

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S RESPONSE TO AMENDED REQUEST FOR INDEPENDENT REVIEW
PROCESS**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to the Amended Request for Independent Review Process (“Amended IRP”) submitted by Afilias Domains No. 3 Limited (“Afilias”), on 21 March 2019.

1. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names such as “icann.org” into numeric IP addresses understood by computers. ICANN’s core Mission is to ensure the stability, security, and interoperability of the DNS.¹ To that end, ICANN contracts with entities that operate generic top-level domains (“gTLDs”), which represent the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG.”

2. This Independent Review Process (“IRP”) proceeding calls for a determination of whether ICANN complied with its Articles of Incorporation (“Articles”), Bylaws and internal policies and procedures relating to disputes over the .WEB gTLD. .WEB is one of the new gTLDs sought in ICANN’s New gTLD Program (the “Program”), through which entities submitted 1,930 applications to ICANN for the opportunity to operate new gTLDs. The Program was designed by ICANN to enhance diversity, creativity, and choice, and to provide the benefits of innovation to consumers via the availability of new gTLDs. The success of the Program is demonstrated by the fact that it has already resulted in the introduction of over 1,200 new gTLDs.

3. Because there were multiple, qualified applicants for .WEB, the .WEB applications were placed in a “contention set,” and ICANN ultimately facilitated an auction to resolve the contention, as is expressly called for in the Applicant Guidebook (“Guidebook”), which contains the procedures for implementation of the Program. The .WEB auction occurred

in July 2016, and Nu Dotco, LLC (“NDC”) was the prevailing bidder. Soon thereafter, Verisign, Inc. (“Verisign”), the operator of .COM and .NET, publicly disclosed that it financially supported NDC’s bid in exchange for NDC’s agreement that, after executing an agreement with ICANN to operate .WEB, NDC would seek ICANN’s permission to transfer that agreement to Verisign, making Verisign the .WEB operator.

4. After Verisign’s disclosure, certain .WEB applicants complained that Verisign’s agreement with NDC violated the Guidebook and raised competition concerns given Verisign’s operation of .COM. Since then, .WEB has been mired in federal court litigation, a Department of Justice Antitrust Division (“DOJ”) investigation and multiple invocations of ICANN’s internal Accountability Mechanisms, which caused ICANN to place .WEB “on hold” pending their resolution. And although ICANN has been caught in the middle of this dispute between powerful and well-funded businesses, ICANN has not taken sides. Rather, ICANN has followed its Articles, Bylaws and internal policies and procedures in overseeing these disputes and in discharging its responsibilities in connection with ICANN’s Accountability Mechanisms.

5. Although content to sit on the sidelines while other .WEB applicants formally pursued their claims in various fora for more than two years, Afilias only recently initiated an IRP. In it, Afilias claims that ICANN failed to apply its policies “neutrally, objectively and fairly” by not fully investigating complaints about NDC prior to the .WEB auction, and because ICANN has not disqualified NDC based on alleged Guidebook violations and competition concerns. Afilias also tacks on a claim that ICANN was either induced by, or colluded with, Verisign to create procedures designed to benefit Verisign in this IRP.

6. The claims that Afilias levels against ICANN are unsupported. ICANN complied with its Articles, Bylaws and internal policies and procedures in facilitating the .WEB auction and in handling the disputes regarding .WEB since the auction. And although Afilias fails to

mention it, Afilias' alleged competition concerns were addressed in DOJ's year-long investigation of the NDC/Verisign agreement. ICANN fully cooperated in that investigation, which the government ultimately closed without taking action to block Verisign from operating .WEB. Finally, there is no support for the incredible claim that ICANN was either duped by, or conspired with, Verisign to create IRP procedures benefitting Verisign.

7. Moreover, Afilias' claims against ICANN are, in one sense, premature and, in another sense, overdue. The claims are premature in that the ICANN Board has not fully evaluated Afilias' allegations that NDC violated the Guidebook – which are fiercely contested by NDC and Verisign and, even if established, would not call for an immediate disqualification of NDC – because .WEB has been on hold since 2016. And since that time, Afilias has not invoked any ICANN Accountability Mechanism that would elevate Afilias' allegations of Guidebook violations to the Board for its consideration and action. Now, with the Afilias IRP pending, the ICANN Board may once again defer any action on .WEB while it awaits this Panel's findings.

8. Conversely, Afilias' claims are overdue in that Afilias has been aware of the NDC/Verisign agreement, the alleged Guidebook violations, and Afilias' purported injury since August 2016, yet Afilias waited *over two years* to assert these claims in an IRP, far outside the applicable limitations period. Whether Afilias is therefore barred from even raising its claims at this late date is a threshold issue the Panel will need to decide.

9. 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. This Panel should not indulge such behavior.

10. To be clear, ICANN's interest in this matter is not in picking winners and losers, but in ultimately completing the rollout of .WEB pursuant to the terms of the Guidebook and consistent with ICANN's Articles and Bylaws. As the party that made a significant financial investment in .WEB over two years ago, Verisign is determined to proceed pursuant to its agreement with NDC so that it can operate .WEB. Afilias, on the other hand, is determined to use this proceeding to seize control of .WEB for itself – at a bid price set by this Panel – even though it did not prevail in the auction. NDC and Verisign have responses to Afilias' allegations of Guidebook violations and anticompetitive conduct, but they also have made claims that Afilias breached rules applicable to the .WEB auction and should itself be disqualified by ICANN. Thus, it is important that NDC and Verisign be permitted to participate in this IRP so that the Panel will have the benefit of their evidence and submissions, in addition to the views of Afilias and ICANN, before rendering any final decision. Although this IRP is yet another delay in the rollout of .WEB, ICANN's Board will respect the process and will seriously consider and evaluate this Panel's findings to determine what action, if any, is appropriate in order to make .WEB finally available to consumers.

SUMMARY OF RELEVANT FACTS

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

11. To help ensure that ICANN is serving, and remains accountable to, the global Internet community, ICANN has established several Accountability Mechanisms that allow certain interested parties to challenge or seek review of ICANN actions and decisions. Through these mechanisms, aggrieved parties can seek to hold ICANN accountable for alleged violations of its Articles, Bylaws, and certain other internal policies and procedures.²

12. For instance, ICANN's Bylaws provide for a process by which “any person or

entity materially affected by an action or inaction” of ICANN may request review or reconsideration of that action or inaction (“Reconsideration Request”).³ A committee of the ICANN Board hears, considers and recommends to the Board whether it should accept or deny a Reconsideration Request.⁴

13. Similarly, ICANN’s Bylaws provide for an Office of the Ombudsman (“Ombudsman”).⁵ The principal function of the Ombudsman is “to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.”⁶

14. While not a formal Accountability Mechanism, ICANN also has a Documentary Information Disclosure Policy (“DIDP”), which allows community members to seek public disclosure of documents concerning ICANN’s operational activities unless there is a compelling reason for non-disclosure, such as confidentiality.

