

INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS,

Respondent.

ICDR CASE NO: 01-18-0004-2702

**REQUEST BY VERISIGN, INC. TO PARTICIPATE AS  
*AMICUS CURIAE* IN INDEPENDENT REVIEW PROCESS**

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VeriSign, Inc. (“Verisign”) hereby submits this Request to Participate as an *Amicus Curiae* in the Independent Review Process (“IRP”) initiated by claimant Afilias Domains No. 3 Limited (“Afilias”) on November 14, 2018, including participation in the pending Request for Emergency Panelist and Interim Measures of Protection (“Interim Relief Request”). On the granting of this Request, Verisign will submit separate responses to the Requests of Afilias for Independent Review and Interim Relief. Nu Dotco, LLC (“NDC”), referenced below, also is filing a request to participate as an *amicus curiae* in this IRP.

## I. INTRODUCTION

1. Through this IRP, Afilias seeks to (i) contravene the contract rights of NDC to enter into a Registry Agreement with ICANN for the .web gTLD; (ii) interfere with Verisign’s right to operate the .web gTLD upon the consent of ICANN to an assignment of the Registry Agreement to Verisign; and (iii) preliminarily and permanently enjoin the transfer or delegation to Verisign or NDC of the .web gTLD. Verisign is a real party in interest in this IRP. It is threatened with irreparable injury and a serious impairment of its rights both by the request for an emergency stay and the permanent relief sought by Afilias in this IRP.

2. NDC is the winner of the public auction for .web, having paid \$135 million for the right to operate the .web gTLD. Verisign is the prospective assignee of .web under its executory contract with NDC, subject to the condition that ICANN consent to the assignment of a Registry Agreement between NDC and ICANN. Afilias seeks a declaration that (i) “ICANN must disqualify NDC’s bid for .web” because of Verisign’s financial arrangement with NDC; and (ii) ICANN must award the right to operate .web to Afilias. (IRP at p. 25). Afilias postures its allegations, plainly in fact directed against Verisign and NDC, as a strained claim that ICANN violated its Articles and Bylaws by failing to credit Afilias’s allegations and disqualify NDC. Indeed, NDC’s and Verisign’s alleged conduct during the application process and auction for the

.web gTLD is the gravamen of each of Afiliás's claims, including those alleging (without merit) violations of ICANN's Bylaws.<sup>1</sup>

3. Under the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (the "Supplementary Procedures"), Verisign has material interests in this Dispute that mandate it be allowed to participate as an *amicus* in this proceeding. Appendix, Ex. 1. Verisign should not be forced to sit on the sidelines while Afiliás seeks to use this IRP to unwind the results of the public auction and contravene its contract rights.

4. Granting Afiliás's requested stay, or Afiliás's request for permanent relief reversing the award of the .web gTLD, without participation by both Verisign and NDC would be fundamentally unfair, a failure of due process, and render the decision unenforceable. It is a well-established principle of law that neither a court nor an arbitration panel is permitted to adjudicate a party's interests without the participation of the party. *See, e.g., Martin v. City of Corning*, 25 Cal. App. 3d 165, 169 (1972) (party to contract that action sought to enjoin was an *indispensable party* to the proceeding as "his interests would inevitably be affected by a judgment rendering the contract void or enjoining further payment to him thereunder."); *Miracle Adhesives Corp. v. Peninsula Tile Contractors' Assn.*, 157 Cal. App. 2d 591, 593 (1958) ("Persons 'whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action' are indispensable parties, and *the action cannot proceed without them.*") (emphasis added). Arbitration panels are not immune from these basic principles of due process and fairness. *See Westra Constr., Inc. v. U.S. Fid. & Guar. Co.*, No. 1:03-cv-0833, 2006 WL 1149252, at \*2 (M.D. Pa. Apr. 28, 2006) (a nonparty to an arbitration can challenge an arbitration award "when the nonparty is adversely affected by the decision."). For the same reasons, proceeding with Afiliás's requests either for preliminary or permanent injunctive relief

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<sup>1</sup> In reality, the IRP is simply a continuation of Afiliás's years-long campaign to interfere with Verisign's and NDC's contractual rights regarding .web for Afiliás's own financial benefit. ICANN is the respondent in name only. There is no doubt that NDC and Verisign are the real targets of Afiliás's IRP, both by reason of the claims made and the relief sought.

in the absence of Verisign and NDC would be contrary to the policies underlying the Supplemental Procedures (see Bylaws, § 4.3(n)(iv)), which “are intended to ensure *fundamental fairness and due process*,” and the Supplementary Procedures, which mandate that the IRP Panel “lean in favor” of broad participation of an *amicus curiae* and require that the Emergency Panelist weigh the “balance of hardships,” which must include the interests of the persons impacted by the requested relief (see Supplementary Procedures, § 7 at fn.4, § 10 at p.12). Appendix, Exs. 1-2 (emphasis added).

