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**VIA EMAIL THROUGH COUNSEL**

Mr. Maarten Botterman  
Chair, Board of Directors  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

**Re: Response to Nu DotCo, LLC's 23 July 2021 Letter to the ICANN Board**

Dear Mr. Botterman and Members of the ICANN Board:

We write on behalf of Altanovo Domains Limited f/k/a Afilias Domains No. 3 Limited<sup>1</sup> (“**Afilias**”) regarding Nu DotCo, LLC’s (“**NDC**”) 23 July 2021 letter to the ICANN Board (“**NDC Letter**”). ICANN publicly posted the NDC Letter on 14 September 2021, almost two months after ICANN received it. The NDC Letter is rife with inaccuracies and rhetoric designed to mislead and distract the Board from the real issues at hand concerning the delegation of the .WEB gTLD, namely, whether NDC’s agreement with VeriSign, Inc. (“**Verisign**”) the August 25, 2015 Domain Acquisition Agreement (“**DAA**”), “complied with the New gTLD Program Rules” and “whether by reason of any violation of the [gTLD Applicant Guidebook (“**AGB**”)] and [Auction Rules for New gTLDs: Indirect Contention Edition (“**Auction Rules**”)], NDC’s application for .WEB should be rejected and its bids at the [ICANN] auction disqualified.”<sup>2</sup>

By this letter, we make three requests:

**First**, ICANN has repeatedly maintained that it will not take “any material action with respect to the [.WEB] application or contention set while the Accountability Mechanism is pending.”<sup>3</sup> Accordingly, we understand and expect that the ICANN Board will not take

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<sup>1</sup> For ease of reference, we will use the term “Afilias” in this letter to refer to the Claimant in the IRP.

<sup>2</sup> **Exhibit 1**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Final Decision (20 May 2021, as corrected 15 July 2021) (“**IRP Decision**”), ¶ 413(5).

<sup>3</sup> **Exhibit 2**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, ICANN’s Rejoinder Memorial in Response to Afilias’ Amended Request for Independent Review (1 June 2020), ¶ 26; **Exhibit 3**, *Afilias*

any action regarding the .WEB matter while the *Afilias v. ICANN* Independent Review Process (“IRP”), or any follow-on litigation regarding the IRP Decision, are pending. We request immediate confirmation in this regard.

**Second**, notwithstanding the foregoing, should the Board nevertheless proceed to consider the .WEB matter before the conclusion of the *Afilias v. ICANN* IRP (including any follow-on litigation related to the Panel’s decision, as it may eventually be amended or supplemented), we ask that it carefully consider the contents of this letter, which (i) corrects the misstatements in the NDC Letter (**Section I**); (ii) sets out the various ways in which NDC’s and Verisign’s entry into and performance of the DAA violated critical provisions of the “**New gTLD Program Rules**”<sup>4</sup> based on what we learned in the IRP (**Section II**); and (iii) addresses why NDC’s conduct should cause ICANN, pursuant to its obligations under the ICANN Articles and Bylaws, to declare NDC ineligible to enter into a registry agreement for .WEB (**Section III**).<sup>5</sup>

**Third**, we request that ICANN comply with its transparency obligations and (i) post the full text of the DAA, which will allow the Internet Community to decide for itself whether Verisign’s and NDC’s conduct violates the letter and spirit of the New gTLD Program Rules; and (ii) post the full merits hearing transcript for the *Afilias v. ICANN* IRP, as ICANN’s counsel committed to do in **June 2021**.<sup>6</sup> ICANN’s efforts to shield NDC and Verisign, and indeed ICANN’s own conduct, from criticism by not posting documents that ICANN is required to publish, does nothing more than exacerbate the dispute over .WEB and constitutes a continuing violation of the Articles and Bylaws (**Section IV**).

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*v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Christopher Disspain (1 June 2020), available at <https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-disspain-01jun20-en.pdf>, ¶ 11 (“ICANN’s Accountability Mechanisms are fundamental safeguards in ensuring that ICANN’s model remains effective, and it did not seem prudent for the Board to interfere with or preempt issues that were the subject of Accountability Mechanisms regarding .WEB that were pending at that time ... that might require the Board to take action.”).

<sup>4</sup> The New gTLD Program Rules include the gTLD Applicant Guidebook (4 June 2012) (“**AGB**”) and the Auction Rules for New gTLDs: Indirect Contention Edition (24 Feb. 2015) (“**Auction Rules**”), attached as **Exhibit 4** and **Exhibit 5** respectively.

<sup>5</sup> We reserve our rights to further respond to the NDC Letter, and any other allegation brought by NDC or Verisign, once the *Afilias v. ICANN* IRP and any additional related proceedings conclude, and the .WEB matter is properly before the ICANN Board.

<sup>6</sup> **Exhibit 6**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Email from E. Enson (Counsel for ICANN) to Afilias and Amici (11 June 2021).

## I. NDC’S CLAIMS REGARDING AFILIAS’ ALLEGED VIOLATIONS OF THE BLACKOUT PERIOD ARE FRIVOLOUS

The NDC Letter contains various unsubstantiated charges regarding Afilias’ conduct in the weeks leading up to the 2016 ICANN-administered auction for .WEB (the “**ICANN Auction**”). It does so plainly to advance NDC’s and Verisign’s strategy to distract the Board from NDC’s (and indeed Verisign’s) own blatant violations of the New gTLD Program Rules. As detailed herein—and as is well-known to ICANN—NDC (a) impermissibly transferred many of its rights as an applicant for .WEB to Verisign by entering into the DAA, (b) purposefully misled ICANN Staff, which was investigating allegations that NDC had effectively transferred control over its application to a third party in violation of the New gTLD Program Rules, and (c) submitted bids on Verisign’s behalf and pursuant to Verisign’s specific instructions during the ICANN Auction. None of these facts are in dispute—they are crystal clear on the face of the DAA; an agreement that NDC and Verisign executed in August 2015 and which they purposefully kept secret from ICANN for over a year and until after the ICANN Auction had taken place. We address NDC’s and Verisign’s conduct in greater detail below, but first we set the record straight regarding the multiple factual inaccuracies contained in the NDC Letter pertaining to the Blackout Period, which NDC and Verisign claim Afilias violated.

### A. NDC Wrongly Attributes the Conduct of Third Parties to Afilias

Much of the NDC Letter is devoted to describing conduct by parties other than Afilias. For example, although Section II of the NDC Letter is entitled “Afilias’ Violation of the Blackout Period,” subsection B is devoted entirely to complaints about NDC’s conduct and requests to delay the .WEB auction that were made by Ruby Glen, LLC (“**Ruby Glen**”); Schlund Technologies GmbH; and Radix FZC (“**Radix**”) to ICANN during June and July 2016. Similarly, subsection C is entirely devoted to describing a litigation prosecuted by Ruby Glen in federal court against ICANN, seeking to enjoin ICANN from conducting the .WEB Auction, and subsection D is entirely devoted to describing a proposal that Schlund made to NDC concerning a private auction.

NDC does not—and cannot—allege that Afilias joined in any of these efforts. NDC’s lengthy recitation of actions taken by other members of the .WEB Contention Set are utterly irrelevant and are included in its letter simply to mask the absence of any evidence of wrongdoing by Afilias. As for its actual complaints against Afilias, NDC complains about texts that Afilias sent to NDC on June 7, 2016 (before the Blackout Period started) and a single text it sent on July 22, 2016 (a couple of days after the Blackout Period had commenced). As discussed below, none of these amounts to a violation of the Blackout Period Rules.

**B. NDC Wrongly Asserts that the June 7, 2016 Texts Violate a Blackout Period that Started on June 20, 2016**

NDC relies on certain texts that Steve Heflin (of Afiliias) sent to Juan Diego Calle (of NDC) on June 7, 2016. But these texts were sent approximately *six weeks before the start of the Blackout Period*. NDC does not—and cannot—explain how these texts constitute a violation of the Blackout Period. Simply put: *they do not*. Frankly, insofar as Mr. Heflin’s texts are concerned, any consideration of NDC’s allegations should end there.

However, for the avoidance of doubt, the Board should rest assured that there is no substance to NDC’s allegations that Mr. Heflin’s texts constitute bid rigging. Bid rigging requires an agreement between two independent parties to, in essence, fix the result of an auction. There was no such agreement here—NDC rejected Mr. Heflin’s proposal.

Contrary to NDC’s assertions, ICANN expressly encouraged contention set members to “resolve string contention among themselves” and “expected that most cases of contention [would] be resolved ... through voluntary agreement among the involved applicants.”<sup>7</sup> The AGB makes clear that resolution of string contention by a public ICANN auction was a “Mechanism of Last Resort.”<sup>8</sup> ICANN both knew and encouraged resolution of string contention by private auction. This is precisely what Mr. Heflin and others were trying to do. As the Board is well aware, in a private auction, the losing bidders divide amongst themselves the proceeds paid by the winning bidder. There is no requirement that these proceeds be divided equally and, in fact, many private auctions in the New gTLD Program have adopted formulas that divide the proceeds unequally. The reason for this is that the AGB requires that all contention set members agree to a private auction; and under such a system a contention set member can hold out for a better share of the proceeds. This, in fact, is what Afiliias assumed NDC was doing when it abruptly announced in June 2016 that it would not participate in the long-planned private auction for .WEB. Mr. Heflin’s proposal concerned the allocation of auction proceeds, in the event NDC consented to a private auction and then lost. NDC’s attempt to cast this legitimate offer as an invitation to purposely lose the private auction and an attempt at bid-rigging is fundamentally illogical and plainly incorrect.