15. In addition, the ICANN Bylaws create the IRP under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an “independent third-party” for review.⁷ IRP claims are submitted to the International Centre for Dispute Resolution (“ICDR”), which is responsible for administering IRP proceedings. IRPs are conducted in accordance with the ICDR’s International Arbitration Rules, as modified by ICANN’s Bylaws and IRP Interim Supplementary Procedures (“Interim Supplementary Procedures”).⁸ In consultation with the Internet community, ICANN’s IRP Implementation Oversight Team (“IRP-IOT”) crafted the Interim Supplementary Procedures in accordance with the Bylaws’ mandate that the IRP-IOT create procedures applicable to IRPs.⁹ On 25 October 2018, after years of discussion, drafting, community consultation and public comment, the Board approved the Interim Supplementary Procedures crafted by the IRP-IOT.

16. Two Interim Supplementary Procedures are particularly important to this IRP.

First, Section 7 provides that any person, group or entity that “has a material interest relevant to” an IRP, such as NDC and Verisign, “shall” be allowed to participate in that IRP as *amicus curiae*.¹⁰ Second, Section 4 dictates¹¹ that an IRP must be commenced within 120 days after a claimant becomes aware of the material effect of the alleged ICANN action or inaction giving rise to the dispute provided, however, that an IRP may not be filed more than twelve months from the date of such action or inaction.¹²

II. ICANN’S NEW GTLD PROGRAM.

A. ICANN’S Policy Development – 2000-2007.

17. In its early years, ICANN focused on increasing the number of companies (known as “registrars”) that could sell domain name registrations to entities and individuals within then existing gTLDs. ICANN also focused on expanding, although more slowly, the number of gTLDs in existence. In 2000, ICANN approved seven new gTLDs as a proof of concept test to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet or the DNS. In 2004 and 2005, ICANN approved a handful of additional gTLDs.

18. The New gTLD Program has produced ICANN’S most ambitious expansion of the Internet’S naming system. Under the Program, any interested party could apply for the opportunity to operate new gTLDs that were not already in use in the DNS, meaning that there was no cap on the number of new gTLDs that could be added to the Internet.¹³ The Program was designed to enhance diversity, creativity and consumer choice in gTLDs, and to provide the benefits of innovation to consumers.¹⁴ The Program arose from policy recommendations by ICANN’S Generic Names Supporting Organization (“GNSO”), which were based on community input during the period 2005-2007.¹⁵ On 26 June 2008, the ICANN Board adopted the GNSO’S policy recommendations and directed the ICANN organization to develop an implementation plan for the Program, to be provided to the Board for approval.¹⁶

B. ICANN's Implementation of the Program – 2008-2012.

19. The Guidebook, which enabled the implementation of the Program, was developed with significant input from the ICANN community over several years. ICANN published a first draft of the Guidebook in October 2008¹⁷ and distributed it for public comment. Numerous revisions were made based on public comment, and additional comments were sought on the revisions. The process repeated many times, resulting in multiple versions of the Guidebook until ICANN adopted the operative, 338-page Guidebook in June 2012.¹⁸

20. The Guidebook provides a step-by-step procedure for new gTLD applicants. It specifies what documents and information are required, the financial and legal commitments of operating a gTLD, what applicants can expect during the application and evaluation periods, and the dispute resolution procedures that could be invoked to object to new gTLD applications.¹⁹

21. The Guidebook requires applicants to provide the names and positions of their “directors,” “officers and partners” and “shareholders holding at least 15% of shares,” as well as information about the applicants’ financial condition so that ICANN can assess the applicants and their technical and financial wherewithal to operate a gTLD.²⁰ The Guidebook also requires applicants to inform ICANN if “information previously submitted by an applicant becomes untrue or inaccurate,” including “applicant specific information such as changes in financial position and changes in ownership or control of the applicant.”²¹ Importantly, an applicant’s failure to inform ICANN that previously submitted information has become untrue or inaccurate does not require denial of an application. The Guidebook gives ICANN discretion to determine whether the changed circumstances are material and what consequences, if any, should follow from a failure to disclose those circumstances, which could include denial of the application.²²

22. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the Guidebook mandates that the applications be

placed in a “contention set.”²³ When this occurs, the Guidebook encourages (but does not require) the applicants to agree among themselves on resolution of the contention set.²⁴ To resolve a contention set privately, all applicants within the contention set must agree to a private resolution.²⁵ If the contention set cannot be resolved through private resolution, the Guidebook requires ICANN to schedule a public auction for those contention set members wishing to proceed with their applications.²⁶ The proceeds of a public auction are provided to ICANN, but are earmarked for purposes consistent with ICANN’s Mission, Core Values and non-profit status, based on Internet community input.²⁷

23. After a successful gTLD applicant passes initial evaluation and resolves any formal objection and/or contention set proceeding, and assuming no ICANN Accountability Mechanisms are pending, the applicant is offered a Registry Agreement with ICANN to become a new gTLD registry operator. A Registry Agreement is a formal, written agreement between a gTLD operator and ICANN that sets forth the rights, duties and obligations of the operator. ICANN offers a model Registry Agreement for most gTLDs, but each Registry Agreement can be negotiated and modified.²⁸ After a Registry Agreement is fully executed, ICANN takes the technical steps necessary to delegate the new gTLD into the DNS. Once a gTLD has been fully delegated into the DNS it becomes accessible on the Internet.²⁹

C. Results of the Program – 2012-Present.

24. In 2012, ICANN received 1,930 applications for new gTLDs. Since then, approximately 1,200 new gTLDs have been delegated and are operational.³⁰ These new gTLDs have increased diversity, consumer choice and competition in the DNS.

25. As one would expect with an expanded marketplace, gTLD operators have chosen to utilize and monetize gTLDs in different ways. Many operators have followed their original business plans for marketing their gTLDs as envisioned in their applications.³¹ Hundreds of

others have assigned or transferred their gTLDs to other entities for financial gain or other reasons.³² Still others have entered the new gTLD marketplace by acquiring new gTLD operators. And some entities have chosen to use the gTLDs for their own benefit, such as for branding purposes.³³

26. Assignments and transfers of Registry Agreements to operate gTLDs must be approved by ICANN, and ICANN follows a known procedure in evaluating such requests.³⁴ ICANN also has published materials explaining how a Registry Agreement can be assigned from one registry operator to another.³⁵ Because ICANN administers, rather than regulates, the DNS,³⁶ ICANN's focus in evaluating a proposed gTLD transfer is whether the transferee organization has the requisite financial and technical ability to operate a gTLD.³⁷

27. Afilias is extremely familiar with the Registry Agreement transfer process due to its involvement in multiple transfers. For instance, 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.”³⁸ On 16 January 2014, ICANN and Afilias Limited entered into a .MEET Registry Agreement.³⁹ 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 2014.⁴⁰ Because ICANN determined that Google had the technical and financial ability to operate .MEET, ICANN approved the transfer.⁴¹