5. Verisign requests that it be granted the right to participate as an *amicus curiae* in Afilias’s IRP, including by but not limited to: (i) submission of briefs on all substantive issues considered by the Emergency Panelist or the IRP Panel, including Afilias’s Interim Relief Request; (ii) submission of evidence relevant to the claims made by Afilias in its IRP, including in connection with Afilias’s Interim Relief Request; (iii) access to all filings or evidence submitted by either ICANN or Afilias in the IRP; and (iv) full participation in any hearings before the Emergency Panelist or the IRP Panel.

## **II. VERISIGN SHOULD BE ALLOWED TO PARTICIPATE AS AMICUS BECAUSE IT HAS A “MATERIAL INTEREST” IN THIS DISPUTE**

6. Pursuant to the Supplementary Procedures, “[a]ny person, group, or entity that has a material interest relevant to the Dispute . . . may participate as an *amicus curiae* before an IRP Panel . . .” (Appendix, Ex. 1, Oct. 25, 2018 Supplementary Procedures, Section 7). Certain entities are automatically “deemed to have a material interest relevant to the Dispute,” including entities that were “part of a contention set for the string at issue in the IRP” and entities whose actions are significantly referred to in briefings before the IRP Panel. (*Id.*) The Supplementary Procedures *require* that entities with a material interest relevant to the Dispute “*shall* be permitted to participate as an *amicus* before the IRP Panel.” (*Id.*) (emphasis added).

7. The Supplementary Procedures further provide that “[d]uring the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of

*amicus curiae* and in then considering the scope of participation from *amicus curiae*, the **IRP Panel shall lean in favor of allowing broad participation of an amicus curiae** as needed to further the purposes of the IRP set forth in Section 4.3 of the ICANN Bylaws.” (Appendix, Ex. 1, Oct. 25, 2018 Supplementary Procedures, Section 7) (emphasis added).

8. Verisign has a material interest in this Dispute and should be permitted to participate as an *amicus curiae*. It has an executory contract with NDC, a member of the Contention Set for .web, and NDC and Verisign are mentioned **over 200 times** in Afiliás’s IRP request. Indeed, the alleged actions of NDC and Verisign are at the core of this Dispute and form the singular basis for Afiliás’s allegations that ICANN violated its Articles of Incorporation and Bylaws. Accordingly, under the Supplementary Procedures, Verisign is presumptively deemed to have a material interest relevant to the Dispute and must be allowed to participate as an *amicus*.

9. Because of its material interest in this Dispute, Verisign would be directly harmed by Afiliás’s request for an emergency stay as well as Afiliás’s request for a reversal of the .web award. More specifically, if the stay were granted, (i) it would delay the delegation of the .web gTLD, resulting in NDC’s and Verisign’s inability to compete in the new gTLD marketplace; (ii) NDC and Verisign would continue to lose revenue that would have been generated from .web registrations and continue to lose market share, including a “head start” from the delay in entering the market; (iii) Verisign will lose the use of \$135 million, the amount of the winning bid that is being held by ICANN pending resolution of this Dispute; and (iv) NDC and Verisign will continue to suffer harm to their business reputations as a result of Afiliás’s false and misleading statements, in this proceeding and publicly to the Internet community, concerning Verisign’s and NDC’s compliance with the Applicant Guidebook.

10. This IRP will benefit from Verisign’s participation. Verisign will provide relevant evidence concerning its agreement to provide funds for the public auction. Second, as part of its evidence, Verisign intends to demonstrate that Afiliás violated the Blackout Period imposed by both the Auction Rules and the Bidder Agreement, and therefore lacks standing to

prosecute this IRP. Third, Verisign will provide evidence of the harm it will suffer from further delay in the delegation of .web, which is critical to the balance of the hardships element of Afilias's Interim Relief Request. Fourth, Verisign intends to offer evidence of Afilias's unclean hands, not only in its collusive and anti-competitive efforts to *rig the auction in its favor*, but then in its **false public attacks on Verisign, NDC, and ICANN** as part of a campaign to coerce ICANN to reverse the .web award. Finally, Verisign will provide evidence contradicting Verisign's allegations of anti-competitive conduct.

11. For the reasons discussed herein, Verisign has a material interest in this Dispute and must be permitted to participate as an *amicus curiae*.

### **III. BACKGROUND**

12. Verisign's material interest in this Dispute is evident from the history both pre and post the public auction for .web. NDC, having prevailed as the winner of the 2016 public auction for .web, and Verisign, as the potential assignee of the .web gTLD and the target of Afilias's allegations of anti-competitive conduct, both have critical interests in this Dispute.