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<sup>7</sup> **Exhibit 4**, AGB, Secs. 4.1.3, 4.3.

<sup>8</sup> *Id.*, Sec. 4.3.

C. **Mr. Kane's July 22, 2016 Text to NDC Does Not Violate the Blackout Period**

NDC's allegations regarding a single text sent by John Kane (of Afilius) on July 22, 2016 to Jose Ignacio Rasco III (of NDC) two days after the start of the Blackout Period are equally exaggerated and nonsensical. The full text of Mr. Kane's text reads:

IF ICANN delays the auction next week would you again consider a private auction? Y-N<sup>9</sup>

The context in which Mr. Kane sent this text is important. A few days before Mr. Kane sent his text (20 July 2016), reports were circulating in industry press that Ruby Glen had filed a Reconsideration Request demanding that ICANN delay the ICANN Auction in order to allow ICANN sufficient time to investigate claims that NDC had breached its obligations under the AGB.<sup>10</sup> Given that there was a reasonable possibility that ICANN would delay the auction in light of the prevailing circumstances, and some uncertainty as to what might be the outcome of ICANN's investigations, Mr. Kane simply sought to ascertain whether NDC would again consider participating in a private auction. Mr. Rasco did not respond to Mr. Kane's text and Mr. Kane made no further attempts to communicate with NDC, as ICANN denied the Reconsideration Request later that same day (22 July 2016), thus ending any speculation about whether the ICANN Auction would proceed as planned.

Mr. Kane's brief text did not violate the Blackout Period Rules. The Blackout Period is designed to prevent members of a contention set from colluding on the administration of a public ICANN auction. This anti-collusion rule is narrowly tailored to this specific purpose; the rule does not prohibit all contact among contention set members during this period. Accordingly, it is important to focus on what the Blackout Period rule prohibits and what it does not. The text of the Blackout Period rule is clear: Applicants are prohibited from discussing (a) "*bids*," (b) "*bidding strategies*," or (c) "*settlement agreements or post-Auction ownership transfer arrangements*."<sup>11</sup> ICANN itself has had cause to interpret the Blackout Period rule in a contemporaneous filing with a U.S. federal court. According to ICANN, the blackout period "is a period of time called for in the

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<sup>9</sup> **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

<sup>10</sup> **Exhibit 8**, Kevin Murphy, "Donuts joins fight to delay .web gTLD auction with emergency appeal," *Domain Incite* (20 July 2016, 10:49 (UTC)), available at <http://domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal>.

<sup>11</sup> **Exhibit 9**, ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt), Sec. 2.6.

Auction Rules during which auction participants are prohibited from communicating, or cooperating, with one another *in terms of the auction.*”<sup>12</sup>

Mr. Kane’s text clearly did not disclose Afilias’ planned bids or bidding strategies, nor did the text propose a settlement agreement or a transfer agreement. Indeed, Mr. Kane’s text *did not concern the ICANN Auction at all*—Mr. Kane’s request was expressly limited to the scenario in which “ICANN delays [that] auction.”<sup>13</sup> Mr. Kane’s text asked a very innocuous question about NDC’s potential willingness to participate in a private auction assuming that ICANN was not proceeding with the public auction (i.e., “[i]f ICANN delays the auction”<sup>14</sup>), which was a very real possibility at the time given ICANN’s investigation of Ruby Glenn’s complaints. He solicited a simple yes or no answer, and made no commitments or promises regarding either a possible private auction or the ICANN Auction. Nothing in Mr. Kane’s text can be legitimately taken to suggest that he was asking NDC to “communicat[e], or cooperat[e], with [Afilias] in terms of the *[ICANN] auction.*”<sup>15</sup> There was, in short, nothing concrete and no attempt at collusion.<sup>16</sup>

NDC and Verisign’s charges against Afilias should be shown for what they are—a shameless effort to distract the Board’s attention from NDC and Verisign’s conduct, a matter to which we now turn.

## II. BY COMPLYING WITH THE DAA, NDC REPEATEDLY VIOLATED THE NEW GTLD PROGRAM RULES

It is critical that the Board have an accurate appreciation of how NDC and Verisign’s conduct violated the New gTLD Program Rules; why Staff’s decision to ignore NDC’s and Verisign’s actions violated the Articles and Bylaws; and why the Board must disqualify NDC’s application for .WEB, reject its auction bids, deem NDC ineligible to enter in to a registry agreement for .WEB, and offer .WEB to Afilias as the next highest bidder. We address these points below.

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<sup>12</sup> **Exhibit 10**, Weinstein Decl., ¶ 7 (emphasis added).

<sup>13</sup> **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

<sup>14</sup> **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

<sup>15</sup> **Exhibit 10**, Weinstein Decl., ¶ 7 (emphasis added).

<sup>16</sup> *Id.* (emphasis added).

**A. Overview of the DAA’s Critical Terms**

As an initial matter, it is fundamental that the Board understand the scope and purpose of NDC and Verisign’s agreement as set out in the DAA. In essence, the DAA allowed Verisign to secretly and Redacted - Third Party Designated Confidential Information

in exchange

Redacted - Third Party Designated Confidential Information.<sup>18</sup> The quoted language is from the DAA itself. From the moment the DAA was signed, Verisign took control over key rights and obligations of NDC, the nominal applicant for the .WEB gTLD—including, Redacted - Third Party Designated Confidential Information

By entering into the DAA, NDC undertook to act Redacted - Third Party Designated Confidential Information<sup>19</sup> Specifically, the DAA provides that:<sup>20</sup>

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<sup>17</sup> **Exhibit 11**, Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC (25 Aug. 2015) (“DAA”), Sec. 10(a).

<sup>18</sup> Redacted - Third Party Designated Confidential Information

*Id.*, Sec. 1 and Ex. A, Secs. 4(b), 4(d).

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

*Id.*, Ex. A, Sec. 10.

<sup>20</sup> Various provisions of the DAA illustrate Verisign’s complete control over NDC’s actions in regards to the .WEB gTLD. The provisions listed here serve as the most relevant examples.

<sup>21</sup> **Exhibit 11**, DAA, Sec. 10(a) (emphasis added).

<sup>22</sup> *Id.*, Sec. 4(f).

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<sup>23</sup> *Id.*, Sec. 4(j) (emphasis added).

<sup>24</sup> *Id.*, Ex. A, Sec. 1 (emphasis added).

<sup>25</sup> *Id.*, Ex. A, Sec. 1(i) (emphasis added). *See id.* Redacted - Third Party Designated Confidential Information

<sup>26</sup> *Id.*, Ex. A, Sec. 1(i) (emphasis added).

<sup>27</sup> *Id.*, Ex. A, Sec. 8 (emphasis added).



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Simply based on the foregoing extracts from the DAA, it should be evident to the Board, as it should have been evident to ICANN Staff after they reviewed the DAA, that the agreement violates the letter and spirit of the New gTLD Program Rules. Staff, however, determined to proceed with delegating the TLD to NDC, knowing full well that NDC was bound to transfer it to Verisign and that NDC was nothing more than a vehicle for Verisign's improper participation in the .WEB Contention Set.

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<sup>28</sup> *Id.*, Ex. A, Sec. 1(h) (emphasis added).

<sup>29</sup> *Id.*, Ex. A, Sec. 2(e) (emphasis added). *See id.*, Ex. A, Sec. 1(f) Redacted - Third Party Designated Confidential Information

<sup>30</sup> *Id.*, Ex. A, Sec. 1(f) (emphasis added).

<sup>31</sup> *Id.*, Ex. A, Sec. 3(g) (emphasis added).

