 Bylaws, [Exhibit C-14], § 4.3(e).
- 2 Auction Rules, [Exhibit C-3], p. 17.
- 3 Bylaws, [Exhibit C-14], § 4.3.
- 4 Auction Rules, [Exhibit C-3], p. 19.
- 5 Bylaws, [Exhibit C-14], § 4.3.
- 6 ICDR Rules, [Exhibit C-19].
- 7 Interim Procedures, [Exhibit C-20].
- 8 This Request for IRP is accompanied by 53 exhibits numbered C-1 through C-52, one (1) legal authority numbered CA-1, and two expert reports: (i) Expert Report of Jeffrey J. Neuman (**Neuman Report**), (ii) Expert Report of Peter Cramton on Verisign and NDC’s Conduct Regarding the ICANN Auction for .WEB (**Crampton Report**).
- 9 Resolution, [Exhibit C-17].
- 10 The First IRP Panel accepted ICANN’s representation that its Board has never considered these issues. Accordingly, while acknowledging that Altanovo’s complaints were “serious” and “legitimate,” it remanded them to the Board to “pronounce upon” “*in the first instance ... subject to the ultimate independent review of an IRP Panel ...*” First IRP Decision, [Exhibit C-1], ¶¶ 300, 404 (emphasis added).
- 11 Afilias amended its .WEB Application to reflect the December 2020 changes to its corporate name and structure by (1) working openly and transparently with ICANN throughout the process and (2) amending its .WEB Application by submitting a New gTLD Application Change Request Form. ICANN approved the change request. ICANN, Application Update History, Application ID 1-1013-6638 (for .WEB), by Afilias Domains No. 3 Limited, <https://gtdresult.icann.org/applicationstatus/applicationchangehistory/292> (last visited 8 June 2023), [Exhibit C-21].
- 12 *Id.*
- 13 Neuman Report, ¶¶ 14-36.
- 14 *Id.*, ¶¶ 37-40.
- 15 *Id.*, ¶¶ 19-23.
- 16 First IRP, Expert Report by Jonathan Zittrain (26 Sep. 2018), [Exhibit C-22], ¶¶ 21-24, 41-45; Neuman Report, ¶¶ 19, 22.
- 17 First IRP, Hr. Tr. (Day 2), [Exhibit C-23], 350:1-2 (Burr Cross-Examination).
- 18 *Id.*, 347:6-12.
- 19 Articles, [Exhibit C-24], ¶ 2(III); *see* Bylaws, [Exhibit C-14], § 1.2(a).
- 20 Bylaws, [Exhibit C-14], § 1.2(a); Articles, [Exhibit C-24], ¶ 2(III).

- 21 *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, Declaration of the Independent Review Panel (19 Feb. 2010), [Exhibit CA-1], ¶ 152.
- 22 Bylaws, [Exhibit C-14], § 3.1.
- 23 *Id.*, § 1.2(a)(v).
- 24 *Id.*, § 1.2(c).
- 25 *See also* Neuman Report, ¶¶ 41-66 and Cramton Report, ¶¶ 7-33 for a more detailed discussion of this history.
- 26 Board Rationales, [Exhibit C-8].
- 27 *Id.*, p. 7.
- 28 AGB, [Exhibit C-5], p. 1-2 (describing the AGB as “the implementation of [a] Board-approved consensus policy concerning the introduction of new gTLDs”); Neuman Report, ¶ 61.
- 29 *Ruby Glen v. ICANN*, ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order, ECF No. 18 (C.D. Cal., 25 July 2016), [Exhibit C-25], p. 15 (“To start, the only contractual relationship between ICANN and Plaintiff is by virtue of its status as an applicant for .WEB[.]”); *id.*, pp. 23-24 (“The Guidebook is not merely a contract between two parties.”).
- 30 AGB, [Exhibit C-5], Pmbl.
- 31 GNSO Report, [Exhibit C-18], p. 8.
- 32 *Id.*, p. 8.
- 33 Bylaws, [Exhibit C-14], § 1.2(a)(v).
- 34 “Brand Top-Level Domains Blog: .WEB Acquired for \$135 Million. Too Much? How Does It Compare?,” *AuthenticWeb*, <https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/> (last visited 25 May 2023), [Exhibit C-26], p. 2 (“***.WEB is a different animal. ... WEB is what we call a ‘super generic’ and arguably the best new TLD alternative to .COM. It is a word that is commonly used with intuitive meaning. .WEB could make a serious dent to .COM over the long run.***”) (emphasis added); C. Negris, “How a \$135 Million Auction Affects the Domain Name Industry and Your Business,” *BIV* (10 Aug. 2016), <https://biv.com/article/2016/08/how-135-million-auction-affects-domain-name-indust> (last visited 26 May 2023), [Exhibit C-27], p. 2 (“***.web is widely considered [to be] the gTLD with the most potential out of 1,930 applications for new domain extensions ICANN received to battle .com and .net for widespread adoption.***”) (emphasis added); “The Next Big Domain Extension,” *Supremacy SEO* (undated), <https://supremacyseo.com/TWS60> (last visited 26 May 2023), [Exhibit C-28], p. 2 (“***.web is the one domain that could unseat .com.***”) (emphasis added).
- 35 Neuman Report, ¶¶ 69-73.