13. As discussed below, Afilias's repeated attempts to interfere with NDC's and Verisign's rights, and to delay the transfer of the .web gTLD to NDC or Verisign, continues to cause serious injury to NDC, Verisign, and consumers, including persons who have had to wait years to reserve .web domain names.

#### ***ICANN and the New gTLD Process***

14. ICANN launched the New gTLD Program application process in 2012. (Appendix, Ex. 3.) It invited any interested party to apply for the creation of a new gTLD and the opportunity to be designated as the operator of that gTLD. As the registry operator, the applicant would be responsible for managing the assignment of names within the gTLD and maintaining the gTLD's database of names and IP addresses. When the application window for the new gTLDs opened on January 12, 2012, ICANN received almost 2,000 applications for new gTLDs from primarily private, non-governmental entities—including some of the world's largest

companies—interested in acquiring the right to operate new gTLDs as a business to sell domain names to the public. (*Id.*)

15. In connection with the New gTLD Program, ICANN published the Applicant Guidebook (the “Guidebook”) and the Auction Rules for New gTLDs (“Auction Rules”), which prescribe the requirements for new gTLD applications to be approved and the criteria by which they are evaluated. (Appendix, Exs. 4-5.)

16. By soliciting applications to operate the new gTLDs, ICANN promised to evaluate applications and oversee the auction process in accordance with the Applicant Guidebook and the Auction Rules, and applicable rules and regulations. The Applicant Guidebook and Auction Rules set forth the mutual understandings, rights, and obligations of ICANN and respective applicants for new gTLDs with respect to the New gTLD Program.

17. Only one registry operator can operate a gTLD consisting of the same letters. In the event more than one application for the same or similar gTLDs passes all of ICANN’s applicable evaluations, the applications are placed in a string contention set (“Contention Set”) that can be resolved through a public auction governed by auction rules established by ICANN in the Guidebook or by private resolution among the members of the Contention Set. The Guidebook provides that the Contention Set will be resolved through a public auction, unless all members of the Contention Set agree otherwise. (Appendix, Ex. 4.)

18. Because ICANN does not specify how applicants might privately resolve the Contention Set, applicants sometimes agree to resolve the Contention Set through a private auction, the terms of which may vary depending on the agreement between the members of the Contention Set. ICANN does not dictate the terms of a private auction. Unlike a public auction, neither ICANN nor the Internet community generally receive any proceeds from a private auction. Instead, in a private auction, the money put forward by the highest bidder at the auction is paid to the losing bidders for their private gain.

19. If all applicants in a Contention Set do not agree to a private auction or some other private resolution of a Contention Set, a gTLD is assigned based on a public auction



administered by ICANN. Consistent with ICANN rules, a public auction is open, competitive, and transparent and its proceeds benefit the public.

20. The Guidebook is clear that “[a]n applicant that has been declared the winner of a contention resolution process *will proceed by entering into the contract execution step*” for the execution of the registry agreement to operate the gTLD. (Appendix, Ex. 4, Guidebook, Module 4, § 4.4) (emphasis added).

#### *NDC’s Application for .Web*

21. On June 13, 2012, NDC submitted an application to ICANN to acquire the right to operate the .web gTLD. (Declaration of Jose Ignacio Rasco III (“Rasco Decl.”), ¶ 2.<sup>2</sup>) Six other entities also applied for the right to operate the .web gTLD: Web.com Group, Inc., Charleston Road Registry Inc., Schlund Technologies GmbH (“Schlund”), Dot Web Inc. (“Dot Web”), Ruby Glen LLC (“Ruby Glen”), and Afilias. NDC’s application passed all applicable evaluations by ICANN in June 2013 and was placed in a Contention Set with the other applicants for the .web gTLD, pursuant to the procedures set forth in the Guidebook. (*Id.* ¶ 3.)

22. In accordance with ICANN’s application requirements, NDC’s application stated that it was a Delaware limited liability company and identified three people as its officers: Jose Ignacio Rasco III, CFO; Juan Diego Calle, CEO; and Nicolai Bezsonoff, COO. It listed Mr. Rasco as its “Primary Contact” and Mr. Bezsonoff as its “Secondary Contact.” It identified two owners having at least 15% interests: Domain Marketing Holdings, LLC, and Nuco LP, LLC. (*Id.* ¶ 4.)

23. The Guidebook provides that “[i]f at any time during the evaluation process information previously submitted by an *applicant becomes untrue or inaccurate*, the applicant must promptly notify ICANN.” (Appendix, Ex. 3, Guidebook, Module 1, § 1.2.7) (emphasis added).)

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<sup>2</sup> The Rasco Decl. is submitted in support of NDC’s request to participate as an *amicus curiae*.