## B. The DAA Is an “Unprecedented” Agreement.

### 1. The DAA Does Not Reflect Any Known “Market Practice”

In 2014, more than two years after the new gTLD application deadline had passed, Verisign decided to pursue the .WEB gTLD.<sup>32</sup> As Verisign’s Mr. Paul Livesay revealed in his testimony in the IRP, this decision was driven by <sup>Redacted - Third Party Designated Confidential Information</sup>  
<sup>33</sup> Redacted - Third Party Designated Confidential Information

<sup>4</sup> Mr. Livesay testified that it was his understanding that TLDs could be acquired on what he described as the “secondary market.”<sup>35</sup> He claimed that he <sup>Redacted - Third Party Designated Confidential Information</sup>

<sup>57</sup> Although it may be true that “varying forms of transactions” were taking place, as NDC’s Jose Ignacio Rasco III testified in the IRP, the deal reflected in the DAA was, in fact, “unprecedented.”<sup>38</sup>

Indeed, reflecting Mr. Rasco’s assessment, the DAA does not remotely resemble the various transactions that NDC and Verisign have presented to the Board as examples of “common business practices” in the secondary market for gTLDs. We address NDC’s and

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<sup>32</sup> **Exhibit 12**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 7 (11 Aug. 2020) (“**Hr. Tr., Day 7**”), 1125:25 – 1126:2 (Livesay Cross-Examination) (“Q: Who gave you this assignment? A: My boss at the time, Tom Indelicarto, and Jim Bidzos, the CEO.”). In 2014, Messrs. Bidzos and Indelicarto gave Mr. Livesay the assignment to pursue the acquisition of .WEB. *Id.*, 1125:17 – 1126:7. Mr. Livesay testified that he reported to Messrs. Bidzos and Indelicarto on a regular basis—“probably weekly or biweekly”—as he pursued the project. *Id.*, 1126:23 – 1127:4.

<sup>33</sup> **Exhibit 13**, *Afilias v. ICANN*, 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) (“**Livesay WS**”), ¶ 4  
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<sup>34</sup> **Exhibit 13**, Livesay WS, ¶ 5.

<sup>35</sup> **Exhibit 12**, Hr. Tr., Day 7, 1170:1-7.

<sup>36</sup> **Exhibit 13**, Livesay WS, ¶ 8; **Exhibit 12**, Hr. Tr., Day 7, 1170:1-7.

<sup>37</sup> **Exhibit 13**, Livesay WS, ¶ 8.

<sup>38</sup> **Exhibit 14**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 5 (7 Aug. 2020) (“**Hr. Tr., Day 5**”), 842:7-8 (Rasco Cross-Examination).

Verisign’s arguments below, and support our refutation of their arguments with testimony elicited from Mr. Livesay during his cross-examination in the IRP.

- **First**, NDC and Verisign point to transactions executed by Donuts, Inc. (“**Donuts**”) and Demand Media, Inc. (“**Demand Media**”) as precedents for the DAA.<sup>39</sup> But none of these transactions resemble the DAA. Unlike the Verisign-NDC deal, the Donuts/Demand Media deal was publicly disclosed **during the period for public comment and evaluation by ICANN**. Mr. Livesay accepted that this was in fact the case during his examination before the IRP Panel. He also conceded that the DAA was structured Redacted - Third Party Designated Confidential Information<sup>40</sup> Specifically, Mr. Livesay admitted that Donuts’ applications had disclosed Donuts’ partnership with Demand Media on backend registry services.<sup>41</sup> He acknowledged that Donuts executives were identified as the relevant contacts in each of these applications. For these reasons, it was clear to everyone during the Evaluation Period provided for by the New gTLD Applicant Guidebook that Donuts and Demand Media were partners in each of the applications.

Unlike the public disclosure of the Donuts/Demand Media partnership, NDC kept its deal with Verisign secret, Redacted - Third Party Designated Confidential Information

. As a result, neither the existence nor terms of the DAA were disclosed to ICANN for a year. ICANN only obtained a copy of the DAA when it was informally requested on a friendly basis by ICANN’s outside litigation counsel at Jones Day from Verisign’s (as opposed to NDC’s) litigation counsel, following Afilias’ formal post-auction complaints. The DAA was not provided to Afilias for more than two years, and then only after an independent arbitrator ordered ICANN to produce the document. The global Internet Community to-date has not been able to review the DAA to see how Verisign struck a secret deal Redacted - Third Party Designated Confidential Information

<sup>39</sup> **Exhibit 15**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 1 (3 Aug. 2020) (“**Hr. Tr., Day 1**”), 190:23 – 191:21 (Verisign Opening Presentation); **Exhibit 13**, Livesay WS, ¶¶ 8-9; **Exhibit 16**, Rasco WS, ¶ 43; **Exhibit 17**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Verisign, Inc.’s Pre-Hearing Brief (Phase II) (26 June 2020) (“**Verisign Br.**”), ¶ 41; **Exhibit 18**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, *Amicus Curiae* Brief of Nu Dotco, LLC (26 June 2020) (“**NDC Br.**”), ¶¶ 33-35.

<sup>40</sup> **Exhibit 12**, Hr. Tr., Day 7, 1175:6-14 (Livesay Cross-Examination).

<sup>41</sup> *Id.*, 1179:16-19 (Livesay Cross-Examination) (“Q: In Paragraph 23 of the .CITY application, Demand Media is identified as a partner for Donuts to provide back-end registry services, correct? A: Correct.”).

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<sup>42</sup> *Id.*, 1197:5-11 (Livesay Cross-Examination) (“Q: Mr. Livesay, when we were talking about the change request criteria, you noted that you had received draft agreements and these were, in your view, precedents for the DAA. Do you recall that testimony, sir? A. Right. These were some examples of that, yeah.”); **Exhibit 13**, Livesay WS, ¶ 14; **Exhibit 16**, Rasco WS, ¶ 44; **Exhibit 17**, Verisign Br., ¶ 42; **Exhibit 18**, NDC Br., ¶ 37; **Exhibit 15**, Hr. Tr., Day 1, 192:25 – 193:14 (Verisign Opening Presentation).

<sup>43</sup> Mr. Livesay testified that he did not review the agreement “in depth really at the time.” **Exhibit 12**, Hr. Tr., Day 7, 1195:4-8 (Livesay Cross-Examination).

<sup>44</sup> *Id.*, 1197:20-21 (Livesay Cross-Examination).

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- **Fourth**, NDC and Verisign repeatedly argued during the IRP that Afilias itself has engaged in transactions that were analogous to Verisign’s deal with NDC.<sup>47</sup> Yet Mr. Livesay was unable to testify about the details of those agreements or about how they were analogous to the DAA.<sup>48</sup> Indeed, the uncontroverted evidence adduced during the course of the IRP was that each of Afilias’ deals were agreed to only **after the relevant registry agreement had been fully executed with ICANN**. Accordingly, none of these transactions was governed by the terms of the Guidebook—they were subject to the terms of the applicable registry agreements, which specifically allow for post-delegation transfers of rights, on the premise that the proposed transferor of the those rights had obtained them legitimately.
- **Fifth**, NDC and Verisign assert that Automatic’s acquisition of the .BLOG gTLD from Primer Nivel mirrors the DAA. Automatic’s .BLOG deal could not have served as a precedent for the DAA, or otherwise informed Mr. Livesay’s understanding of market conditions when he negotiated the DAA, since this transaction post-dates the DAA.<sup>49</sup> Moreover, the terms of Automatic’s deal are unknown—there is no evidence to suggest that

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<sup>45</sup> *Id.*, 1187:3-9 (Livesay Cross-Examination); **Exhibit 13**, Livesay WS, ¶ 13.

<sup>46</sup> **Exhibit 12**, Hr. Tr., Day 7, 1190:6-9 (Livesay Cross-Examination).  
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(*id.*, 1187:3-9).

<sup>47</sup> **Exhibit 15**, Hr. Tr., Day 1, 193:16-21 (Verisign Opening Presentation); *id.*, 243:19–244:12 (NDC Opening Presentation); **Exhibit 17**, Verisign Br., ¶ 38; **Exhibit 18**, NDC Br., ¶¶ 38-39. NDC and Verisign cite deals concerning gTLDs .MEET, .PROMO, .ARCHI and .SKI specifically.

<sup>48</sup> **Exhibit 12**, Hr. Tr., Day 7, 1210:10-17 (Livesay Cross-Examination).

<sup>49</sup> *Id.*, 1208:1-6 (Livesay Cross-Examination) (“Q: So it’s fair to say that you did not discover information concerning the Automatic-Primer Nivel transaction as part of your research prior to the execution of the DAA, correct? A: That would seem to be the case, yeah.”).

Automattic acquired the same rights as Verisign did in the DAA.<sup>50</sup> Even assuming that Automattic’s deal was identical to the DAA, Primer Nivel’s conduct does not excuse NDC’s violations of the Guidebook: One possible example hardly constitutes industry practice. Moreover, if the terms of such transactions are concealed from the public (as with the DAA), how can they possibly be considered industry practice? ICANN itself would probably never have learned of the terms of the DAA had it not been for Afiliias’ complaints.

In short, there is absolutely no substance to NDC’s and Verisign’s position that the DAA reflected at the time or reflects current market practice. It is, as Mr. Rasco put it, “unprecedented.”

## 2. The DAA Is Not A “Financing Agreement”

In addition to arguing that the DAA reflected market practice (which, as shown above, is not true), NDC and Verisign have argued that the DAA was merely a financing arrangement. This argument, which was presented by NDC and Verisign’s counsel in the IRP, was shot down by Mr. Livesay.<sup>51</sup> Mr. Livesay testified on cross-examination that the DAA lacks any hallmarks of a financing agreement, such as terms defining the principal amount to be financed, the interest to be paid, the collateral received, or the obligation of the borrower to repay the principal and interest.<sup>52</sup> He further testified that

Redacted - Third Party Designated Confidential Information<sup>53</sup> that the DAA did not operate like either a bank loan<sup>54</sup> or  
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<sup>50</sup> *Id.*, 1209:19-22 (Livesay Cross-Examination) (“Q: And you don’t know any of the details about how the Automattic and Primer Nivel deal was structured, do you? A: No, I don’t have any window into that.”).