- 36 At the time of its application, NDC was owned by Domain Market Holdings LLC and NuCo LP LLC (both Delaware corporations). Altanovo has not been able to ascertain the ownership of these entities.
- 37 AGB, [Exhibit C-5], pp. 1-4, 1-25, A-5–A-4.
- 38 *Id.*, pp. 1-4, 1-25, A-5–A-4.
- 39 *Id.*, pp. 1-4, 1-25, A-5–A-46; Neuman Report, ¶ 71.
- 40 AGB, [Exhibit C-5], p. 6-2.
- 41 *Id.*, pp. 1-4, 1-25, A-5–A-46.
- 42 *Id.*, pp. 1-30, 6-2; Neuman Report, ¶¶ 74-75.
- 43 Change Request Criteria, [Exhibit C-29]; Neuman Report, ¶¶ 75-80.
- 44 Bylaws, [Exhibit C-14], §§ 1.2(b)(v) & 3.1.
- 45 Neuman Report, ¶¶ 67-73. In the First IRP, when asked why Verisign chose not to disclose it had entered into the Acquisition Agreement and instructed NDC not to do so either, Redacted - Third Party Designed Confidential Information

First IRP, Hr. Tr. (Day 7) (11 Aug. 2020), [Exhibit C-11], 1247:11-16 (Livesay Cross-Examination). He also testified that Redacted - Third Party Designed Confidential Information *Id.*, 1246:15–1247:4. But, that is precisely why the Rules required a public comment period for applications: so that the Internet community and other applicants could raise concerns.

- 46 AGB, [Exhibit C-5], p. 1-15 (identifying the lifecycle timeline for an uncomplicated gTLD application).
- 47 *Id.*, p. 1-13.
- 48 ICANN, Contention Set Status for .WEB/WEBS, <https://gtldresult.icann.org/applicationstatus/stringcontentionstatus> (last visited 21 June 2023), [Exhibit C-15].
- 49 AGB, [Exhibit C-5], p. 1-28; Neuman Report, ¶ 81.
- 50 Cramton Report, ¶¶ 7-33; Neuman Report, ¶¶ 82-84.
- 51 First IRP, Livesay Witness Statement, [Exhibit C-10], ¶ 4.
- 52 Before the deadline, Verisign submitted applications for .COMSEC, .VERISIGN, and non-Latin versions of .COM and .NET.
- 53 DAA, [Exhibit C-2], p. 15.
- 54 Neuman Report, ¶¶ 86-92. Redacted - Third Party Designated Confidential Information

DAA, [Exhibit C-2], § 1 & Ex. A, §§ 4(b), 4(d).