24. Contrary to the unsupported allegations by Afiliás, *there has never been a change in NDC’s control, and no one other than those named in the application has ever owned more than a 15% interest in NDC. Furthermore, there were no changes in circumstances that rendered untrue or inaccurate any information in NDC’s application.* (Rasco Decl. ¶ 5.)

#### *The Agreement Between NDC and Verisign*

25. On August 15, 2015, more than three years following the submission of NDC’s application, NDC and Verisign entered into an executory agreement (“Agreement”) by which (i) Verisign agreed to provide the funds for NDC to bid in the auction for the .web gTLD, and (ii) if NDC prevailed at the auction, upon execution of the registry agreement between ICANN and NDC, and *upon further application to ICANN and with ICANN’s consent*, NDC would assign the registry agreement for the .web gTLD to Verisign. (Rasco Decl. ¶ 6.) Contrary to the false claims of Afiliás in this proceeding and elsewhere, the Agreement did not transfer ownership, management, or control of NDC to Verisign, and Verisign has never had any direct or indirect legal or beneficial ownership or other interest in NDC, or been assigned any rights or obligations of the .web gTLD application. (*Id.* ¶ 7.)

26. Under the terms of ICANN’s New gTLD Registry Agreement (the “Registry Agreement”), “neither party may assign any of its rights and obligations under this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld.” (Appendix, Ex. 6, Registry Agreement, § 7.5.) NDC and Verisign intend to seek ICANN’s consent to assign the .web gTLD from NDC to Verisign. As the long-standing operator of the .com and .net gTLDs, Verisign is eminently qualified to operate the .web gTLD pursuant to ICANN’s requirements.

27. By this IRP, Afiliás seeks to nullify (i) NDC’s right to enter the registry agreement as the winner of the auction and (ii) Verisign’s right—upon application to ICANN and with ICANN’s consent—to an assignment of the Registry Agreement from NDC.

***Afilias’s Illegal Collusion with Other Bidders to Interfere  
with a Competitive Auction and Its Attempt to Bribe NDC***

28. On April 27, 2016, ICANN scheduled a public auction for the .web gTLD, notified all members of the Contention Set, and provided them with instructions and deadlines to participate in the auction. (Appendix, Ex. 7.) ICANN provided the .web Contention Set with a deadline of June 12, 2016, to notify ICANN as to whether the applicants in the .web Contention Set unanimously agreed to resolve the Contention Set privately, in lieu of a public auction. Although certain members of the Contention Set requested (repeatedly, *see infra*) a private resolution of the Contention Set, NDC informed the other applicants that it wished to proceed with a public auction.

29. Upon NDC refusing to agree to resolve the Contention Set by private auction, Afilias, and other members of the Contention Set operating in concert with Afilias, attempted to coerce NDC into a private auction, on terms whereby the auction proceeds would be paid to the losing bidders rather than to ICANN, which could then invest in the improvement of the Internet. Furthermore, Afilias and other bidders proposed that a private auction be performed pursuant to collusive and potentially illegal terms about who could win and who would lose the auction, including guarantees of auction proceeds to certain losers of the auction. When NDC refused to agree to such terms, Afilias and other members of the Contention Set initiated baseless proceedings against NDC, and later ICANN, attempting to delay a public auction and, when those efforts failed, to set aside the results of the auction. This IRP is merely a continuation of Afilias’s campaign to secure .web through any means. (Rasco Decl. ¶¶ 8-17.)

30. On June 6, 2016, Donuts Inc. (“Donuts”), the parent company of Contention Set member Ruby Glen, contacted NDC to ask it to reconsider its decision to forego a private resolution of the Contention Set and for a two-month delay of the public auction. (*Id.* ¶ 8). On June 7, 2016, Mr. Rasco, on behalf of NDC, informed Donuts that NDC would not change its position and would not agree to postpone the public auction. (*Id.*)

31. On June 7, 2016, Afilius contacted Mr. Juan Calle of NDC and asked him to reconsider NDC's decision to forego a private resolution of the Contention Set. (*Id.* ¶ 9.) To induce NDC to participate in a private resolution, Afilius offered to "guarantee [NDC] score[s] at least **16 mil if you go into the private auction and lose.**" *Id.*, Ex. A (emphasis added). NDC declined Afilius's offer, whereupon Afilius offered to increase the guaranteed payment to \$17.02 million. (*Id.*) NDC again declined Afilius's offer. (*Id.*) Afilius's offers to "guarantee" the amount of a payment to NDC as a losing bidder are an explicit offer to pay off NDC to not compete with Afilius in bidding on .web.