<sup>51</sup> **Exhibit 12**, Hr. Tr., Day 7, 1215:16-17 (Livesay Cross-Examination) (“I did not say this [was] a financing.”).

<sup>52</sup> *Id.*, 1215:16 – 1216:13 (Livesay Cross-Examination).

<sup>53</sup> *Id.*, 1212:23-25 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

<sup>54</sup> *Id.*, 1227:8-9 (Livesay Cross-Examination) (“I think comparing this to a mortgage is totally inappropriate.”).

<sup>55</sup> *Id.*, 1231:3-4 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

<sup>56</sup> *Id.*, 1231:25 – 1232:11 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

To the contrary, and unlike any financing deal, the evidence adduced during the hearing demonstrated that if Redacted - Third Party Designated Confidential Information

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

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Mr. Livesay went on to testify that Verisign  
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<sup>57</sup> *Id.*, 1217:14 – 1218:6 (Livesay Cross-Examination).

<sup>58</sup> *Id.*, 1229:23 – 1230:2 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

<sup>59</sup> *Id.*, 1229:12-16 (Livesay Cross-Examination) (admitting that if Redacted - Third Party Designated Confidential Information

<sup>60</sup> *Id.*, 1229:4-8 (Livesay Cross-Examination) (admitting that in Redacted - Third Party Designated Confidential Information

<sup>61</sup> *Id.*, 1229:4-8 (Livesay Cross-Examination).

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In sum, the DAA was truly as “unprecedented” as Mr. Rasco admitted during the IRP. Verisign negotiated terms Redacted - Third Party Designated Confidential Information

And despite discovering a “robust secondary market for TLDs,” NDC and Verisign remain unable to cite to a single transaction that comes close to replicating the unique control rights Verisign acquired in the DAA—the very control rights that, as demonstrated below, violate the New gTLD Program Rules.

### C. The Terms of the DAA Violate the New gTLD Program Rules.

As the Board is aware, the New gTLD Program Rules are “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”<sup>63</sup> Accordingly, the Rules must be interpreted and applied “in a manner that complies with and reflects [ICANN’s] Commitments and respects [ICANN’s] Core Values[.]”<sup>64</sup> This means that the New gTLD Program Rules must be applied in a consistent, neutral, objective, fair, non-discriminatory, and transparent manner that complies with relevant principles of international law, such as the principle of good faith.<sup>65</sup> For instance, the New gTLD Program Rules require transparency from both ICANN and the program applicants. Under the rules, applicants are required to provide significant details to ICANN about their business plan for the proposed gTLD; their financial, technical, and operational capabilities needed to operate a registry; and their management.<sup>66</sup> They are further required to maintain the accuracy and truthfulness of their applications at all times.<sup>67</sup> A secret agreement, especially one kept secret from ICANN and the Internet Community, contravenes this

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<sup>62</sup> *Id.*, 1230:5 – 1231:4 (Livesay Cross-Examination) (denying that Verisign and NDC entered into a “borrower-lender” relationship and then proposing and then rejecting analogy to venture capital, since Verisign did not have “an interest in the entity”).

<sup>63</sup> **Exhibit 19**, *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), ¶ 54 (quoting with approval Booking.com’s Request, ¶ 13).

<sup>64</sup> **Exhibit 20**, Bylaws, Sec. 1.2.

<sup>65</sup> **Exhibit 21**, Articles, Art. 2(III).

<sup>66</sup> **Exhibit 4**, AGB, pp. 1-4, 1-25, 6-2, A-5 – A-46.

<sup>67</sup> *Id.*, pp. 1-30, 6-2.



foundational principle of the New gTLD Program Rules and the plain text of the rules themselves.

NDC, as a consequence of its entry into and compliance with the DAA, violated the New gTLD Program Rules by (i) omitting material information from and failing to correct material misleading information in its .WEB application (**Section III.C.1**); (ii) repeatedly making material misstatements regarding its application to ICANN and other .WEB applicants (**Section III.C.2**); (iii) selling, assigning, or transferring the rights and obligations in its .WEB application to Verisign (**Section III.C.3**); and, (iv) submitting bids on Verisign's behalf at the ICANN Auction (**Section III.C.4**).

### 1. NDC Failed to Amend its Application

NDC's failure to disclose the terms of the DAA was an omission of material information that violated the New gTLD Program Rules, as the obligations that NDC assumed under the DAA fundamentally changed the nature of its application. The AGB requires applicants to warrant that all of the statements in their applications are at all times true, accurate, and complete.<sup>68</sup> Applicants are also required to "promptly" notify ICANN if any "change in circumstances" rendered the application to be "false or misleading," whether by virtue of material information included in or omitted from the application.<sup>69</sup> As stated in Module 6 of the AGB,

*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*

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<sup>68</sup> *Id.*, p. 6-2.

<sup>69</sup> *Id.*

*in circumstances that would render any information provided in the application false or misleading.*<sup>70</sup>

NDC ignored the AGB's rules and procedures for amending its application in favor of concealing the fact that Verisign had now become the real party-in-interest behind its application—after all, under the DAA, <sup>Redacted - Third Party Designated Confidential Information</sup>

NDC fundamentally deceived ICANN, other members of the .WEB Contention Set, and the entire Internet Community into believing that it was seeking to obtain .WEB for itself in order to compete against .COM (as stated in the Mission/Purpose statement of NDC's application).<sup>72</sup> However, NDC sold the rights in its .WEB application to Verisign, the .COM registry, rendering this representation entirely and irredeemably false.

In fact, once NDC entered into the DAA, NDC's application was no longer true, accurate, or complete in several respects. Specifically, the following provisions were rendered untrue, inaccurate, or incomplete as a result of the DAA:

- NDC represented that, if its Application prevailed, users of .WEB would “benefit from *the long-term commitment* of a *proven executive team* that has *a track-record of building and successfully marketing affinity TLD's*” such as .CO.<sup>73</sup>
- NDC represented that its “intention” was “for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's [i.e., NDC's] experience and expertise in marketing and branding TLD properties.”<sup>74</sup>

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<sup>70</sup> *Id.* (emphasis added); *see also id.*, p. 1-30 (“If at *any time* during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must *promptly notify ICANN* via submission of the appropriate forms.”) (emphasis added).

<sup>71</sup> **Exhibit 11**, DAA, Sec. 10(a).

<sup>72</sup> **Exhibit 22**, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012) (“**NDC .WEB Application**”), *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1053>, p. 7 (“The experienced team behind this application initially launched and currently operates the .CO ccTLD. The intention is for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's experience and expertise in marketing and branding TLD properties.”).

<sup>73</sup> *Id.*, p. 6 (emphasis added).

<sup>74</sup> *Id.* p. 7.

- NDC represented that, under its stewardship, .CO had “differentiated itself from other existing TLDs by combining *innovative branding*” with, *inter alia*, “*unprecedented marketing campaigns*,” and that NDC “*plan[ned] to implement a very similar strategy for .WEB in its launch, operation, promotion and growth.*”<sup>75</sup>
- NDC represented that, if its Application prevailed: “*We [i.e., NDC] plan to target a similar [i.e., to .CO] community of entrepreneurs, startups, and progressive corporate entities* that are looking for an online presence with a suitable domain name[,]” and that NDC’s “*marketing strategy will utilize a 3 pillar framework, similar to that used with .CO.*”<sup>76</sup>
- NDC represented that, if its Application prevailed, NDC “*plan[ned] to foster the community of users of .WEB via a combination [of] community engagement and outreach, use-case development and direct marketing to base.*”<sup>77</sup>
- NDC justified its pursuit of .WEB on the basis, *inter alia*, that it was seeking to challenge the dominance of “*older incumbent players*” (*e.g.*, Verisign).<sup>78</sup>
- NDC continued to identify itself as the “*applicant*,” that is, the “*entity that would enter into a Registry Agreement with ICANN.*”<sup>79</sup>

Not only were all of these specific representations to ICANN and the Internet Community false and misleading after NDC entered into the DAA with Verisign, the entire premise underlying NDC’s application—*i.e.*, that NDC was applying for the .WEB gTLD rights on its own behalf and for the reasons stated in its application (rather than on behalf of an undisclosed, non-applicant)—became false and misleading. Through the DAA,

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. The DAA therefore plainly constituted a “change of circumstances” that rendered “information provided in the application false or

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<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> *Id.* (emphasis added).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, p. 6.