28. Likewise, in 2015, the entity that entered into a Registry Agreement with ICANN to operate .PROMO requested that ICANN approve a transfer of the .PROMO Registry Agreement 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.⁴²

29. Finally, as described on its own corporate website, “Afilias has an active program for acquiring new Top Level Domains.”⁴³ 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.”⁴⁴ ICANN approved the transfer of those TLDs to Afilias plc based on its technical and financial ability to operate them.⁴⁵

III. THE .WEB CONTENTION SET.

30. ICANN received seven applications for .WEB from sophisticated companies, including Afilias, NDC, Ruby Glen LLC (“Ruby Glen”), a subsidiary of Donuts Inc, Charleston Road Registry, Inc., a subsidiary of Google, Web.com Group, Inc., DotWeb Inc., and Schlund Technologies GmbH. ICANN also received two applications for .WEBS from another applicant, Vistaprint Limited, which later withdrew one of its applications in April 2016. The seven applications for .WEB passed all applicable evaluations and were placed in a contention set, pursuant to the procedures set forth in the Guidebook.⁴⁶

31. In 2013, one of the .WEB applicants filed a “string confusion” objection against the .WEBS applications with the ICDR, arguing that .WEB and .WEBS were confusingly similar. The objection was ultimately upheld by an independent ICDR panelist, resulting in the .WEBS and .WEB applications being placed in the same contention set, which thereby became the “.WEB Contention Set.”⁴⁷

32. In June 2014, the .WEBS applicant filed an IRP against ICANN challenging ICANN’s acceptance of the ICDR’s determination on the string confusion objection. In October 2015, ICANN prevailed in the .WEBS IRP. The ICANN Board considered the .WEBS IRP Final Declaration in October 2015, December 2015, and March 2016, and resolved that ICANN

should “move forward with the processing of the [.WEB Contention Set].”⁴⁸

33. On 27 April 2016, per the Guidebook, ICANN scheduled an auction for 27 July 2016 to resolve the .WEB Contention Set if it could not be privately resolved by the applicants before then.⁴⁹ As the date of the auction approached, the members of the .WEB Contention Set had not resolved the contention set privately, and the members as a whole did not request a postponement of the auction. Accordingly, ICANN proceeded with plans for the auction.⁵⁰

34. Just before the auction, Ruby Glen (a .WEB applicant) invoked several of ICANN’s Accountability Mechanisms, and eventually commenced litigation, in an attempt to halt the auction from going forward and instead force a private auction for .WEB where the proceeds would be divided and paid to the losing bidders.⁵¹ Ruby Glen complained to ICANN that NDC had a change in ownership or control, and that NDC had failed to notify ICANN of this change, as required by the Guidebook.⁵² According to Ruby Glen, this alleged failure constituted a “potentially disqualifying change[] to NDC’s application.”⁵³ Neither Ruby Glen, nor any other .WEB applicant, suggested to ICANN that NDC had some sort of arrangement with another entity regarding .WEB.

35. ICANN thoroughly investigated these claims. ICANN contacted NDC on 27 June 2016, asking it to confirm whether there were any changes to NDC’s organizational structure that required reporting to ICANN.⁵⁴ NDC’s Chief Financial Officer, Jose Ignacio Rasco III, responded the same day to confirm that NDC had not experienced any changes in its organizational structure.⁵⁵ In an abundance of caution, however, ICANN again contacted NDC to inquire further into potential changes to NDC’s organization.⁵⁶ ICANN staff also interviewed Mr. Rasco via telephone.⁵⁷ During the call, Mr. Rasco stated, and later confirmed via email on 11 July 2016, that: “Neither the ownership nor the control of [NDC] has changed since we filed our application.”⁵⁸ Thereafter, ICANN informed all the contention set members, including Ruby

Glen and Afilius, that ICANN had “investigated the matter, and to date [has] found no basis to initiate the application change request process or postpone the auction.”⁵⁹

36. Ruby Glen then brought the same allegations regarding changes to NDC’s organization or control to the ICANN Ombudsman, who also investigated the claim.⁶⁰ Like ICANN, the Ombudsman did not find “any evidence which would satisfy [him] that there has been a material change to the application.”⁶¹

37. On 17 July 2016, Ruby Glen submitted an emergency Reconsideration Request to ICANN to enjoin the auction, claiming that ICANN staff had failed to sufficiently investigate Ruby Glen’s claims regarding NDC.⁶² ICANN’s Board Governance Committee (“BGC”), which was then tasked with evaluating Reconsideration Requests, expeditiously reviewed the thoroughness of the investigation into the alleged changes in NDC’s management and control.⁶³ After finishing its review, the BGC denied the Reconsideration Request on 21 July 2016, concluding that ICANN staff had sufficiently investigated Ruby Glen’s claims.⁶⁴

38. Then, just days before the .WEB auction was set to begin, Ruby Glen escalated its actions by filing a complaint in Federal District Court in Los Angeles against ICANN and an *ex parte* application for a temporary restraining order (“TRO”) to block the auction.⁶⁵ ICANN opposed the TRO application arguing, among other things, that Ruby Glen was not likely to succeed on the merits of its claims because ICANN appropriately investigated Ruby Glen’s claims and detected no changes to NDC’s ownership or control, a finding corroborated by sworn declarations from NDC’s Chief Operating Officer and Chief Financial Officer.⁶⁶

39. The District Court denied Ruby Glen’s request for a TRO based, in part, on the “strength of ICANN’s evidence.”⁶⁷ Specifically, the District Court held:

ICANN has provided evidence that it has conducted investigations into Plaintiff’s allegations concerning potential changes in NDC’s management and ownership structure at each level of Plaintiff’s appeals to ICANN for an investigation and

postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN's Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC's management, membership, or ownership since NDC first filed its application with ICANN.⁶⁸

IV. THE .WEB AUCTION AND ENSUING LITIGATION, ACCOUNTABILITY MECHANISMS, AND GOVERNMENT INVESTIGATION.

40. After denial of the TRO application, the .WEB auction proceeded as scheduled on 27-28 July 2016. NDC prevailed at a bid price of \$135 million.⁶⁹ Days later, Verisign, the entity that operates .COM and .NET, publicly stated that it had "entered into an agreement with [NDC] wherein [Verisign] provided funds for [NDC's] bid" and that, if NDC entered into a Registry Agreement with ICANN to operate .WEB, NDC "will then seek to assign[] the Registry Agreement to VeriSign upon consent from ICANN."⁷⁰

41. On 8 August 2016, Afilias' General Counsel wrote ICANN a letter demanding an immediate disqualification of NDC based on three claims. First, Afilias stated that the NDC/Verisign agreement constituted a transfer of NDC's rights and obligations in its application in violation of the Guidebook. Second, Afilias stated that NDC violated the disclosure requirements of the Guidebook by failing to inform ICANN of the agreement. Third, Afilias contended that the agreement "likely constitutes a change of control of the applicant."⁷¹ These are precisely the same alleged Guidebook violations that Afilias is now pursuing in this IRP, more than two years after this letter.