32. On June 23, 2016, in a bid to delay the upcoming public auction, Donuts and Ruby Glen falsely represented to ICANN that NDC had changed its ownership and/or management structure, but had not reported that change to ICANN as required. (*Id.* ¶ 10.) Donuts and Ruby Glen requested that ICANN delay the public auction based on these misrepresentations. (*Id.*)

33. ICANN contacted NDC on June 27, 2016, to investigate the accuracy of Donuts' and Ruby Glen's complaint. (*Id.* ¶ 11.) Mr. Rasco responded that same day and confirmed that there had been no changes to NDC's ownership and/or management. (*Id.*)

34. Ruby Glen further objected to the scheduled public auction to the ICANN Ombudsman in late June 2016. (*Id.* ¶ 12.) In support of its efforts to delay the public auction, Ruby Glen made the same misrepresentations to the Ombudsman as it made above to ICANN. (*Id.*) Upon information and belief, after communications with NDC, the Ombudsman advised ICANN and Ruby Glen that there were no grounds for a delay of the auction. (*Id.*)

35. On July 5, 2016, Oliver Mauss of Schlund, another member of the .web Contention Set, emailed Mr. Calle a proposal for an "alternative private auction," touting its alleged numerous advantages over an ICANN public auction. (*Id.* ¶ 13, Ex. B.) So-called "benefits" of this alternative form of private auction model, according to Mr. Mauss, included that the winning participant would pay less for the gTLD than it would in an ICANN public auction; it "divides the participants into groups of strong and weak"; the "weak players are

*meant to lose and are compensated for this with a pre-defined sum*”; “the strong players bid for the asset”; and “the losing weak players receive a lower return than in the Applicant Auction.” (*Id.* (emphasis added).)

36. On July 8, 2016, NDC had a further conversation with Christine Willett, the Vice President of Operations, Global Domains Division, for ICANN. (*Id.* ¶ 14.) Mr. Rasco told Ms. Willett that there was no basis to delay the scheduled public auction for .web. (*Id.*) Mr. Rasco reiterated to Ms. Willett that neither the ownership nor management of NDC had changed since NDC filed its .web application and, accordingly, there was no need to update the application. (*Id.*) During their call, Ms. Willett stated that she understood that the attempt to delay the public auction was motivated by the desire of Donuts, Afilias, and the other applicants to hold a private auction. (*Id.*) Mr. Rasco advised Ms. Willett that he had the same understanding. (*Id.*)

37. On July 11, 2016, Mr. Rasco confirmed in writing to Ms. Willett that NDC had made clear to other applicants that it had no desire to participate in a private auction and that it was committed to participating in ICANN’s scheduled public auction. (*Id.* ¶ 15.)

38. On July 11, 2016, two other applicants—Radix FZC (“Radix”), on behalf of applicant Dot Web, and Schlund—filed objections with ICANN to proceeding with a public auction. (Appendix, Exs. 8-9.) Their objections were made on the same grounds as the objections by Donuts and Ruby Glen. (*Id.*) The objections by Radix and Schlund used identical language. They each told ICANN: “We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.” (*Id.*)

39. Despite the concerted efforts of Afilias, Donuts, and other members of the Contention Set to avoid a public auction, on July 13, 2016, ICANN denied their requests to postpone the public auction. (Appendix, Ex. 10.) ICANN found “no basis to initiate the

application change request process or postpone the auction” based on any change in NDC’s management. (*Id.*) ICANN also informed the applicants that the request must be denied because the deadline for requesting a postponement had passed on June 12, 2016, prior to their requests to delay the public auction. (*Id.*)

40. On July 17, 2016, Donuts/Ruby Glen and Radix jointly filed with ICANN a request for reconsideration (“RFR”) of ICANN’s determination that the auction proceed as planned. (Appendix, Ex. 11.) As with the previous attempts to delay the auction, the RFR contained a number of wholly false allegations with respect to NDC. Once again, Donuts/Ruby Glen and Radix jointly accused NDC of failing to report a change in control, when in fact no such change had occurred. Donuts/Ruby Glen and Radix made further false representations that NDC and ICANN violated the Applicant Guidebook. In fact, NDC complied with the Guidebook at all times during the .web application process. Finally, Donuts/Ruby Glen and Radix made misleading representations that any delay in the auction would be harmless. To the contrary, applicants, parties providing funding for such auctions, and consumers have an interest in allowing the auction to proceed in a timely and orderly fashion, and a delay of the auction based on the spurious grounds offered by Donuts/Ruby Glen and other members of the Contention Set would harm all of these interests.

41. The RFR acknowledged the concerted actions of Donuts/Ruby Glen and other members of the Contention Set to postpone the public auction. Although the RFR claimed that each company had “their own concerns” in proceeding with the .web public auction, the RFR quoted only one company’s correspondence with ICANN as the basis for the misrepresentations of all three companies in seeking a reversal of ICANN’s decision. (*Id.*) In fact, the objecting parties’ opposition to a public auction was part of their collusive efforts to replace a public auction with a private auction.