<sup>79</sup> **Exhibit 4**, AGB, p. A-5; *see* **Exhibit 22**, NDC .WEB Application, p. 1. The final section of the public portions of NDC’s application provide a “demonstration of technical and operational capability.” *Id.*, pp. 13-18. Virtually all of the information provided in this part of the application is based on information provided by a third party that, following the execution of the DAA, ceased to have any role regarding the operation of .WEB.

misleading.”<sup>80</sup> Following the execution of the DAA, the sole purpose of NDC’s application was to Redacted - Third Party Designated Confidential Information . Yet NDC did not, as required, notify ICANN about this change in circumstances.<sup>81</sup> Redacted - Third Party Designated Confidential Information

## 2. NDC’s Material Misstatements

Pursuant to the AGB, “documents submitted and oral statements made and confirmed in writing in connection with the application” also had to be “true and accurate and complete in all material respects.”<sup>82</sup> NDC violated this “binding” and “material” requirement of the New gTLD Program Rules by repeatedly concealing Verisign’s control over NDC’s application.

In fact, during the *Afilias v. ICANN* merits hearing, NDC admitted that Jose Ignacio Rasco III (Co-founder, Co-manager, and Chief Financial Officer of NDC) *lied* to other applicants and *to ICANN* about the existence of the DAA and the effect that its terms had on NDC’s application and autonomy as an applicant. Indeed, Mr. Rasco attempted to spin his mendacity during the IRP, testifying that he told “*a little white lie* in order to get [Ruby Glen] off my back.”<sup>83</sup> But it was Mr. Rasco’s “white lie” that lay at the foundation of ICANN’s pre-auction investigation of NDC. And, over the course of that investigation, Mr. Rasco engaged in additional “white lies” to ICANN Staff and the ICANN Ombudsman. Specifically,

- Mr. Rasco deliberately avoided answering ICANN Staff’s direct inquiry about whether there was “any information that is no longer true and accurate in [NDC’s] application”<sup>84</sup> despite the numerous provisions of the application that were no longer accurate following NDC’s execution of the DAA.

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<sup>80</sup> **Exhibit 4**, AGB, p. 1-30.

<sup>81</sup> In fact, NDC could not unilaterally comply with its disclosure obligations in connection with the .WEB application. The DAA prohibited NDC Redacted - Third Party Designated Confidential Information **xhibit 11**, DAA, Sec. 10(a).

<sup>82</sup> **Exhibit 4**, AGB, p. 6-2.

<sup>83</sup> **Exhibit 14**, Hr. Tr., Day 5, 860:17-25; **Exhibit 15**, Hr. Tr., Day 1, 225:18-24 (NDC Opening Presentation) (“It’s a white lie that Mr. Rasco is telling Mr. [Nevett] at the time in that conversation. They had been colleagues in the Internet industry, and Mr. Rasco says, when Mr. [Nevett] was pressing him on who was making this decision, I just wanted to deflect. It is a natural thing to do. And out of that comes the complaints to ICANN.”).

<sup>84</sup> **Exhibit 23**, Emails between J. Erwin (ICANN) and J. Rasco (NDC) (27 June 2016).

- Mr. Rasco informed the ICANN Ombudsman that “[t]here have been no changes to the [NDC] application. ... I take my duties very seriously and for major decisions, I confer with the Members (i.e., shareholders), which again for clarification, have never changed.”<sup>85</sup> However, at the time, neither Mr. Rasco nor NDC’s other managers were making any “major decisions” (or even minor ones) in connection with NDC’s .WEB application. Under the terms of the DAA, Verisign was making all such decisions.
- Mr. Rasco verbally assured Christine Willett (Vice President of gTLD Operations, Global Domains Division) that NDC’s “application materials were still true and accurate” and that NDC’s “decision to not resolve the contention privately ... was in fact his.”<sup>86</sup> This was not true: by the express terms of the DAA, Redacted - Third Party Designated Confidential Information

In no respects was the decision not to participate in the planned private auction taken by Mr. Rasco or anyone else at NDC.<sup>87</sup>

NDC plainly and blatantly breached its warranty to ICANN 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.”<sup>88</sup> Moreover, NDC breached its obligation “to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.”<sup>89</sup> When expressly given the opportunity to notify ICANN that NDC’s application had in fact undergone a dramatic change in circumstances, Mr. Rasco responded by lying to and misleading ICANN. Mr. Rasco’s oral assertions—confirmed to ICANN in writing—that there had been no changes to NDC’s application and that he continued to make all “major decisions” in connection

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<sup>85</sup> **Exhibit 24**, Emails between C. LaHatte (Ombudsman) and J. Rasco (NDC) (7 July 2016).

<sup>86</sup> **Exhibit 25**, Emails between Chris LaHatte (ICANN) and Christine Willett (ICANN) (various dates), p. 2.

<sup>87</sup> Mr. Rasco’s attempts to downplay Verisign’s control over NDC’s actions during the merits hearing are, frankly, preposterous. He repeatedly claimed that “I made the decision that we [i.e., NDC] were going to an ICANN auction” because “I decided on entering the DAA.” **Exhibit 14**, Hr. Tr., Day 5, 855:14-18; *see id.*, 867:15-868:1, 872:1-9. Mr. Rasco ignores the undisputed fact that his decision to enter into the DAA was not a decision to forego a private auction for .WEB—it was a decision to give Verisign Redacted - Third Party Designated Confidential Information. **Exhibit 11**, DAA, Ex. A, Sec. 1(i).

<sup>88</sup> **Exhibit 4**, AGB, p. 6-2.

<sup>89</sup> *Id.*

with the .WEB application—were plainly and demonstrably misleading at best, outright false at worst. Either way, Mr. Rasco’s statements breached NDC’s duty to candor with ICANN as an applicant in the New gTLD Program.

### 3. The Resale, Transfer, or Assignment of NDC’s Application

In addition to its failure to disclose material information relevant to its application, NDC also breached the AGB’s prohibition against an applicant reselling, transferring, or assigning its application. The AGB states in unambiguous terms that an “[a]pplicant may not resell, assign, or transfer *any* of the applicant’s rights or obligations in connection with the application.”<sup>90</sup>

Contrary to the AGB’s anti-assignment clause,<sup>Redacted - Third Party Designated Confidential Information</sup>

For

instance,

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The AGB requires applicants “to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.”<sup>91</sup> However,<sup>Redacted - Third Party Designated Confidential Information</sup>

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Pursuant to the AGB, applicants “are encouraged to reach a settlement or agreement among themselves that resolves the contention.”<sup>93</sup> An applicant therefore has the right to choose to “withdraw their application,” “combin[e] in a way that does not materially affect the remaining application,” or participate in a private auction.<sup>94</sup> However, NDC<sup>Redacted - Third Party Designated Confidential Information</sup> represented and warranted to Verisign that

<sup>95</sup> NDC further<sup>Redacted - Third Party Designated Confidential Information</sup>

<sup>90</sup> *Id.*, p. 6-6 (emphasis added).

<sup>91</sup> *Id.*, p. 6-2.

<sup>92</sup> **Exhibit 11**, DAA, Sec. 4(f) (emphasis added).

<sup>93</sup> **Exhibit 4**, AGB, p. 4-6.

<sup>94</sup> *Id.*

<sup>95</sup> **Exhibit 11**, DAA, Sec. 4(j).

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Verisign and NDC thereby duped ICANN, along with all of the *bona fide* applicants for .WEB.

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The AGB explicitly requires that the *applicant* engage in the transition to delegation process for a gTLD.<sup>98</sup> However, Verisign is admittedly “engaged in ICANN’s process to move the delegation of .web forward.”<sup>99</sup>

Thus, there can be no question that NDC breached the New gTLD Program Rules—specifically the AGB—through the sale, assignment, and/or transfer of its rights and obligations in its .WEB application to Verisign.

#### 4. Each of NDC’s Bids at the ICANN Auction Were Invalid Under the New gTLD Program Rules

Additionally, NDC did not comply with the Auction Rules governing the ICANN Auction. The AGB provides that “[o]nly bids that comply with *all aspects* of the auction rules will

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<sup>96</sup> *Id.*, Ex. A, Sec. 1(i) (emphasis added).

<sup>97</sup> *Id.*, p. 16 (emphasis added).

<sup>98</sup> See **Exhibit 4**, AGB, Module 5 (discussing the applicant’s obligations regarding the transition to delegation process).

<sup>99</sup> **Exhibit 26**, Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), p. 4.

be considered valid.”<sup>100</sup> Hence, NDC’s failure to comply with *any* of the Auction Rules renders its bids invalid. And NDC failed to comply with a significant number of Auction Rules, including the following:

- The Auction Rules provide that “[p]articipation in an Auction is limited to *Bidders*.”<sup>101</sup> It defines “Bidders” as either: (1) a “Qualified Applicant;” or (2) a “Designated Bidder” of a Qualified Applicant.<sup>102</sup> A Qualified Applicant is defined as “[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.”<sup>103</sup> Verisign 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. Verisign was therefore not a Bidder under the Auction Rules; yet, Verisign nonetheless participated in the ICANN Auction through NDC by virtue of the DAA.
- The Auction Rules provide that a Bidder may only “bid on *its* behalf”<sup>104</sup> and that each “Bid must be placed *by a Bidder for its Application in an Open Contention Set*”<sup>105</sup> at an ICANN-administered auction. Although NDC was obligated under the auction rules to participate in the ICANN Auction “on its own behalf,”<sup>106</sup> NDC was contractually obligated to participate in the ICANN Auction Redacted - Third Party Designated Confidential Information
- 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

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<sup>100</sup> **Exhibit 4**, AGB, p. 4-22 (emphasis added).

