Dechert LLP

1900 K Street, NW
Washington, DC 20006-1110
+1 202 261 3300 Main
+1 202 261 3333 Fax
www.dechert.com

ARIF HYDER ALI

arif.ali@dechert.com
+1 202 261 3307 Direct
+1 202 261 3079 Fax

11 February 2022
(Corrected on 13 February 2022)

VIA E-MAIL

The ICANN Board of Directors
c/o Mr. Maarten Botterman, Chair
maarten.botterman@board.icann.org

The Accountability Mechanisms Committee of the ICANN Board (**BAMC**)
c/o Ms. Becky Burr, Chair
bburr@hwglaw.com

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: ICANN Board Resolutions 2022.01.16.12 – 2022.01.16.15

Dear Mr. Botterman, Ms. Burr, and Members of the ICANN Board:

We write on behalf of Altanovo Domains Limited ("Altanovo"), formerly known as Afilias Domains No. 3 Limited ("Afilias").

Having reviewed the Resolutions and Rationale the Board adopted on 16 January 2022, we write to call your attention to a critical misstatement (**Section I**) and critical omissions (**Section II**) in the Rationale. Neither the BAMC nor the Board will be able properly to consider and evaluate the IRP Panel's Final Decision unless it understands the significance of the misstatement and omissions, both of which we respectfully request be corrected immediately.

We also write to request disclosures by the Board members relating to their impartiality and independence to consider this matter (**Section III**).

I. THE MISSTATEMENT

A. ICANN's adoption of Verisign/NDC's mischaracterization of the Domain Acquisition Agreement

As the Board and BAMC are aware, Applicant Nu DotCo, LLC ("NDC") and non-applicant VeriSign, Inc. ("Verisign") entered into an agreement on 25 August 2015 relating to the .WEB gTLD, which they styled the **DOMAIN ACQUISTION AGREEMENT** ("DAA").

They maintain that the DAA is an agreement pursuant to which Verisign merely provided the funds for NDC to bid for .WEB, in exchange for a future assignment of rights of the .WEB registry agreement to Verisign. ***This characterization of the DAA is simply incorrect***. Nevertheless, in the Rationale ICANN has essentially adopted Verisign and NDC's characterization, and in so doing has effectively ***pre-judged an issue*** (amongst many others) that is hotly contested.[1]

The Rationale states that the IRP Panel concluded that ICANN violated its Articles and Bylaws when (among other things):

> (a) ICANN staff failed to decide whether the Domain Acquisition Agreement (DAA) between NDC and Verisign ***(pursuant to which Verisign financially supported NDC's bidding in the .WEB auction)*** violated the Guidebook and Auction Rules, and moved forward toward contracting with NDC in June 2018 without first having made that decision; and (b) the ICANN Board did not prevent staff from moving forward toward contracting in June 2018 or decide whether the DAA violated the Guidebook and Auction Rules ….

But the above is <u>not</u> what the IRP Panel stated. In the above-quoted language, the Rationale paraphrases Paragraph 413(1) of the Final Decision—***except that there is no***

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[1] In the Final Decision, the IRP Panel stated that Altanovo "***rejects any analogy between the Domain Acquisition Agreement and a financing agreement***." *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 191 (emphasis added). We observe that ICANN also adopted the Verisign/NDC mischaracterization of the DAA as a "funding arrangement" in its 16 September 2016 Questionnaire, apparently based on a "confidential" letter from Verisign/NDC's outside counsel dated 23 August 2016. The Panel concluded that ICANN's use of the Questionnaire with respect to Afilias—which at that point did not have access to the DAA (and which still has access to it on an "ATTORNEYS' EYES" only basis)—violated ICANN's commitment under the Bylaws "to operate in an open manner and consistent with procedures designed to ensure fairness." *Id*., ¶¶ 307- 316, 413(3).

language there (or anywhere else in the Final Decision) that remotely describes the DAA as ICANN has described it in the Rationale.

To the contrary, ICANN's mischaracterization of the DAA as an agreement to provide financial support comes directly from Verisign and NDC's submissions in the IRP. The drafters of the Rationale have inexplicably taken the Verisign/NDC mischaracterization of the DAA and inserted it into what ICANN inaccurately reports to the Internet Community as a key declaration by the IRP Panel. The effect is to give the false impression that Altanovo alleged that a mere funding agreement breaches the New gTLD Program Rules. That, of course, is ***not*** Altanovo's sole contention, which is evident from even a cursory review of our IRP submissions.

Redacted – Third Party Designated Confidential Information

Verisign and NDC entered into the DAA nearly a year before the ICANN auction for .WEB in July 2016, but actively hid their agreement from ICANN, the other applicants for .WEB, and the Internet Community. NDC's key witness in the IRP even admitted lying to conceal the existence of the DAA.