42. On July 21, 2016, ICANN again rejected Donuts/Ruby Glen’s and Radix’s attempt to delay the auction by denying Donuts’ RFR. (Appendix, Ex. 12.) ICANN found no

change in control of NDC and thus no requirement for NDC to update or change its application, nor any reason to delay the auction for the .web gTLD. (*Id.*)

43. In the weeks leading up to the scheduled July 27 auction for the .web gTLD, members of the Contention Set continued to attempt to pressure NDC into resolving the Contention Set via a private auction in lieu of ICANN’s public auction. On several occasions, Mr. Rasco and/or Mr. Calle of NDC were contacted by Steve Heflin and John Kane of Afilias, Jonathon Nevitt of Donuts, and/or Oliver Mauss of Schlund for this purpose. On each such occasion, Mr. Rasco or Mr. Calle responded that NDC was not interested in participating in a private auction. (Rasco Decl. ¶ 16.)

44. Importantly, on July 22, 2016, five days before the Auction’s July 27, 2016 commencement date, after the deposit deadline for the Auction had passed—and **during the Blackout Period**—Afilias reiterated its earlier offers to NDC. John Kane of Afilias sent this text message to Mr. Rasco of NDC: “If ICANN delays the auction next week would you again consider a private auction?” (*Id.*, ¶ 17, Ex. C.) This renewed offer constitutes a prohibited discussion regarding bids, bidding strategies and settlement of the Contention Set, during the Blackout Period.

45. Once the deposit deadline for an ICANN administered auction passes, both the Bidder Agreement and the Auction Rules for new gTLD auctions prohibit all applicants within a Contention Set from “cooperating or collaborating with respect to, **discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies or discussing or negotiating settlement agreements...**” until the auction has completed and full payment has been received from the winner. (Appendix, Ex. 13, Bidder Agreement, § 2.6; Auction Rules, Clause 68). Violation of this “Blackout Period” is a “serious violation” of ICANN’s rules under the Bidder Agreement and Auction Rules, so much so that applicants are warned that such violations may result in forfeiture of the violator’s application. (*Id.*, Bidder Agreement, § 2.10; Auction Rules, Clause 61).

46. Afilias's text message during the Blackout Period was a direct inquiry regarding the parties' strategies for the upcoming auction, including the terms for the auction, and seeking to enter into a settlement of the auction, all of which were in plain violation of the Blackout Period.

47. Afilias is a sophisticated applicant with full knowledge and awareness of the rules, including those pertaining to the Blackout Period. Moreover, Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the .web auction) sent every member of the Contention Set an email on July 20, 2016 -- two days before Afilias reiterated its offer of guaranteeing money to NDC in a private auction -- expressly reminding them that "the Deposit Deadline for .WEB/.WEBS has passed and *we are now in the Blackout Period.*" (Appendix, Ex. 14.)

48. On July 22, 2016, despite the baseless objections of the Contention Set being rejected by ICANN three times, and contrary to an express covenant not to sue set forth in the Guidebook, Ruby Glen filed a civil action in U.S. District Court (C.D. Cal. No. 16-5505) against ICANN and Doe defendants seeking postponement of the public auction through a temporary restraining order ("TRO"). Ruby Glen's claims were based on the same meritless accusations that ICANN had repeatedly rejected. (Appendix, Ex. 15.)

49. On July 26, 2016, the District Court denied Ruby Glen's TRO. In its Order, the Court noted "the weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN [B]ylaws and Applicant Guidebook" and concluded that Ruby Glen had failed to "establish that it is likely to succeed on the merits" and *failed to demonstrate that its allegations "raise[d] serious issues."* (Appendix, Ex. 16, at 4) (emphasis added).

#### ***The Public Auction for .Web***

50. Despite the repeated and concerted efforts of Afilias, Donuts, and other members of the Contention Set to induce NDC to participate in a private auction, the auction proceeded as scheduled on July 27, 2016. In accordance with its Agreement with NDC, Verisign provided funds to NDC for it to use in its bidding for the .web gTLD in the public auction. (Rasco Decl.



¶ 18.) NDC submitted a final bid of \$142 million that ICANN deemed to be and announced as the winning bid. (*Id.*) Having won the auction, pursuant to the Guidebook, NDC has the right and ICANN has the obligation to execute the .web Registry Agreement, and NDC thereafter has the right to operate the .web gTLD (subject to compliance with appropriate conditions).

51. Although additional steps remain to be taken after the Auction before the gTLD is delegated to NDC, pursuant to the Guidebook, these steps are routine and administrative. Generally, ICANN will execute a registry agreement without further Board approval so long as no material changes are made to ICANN's form registry agreement. NDC executed the registry agreement without change. (Appendix, Ex. 4, Guidebook, Module 5, § 5.1(4)).