<sup>101</sup> **Exhibit 5**, Auction Rules, ¶ 12 (at p. 2) (emphasis added).

<sup>102</sup> *Id.*, p. 16.

<sup>103</sup> *Id.*, p. 19 (emphasis added).

<sup>104</sup> *Id.*, p. 3 (emphasis added).

<sup>105</sup> *Id.*, ¶ 40(b) (at p. 7) (emphasis added).

<sup>106</sup> **Exhibit 9**, ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt), p. 1.

<sup>107</sup> **Exhibit 11**, DAA, Ex. A, Sec. 1.



favor of its Application.”<sup>108</sup> Although NDC was obligated to submit bids at the ICANN Auction that reflected the amount that *it* was willing to pay for .WEB, NDC was contractually obligated to Redacted - Third Party Designated Confidential Information

For these reasons, none of NDC’s bids complied with “all aspects of the auction rules.”<sup>110</sup>

The foregoing is simply an outline of NDC’s various breaches of the New gTLD Program Rules. Afilias reserves the right to present further evidence and additional information to the Board in this regard at the appropriate time.

### **III. THE ICANN BOARD MUST DISQUALIFY NDC PURSUANT TO THE NEW GTLD PROGRAM RULES**

In order to comply with its Bylaws-imposed obligation to enforce the New gTLD Program Rules,<sup>111</sup> the ICANN Board must disqualify NDC’s application for the .WEB gTLD (**Section III.A**) and NDC’s bids at the ICANN Auction (**Section III.B**). The New gTLD Program Rules further permit ICANN to deem NDC ineligible to enter into a registry agreement and to delegate the .WEB gTLD to Afilias (as the second-highest bidder at the ICANN Auction) (**Section III.C**).

#### **A. ICANN Must Disqualify NDC’s Application for .WEB**

The ICANN Board must disqualify NDC’s application in order to ensure that (1) the New gTLD Program embodies transparency, openness, and accountability; (2) enables competition and open entry in Internet-related markets; and (3) applies standards and documented polices consistently, neutrally, objective, fairly, and in a non-discriminatory manner.

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<sup>108</sup> **Exhibit 5**, Auction Rules, p. 5 (emphasis added).

<sup>109</sup> **Exhibit 11**, DAA, Ex. A, Sec. 1(h).

<sup>110</sup> **Exhibit 4**, AGB, p. 4-22.

<sup>111</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a)(v) (imposing on ICANN an obligation to make “decisions by applying documented policies consistently, neutrally, objectively, and fairly[.]”).

*First*, ICANN must exercise any discretion that it has consistent with its Articles and Bylaws. The AGB provides that each 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.”<sup>112</sup> NDC’s aforementioned breaches made a mockery of the most basic principles by which ICANN was required to implement the New gTLD program, including openness, transparency, fairness, equal treatment of the applicants, and “the participation of many stakeholder groups in a public discussion.”<sup>113</sup> Furthermore, by failing to disqualify NDC’s application for its material misstatements, misrepresentations, and omissions, the ICANN Board will allow NDC and Verisign to deceive not only ICANN, but the entire Internet Community—ranging from the other .WEB applicants who acted in good faith and followed the New gTLD Program Rules, to the consumers and users of Internet services who were falsely led to believe that they had the opportunity to review and comment on the applications of all applicants who were seeking the gTLD rights in .WEB.

*Second*, NDC must be prohibited from entering into a Registry Agreement because it cannot comply with the representations and warranties therein. ICANN’s standard form Registry Agreement, which is incorporated into the AGB, states:

Registry Operator represents and warrants to ICANN ... [that] *all material information* provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and *such information or statements continue to be true and correct in all material respects* as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN[.]<sup>114</sup>

NDC’s application remains untrue and inaccurate, as discussed above, and therefore NDC cannot comply with the above requirements of completeness, truthfulness, and accuracy.

*Third*, the ICANN’s Bylaws require that ICANN “enable competition” and “[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and

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<sup>112</sup> **Exhibit 4**, AGB, p. 6-2.

<sup>113</sup> *Id.*, p. 1-5.

<sup>114</sup> *Id.*, New gTLD Agreement, Sec. 1.3(a)(i).

beneficial to the public interest[.]”<sup>115</sup> The ICANN Board launched the New gTLD Program “in fulfillment of a core part of ICANN’s Bylaws: [namely] the introduction of competition and consumer choice in the DNS.”<sup>116</sup> Indisputably, the .COM gTLD—run by Verisign—dominates that domain name space. The .WEB gTLD is widely seen as the best potential competitor to .COM from the New gTLD Program. As a result of NDC’s various breaches of the New gTLD Program Rules, Verisign, long the dominant player in the DNS, stands at the precipice of acquiring the next best alternative to its dominant .COM registry, despite not having applied for .WEB and not having informed ICANN or the global Internet Community of its intention to do so. Verisign’s secret “indirect participation” in the .WEB Contention Set through NDC was plainly an effort to mislead ICANN and the global Internet Community which rightly would be concerned about Verisign’s attempt to corner the market on “truly generic gTLDs.” The ICANN Board must uphold its mandate to “enable competition” and disqualify NDC’s .WEB application for its blatant violations of the New gTLD Program Rules. In doing so, the ICANN Board will protect and promote competition within the DNS—*i.e.*, one of the principal purposes of the New gTLD Program, and indeed, of ICANN.

**Fourth**, by allowing Verisign secretly to take over NDC’s application—to “indirectly participate” in the contention set and to seek to become the registry operator for .WEB under the cover of NDC’s application—ICANN 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” 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>117</sup> Other applicants in the .WEB Contention Set—who followed the “clear roadmap”<sup>118</sup> provided by the New gTLD Program 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 the subject to the public notice and comment and evaluation process, and without ever being required to disclose even its

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<sup>115</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a), 1.2(b)(iv).

<sup>116</sup> **Exhibit 27**, ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), *available at* <https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>, p. 7.

<sup>117</sup> *See, e.g.*, **Exhibit 19**, *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), ¶¶ 11, 14 (*quoting Exhibit 4*, AGB, *Preamble*).

<sup>118</sup> *See, e.g., id.*, ¶ 14 (*quoting Exhibit 4*, AGB, *Preamble*).

interest in the .WEB gTLD until *after* the contention set was resolved in favor of its agent, NDC.

### B. ICANN Must Disqualify NDC's Bids at the ICANN Auction

Independently, ICANN is further required to disqualify NDC's bids as invalid. For the reasons discussed above, each bid that NDC placed <sup>Redacted - Third Party Designated Confidential Informa</sup> was invalid under the New gTLD Program Rules because “[o]nly bids that comply with *all aspects* of the auction rules will be considered valid.”<sup>119</sup> As discussed at **Section II.C.4** above, each of NDC's bids at the ICANN Auction failed to fully comply with the auction rules. Specifically, each of NDC's bids were, as provided for in the DAA, submitted Redacted - Third Party Designated Confidential Information

Under the Auction Rules, an invalid bid *must* be treated as “an exit bid at the start-of-round price for the current auction round.”<sup>120</sup> In other words, each of NDC's bids was required to be treated as “an exit bid.” NDC should never have been allowed to move to the next bidding round because, once its subterfuge was discovered, all of its bids should have been declared in default—from its opening bid to its winning bid. As stated by 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 been 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.*<sup>121</sup>

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<sup>119</sup> **Exhibit 4**, AGB, p. 4-22 (emphasis added).

<sup>120</sup> *Id.*, p. 4-23.

<sup>121</sup> **Exhibit 5**, Auction Rules, ¶¶ 58-59 (emphasis added); **Exhibit 4**, AGB, p. 4-26 (“Once declared in default, any winning bidder is subject to immediate forfeiture of its position in the auction and assessment of default penalties. After a winning bidder is declared in default, the remaining bidders will

There is nothing in the New gTLD Program Rules to suggest that ICANN has any discretion to do anything other than disqualify each of NDC's invalid bids. The ICANN Board is required to declare NDC's bids in default and offer .WEB to Afilias as the second highest bid after NDC's bid is disqualified.<sup>122</sup>

The Auction Rules—and ICANN's lack of discretion in enforcing them—are consistent with ICANN's governing principles of openness, fairness, accountability, good faith and non-discrimination. If the application or the bid of a "Winning Bidder" is disqualified by ICANN, then it is only fair that the "Qualified Applicant" with the next highest bid should be offered the opportunity to obtain the TLD rights subject to payment of its exit bid. That applicant (in this case, Afilias) will have gone through the expensive, arduous, and multi-year process of reaching the ICANN Auction phase, and will have submitted the highest valid bid to acquire the rights to the Domain.