- <sup>55</sup> DAA, **[Exhibit C-2]**, Ex. A, § 1 (emphasis added).
- <sup>56</sup> *Id.*, Ex. A, § 10(a); Neuman Report, ¶ 91.
- <sup>57</sup> Email Communications between .WEB Applicants (various dates), **[Exhibit C-30]**, p. 3.
- <sup>58</sup> *Id.*, p. 2.
- <sup>59</sup> In a private auction, the amount of the winning bid is distributed among the contention set members. In an ICANN auction, ICANN receives the full amount of the winning bid.
- <sup>60</sup> Willett Declaration, **[Exhibit C-31]**, Ex. A (at p. 10).
- <sup>61</sup> *Id.*, Ex. B (at p. 12).
- <sup>62</sup> *Id.*, p. 5 & Ex. E (at p. 24) (emphasis added).
- <sup>63</sup> *Id.*, Ex. D (at p. 18).
- <sup>64</sup> Letter from C. Willett (ICANN) to Members of the .WEB/.WEBS Contention Set (13 July 2016), **[Exhibit C-32]**, p. 1.
- <sup>65</sup> ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), **[Exhibit C-9]**, p. 2.
- <sup>66</sup> *Id.*, p. 1 (emphasis added); Cramton Report, ¶¶ 7-33.
- <sup>67</sup> AGB, **[Exhibit C-5]**, p. 4-20 (emphasis added). Reflecting the AGB, the Auction Rules also provide that “[a] Bid represents a price, *which the Bidder is willing to pay* to resolve string contention within a Contention Set in favor of its Application.” Auction Rules, **[Exhibit C-3]**, p. 5 (emphasis added).
- <sup>68</sup> ICANN, Contention Set Status for .WEB/WEBS, <https://gtdresult.icann.org/applicationstatus/stringcontentionstatus> (last visited 21 June 2023), **[Exhibit C-15]**.
- <sup>69</sup> NDC applied for twelve other gTLDs, but lost every auction in which it participated other than the .WEB Auction.
- <sup>70</sup> DAA, **[Exhibit C-2]**, Ex. A, § 1(f).
- <sup>71</sup> *Id.*, Ex. A, § 1; First IRP, Hr. Tr. (Day 5) (7 Aug. 2020), **[Exhibit C-13]**, 830:18–831:18 (Rasco Cross-Examination).
- <sup>72</sup> First IRP, Hr. Tr. (Day 7) (11 Aug. 2020), **[Exhibit C-11]**, 1235:4-6, 1238:19-25 (Livesay Cross-Examination); First IRP, Hr. Tr. (Day 5) (7 Aug. 2020), **[Exhibit C-13]**, 828:14-19, 829:8-25 (Rasco Cross-Examination).
- <sup>73</sup> First IRP, Hr. Tr. (Day 7) (11 Aug. 2020), **[Exhibit C-11]**, 1238:2–1239:8 (Livesay Cross-Examination).
- <sup>74</sup> DAA, **[Exhibit C-2]**, Sched. 1, §§ 1, 2; First IRP, Hr. Tr. (Day 5) (7 Aug. 2020), **[Exhibit C-13]**, 823:13-25, 844:7-16 (Rasco Cross-Examination); *see* Cramton Report, ¶¶ 35-39.
- <sup>75</sup> Verisign, Inc., Form 10-Q (Quarterly Report) (28 July 2016), **[Exhibit C-33]**, Note 11 (at p. 13) (“Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately

\$130.0 million for the future assignment of contractual rights, which are subject to third-party consent.”).

- <sup>76</sup> Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Exhibit C-34]; Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 Sep. 2016), [Exhibit C-35].
- <sup>77</sup> First IRP Decision, [Exhibit C-1], ¶ 322.
- <sup>78</sup> NDC and Verisign’s counsel’s communication to ICANN and the DAA were only made available to Altanovo in the course of document production ordered in the First IRP. First IRP, Emergency Panelist’s Decision on Afilias’ Request for Production of Documents in Support of Its Request for Interim Measures (2 Dec. 2018), [Exhibit C-36].
- <sup>79</sup> First IRP, ICANN’s Rejoinder Memorial (1 June 2020), [Exhibit C-37], ¶ 41 (citation omitted).
- <sup>80</sup> First IRP Decision, [Exhibit C-1], ¶ 274.
- <sup>81</sup> Letter from A. Ali to ICANN Board of Directors (23 Feb. 2018), [Exhibit C-38], p. 1; Letter from A. Ali to ICANN Board of Directors (16 Apr. 2018), [Exhibit C-39], p. 4; Letter from A. Ali to J. LeVee (1 May 2018), [Exhibit C-40], pp. 1, 3.
- <sup>82</sup> Email from ICANN Global Support to J. Kane (Afilias) (7 June 2018), [Exhibit C-41].
- <sup>83</sup> First IRP, Hr. Tr. (Day 4) (6 Aug. 2020), [Exhibit C-42], 745:24–746:3 (Willett Cross-Examination).
- <sup>84</sup> First IRP Decision, [Exhibit C-1], ¶ 334.
- <sup>85</sup> First IRP, Decision on Phase I, [Exhibit C-43], ¶¶ 139-181.
- <sup>86</sup> First IRP Decision, [Exhibit C-1], ¶ 283.
- <sup>87</sup> First IRP, ICANN’s Response to Amended IRP (31 May. 2019), [Exhibit C-44], ¶ 9 (emphasis added). It is hard to see how the Board could have reached a neutral, objective and fair decision in adopting the Resolution if ICANN Staff, ICANN Legal, and ICANN’s outside counsel from Jones Day were in any way present or involved in the Board’s deliberations.
- <sup>88</sup> First IRP Decision, [Exhibit C-1], ¶ 315.
- <sup>89</sup> *Id.*, ¶ 311.
- <sup>90</sup> *Id.*, ¶ 332. In the First IRP, ICANN initially took the categorical position that it had addressed Altanovo’s complaints and the disposition of .WEB. First IRP, ICANN’s Opposition (17 Dec. 2018), [Exhibit C-45], ¶ 3 (emphasis added). Late in the IRP, as part of its litigation strategy, ICANN flip-flopped, arguing that no evaluation or decision had taken place. First IRP, ICANN’s Rejoinder Memorial (1 June 2020), [Exhibit C-37], ¶¶ 3, 89-93.
- <sup>91</sup> First IRP Decision, [Exhibit C-1], ¶¶ 335, 347.
- <sup>92</sup> *Id.*, ¶ 413(3).
- <sup>93</sup> *Id.*, ¶ 299.