***Post-Auction Efforts by Afilias and Others to Interfere with the Auction Results***

52. On August 2, 2016, shortly after the public auction, Donuts/Ruby Glen initiated a "Cooperative Engagement Process" ("CEP") with ICANN with respect to the .web gTLD. (Appendix, Ex. 17.) The CEP was based on the same misrepresentations regarding NDC's application. Under ICANN's procedures, a CEP is a process voluntarily invoked by a complainant prior to the filing of an IRP for the purpose of resolving or narrowing the issues that are contemplated to be raised in the IRP. The CEP was finally closed on January 31, 2018. (Appendix, Ex. 18.) ICANN gave Donuts/Ruby Glen until February 14, 2018 to commence an IRP or it would proceed with the delegation of the .web gTLD. (*Id.*) Donuts/Ruby Glen did not commence an IRP by the February 14 deadline or at any time since that date. Ruby Glen's failure to pursue an IRP after its repeated objections to NDC's participation in the .web auction demonstrates that its baseless accusations were intended only to delay the delegation of .web to NDC.

53. On August 8, 2016, Scott Hemphill, the General Counsel of Afilias and Afilias Domains, wrote to ICANN asserting that NDC should be disqualified from its participation in the .web Contention Set due to purported violations of the Guidebook and demanding that ICANN "proceed to the next highest bidder in the auction to contract for the string, at the price at which the third highest bidder exited the auction." (Appendix, Ex. 19.) Afilias was the second-

highest bidder in the .web auction and stands to gain directly from NDC's disqualification by potentially obtaining the .web gTLD for a windfall price far below the competitive amount paid by NDC. Afilias also requested that ICANN stay any further action with respect to the .web gTLD, including entering into a registry agreement for .web with NDC, or acting on any request from NDC or Verisign to assign the registry agreement to Verisign. Finally, Mr. Hemphill asserted that Afilias was filing a complaint with ICANN's Ombudsman with regard to .web. (*Id.*) Mr. Hemphill made the same allegations on September 9, 2016. (Appendix, Ex. 20.)

54. On October 7, 2016, Afilias wrote to ICANN that NDC should be disqualified from the Contention Set for .web because it purportedly failed to disclose material information to ICANN. (Appendix, Ex. 21.) Afilias further alleged that Verisign funded NDC's bid to "preserve a monopoly," reduce competition, and harm consumers. (*Id.*) Afilias did not cite then—and has never cited—any basis for or evidence in support of Afilias' statements to ICANN.

55. ***Afilias took no steps for over two years following its letters to ICANN to initiate an IRP or pursue any other ICANN accountability mechanism.*** Instead, Afilias sat on its supposed rights, relying on Donut's CEP for a temporary stay of delegation, thereby scheming, along with Donuts, to delay the delegation of .web for as long as it could.

56. Verisign believes that Afilias also undertook a campaign to persuade the Antitrust Division of the Department of Justice ("DOJ") to investigate competition issues related to Verisign becoming the operator of .web. (Appendix, Ex. 22, Excerpts from Verisign Q4 2017 10-K.) On information and belief, Afilias made false allegations and representations to the DOJ regarding Verisign, .web., its own business plans with respect to .web, and the TLD marketplace, all in an effort to persuade the DOJ to open and then prolong an investigation.

57. Verisign believes that Afilias's allegations in the DOJ investigation were, in substance, the same "harm to competition" arguments it advances in this IRP.

58. The DOJ thoroughly investigated Afilias's claims and, on January 9, 2018, the DOJ closed its investigation without taking any action. (*Id.*)

59. On February 23, 2018, Afilias again attempted to delay the execution of the .web registry agreement between NDC and ICANN, following the conclusion of the Ruby Glen’s CEP by sending ICANN a request for documentation regarding .web pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”). (Appendix, Ex. 23.) Afilias sought a series of documents relating to, among other things, the applications submitted by the .web Contention Set, the various accountability mechanisms initiated by Donuts/Ruby Glen and other members of the .web Contention Set, and documents provided by ICANN to the DOJ in connection with its investigation of the Agreement between Verisign and NDC. (*Id.*) Verisign believes that ICANN viewed Afilias’s invocation of the DIDP as an accountability mechanism and, based thereon, delayed execution of a .web registry agreement with NDC for a period of time to assess Afilias’s position.