The DAA made NDC little more than Verisign's puppet, pursuing .WEB for Verisign's benefit, while at the same time concealing the identity of the puppet master from ICANN and everyone else. In addition to providing NDC the "funds" to secretly make bids on Verisign's behalf, Verisign paid NDC Redacted – Third Party Designated Confidential Info. in "fees" to acquire such rights in NDC's application. ***No objective, independent, impartial person—who has reviewed the DAA—could reasonably characterize it simply as an agreement by which Verisign provided the financing for NDC's bids***.[2]

NDC and Verisign plainly violated the letter and spirit of the New gTLD Program Rules. Yet, even after obtaining the DAA, ICANN failed to disqualify NDC's application, reject its auction bids, and deem it ineligible to enter into a registry agreement for .WEB, as

[2] We have repeatedly written to ICANN's outside counsel to ask for confirmation that the Final Decision, DAA, and other relevant materials have been provided to the Board in full and unredacted form. ICANN's outside counsel have not responded to our correspondence, nor have they responded to any of our other correspondence requesting information as to how and when the Board intends to proceed. We ask that the Board and BAMC confirm that they have reviewed the DAA and Final Decision in full and unredacted form.

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required by the plain terms of the New gTLD Program Rules. Instead, ICANN Staff proceeded to delegate .WEB to NDC, and the ICANN Board did nothing to stop the delegation. The IRP Panel clearly found as much.[3]

Furthermore, if the DAA were simply an agreement "pursuant to which Verisign financially supported NDC's bidding in the .WEB auction," the IRP Panel would have had little reason to state that the specific questions raised by Altanovo concerning the DAA are "***legitimate, serious, and deserving of [ICANN's] careful attention***"—when those questions go far beyond what would be asked about a funding agreement. In fact, the Panel repeated that language several times in its Final Decision, including in the following passage of the Final Decision:

> The questions raised by [Altanovo] that are, in the opinion of the Panel, ***serious and deserving of [ICANN's] consideration***, include the following, ***which the Panel merely cites as examples***:
>
> - Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an "***Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application***".
>
> - Whether the execution of the DAA by NDC constituted a "***change in circumstances that [rendered] any information provided in the application false and misleading***".
>
> - Whether by entering into the DAA after the deadline for the submission of applications for new gTLD's, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, ***Verisign impermissibly circumvented the "roadmap" provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules***.[4]

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[3] *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶¶ 333-48, 413(1).

[4] *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 320 (emphasis added).

Again, these are only "examples" of the questions that the ICANN Board must now consider to make its first-instance pronouncement under the IRP's Final Decision. Neither the BAMC nor the Board can even begin to consider those questions objectively and impartially if the members are under the serious misapprehension that the DAA is merely a funding agreement.

B. Request that ICANN issue an amended Rationale omitting the mischaracterization.

ICANN's adoption of Verisign/NDC's mischaracterization of the DAA creates several serious problems.

First, the Rationale has misstated to the Internet Community the serious and legitimate issues presented by Altanovo in this matter. It gives the Internet Community the false impression that Altanovo is contending that a mere funding agreement violates the New gTLD Program—when that is ***not*** Altanovo's sole contention.

Second, the misstatement exacerbates the ***inherent unfairness*** created by (a) ICANN's ***refusal (at the behest of Verisign/NDC) to disclose*** any portion of the DAA and (b) ICANN's redaction of every description of the DAA in the Final Decision and other IRP materials. ICANN has enabled Verisign to announce to the Internet Community that the DAA is merely a funding agreement—while preventing Altanovo from responding to that mischaracterization by pointing to the DAA's actual terms.

Third, if the Board indeed intended to adopt Verisign/NDC's position that the DAA is merely a funding agreement, then the ICANN Board has ***erroneously and unfairly prejudged the issue***—and has already failed to consider the IRP Panel's Final Decision. Moreover, it is impossible to understand how the Board could characterize the DAA as merely a funding agreement—***if*** the members had actually reviewed the DAA in its full and unredacted form.

For the avoidance of doubt, we are attaching a separate annex (**Annex A**) that includes relevant portions of the DAA for your review, which demonstrate that ICANN cannot fairly or accurately characterize the DAA as a mere funding or financing agreement. (We ask that ICANN promptly post this letter in unredacted form, but without Annex A.[5])

[5] We are putting the relevant portions of the DAA in a separate annex because, as noted above, ICANN has designated the DAA as "Highly Confidential" in its entirety. Altanovo continues to object to ICANN's refusal to post the DAA publicly—and to ICANN's redaction of extensive portions of the

To be clear, the issues on which you have resolved to pronounce upon in the first instance require more than a review of these provisions of the DAA. You will need to review other portions of the record to make your first-instance pronouncement on whether (a) the DAA, and NDC's performance of its obligations under the DAA, constitute material violations of the New gTLD Program Rules, and (b) if so, whether ICANN must disqualify NDC and offer .WEB to Altanovo as the second-highest bidder. That is why (as stated below) we believe that the members of the BAMC and Board should receive submissions from both Altanovo and NDC on these questions.