- <sup>94</sup> ICANN, Board Activities and Meetings, Approved Board Resolutions, Special Meeting of the ICANN Board (16 Jan. 2022), <https://www.icann.org/en/board-activities-and-meetings/materials/approved-board-resolutions-special-meeting-of-the-icann-board-16-01-2022-en> (last visited 21 June 2023), [Exhibit C-46], p. 19; First IRP Decision, [Exhibit C-1], ¶ 413(5).
- <sup>95</sup> Resolution, [Exhibit C-17], p. 53. The remainder of the Resolution addressed allegations by NDC and Verisign against Altanovo relating to the ICANN Auction “blackout period,” which the Board determined it did not need to address. *Id.* p. 54. In the remaining resolutions, the Board (i) directed ICANN Staff, inter alia, “to carefully consider the issues raised by the parties and the Panel in the .WEB IRP with regard to agreements similar to the DAA ... when developing the Guidebook and auction rules for the next round of the New gTLD Program in order to provide greater clarity to applicants regarding the transparency and notification requirements throughout the application and auction processes[;]” and (ii) determined to redact portions of the resolution relating to the DAA. *Id.* pp. 54-56.
- <sup>96</sup> ICANN’s decision to redact key language describing the DAA further reflects its bias in favor of NDC and Verisign. It is hard to see how an agreement entered into some eight years ago, relating to a program that is now terminated can still warrant confidentiality protection, especially in light of ICANN’s obligation to “operate to the maximum extent feasible in an open and transparent manner....” Bylaws, [Exhibit C-14], § 3.1.
- <sup>97</sup> *Id.*, § 1.2(a)(v).
- <sup>98</sup> *Id.*, § 2.3.
- <sup>99</sup> *Id.*, § 3.1.
- <sup>100</sup> *Id.*, § 1.2(a).
- <sup>101</sup> Resolution, [Exhibit C-17], p. 73.
- <sup>102</sup> *Id.*, p. 73.
- <sup>103</sup> First IRP, ICANN’s PHB, [Exhibit C-49], ¶ 144 (“The Bylaws merely require that ICANN apply its ‘documented policies’ – including the Guidebook and Auction Rules – ‘consistently, neutrally, objectively and fairly.’”).
- <sup>104</sup> Resolution, [Exhibit C-17], p. 74 (footnote omitted).
- <sup>105</sup> DAA, [Exhibit C-2], § 10(a).
- <sup>106</sup> *Id.*, Ex. A, § 1 (emphasis added). The only example cited in a footnote pertains to an agreement completely dissimilar to the Acquisition Agreement. ICANN cites as an example Demand Media’s agreement with Donuts about Donuts’ 107 gTLD applications. Resolution, [Exhibit C-17], p. 74 n.20. However, Donuts and Demand Media **disclosed their agreement to ICANN and the public** before the applications were resolved. First IRP, Afiliias’ Response to *Amicus Curiae* Briefs (24 July 2020), [Exhibit C-50], ¶¶ 122-127. NDC and Verisign, however, kept their partnership a secret until after the .WEB Auction.
- <sup>107</sup> AGB, [Exhibit C-5], p. 6-6 (emphasis added).