### C. ICANN Must Declare NDC Ineligible to Enter into a Registry Agreement

ICANN is authorized to (and should) declare NDC ineligible to enter into a Registry Agreement as a consequence of NDC's repeated violations of the New gTLD Program Rules. ICANN requires that registries represent and warrant to ICANN that "***all material information*** provided and statements made in the registry TLD application ... were true and correct in all material respects at the time made, and ***such information or statements continue to be true and correct in all material respects***" in the Registry Agreement; NDC cannot validly make such as representation for the reasons stated above, and therefore cannot validly enter into a Registry Agreement with ICANN.<sup>123</sup>

Such relief is warranted. ICANN has expressly contemplated the possibility that the winning applicant of an ICANN-administered auction may later be declared ineligible to enter into a Registry Agreement. According to the Auction Rules,

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 ... ***will receive offers to have their Applications accepted, one at a time, in***

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receive an offer to have their applications accepted, one at a time, in descending order of their exit bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price.").

<sup>122</sup> See Exhibit 5, Auction Rules, ¶¶ 58-59

<sup>123</sup> *Id.*, New gTLD Agreement, Sec. 1.3(a)(i).

***descending order of and subject 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>124</sup>

ICANN should therefore declare that NDC ineligible to enter into a Registry Agreement with ICANN for the .WEB gTLD as a consequence of NDC's repeated violations of the New gTLD Program Rules. As a consequence of NDC's ineligibility, ICANN must then offer the .WEB gTLD to Afilias, the second-highest bidder at the ICANN Auction. The Auction Rules do not grant ICANN Staff or the ICANN Board discretion over the matter.<sup>125</sup>

#### **IV. ICANN MUST COMPLY WITH ITS TRANSPARENCY OBLIGATIONS**

The ICANN Bylaws require that ICANN hold itself to high standards of transparency and openness.<sup>126</sup> These standards require that ICANN (1) operate "through open and transparent processes";<sup>127</sup> (2) "[p]reserve and enhance the ... openness of the DNS and the Internet;"<sup>128</sup> (3) "employ[] open, transparent and bottom-up, multistakeholder policy development processes;"<sup>129</sup> and (4) "operate to the ***maximum extent feasible in an open and transparent manner*** and consistent with procedures designed to ensure fairness".<sup>130</sup> Complete transparency in regards to the .WEB gTLD is further underscored by the *Afilias v. ICANN* IRP Panel's determination that, in its treatment of Afilias' complaints about NDC's conduct, the Board violated its "commitment to operate 'in an open and transparent manner and consistent with procedures to ensure fairness.'"<sup>131</sup>

ICANN has failed to comply with this commitment to transparency in two significant ways, and must act quickly in order to rectify these failures.

***First***, ICANN has kept the DAA confidential. ICANN must disregard its self-imposed and unjustifiable obligation to keep the document confidential because ICANN's present position sends a message to all future New gTLD Program applicants that ICANN will

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<sup>124</sup> **Exhibit 5**, Auction Rules, ¶ 62 (emphasis added).

<sup>125</sup> **Exhibit 5**, Auction Rules, ¶ 62 (noting that the next applicant "will receive [an] offer[]").

<sup>126</sup> **Exhibit 20**, Bylaws, Secs. 1.2(a); 1.2(a)(i); 1.2(a)(iv); *id.*, Art. 3.

<sup>127</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a).

<sup>128</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a)(i).

<sup>129</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a)(iv).

<sup>130</sup> **Exhibit 20**, Bylaws, Sec. 3.1 (emphasis added).

<sup>131</sup> **Exhibit 1**, IRP Decision, ¶ 332.

allow them to engage in subterfuge and keep secrets from ICANN and other applicants without reprimand or censure. The ICANN Board must not set this precedent, especially since disclosure not only is in line with ICANN’s transparency obligations but also sets strong precedent that ICANN will not tolerate attempts to undermine core ICANN principles, such as ensuring “open and transparent processes”<sup>132</sup> and “operat[ing] to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”.<sup>133</sup>

**Second**, ICANN has not posted the *Afilias v. ICANN* hearing transcripts. The *Afilias v. ICANN* hearing occurred **over one year ago**, and still only the IRP participants have access to the transcripts. Such a delay is simply unacceptable, especially in light of ICANN’s obligation to operate “with **efficiency** and excellence”.<sup>134</sup> In fact, ICANN’s own counsel **agree** that the transcripts must be made public, as seen by Mr. Eric Enson’s assertion that “ICANN will be posting transcripts of the .WEB hearing” on **11 June 2021**.<sup>135</sup> Yet, over 14 months after the hearing and over four months after ICANN’s reassurance, the transcripts remain private. The ICANN Board cannot allow the continued concealment of these important IRP documents from the Internet community.

The ICANN Board, in order to comply compliance with the transparency obligations under the Bylaws, as interpreted by the *Afilias v. ICANN* IRP Panel, must adopt fairer and more transparent practices in regards to the .WEB gTLD—such as by ensuring that both the DAA and the *Afilias v. ICANN* hearing transcripts are hastily made available to the Internet community.

## V. CONCLUSION

When the question of NDC’s compliance with the New gTLD Program Rules is properly before the ICANN Board—i.e., after the *Afilias v. ICANN* IRP Panel issues its decision on Afilias’ Article 33 Application, and any follow-on litigation—the ICANN Board must apply the New gTLD Program Rules in a consistent, neutral, fair, and transparent manner that complies with international law. As shown above, the application of those rules in such a manner necessitates the disqualification of NDC’s .WEB application and the rejection of its bids at the auction. The rules also require that the Board deem NDC ineligible to enter into a registry agreement for .WEB and to offer the .WEB gTLD to one

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<sup>132</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a).

<sup>133</sup> **Exhibit 20**, Bylaws, Sec. 3.1 (emphasis added).

<sup>134</sup> **Exhibit 20**, Bylaws, Sec. 1.2(b)(v).

<sup>135</sup> **Exhibit 6**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Email from E. Enson (Counsel for ICANN) to Afilias and *Amici* (11 June 2021).

of the remaining Bidders, “one at a time, in descending order of and subject 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>136</sup> The Board simply cannot sanction the manner in which NDC and Verisign subverted the application process for .WEB and act consistently with its Articles, Bylaws, and Rules themselves. Were it to do so, it would have rendered the entire New gTLD Program system a nullity, while also making a mockery of the basic principles by which—according to ICANN’s Articles and Bylaws—ICANN *must* operate.

In order to facilitate the ICANN Board’s proper evaluation and application of the New gTLD Program Rules, at the appropriate time, Afilias requests permission to make an oral presentation to the ICANN Board on the .WEB matter.

Afilias further reserves all of its rights and remedies in all available fora whether within or outside of the United States of America in regards to this matter.

Sincerely,



Arif Hyder Ali  
*Counsel for Altanovo Domains Limited*

Enclosures (Exhibits 001-027)

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<sup>136</sup> Exhibit 5, Auction Rules, ¶¶ 58-59.



**LIST OF EXHIBITS**

No.	Description
Exhibit 1	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Final Decision (20 May 2021, as corrected 15 July 2021)
Exhibit 2	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, ICANN’s Rejoinder Memorial in Response to Afilias’ Amended Request for Independent Review (1 June 2020)
Exhibit 3	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Witness Statement of Christopher Disspain (1 June 2020), <i>available at</i> <a href="https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-disspain-01jun20-en.pdf">https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-disspain-01jun20-en.pdf</a>
Exhibit 4	ICANN, gTLD Applicant Guidebook (4 June 2012), <i>available at</i> <a href="https://newgtlds.icann.org/en/applicants/agb">https://newgtlds.icann.org/en/applicants/agb</a> (last accessed 25 Oct. 2021)
Exhibit 5	Power Auctions LLC, Auction Rules for New gTLDs: Indirect Contentions Edition (24 Feb. 2015)
Exhibit 6	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Email from E. Enson (Counsel for ICANN) to Afilias and <i>Amici</i> (11 June 2021)
Exhibit 7	Text Message (from cell phone belonging to J. Rasco) (21 July 2016)
Exhibit 8	Kevin Murphy, “Donuts joins fight to delay .web gTLD auction with emergency appeal,” <i>Domain Incite</i> (20 July 2016, 10:49 (UTC)), <i>available at</i> <a href="http://domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal">http://domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal</a>
Exhibit 9	ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt)
Exhibit 10	<i>Ruby Glen, LLC v. ICANN</i> , C.D. Cal., Case No. 2:16-cv-5505, Declaration of Russ Weinstein In Support Of Defendant’s Opposition To Plaintiff’s Ex Parte Application For Temporary Restraining Order (25 July 2016), <i>available at</i> <a href="https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-weinstein-25jul16-en.pdf">https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-weinstein-25jul16-en.pdf</a>
Exhibit 11	Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC (25 Aug. 2015)