60. On March 24, 2018, ICANN responded to Afilias by stating that it was disclosing some of the requested documents, denying other requests, and lacked documents responsive to the remaining requests. (Appendix, Ex. 24.) On April 23, 2018, Afilias replied to ICANN by modifying its requests for documents. (Appendix, Ex. 25.) Afilias has characterized its requested documents as relating to “the impact on competition if Verisign obtains the .WEB license; whether Verisign and NDC violated, *inter alia*, provisions of the New gTLD Application Guidebook and ICANN’s Auction Rules; and whether ICANN’s handling of these matters has been consistent with its Bylaws and Articles of Incorporation.” (*Id.*)

61. On April 23, 2018, Afilias initiated a Request for Reconsideration of ICANN’s partial denial of its DIDP request. (Appendix, Ex. 26.) Afilias alleged that ICANN violated its Bylaws concerning accountability, transparency, and openness by refusing to disclose the requested documents. (*Id.*) Afilias’s Request for Reconsideration further alleged that Afilias requires the documents in order to investigate purported anti-competitive conduct by NDC and Verisign, claims it made almost two years earlier. (*Id.*) Afilias asserted falsely that “[i]n order to maintain its monopoly, Verisign entered into a secret arrangement with NDC to obtain the right

to operate the .WEB gTLD and further diminish competition,” and “[a]llowing Verisign to carry out this subterfuge and acquire the .WEB license will harm the Internet community . . .” (*Id.*)

62. ICANN’s Board Accountability Mechanisms Committee (“BAMC”) responded to Afilias’s Request for Reconsideration on June 5, 2018. (Appendix, Ex. 27.) The BAMC determined that Afilias did not meet the requirements for bringing a reconsideration request and summarily dismissed the request. (*Id.*)

### *Afilias’s IRP Request*

63. On November 14, 2018, Afilias filed its IRP. By way of its IRP, Afilias seeks to set aside the results of the public auction for .web and claim the right to operate .web for itself. It claims that NDC, as the winning bidder, should be disqualified from bidding because of NDC’s relationship with Verisign and that Afilias, as the second-highest bidder and direct competitor of NDC and Verisign, should take all. Afilias has couched its allegations as premised on ICANN’s alleged violations of its Articles and Bylaws, but the gravamen of Afilias’s claim centers on the agreement between NDC and Verisign and conduct by NDC and Verisign.

64. Afilias further claims that a principal purpose of the New gTLD Program was to increase competition by ending Verisign’s market power. The Bylaws and Applicant Guidebook do not prohibit Verisign from acquiring any new gTLDs, and indeed, there are no provisions that bar Verisign from participating in the New gTLD Program. To the extent Afilias is using this IRP to raise antitrust allegations before ICANN, those issues have already been thoroughly investigated by the DOJ, which took no action. Indeed, Verisign understands that ICANN’s usual approach if there is an alleged competition issue is to refer the matter to the relevant competition authorities. Here, that competition review has already occurred and been resolved.

65. Verisign and NDC—who are referenced over 200 times in Afilias’s IRP Request—are real parties in interest and the parties who would suffer serious and irreparable injury if the delegation of .web was further delayed. Afilias’s IRP is premised on the alleged market position of Verisign and conduct of NDC and Verisign in connection with the auction.

#### **IV. ALLOWING VERISIGN TO PARTICIPATE AS AN *AMICUS* FURTHERS IMPORTANT GOALS AND POLICIES OF ICANN AND IS NECESSARY TO PROTECT VERISIGN'S RIGHTS**

66. Allowing Verisign to participate as an *amicus* in this IRP serves important goals consistent with ICANN's Bylaws.

67. First, Verisign must participate in this IRP, including the emergency stay proceedings, because its rights and interests would be irreparably impacted by the relief requested by Afilias. Fundamental fairness and considerations of due process require Verisign's participation. The IRP seeks to set aside the results of the auction award and directly interfere with Verisign's rights to secure an assignment of the registry agreement for .web, conditional upon NDC's request to assign the registry agreement and consent by ICANN to the assignment.

68. Second, Verisign can provide relevant evidence concerning its agreement to provide funds for the public auction as well as Afilias's false allegations regarding the history of the top level domain market and alleged anticompetitive conduct by Verisign, and the agreement between Verisign and NDC. Verisign is a party that will be materially affected by this IRP and its conduct forms the core of Afilias's allegations in its IRP Request. Thus, Verisign's participation as an *amicus* will lead to a more complete record and provide the Panel with a more informed basis for its decisions on interim relief.

69. Third, ICANN's Bylaws require it to "striv[e] to achieve a reasonable balance between the interests of different stakeholders." (Appendix, Ex. 2, New Bylaws, Section 1.2(b)(vii)). NDC and Verisign are stakeholders in the process that is being *directly, materially,* and *imminently* challenged by Afilias, and the Panel will be better positioned to determine whether ICANN and this proceeding achieves the reasonable balance required by the Bylaws only if both Verisign and NDC are allowed to have a voice in this proceeding.

70. Accordingly, for the reasons set forth above, Verisign should be allowed to participate as an *amicus* in this IRP and will comply with any briefing schedule set by the Procedures Officer.

Dated: December 11, 2018

ARNOLD & PORTER

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