42. Also on 8 August 2016, Ruby Glen filed its First Amended Complaint against ICANN in Federal District Court, making claims that NDC violated the Guidebook and should have been disqualified on the same grounds asserted in Afilias' letter to ICANN.⁷²

43. At this same time, Ruby Glen's parent organization, Donuts, Inc. ("Donuts"), invoked ICANN's Cooperative Engagement Process ("CEP"), a pre-IRP proceeding that allows

the parties to attempt to resolve or narrow the issues to be brought in an IRP proceeding.⁷³

44. In connection with the New gTLD Program, ICANN employs a practice, depending on the circumstances, of placing a contention set or a gTLD application on hold if it is the subject of certain ICANN Accountability Mechanisms, including the initiation of a CEP.⁷⁴ Thus, on 19 August 2016, ICANN placed the .WEB Contention Set “on hold” due to the pendency of the Donuts CEP.

45. Rather than invoking an ICANN Accountability Mechanism, Afilias sent ICANN another letter, dated 9 September 2016, demanding the immediate disqualification of NDC for the same reasons it had raised in its August 2016 letter. The 9 September 2016 letter also asserted competition concerns that are identical to those alleged in this IRP.⁷⁵

46. As part of ICANN’s due diligence into the issues raised by Afilias and Ruby Glen in 2016, ICANN issued a set of questions to Afilias, Ruby Glen, NDC, and Verisign, seeking input regarding the .WEB auction, the NDC/Verisign agreement, and the alleged violations of the Guidebook.⁷⁶ These questions were designed to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen.

47. On 7 October 2016, Afilias responded to ICANN’s questions, reiterating its core objections to the purported NDC/Verisign agreement and describing it as a “failure to disclose material information relating to [NDC’s] bid for the .WEB rights” and as “clearly designed to preserve Verisign’s existing monopoly in gTLD services that results from its control of .COM and .NET.”⁷⁷ Again, these are the same claims Afilias is now belatedly pressing in this IRP.

48. Thereafter, on 28 November 2016, the Federal District Court dismissed with prejudice Ruby Glen’s First Amended Complaint regarding the .WEB auction based on the covenant not to sue in the Guidebook, which requires applicants to use ICANN’s Accountability Mechanisms instead of filing lawsuits against ICANN.⁷⁸ Ruby Glen appealed.

49. Then, in early 2017, the Antitrust Division of the United States Department of Justice (“DOJ”) issued a civil investigative demand (“CID”) to ICANN, Verisign and others involved in the .WEB auction, seeking documents and information “in connection with DOJ’s investigation of Verisign’s proposed acquisition of NDC’s contractual rights to operate the .WEB gTLD.”⁷⁹ DOJ requested that ICANN take no action on .WEB during the pendency of the investigation. Between February and June 2017, ICANN made several document productions and provided information to DOJ, and ICANN is informed and believes that Verisign produced documents to, and met with representatives of, DOJ.⁸⁰

50. A year later, in January 2018, DOJ formally closed its investigation without taking any action. Such a decision typically is interpreted as meaning the government did not find a threat to competition that warranted further action.⁸¹ Despite the fact that Afilias’ claims are rooted in the alleged anticompetitive effects of having Verisign operate .WEB, Afilias *does not even mention* DOJ’s investigation – much less DOJ’s decision to close its investigation – in its Amended IRP Request.

51. On 30 January 2018, ICANN closed the Donuts CEP, giving Donuts until 14 February 2018 to file an IRP, which Donuts chose not to do. Thereafter, Afilias submitted two successive DIDP requests to ICANN seeking documents regarding the .WEB Contention Set, but Afilias did not file a formal challenge to ICANN proceeding with contracting for or delegation of .WEB under any of ICANN’s Accountability Mechanisms. Afilias also filed Reconsideration Requests on ICANN’s DIDP responses that were ultimately resolved and denied as of 5 June 2018. With Afilias’ DIDP Reconsideration Requests resolved, and no other Accountability Mechanisms pending, ICANN took the .WEB Contention Set off hold in early June 2018. Then, on 18 June 2018, almost two years after the .WEB auction took place, Afilias initiated its own CEP asserting precisely the same claims it had raised in its 2016 letters to ICANN but did not

formally pursue.⁸² Despite Afilias’ delay in bringing its claims, ICANN placed the .WEB Contention Set back on hold.

52. Thereafter, on 15 October 2018, the Ninth Circuit Court of Appeals issued an order affirming the dismissal of Ruby Glen’s First Amended Complaint against ICANN.⁸³

53. With the DOJ Antitrust Division investigation closed, the Ruby Glen litigation over and, as of 13 November 2018, the Afilias CEP proceedings closed – ICANN provided Afilias with time to file an IRP and assured Afilias that the .WEB Contention Set would remain on hold until there was a resolution of Afilias’ anticipated Request for Interim Measures of Protection seeking to stay action on .WEB.⁸⁴ On 14 November 2018, Afilias filed its IRP. On 27 November 2018, Afilias filed its Request for Interim Measures of Protection.

54. To this day, the .WEB Contention Set remains on hold.

STANDARD OF REVIEW

55. An IRP Panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN’s Articles, Bylaws, and internal policies and procedures.⁸⁵ But with respect to IRPs challenging the ICANN Board’s exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.⁸⁶ Rather, the core task of an IRP panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.⁸⁷

ARGUMENT

I. ICANN HAS COMPLIED WITH ITS ARTICLES, BYLAWS AND POLICIES IN OVERSEEING THE .WEB CONTENTION SET DISPUTES AND RESULTING ACCOUNTABILITY MECHANISMS.

56. Afilias argues that ICANN has failed to apply its policies “neutrally, objectively and fairly” because ICANN did not fully investigate NDC prior to the .WEB auction and because ICANN has not disqualified NDC based on Afilias’ alleged Guidebook violations.⁸⁸ Afilias is

wrong: ICANN thoroughly investigated claims made about NDC prior to the .WEB auction, none of which included a suggestion that NDC had reached an agreement with Verisign regarding .WEB. Likewise, the ICANN Board has not yet had an opportunity to fully evaluate the alleged Guidebook violations – all of which are vigorously denied by NDC and Verisign, and none of which call for an automatic disqualification of NDC – due to the pendency of government investigations and Accountability Mechanisms, including this IRP.