No.	Description
Exhibit 12	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 7 (11 Aug. 2020)
Exhibit 13	<i>Afilias 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)
Exhibit 14	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 5 (7 Aug. 2020)
Exhibit 15	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 1 (3 Aug. 2020)
Exhibit 16	Witness Statement of Jose Ignacio Rasco III (1 June 2020)
Exhibit 17	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Verisign, Inc.'s Pre-Hearing Brief (Phase II) (26 June 2020)
Exhibit 18	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Amicus Curiae Brief of Nu Dotco, LLC (26 June 2020)
Exhibit 19	<i>Booking.com B.V. v. ICANN</i> , ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015)
Exhibit 20	ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 28 Nov. 2019), <i>available at</i> <a href="https://www.icann.org/resources/pages/governance/bylaws-en">https://www.icann.org/resources/pages/governance/bylaws-en</a> (last accessed 25 Oct. 2021)
Exhibit 21	ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016), <i>available at</i> <a href="https://www.icann.org/resources/pages/governance/articles-en">https://www.icann.org/resources/pages/governance/articles-en</a> (last accessed on 25 Oct. 2021)
Exhibit 22	New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012), <i>available at</i> <a href="https://gtdresult.icann.org/applicationstatus/applicationdetails/1053">https://gtdresult.icann.org/applicationstatus/applicationdetails/1053</a>
Exhibit 23	Emails between J. Erwin (ICANN) and J. Rasco (NDC) (27 June 2016)
Exhibit 24	Emails between C. LaHatte (Ombudsman) and J. Rasco (NDC) (7 July 2016)

No.	Description
Exhibit 25	Emails between Chris LaHatte (ICANN) and Christine Willett (ICANN) (various dates)
Exhibit 26	Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018)
Exhibit 27	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), <i>available at</i> <a href="https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf">https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf</a>

## **Exhibit 1**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Final  
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available at

<https://www.icann.org/en/system/files/files/irp-afilias-corrected-final-declaration-redacted-15jul21-en.pdf>.

## **Exhibit 2**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, ICANN's Rejoinder Memorial in Response to Afilias' Amended Request for Independent Review (1 June 2020), available at

<https://www.icann.org/en/system/files/files/irp-afilias-icann-response-amended-request-01jun20-en.pdf>.

### **Exhibit 3**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702,  
Witness Statement of Christopher Disspain (1 June 2020),  
available at

<https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-disspain-01jun20-en.pdf>.

## **Exhibit 4**

ICANN New gTLD Applicant Guidebook (4 June 2012),  
available at

[https://newgtlds.icann.org/en/applicants/agb/guidebook  
-full-04jun12-en.pdf](https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf).

## **Exhibit 5**

Power Auctions LLC, Auction Rules for New gTLDs: Indirect Contentions Edition (24 Feb. 2015), available at <https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c1-c58-redacted-26nov18-en.pdf>, Exhibit C-4.



## **Exhibit 6**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Email  
from E. Enson (Counsel for ICANN) to Afilias and Amici  
(11 June 2021)

**From:** [Enson, Eric P.](#)  
**To:** [Ali, Arif](#); [de Gramont, Alexandre](#); [EXT elitwin@constantinecannon.com](mailto:EXT.elitwin@constantinecannon.com); [Wong, Rosey](#); [Attanasio, David](#); [Losco, Michael](#); [Sarjveladze, Tamar](#); [Defriez, Henry](#); [Aviles Alfaro, Anna](#); [Ron Johnston](#); [Blackburn, James S.](#); [Chedid, Maria](#); [Steve Marenberg](#)  
**Cc:** [LeVee, Jeffrey A.](#); [Smith, Steven L.](#); [Wallach, David L.](#); [Ozurovich, Kelly M.](#)  
**Subject:** .WEB - Posting of Hearing Transcripts  
**Date:** Friday, June 11, 2021 5:51:48 PM  
**Attachments:** [Hearing Transcripts.zip](#)

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[EXTERNAL EMAIL]

Dear all,

ICANN will be posting transcripts of the .WEB hearing. Copies are attached. If you have any proposed redactions to the transcripts that you would like ICANN to consider before posting, please let us know by June 30. Thank you.

Eric

Eric P. Enson

[JONES DAY® - One Firm Worldwide<sup>SM</sup>](#)

Los Angeles +1.213.243.2304

San Francisco +1.415.963.6994

Mobile Contact Information Redacted

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## **Exhibit 7**

Text Message (from cell phone belonging to J. Rasco) (21  
July 2016)

Thu, Jul 21, 1:54 PM

Talk?

Fri, Jul 22, 10:24 AM

IF ICANN delays the auction  
next week would you again  
consider a private auction? Y-N

## **Exhibit 8**

Kevin Murphy, “Donuts joins fight to delay .web gTLD auction with emergency appeal,” Domain Incite (20 July 2016), available at <http://www.domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal>.

## **Exhibit 9**

ICANN New gTLD Auctions Bidder Agreement (3 April 2014), available at

<https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c1-c58-redacted-26nov18-en.pdf>, Exhibit C-5.

## **Exhibit 10**

Ruby Glen, LLC v. ICANN, C.D. Cal., Case No. 2:16-cv-5505, Declaration of Russ Weinstein In Support Of Defendant's Opposition To Plaintiff's Ex Parte Application For Temporary Restraining Order (25 July 2016), available at <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-weinstein-25jul16-en.pdf>.

## **Exhibit 11**

Domain Acquisition Agreement between VeriSign, Inc.  
and Nu Dotco LLC (25 Aug. 2015)

Exhibit Redacted – Third Party Designated Confidential  
Information



## **Exhibit 12**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Merits  
Hearing, Transcript Day 7 (11 August 2020)

To Be Published at Afilias Domains No. 3 Limited (.WEB)  
IRP Page, available at

[https://www.icann.org/resources/pages/irp-afilias-v-  
icann-2018-11-30-en](https://www.icann.org/resources/pages/irp-afilias-v-icann-2018-11-30-en).

## **Exhibit 13**

Afilias v. ICANN, 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), available at  
<https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-livesay-redacted-01jun20-en.pdf>.

## **Exhibit 14**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Merits  
Hearing, Transcript Day 5 (7 August 2020)

To Be Published at Afilias Domains No. 3 Limited (.WEB)  
IRP Page, available at

<https://www.icann.org/resources/pages/irp-afili-as-v-icann-2018-11-30-en>.

## **Exhibit 15**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Merits  
Hearing, Transcript Day 1 (3 August 2020)

To Be Published at Afilias Domains No. 3 Limited (.WEB)  
IRP Page, available at

<https://www.icann.org/resources/pages/irp-afili-as-v-icann-2018-11-30-en>.

## **Exhibit 16**

Witness Statement of Jose Ignacio Rasco III (1 June 2020), available at

<https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-rasco-iii-redacted-01jun20-en.pdf>.

## **Exhibit 17**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702,  
Verisign, Inc.'s Pre-Hearing Brief (Phase II) (26 June  
2020), available at

<https://www.icann.org/en/system/files/files/irp-afiliias-amicus-curiae-brief-verisign-redacted-26jun20-en.pdf>.

## **Exhibit 18**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Amicus Curiae Brief of Nu Dotco, LLC (26 June 2020), available at <https://www.icann.org/en/system/files/files/irp-afilias-amicus-curiae-brief-nu-dotco-redacted-26jun20-en.pdf>.

## **Exhibit 19**

Booking.com B.V. v. ICANN, ICDR Case No. 50-20-1400-0247, Final Declaration (3 March 2015), available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.



## **Exhibit 20**

Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 28 November 2019), available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

## **Exhibit 21**

Amended and Restated Articles of Incorporation of  
Internet Corporation for Assigned Names and Numbers  
(approved on 9 August 2016), available at  
[https://www.icann.org/resources/pages/governance/arti  
cles-en](https://www.icann.org/resources/pages/governance/articles-en).

## **Exhibit 22**

New gTLD Application for .WEB Submitted to ICANN by  
NU DOT CO LLC, Application ID: 1-1296-36138 (posted 13  
June 2012), available at

[https://gtdresult.icann.org/applicationstatus/application  
details:downloadapplication/1053?t:ac=1053](https://gtdresult.icann.org/applicationstatus/application<br/>details:downloadapplication/1053?t:ac=1053).

## **Exhibit 23**

Emails between J. Erwin (ICANN) and J. Rasco (NDC) (27 June 2016), available at

<https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c-89-124-ca-15-26-redacted-04may20-en.pdf>,

Exhibit C-96.

## **Exhibit 24**

Emails between C. LaHatte (Ombudsman) and J. Rasco  
(NDC) (7 July 2016), available at

<https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>,

Exhibit E.

## **Exhibit 25**

Emails between Chris LaHatte (ICANN) and Christine Willett (ICANN) (various dates), available at <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>,  
Exhibit D.

## **Exhibit 26**

Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 February 2018), available at <https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c1-c58-redacted-26nov18-en.pdf>, Exhibit C-47.

## **Exhibit 27**

ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), available at <https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>.