In the meantime, if it was not the intention of the Board to adopt and promulgate Verisign/NDC's mischaracterization of the DAA, then for all the foregoing reasons, we respectfully request ICANN to amend the Rationale to omit the mischaracterization of the DAA as an agreement "pursuant to which Verisign financially supported NDC's bidding in the .WEB auction."

II. THE OMISSIONS

First, although the Rationale states that the IRP Panel decided to defer to ICANN to "pronounce" "in the first instance" on the substantive questions Altanovo raised in the IRP, the Rationale omits the Panel's proviso concerning such "deference." The Panel stated:

> [T]he Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of [ICANN's] Staff and Board. ***However, it needs to be emphasized that this deference is necessarily predicated on the assumption that [ICANN] will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules***.[6]

The Panel further stated that ICANN "is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules,

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Final Decision and other IRP materials that quote or even summarize the DAA's terms. However, we are not at present asking ICANN to publish Annex A.

[6] *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 299 (emphasis added).

not only for the benefit of the direct participants in the Program but also for the benefit of the wider Internet community."[7]

We emphasize these statements by the IRP Panel, as they are not mentioned or referred to in the Rationale. We respectfully request that the Resolution and Rationale be amended to reflect the foregoing.

Second, we observe that the Rationale describes the fee award made against ICANN, on the one hand, and against Altanovo, on the other, in starkly different terms. The Panel made both fee awards under Section 4.3(r) of the Bylaws, which allows the Panel to shift fees to the other Party if it identifies a claim or defense "as frivolous or abusive." Although the Panel explicitly found that ICANN's conduct was "***abusive***" in ordering ICANN to pay Altanovo $450,000 in fees, the Rationale blandly describes that fee award as "cost shifting for legal fees"—and avoids any mention of the Panel's finding of "***abusive***" conduct by ICANN. By contrast, in describing the much smaller fee award (for $236,884.30) made against Altanovo, the Rationale goes out its way to specifically quote the Panel's finding that Altanovo's conduct was "frivolous."[8]

The Rationale thus avoids any mention of the Panel's finding of "frivolous or abusive" conduct when the finding is made against ICANN—but emphasizes that finding when made against Altanovo. Unfortunately, this same blatant lack of evenhandedness has marred ICANN's treatment of Altanovo both before and during the IRP. We hope that it will finally end now, and, accordingly, ask the Resolutions and Rationale to be amended. If ICANN specifically quotes the "frivolous or abuse" finding by the Panel when made against Altanovo, it most do the same when applied against ICANN.

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[7] *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 299 (emphasis added).

[8] Thus, with respect to the fee award ***against ICANN***, the Rationale states: "The Panel denied the majority of Afilias' request for cost shifting of legal fees, but did grant legal fees in connection with the Request for Emergency Interim Relief (related to whether the contention set would remain on hold during the pending of the IRP) in reduced amount of US$450,000." With respect to the $236,884.39 fee award ***against Altanovo***, the Rationale states: "[T]he Panel unanimously denied Afilias' Request in its entirety, finding that the Request was 'frivolous' and awarding ICANN the legal fees it incurred in responding to the Request (in the amount of $US236,884.39)."

III. THE OBJECTIVE, NEUTRAL, AND IMPARTIAL REVIEW OF THESE ISSUES BY THE BAMC AND BOARD

We observe that in a recent earnings call, Verisign expressed no doubt as to how ICANN will resolve this matter. Verisign—again, *a non-applicant for .WEB*—told the investing public:

> With the rejection of Afilias' application and the reaffirmation of the panel's final decision, those roadblocks are now out of the way, and ICANN looks to be moving forward with making the decision on the delegation of .web, and we will be monitoring their process. ***As we have said before, we continue to look forward to becoming the .web registry operator and establishing [it] alongside .com and .net*** as an additional operation for businesses and individual end users worldwide.[9]

These comments by Verisign's CEO and Chairman Jim Bidzos suggest to us that he either has not read the IRP Panel's Final Decision, or that he has information that we do not. We also observe that while Verisign may be in a position to "monitor[ ]" ICANN's "process," Altanovo is not. We have written to ICANN's counsel, specifically to ask when and how the Board will be carrying out the process of making its "first instance" pronouncement, pursuant to the Final Decision. We have had no response.