- 108 Resolution, **[Exhibit C-17]**, p. 73.
- 109 *Id.*, pp. 73-74.
- 110 Neuman Report, ¶¶ 97-107.
- 111 DAA, **[Exhibit C-2]**, Ex. A, §§ 1(a), 1(i).
- 112 *Id.*, Ex. A, § 1 (emphasis added).
- 113 *Id.*, Ex. A, § 1(h).
- 114 *Id.*, § 4(f).
- 115 AGB, **[Exhibit C-5]**, p. 1-14.
- 116 DAA, **[Exhibit C-2]**, Ex. A, § 3(b).
- 117 Verisign, Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), **[Exhibit C-51]**, p. 4.
- 118 Resolution, **[Exhibit C-17]**, pp. 75-76.
- 119 AGB, **[Exhibit C-5]**, § 1.2.7 & p. 6-2; Neuman Report, ¶¶ 93-96, 108-115.
- 120 Resolution, **[Exhibit C-17]**, p. 76.
- 121 AGB, **[Exhibit C-5]**, § 1.2.7 (emphasis added).
- 122 The preamble to AGB Module 6 states: “By submitting this application through ICANN’s online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.” AGB, **[Exhibit C-5]**, Module 6, Pmbl.
- 123 *Id.*, p. 6-2 (emphasis added).
- 124 ICANN, GNSO, Final Report, Part B (1 Aug. 2007), <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-partb-01aug07.htm> (last visited 13 June 2023), **[Exhibit C-52]**, p. 7.
- 125 NDC .WEB Application, **[Exhibit C-16]**, p. 6.
- 126 AGB, **[Exhibit C-5]**, p. 6-2.
- 127 First IRP, Livesay Witness Statement, **[Exhibit C-10]**, ¶ 5; First IRP, Hr. Tr. (Day 7) (11 Aug. 2020), **[Exhibit C-11]**, 1166:11-18 (Livesay Cross-Examination); *see also* First IRP Decision, **[Exhibit C-1]**, ¶ 150.
- 128 Change Request Criteria, **[Exhibit C-29]**.
- 129 *Id.*, p. 2 (emphasis added).
- 130 *Id.*, p. 2 (emphasis added).
- 131 *Id.*, p. 2 (emphasis added).

- 132 *Id.*, p. 2 (emphasis added).
- 133 Resolution, [Exhibit C-17], p. 76.
- 134 Cramton Report, ¶¶ 7-33.
- 135 Auction Rules, [Exhibit C-3], Rule 12 (emphasis added).
- 136 *Id.*, p. 16. A Qualified Applicant is “[a]n entity *that has submitted an Application for a new gTLD*, has *received all necessary approvals from ICANN*, and which *is included in a Contention Set* to be resolved by an Auction.” *Id.*, p. 19 (emphasis added).
- 137 Cramton Report, ¶ 38.
- 138 DAA, [Exhibit C-2], Ex. A, § 1 (emphasis added).
- 139 Bidder Agreement, [Exhibit C-4], p. 1 (emphasis added).
- 140 Cramton Report, ¶¶ 40-42.
- 141 Auction Rules, [Exhibit C-3], p. 5 (emphasis added).
- 142 DAA, [Exhibit C-2], Ex. A, § 1(h).
- 143 First IRP, Hr. Tr. (Day 7) (11 Aug. 2020), [Exhibit C-11], 1238:2–1239:8 (Livesay Cross-Examination).
- 144 As ICANN itself represented to the U.S. courts, the determination of an invalid bid and disqualification can be made after the Auction has taken place. *Ruby Glen v. ICANN*, ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order, ECF No. 18 (C.D. Cal., 25 July 2016), [Exhibit C-25], p. 20.
- 145 AGB, [Exhibit C-5], § 4.2.1 (at p. 4-22) (emphasis added).
- 146 *Id.*, § 4.2.1 (at p. 4-23).
- 147 Altanovo’s 1 May 2018 letter to the ICANN Board and submissions in the First IRP sets forth in greater detail NDC’s numerous violations of the New gTLD Program Rules during the ICANN Auction. *See* Letter from A. Ali to J. LeVee (1 May 2018), [Exhibit C-40].
- 148 Resolution, [Exhibit C-17], p. 76.
- 149 Auction Rules, [Exhibit C-3], Rules 58-59.
- 150 *Id.*, Rules 58-59, 62 (emphasis added).
- 151 *Id.*, Rule 62. Sections 4.3.2 and 4.3.3 of the AGB and the Bidders Agreement contain similar mandatory language. AGB, [Exhibit C-5], pp. 4-25–4-26; Bidder Agreement, [Exhibit C-4], § 2.9.
- 152 Cramton Report, ¶¶ 43-44.
- 153 Auction Rules, [Exhibit C-3], Rule 59.
- 154 AGB, [Exhibit C-5], §§ 4.3.2-4.3.3 (at pp. 4-25–4-26); Bidder Agreement, [Exhibit C-4], § 2.9.

<sup>155</sup> DAA, [Exhibit C-2], § 10(a).

<sup>156</sup> AGB, [Exhibit C-5], Pmbl.

<sup>157</sup> Bylaws, [Exhibit C-14], § 1.2(a)(v).

<sup>158</sup> AGB, [Exhibit C-5], Pmbl.