A. Afilias’ Complaints About ICANN’s Pre-Auction Investigation Of NDC Are Unsupported.

57. In June 2016, ICANN completed an investigation of whether NDC had undergone a change in control prior to the .WEB auction based on complaints raised by Ruby Glen.⁸⁹ Ruby Glen’s accusation was that “[u]pon information and belief, there have been changes to the Board of Directors and potential control of” NDC, and Ruby Glen requested that “ICANN investigate the change in NDC’s Board and potential control.”⁹⁰ Ruby Glen asserted no claims about Verisign and did not suggest that NDC had an agreement with Verisign regarding .WEB.⁹¹

58. Pursuant to its authority to verify information provided by a gTLD applicant,⁹² ICANN investigated whether there had been a change in NDC’s Board or undisclosed owners or managers through several interviews of, and communications with, NDC’s representative. On each occasion, NDC’s representative certified to ICANN that there had been no changes to the NDC “organization that would need to be reported to ICANN.”⁹³ NDC confirmed the same to the Ombudsman in July 2016,⁹⁴ and later in sworn affidavits filed in connection with Ruby Glen’s TRO application seeking to halt the .WEB auction.⁹⁵

59. In its Amended IRP Request, Afilias asserts that “ICANN failed to fully investigate rumors that NDC had reached an agreement with Verisign prior to the .WEB auction.”⁹⁶ ICANN, however, was not asked to – and had no reason to – investigate whether NDC had an arrangement with Verisign regarding .WEB at that time. Rather, ICANN

investigated what it was asked to investigate – namely, if there had been a change in ownership, management or control of NDC, which had not occurred. Thus, ICANN properly exercised its authority in investigating Ruby Glen’s claims, and the Board, in denying Ruby Glen’s Reconsideration Request regarding ICANN’s investigation, properly relied on the due diligence performed by ICANN’s staff and Ombudsman as well as NDC’s representations (later confirmed by the sworn Declarations in the Ruby Glen litigation).

60. If Afilias was aware of rumors regarding an arrangement between NDC and Verisign, Afilias should have raised its concerns with ICANN by invoking an appropriate Accountability Mechanism at the time, just as Ruby Glen had done. The same recourse was available to Afilias if it felt that ICANN’s investigation of NDC prior to the auction was deficient in any meaningful way. But Afilias did not do so. Afilias’ current claim that ICANN’s pre-auction investigation was deficient is, at best, a *post hoc* invention that is time barred, as discussed below.

B. Due To Pending Accountability Mechanisms As Well As The DOJ Investigation, The Board Has Not Fully Evaluated the Guidebook Violations Alleged By Afilias, Which Are Hotly Contested And Do Not Call For Automatic Disqualification.

61. Afilias argues that NDC breached the Guidebook by failing to amend its application,⁹⁷ by transferring rights in connection with its application to Verisign,⁹⁸ and by submitting auction bids that were controlled by and made on behalf of Verisign.⁹⁹ Afilias also argues that ICANN violated its Bylaws by failing to automatically disqualify NDC for these alleged breaches.¹⁰⁰ Afilias is wrong on several levels.

62. First, the ICANN Board has not fully evaluated the Guidebook violations that Afilias alleges because .WEB has been predominantly on hold since 2016 and no other formal Accountability Mechanism has been invoked calling on the Board to take action. Specifically, the .WEB Contention Set has been on hold from August 2016 through today, with the exception

of approximately two weeks in June 2018 after Afilius' DIDP-related Reconsideration Requests were resolved and before Afilius initiated its CEP. During the entire period from July 2016 through June 2018, Afilius took no action that would have placed the .WEB issues before the Board, although Afilius easily could have. For instance, rather than writing letters, Afilius could have filed a Reconsideration Request challenging the .WEB auction results or ICANN's decision to take .WEB off hold in June 2018. Afilius also could have waited for a proposed transfer of .WEB to Verisign and then filed a Reconsideration Request challenging that transfer. These actions – and perhaps others – would have elevated the Guidebook violations that Afilius alleges to the Board for consideration.

63. Second, the Guidebook breaches that Afilius alleges are the subject of good faith dispute by NDC and Verisign, both of which are seeking to participate in this IRP pursuant to their *amicus* applications. For instance, Afilius' overarching theme that the NDC/Verisign agreement is anticompetitive is flatly denied by Verisign, which is prepared to come forward with evidence of its intentions for .WEB, Verisign's competitors, and the fact that Afilius' competition claims have already been thoroughly investigated by DOJ. Likewise, many of Afilius' technical arguments regarding the Guidebook and Auction Rules have also been contested by Verisign and NDC in correspondence to ICANN. For their part, NDC and Verisign claim that Afilius violated the .WEB auction rules and should itself be disqualified by ICANN. While Afilius' Amended IRP Request is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and Verisign, to which NDC and Verisign have responses. Again, this dispute resolution process and the quality of the Panel's consideration of the issues that Afilius raises will benefit substantially from NDC's and Verisign's participation in this IRP.

64. Third, the alleged Guidebook violations identified by Afilius do *not* call for the automatic disqualification of NDC, as Afilius requests of this Panel. Instead, the Guidebook

grants ICANN discretion to determine whether information not disclosed to ICANN – or any other potential Guidebook violation – warrants disqualification.¹⁰¹ An immediate and less-than-fully-informed disqualification of NDC of the sort sought by Afilias is unprecedented, not mandated by the Guidebook, and could violate ICANN’s obligations to act fairly and transparently as to NDC.

65. Fourth, the demands made by Afilias, in substantial part, require the Panel to usurp the discretion that is more broadly reserved under ICANN’s Bylaws to the ICANN Board and thus exceed the Panel’s jurisdiction. Pursuant to the Bylaws, where, as here, IRP claims arise out of the Board’s exercise of its fiduciary duties, “the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action *or inaction* is within the realm of reasonable business judgment.”¹⁰²

66. Due to the pendency of DOJ’s investigation and a series of Accountability Mechanisms, the Board has not yet had an opportunity to fully address most of the issues that Afilias now pursues in its Amended IRP Request. Deferring such consideration until this Panel renders its final decision is well within the realm of reasonable business judgment. It was entirely reasonable for the ICANN Board to wait to analyze the issues surrounding .WEB until the DOJ investigation concluded and each of the related Accountability Mechanisms was resolved, including this IRP, and then to undertake that analysis on the basis of the results of those proceedings. Should this Panel determine that Afilias’ claims regarding NDC’s conduct have any merit, the Panel should not substitute its own discretion for that of the ICANN Board in deciding what corrective action, if any, is appropriate. Those business judgments must instead be left to the discretion of the Board, after consideration of this Panel’s findings.

67. This conclusion is also mandated by well-settled case law applying a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad

discretion in making corporate decisions.”¹⁰³ This principle is applicable here, and the result is unequivocal: the demands that Afilias makes – disqualification of NDC and an order that ICANN enter a Registry Agreement for .WEB with Afilias at a bid price to be determined by the Panel – are remedies that the Panel is not empowered to grant.

II. ICANN HAS COMPLIED WITH ITS CORE VALUE REGARDING COMPETITION.

68. One of ICANN’s Core Values, as set forth in its Bylaws, is “[w]here feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market.”¹⁰⁴ Afilias’ argument that failing to disqualify NDC violates this Core Value is baseless for a number of reasons.