We understand and appreciate that the members of the Board are busy people who maintain demanding positions outside of ICANN. However, we respectfully submit that the task before the Board is not difficult. Any objective, neutral, and impartial application of the New gTLD Program Rules to the terms of the DAA—and the conduct of NDC in performing the DAA—requires disqualification of NDC's application and bids, and offering .WEB to Altanovo as the second-highest bidder. But to perform that task in an objective, neutral, and impartial manner, it is critically important that you have access to the full and unredacted record from the IRP. You should not allow others to "cherry-pick" the portions of the record that you will read. Nor should you allow others to characterize on your behalf documents that you have not read.

We also submit that the Board will not be taking "ownership of these issues" if it simply delegates the analysis to ICANN's Staff and in-house and outside legal counsel *(i.e.*, Jones

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[9] Transcript of Verisign Q4 Earnings Call on 10 February 2022 (remarks of J. Bidzos), *available at* https://www.fool.com/earnings/call-transcripts/2022/02/10/verisign-vrsn-q4-2021-earnings-call-transcript/ (last accessed on 11 Feb. 2022) (emphasis added).

Day), who have already taken aggressive positions on these issues adverse to Altanovo. As the IRP Panel observed in its Final Decision, ICANN failed not only to address "***the questions raised as to propriety of NDC's and Verisign's conduct," which "are legitimate, serious, and deserving of [ICANN's] careful attention***"; ICANN ***also "adopted contradictory positions, including in these [IRP] proceedings, that at least in appearance undermine the impartiality of its processes***."[10] Furthermore, the Board cannot act consistently with the Articles and Bylaws by delegating its analysis to Staff and legal counsel, and then claiming that its first-instance decision-making process is protected from disclosure based on assertions of legal privilege. We object to the involvement of any member of ICANN's Staff, in-house counsel or outside counsel in the independent assessment that the BAMC and Board must undertake pursuant to the IRP Panel's Final Decision.

Finally, we understand that one member of the BAMC has already recused himself from this matter, on the grounds that he was an employee of Afilias many years ago. Consistent with that member's decision, we request the Board's confirmation that each member who reviews these matters for ICANN's first-instance pronouncement is capable of doing so objectively, independently, and impartially. We further request that each member promptly disclose any facts or circumstances that could reasonably give rise to doubts as to the member's objectivity, independence, and impartiality, including, without limitation, the disclosure of any business dealings with Verisign, NDC, or Altanovo outside the context of the member's official ICANN responsibilities.

We remain available to answer any questions or provide any assistance to the BAMC and the rest of the Board as ICANN undertakes its first-instance consideration and pronouncement on these issues. We understand that the record from the IRP is voluminous, and that much of it is devoted to important procedural issues on which the Panel has already made declarations. We therefore believe it is important for the BAMC to invite both Atlanovo and NDC to make written and oral submissions to you on the substantive issues on which you have now resolved to pronounce in the first instance, and hereby ask that such an invitation be issued. In their submissions, both Altanovo and NDC can point you to the portions of the record which they believe support their respective positions.

We also reiterate our request to be informed (along with Verisign and NDC) as to the timing and process by which the BAMC will make its recommendations to the Board and by which the Board will then make its first-instance pronouncement. And we reiterate our requests

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[10] *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 300 (emphasis added).

that ICANN provide us with the information we have requested in prior correspondence and address our various requests.

We are copying outside counsel for Verisign, NDC, and ICANN on this letter, and request that all correspondence between (a) ICANN and (b) Verisign and/or NDC concerning .WEB be copied to us as counsel to Altanovo.

Altanovo 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
f/k/a Afilias Domains No. 3 Limited

Cc: *Counsel for ICANN*
Mr. John Jeffrey
Ms. Amy Stathos
ICANN General Counsel's Office

Mr. Jeffrey A. LeVee
Mr. Steven L. Smith
Mr. Eric P. Enson
Ms. Kelly M. Ozurovich
Jones Day LLP

Counsel for Verisign
Mr. Ronald L. Johnston
Mr. James S. Blackburn
Ms. Maria Chedid
Mr. Oscar Ramallo
Mr. John Muse-Fisher
Arnold & Porter Kaye Scholer LLP

Counsel for NDC
Mr. Steven Marenberg
Mr. Josh B. Gordon
Ms. April H. Hua
Paul Hastings LLP

Without Prejudice

HIGHLY CONFIDENTIAL[1]

ANNEX A to Altanovo's Letter to the ICANN Board dated 11 February 2022

Redacted – Third Party Designated Confidential Information