69. As an initial matter, Afilias and its witnesses, Mr. Zittrain and Mr. Sadowsky, are wrong to suggest that the sole purpose of the New gTLD Program was to create competition for Verisign. While the community-developed policy underlying the Program was aimed at increasing competition and consumer choice in the DNS, the Program was not specifically designed to take market share from .COM, nor was Verisign prohibited from participating in the Program.¹⁰⁵ Indeed, neither the community-developed policy, the Guidebook nor any other ICANN document or statement underlying the Program says as much or even suggests that Verisign should not be permitted to participate fully in the Program.¹⁰⁶

70. Likewise, Afilias and its witnesses are wrong to suggest that ICANN’s Core Value regarding competition requires ICANN to act like a government regulator responsible for blocking transactions or curbing conduct that may impinge on competition.¹⁰⁷ In fact, ICANN’s Bylaws make clear that “ICANN does not hold any governmentally authorized regulatory authority.”¹⁰⁸ Instead, as ICANN Board member, Ms. Burr, explains in her witness statement, ICANN, as an administrator of the DNS, fulfills its competition mandate by enacting policies that promote competition – such as the New gTLD Program – and by deferring to an appropriate

government regulator – such as DOJ – for investigation of potential competition issues.¹⁰⁹

71. Indeed, an investigation by DOJ of the potential competition issues associated with a Verisign-operated .WEB is precisely what occurred in this matter. DOJ conducted a year-long investigation into the potential competitive effects of the NDC/Verisign agreement and Verisign’s proposed operation of .WEB.¹¹⁰ ICANN fully cooperated with DOJ’s investigation, and DOJ concluded that intervention was not warranted.¹¹¹ The government’s decision not to act answers the question of whether ICANN is required to act to address Afilias’ allegations of anticompetitive conduct. It is not.¹¹²

72. Finally, as expert economist Dennis Carlton concludes in his report, there is no evidence that .WEB will be a unique competitive check on .COM, at least any more than all of the other TLDs that are already in existence.¹¹³ Likewise, the claim that Afilias will promote .WEB more aggressively than Verisign is not supported by any evidence.¹¹⁴

III. ALL OF AFILIAS’ CLAIMS ARE TIME BARRED.

73. According to the Bylaws in place in August 2016, an IRP had to be filed within 30 days of the posting of the Board minutes relating to the challenged ICANN decision or action.¹¹⁵ Under the current Interim Supplementary Procedures, an IRP must be filed within 120 days after the claimant becomes aware “of the material effect of the action or inaction” giving rise to the dispute, provided that an IRP may not be filed 12 months from the date of such action or inaction.¹¹⁶ Under either measure, Afilias’ claims are undoubtedly time barred.

74. For instance, Afilias’ claims regarding deficiencies in ICANN’s pre-auction investigation of NDC accrued on 12 September 2016 when ICANN posted minutes regarding the Board’s denial of Ruby Glen’s Reconsideration Request challenging the investigation, making an IRP on such claims due on 12 October 2016. Afilias missed this deadline by over two years.

75. Likewise, the facts and claims supporting Afilias’ allegations of NDC’s

Guidebook violations were known to Afilias and set forth in its August and September 2016 letters to ICANN. Specifically, Afilias' 9 September 2016 letter to ICANN claimed that: (1) "NDC violated Section 1.2.7 of the Guidebook" for failing to amend its application to reflect its arrangement with Verisign; (2) that "NDC violated Paragraph 10 of the Terms and Conditions of Module 6" of the Guidebook by "transfer[ring] NDC's rights and obligations regarding its .WEB application to Verisign;" (3) that "NDC violated the Auction Rules" by submitting bids that were not on its own behalf; and (4) that ICANN must disqualify NDC for these alleged breaches pursuant to ICANN's competition mandate.¹¹⁷ These are identical to the claims asserted by Afilias in its Amended IRP Request.¹¹⁸ Afilias sat on its hands for *over two years* before asserting these claims in an IRP. There is no doubt that these claims are time barred as well.

76. Afilias' assertion that it was not aware of its claims until it received a copy of the NDC/Verisign agreement in this IRP is belied by the specific claims Afilias made in its September 2016 letter. The argument is also undercut by the requirement in the Interim Supplementary Procedures that an IRP must be brought within 120 days after the claimant becomes aware "of the *material effect* of the action or inaction" giving rise to the dispute,¹¹⁹ which Afilias was certainly aware of in 2016. Moreover, it is settled law that statutes of limitations begin to run even though a plaintiff is not aware of all operative facts.¹²⁰ Even if Afilias were not aware of all the facts regarding the NDC/Verisign agreement, the Interim Supplementary Procedures bar IRPs filed 12 months after the date of alleged ICANN action or inaction.

IV. ICANN COMPLIED WITH ITS ARTICLES AND BYLAWS IN ADOPTING RULE 7 OF THE INTERIM SUPPLEMENTARY PROCEDURES.

77. As set forth fully in ICANN's briefing to the Procedures Officer, ICANN did not violate its Articles or Bylaws in adopting Rule 7 of the Interim Supplementary Procedures, nor

did Verisign exert any pressure on the IRP-IOT to do so. The single Verisign-affiliated member of the IRP-IOT did *not* prepare the October 2018 draft of the Interim Supplementary Procedures and was *not* aware of Afilias' dispute regarding .WEB at that time. Moreover, that draft did not significantly change or expand Rule 7 from the version publicly posted nearly eight months earlier, in February 2018, rebutting Afilias' claim that Rule 7 was surreptitiously amended "just days" before the Board adopted the Interim Supplementary Procedures.

78. Afilias' remaining arguments lack merit. First, Afilias challenges the IRP-IOT's inclusion of ICANN counsel towards a quorum. Yet, nothing in ICANN's Bylaws prohibits ICANN counsel from participating in the IRP-IOT's work or counting towards a quorum.

79. Second, Afilias' argument that Rule 7 violates the Bylaws because it is "foreign" to international arbitration is misleading. ICANN's Bylaws do not require that every rule in the Interim Supplementary Procedures be found explicitly or exactly in international arbitration procedures. Instead, the Bylaws require that the Interim Supplementary Procedures be "informed by international arbitration norms"¹²¹ and, more importantly, that they should be "consistent with the Purposes of the IRP." Rule 7 does not violate either of those provisions.

80. Third, Afilias' argument that the Bylaws required the Interim Supplementary Procedures to be published for public comment a second time is wrong. While the Bylaws require the IRP-IOT to post the Interim Supplementary Procedures for public comment prior to adoption by the ICANN Board, they do not require that every iteration or draft be posted for comment. Here, the IRP-IOT complied with the Bylaws when it posted the Interim Supplementary Procedures for public comment in November 2016. Notably, the IRP-IOT received comments regarding Rule 7 that supported granting broader participation rights to interested parties, which the IRP-IOT incorporated into subsequent drafts of the Interim Supplementary Procedures.

81. Fourth, Afilias' vague allegations that drafting "principles" were violated prior to the Board's adoption of the Interim Supplementary Procedures are unsupported. The committee acted in accordance with its purpose when it sought input from, and coordinated with, all relevant entities in drafting the Interim Supplementary Procedures and presenting them to the ICANN Board.

82. In any event, Afilias challenges conduct by the IRP-IOT only; it has not alleged any inappropriate conduct by ICANN in the adoption of the Interim Supplementary Procedures and thus does not even have standing to pursue these claims in an IRP against ICANN. For each of these reasons, Afilias' claims regarding Rule 7 fail.

CONCLUSION

83. ICANN complied with its Articles, Bylaws, and internal policies and procedures relating to disputes over the .WEB gTLD. Moreover, Afilias' claims were known to Afilias more than two years ago and are therefore time-barred. In addition, Afilias' requested relief from the IRP Panel goes far beyond what is permitted by ICANN's Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the ICANN Board. Accordingly, Afilias' Amended IRP Request should be denied.

Respectfully submitted,
JONES DAY

Dated: May 31, 2019

By: 
Jeffrey A. LeVee

Counsel for Respondent ICANN

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- ¹ Witness Statement of Christine Willett (“Willett Stmt.”) ¶ 2.
- ² Bylaws, Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2, Ex. C-1.
- ³ *Id.*, Art. 4, § 4.2.
- ⁴ *Id.*
- ⁵ *Id.*, Art. 5.
- ⁶ *Id.*, Art. 5, § 5.2.
- ⁷ *Id.*, Art. 4, § 4.3.
- ⁸ Interim Supplementary Procedures (25 Oct. 2018) (“Supp. Procedures”), Ex. C-59.
- ⁹ Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 1 October 2016), Art. 4, § 4.3(n)(i), R-1.
- ¹⁰ Supp. Procedures, Rule 7, Ex. C-59.
- ¹¹ The deadlines in the Interim Supplementary Procedures are subject to change because, as the procedures recognize, “[i]n the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.” Supp. Procedures, Rule 4, fn3, Ex. C-59.
- ¹² Supp. Procedures, Rule 4, Ex. C-59. Under the previous procedures in effect until October 2016, an IRP had to be filed within thirty days after posting of the Board minutes that contain the action or inaction that allegedly violated the ICANN Articles or Bylaws. Bylaws (as amended 11 February 2016) Art. IV, § 3, Ex. C-23.
- ¹³ Willett Stmt. ¶ 3.
- ¹⁴ Guidebook, Preamble, Ex. C-3.
- ¹⁵ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 Aug. 2007), Ex. C-20.
- ¹⁶ ICANN Adopted Board Resolutions (26 June 2008), Ex. C-21.
- ¹⁷ Guidebook (24 October 2008 version), *available at* <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.
- ¹⁸ Guidebook, Preamble, Ex. C-3; Willett Stmt. ¶ 4.
- ¹⁹ *See generally*, Guidebook, Ex. C-3.
- ²⁰ Willett Stmt. ¶ 16.
- ²¹ Guidebook § 1.2.7, Ex. C-3.
- ²² *Id.*
- ²³ *Id.*, § 4.1.1.
- ²⁴ *Id.*, § 4.1.3.
- ²⁵ *See id.*
- ²⁶ *Id.*, § 4.3.
- ²⁷ *Id.*, § 4.3, n.1.
- ²⁸ Willett Stmt. ¶ 35.
- ²⁹ *Id.*, ¶ 36.
- ³⁰ <https://newgtlds.icann.org/en/program-status/statistics>.
- ³¹ Willett Stmt. ¶ 37.
- ³² *Id.*; *see also* <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>.
- ³³ Willett Stmt. ¶ 37.

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- ³⁴ *Id.*, ¶ 38; *see also* <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>.
- ³⁵ <https://www.icann.org/en/system/files/files/gtld-drd-ui-10sep13-en.pdf>.
- ³⁶ Bylaws, Art. 1, § 1.1(c), Ex. C-1 (“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). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”).
- ³⁷ Willett Stmt. ¶ 38.
- ³⁸ .MEET Application, 18(b), Ex. R-2.
- ³⁹ <https://www.icann.org/resources/agreement/meet-2014-01-16-en>.
- ⁴⁰ *See* Application for Assignment – Registry Agreement (Material Subcontracting Arrangement) for .MEET, Ex. R-3.
- ⁴¹ <https://www.icann.org/resources/agreement/meet-2014-01-16-en>; *see also* Willett Stmt. ¶ 39.
- ⁴² <https://www.icann.org/resources/agreement/promo-2014-12-18-en>; *see also* Willett Stmt. ¶ 39.
- ⁴³ <https://afiliias.info/news/2016/08/08/afiliias-acquires-premium-tlds-archi-bio-and-ski>.
- ⁴⁴ *Id.*
- ⁴⁵ <https://www.icann.org/resources/agreement/ski-2015-04-09-en>;
<https://www.icann.org/resources/agreement/bio-2014-03-06-en>;
<https://www.icann.org/resources/agreement/archi-2014-02-06-en>.
- ⁴⁶ Willett Stmt. ¶ 10.
- ⁴⁷ *Id.*, ¶ 11.
- ⁴⁸ *Id.*, ¶ 12.
- ⁴⁹ *Id.*, ¶ 13.
- ⁵⁰ *Id.*, ¶ 14.
- ⁵¹ *See generally*, *Ruby Glen v. ICANN*, First Amended Complaint, Ex. R-4.
- ⁵² *Id.*; Willett Stmt. ¶ 19, Ex. A, ¶ 20.
- ⁵³ *Ruby Glen v. ICANN*, First Amended Complaint ¶ 36, Ex. R-4.
- ⁵⁴ Willett Stmt. ¶ 21.
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*, ¶ 26.
- ⁵⁷ *Id.*
- ⁵⁸ *Id.*, ¶ 26, 28, Ex. F.
- ⁵⁹ *Id.*, ¶ 30; *see also* Ex. C-44.
- ⁶⁰ Willett Stmt. ¶¶ 24-25.
- ⁶¹ *Id.*, ¶ 29, Ex. G.
- ⁶² Reconsideration Request by Ruby Glen, LLC and Radix FZC (17 July 2016), Ex. R-5.
- ⁶³ Determination of the Board Governance Committee (BGC), Reconsideration Request 16-9 (21 July 2016), Ex. R-6.
- ⁶⁴ *Id.*
- ⁶⁵ *Ruby Glen v. ICANN*, Docket, Ex. R-7.
- ⁶⁶ *Ruby Glen v. ICANN*, Opp’n to *Ex Parte* Appl. for TRO, Ex. R-8.
- ⁶⁷ *Ruby Glen v. ICANN*, Order on *Ex Parte* Appl. for TRO, Ex. R-9.
- ⁶⁸ *Id.*, at 4.

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- ⁶⁹ ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB / WEBS, Ex. R-10.
- ⁷⁰ Verisign Statement Regarding .Web Auction Results (1 August 2016), Ex. C-46.
- ⁷¹ Letter from S. Hemphill (General Counsel, Afiliias) to A. Atallah (President, ICANN’s Global Domains Division) (8 August 2016), Ex. C-49.
- ⁷² *Ruby Glen v. ICANN*, First Amended Complaint, ¶¶ 68-69, 71, Ex. R-4.
- ⁷³ Cooperative Engagement and Independent Review Processes Status Update – 20 June 2018, Ex. R-11.
- ⁷⁴ Willett Stmt. ¶ 9.
- ⁷⁵ Letter from S. Hemphill (General Counsel, Afiliias) to A. Atallah (President, ICANN’s Global Domains Division) (9 September 2016), Ex. R-12.
- ⁷⁶ Letter from C. Willett (Vice President, ICANN’s gTLD Operations) to J. Kane (Vice President, Afiliias’ Corporate Services) (16 September 2016), Ex. C-50.
- ⁷⁷ Letter from J. Kane (Vice President, Afiliias’ Corporate Services) to C. Willett (Vice President, ICANN’s gTLD Operations) (7 October 2016), Ex. C-51. NDC and Verisign also responded to ICANN’s questions in confidential responses.
- ⁷⁸ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf>.
- ⁷⁹ <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.
- ⁸⁰ *Id.*
- ⁸¹ Excerpts from Verisign 10-K (for the fiscal year ended 31 December 2017), Ex. R-13; Expert Report of Dennis W. Carlton (“Carlton Expert Report”) ¶¶ 58-61.
- ⁸² Cooperative Engagement and Independent Review Processes Status Update – 20 June 2018, Ex. R-11.
- ⁸³ *Ruby Glen v. ICANN*, Memorandum, Ex. R-14.
- ⁸⁴ Letter from J. LeVee to K. Reisenfeld (3 December 2018), Ex. R-15.
- ⁸⁵ Bylaws, Art. 4, § 4.3, Ex. C-1.
- ⁸⁶ *Id.*, § 4.3(h)(i)(iii); *see also* Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 (“Booking.com Final Declaration”) ¶ 115 (3 March 2015), Ex. R-16.
- ⁸⁷ Bylaws, Art. 4, § 4.3(b), Ex. C-1.
- ⁸⁸ Amended IRP at ¶ 78.
- ⁸⁹ Willett Stmt. ¶¶ 19-31.
- ⁹⁰ *Id.*, ¶ 19, Ex. A.
- ⁹¹ *Id.*, ¶ 20.
- ⁹² Guidebook, Terms and Conditions 11(a).
- ⁹³ Willett Stmt. ¶¶ 21, 26, 28.
- ⁹⁴ *Id.*, ¶ 25.
- ⁹⁵ *Ruby Glen v. ICANN*, Order on *Ex Parte* Appl. for TRO, Ex. R-8.
- ⁹⁶ Amended IRP ¶ 78.
- ⁹⁷ *Id.*, ¶¶ 54-62.
- ⁹⁸ *Id.*, ¶¶ 63-68.
- ⁹⁹ *Id.*, ¶¶ 69-74.
- ¹⁰⁰ *Id.*, ¶ 78.
- ¹⁰¹ Guidebook at § 1.2.7 (“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.”) (emphasis added); Terms and Conditions 1 (“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.”) (emphasis added); Terms and Conditions 3 (“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.*” (emphasis added).

¹⁰² Bylaws, Art. 4. § 4.3(i)(iii), Ex. C-1.

¹⁰³ *Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal. App. 4th 1020, 1045 (2009) (“[A] court will not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose.”).

¹⁰⁴ Bylaws, Art. 1, § 1.2(b)(iii), Ex. C-1.

¹⁰⁵ Witness Statement of J. Beckwith Burr (“Burr Stmt.”) ¶ 27.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, ¶¶ 28-32.

¹⁰⁸ Bylaws, Art. 1, § 1.1(c), 1.2(b)(iii), Ex. C-1.

¹⁰⁹ Burr Stmt. ¶ 32.

¹¹⁰ Burr Stmt. ¶ 31; Carlton Expert Report ¶ 60.

¹¹¹ Carlton Expert Report ¶¶ 60-61.

¹¹² Burr Stmt. ¶ 32.

¹¹³ Carlton Expert Report ¶¶ 28-54.

¹¹⁴ *Id.*, ¶¶ 55-57.

¹¹⁵ Bylaws (as amended 11 February 2016), Art. IV, § 3.3, Ex. C-23, *available at* <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>.

¹¹⁶ Supp. Procedures, Rule 4, Ex. C-59.

¹¹⁷ Letter from S. Hemphill to A. Atallah (9 Sep. 2016), Ex. R-12.

¹¹⁸ Amended IRP Request at ¶¶ 54-62 (alleging violation of Section 1.2.7); ¶¶ 63-68 (alleging violation of Paragraph 10 of the Terms and Conditions); ¶¶ 69-74 (alleging violation of the Auction Rules); ¶¶ 75-83 (alleging that ICANN must disqualify NDC for these alleged breaches and in accordance with ICANN’s competition mandate).

¹¹⁹ Supp. Procedures, Rule 5, Ex. C-59.

¹²⁰ *See United States v. Kubrick*, 444 U.S. 111, 122 (1979) (cause of action accrues when a plaintiff learns of the critical facts of his claim: that he has been injured and who inflicted the injury); *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1092 (9th Cir. 2006) (“Accrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim. Nor is accrual deferred until the injured party has enough information to calculate its damages. Rather, once a plaintiff has inquiry notice of its claim, it bears the responsibility of making diligent inquiries to uncover the remaining facts needed to support the claim.”) (internal quotation marks and citations omitted); *Wolf v. Travolta*, 167 F. Supp. 3d 1077, 1102-03 (C.D. Cal. 2016) (“The discovery rule does not require absolute certainty for a cause of action to accrue. Rather, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period.... Stated differently, once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights.... A plaintiff need not be aware of the specific ‘facts’ necessary to establish the

claim in order for the claim to accrue; that is a process contemplated by pretrial discovery.”) (internal quotation marks and citations omitted).

¹²¹ Provisions on amicus participation in international arbitration can be found in various arbitral rules, including, most prominently, in Article 37(2) of the ICSID Arbitration Rules, which gives ICSID tribunals discretion to permit amicus briefing.

PROOF OF SERVICE BY E-MAIL

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On May 31, 2019, I served a copy of the following documents:

1. **ICANN'S RESPONSE TO AMENDED REQUEST FOR INDEPENDENT REVIEW PROCESS AND SUPPORTING EXHIBITS**
2. **EXPERT REPORT OF DENNIS W. CARLTON**
3. **WITNESS STATEMENT OF J. BECKWITH BURR**
4. **WITNESS STATEMENT OF CHRISTINE WILLETT**

by e-mailing a copy thereof to the following individual(s) at the following e-mail addresses:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 31, 2019, at Los Angeles, California.



Kelly Ozurovich