

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

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

ICDR Case No. 01-18-0004-2702

**REQUEST FOR EMERGENCY PANELIST AND
INTERIM MEASURES OF PROTECTION**

27 November 2018

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1. INTRODUCTION

1. Afiliás Domains No. 3 Limited (“**Afiliás**”) submits this Request¹ for the appointment of an Emergency Panelist and an order providing for Interim Measures of Protection (the “**Interim Request**”) pursuant to Article 4, Section 4.3 of the “**Bylaws**” of the Internet Corporation for Assigned Names and Numbers (“**ICANN**”),² Article 10 of the Interim Supplementary Procedures for ICANN Independent Review Process (“**Supplementary Procedures**”),³ and Articles 6 and 24 of the International Arbitration Rules of the International Centre for Dispute Resolution (“**ICDR Rules**”).⁴

2. Afiliás makes this request in the context of the Independent Review Process (“**IRP**”) ⁵ it commenced against ICANN on 14 November 2018 to resolve a dispute between the parties concerning the application and auction processes by which presumptive rights to the .WEB gTLD were awarded. The parties’ dispute arises from the ICANN Board’s and Staff’s breaches

¹ Afiliás requests the right to amend and supplement this Interim Request within a reasonable period of time following the production of documents requested in **Section 5, *infra***.

² ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [**Ex. C-1**], Art. 4, Sec. 4.3(p) (“A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered ... in order to maintain the *status quo*.”).

³ ICANN, Interim Supplementary Procedures for ICANN Independent Review Process (25 Oct. 2018), [**Ex. C-59**], Art. 10 (“A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).”).

⁴ International Centre for Dispute Resolution, *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)* (1 June 2014) (“**ICDR Rules**”), Arts. 6, 24.

⁵ Afiliás submitted the Notice of IRP for this proceeding on 14 November 2018. *See* Afiliás’ Notice of Independent Review (14 Nov. 2018).

of the Bylaws and Articles of Incorporation (“**Articles**”)⁶ by, *inter alia*, failing to enforce the rules and underlying policies governing the New Generic Top-Level Domain (“**gTLD**”) Program, specifically, the rules, procedures, and policies set out in the New gTLD Applicant Guidebook⁷ (“**AGB**”) and the Auction Rules for New gTLDs: Indirect Contentions Edition⁸ (“**Auction Rules**”) (collectively the “**New gTLD Program Rules**”). Afilias’ Request for Independent Review Process (“**Request for IRP**”) is incorporated herein by reference.

3. Afilias and six other applicants submitted competing applications for the right to operate the crown jewel of the New gTLD Program, the .WEB gTLD registry, pursuant to the New gTLD Program Rules (collectively, the “**.WEB contention set**”). As described further in Afilias’ Request for IRP, NU DOT CO LLC (“**NDC**”) entered into a secret agreement with a non-applicant, VeriSign, Inc. (“**VeriSign**”), which enabled VeriSign was able to secretly participate in and win an ICANN-administered auction for .WEB (the “**.WEB Auction**”) contrary to the intent and language of the New gTLD Program Rules. Afilias was the second-place bidder in the .WEB Auction. ICANN now intends to conclude a “**Registry Agreement**” for .WEB with NDC, which is contractually obligated to assign that Registry Agreement to VeriSign. ICANN’s intended course of action fundamentally changes the *status quo* regarding .WEB, notwithstanding the fact that Afilias raised objections with ICANN regarding NDC’s subterfuge and its violation of the New gTLD Program Rules some two years ago and, now, in Afilias’ recent Request for IRP.

4. Afilias therefore submits this Interim Request, seeking a stay of all ICANN actions that further the delegation of the .WEB gTLD during the pendency of the IRP, including, but not

⁶ ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016), *available at* <https://www.icann.org/resources/pages/governance/articles-en> (last accessed on 29 July 2018), [Ex. C-2].

⁷ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. C-3].

⁸ Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015), [Ex. C-4].

limited to, (1) the continued negotiation and execution of a Registry Agreement concerning .WEB, (2) any pre-delegation testing of the .WEB registry, and (3) the delegation of .WEB to the root server. This Interim Request is warranted because (1) Afilias will suffer irreparable harm barring such a stay; (2) Afilias' Request for IRP raises serious questions regarding ICANN's compliance with its Bylaws in administering the .WEB application and auction processes; and, (3) since ICANN will suffer no harm should the Interim Request be granted, the balance of hardships weighs decidedly in favor of Afilias.

2. FACTUAL BACKGROUND

5. The factual background to the parties' dispute is set out more fully in paragraphs 7 to 36 of Afilias' Request for IRP. Briefly, however, the main facts are as follows:

- VeriSign, which operates the .COM and .NET registries, possesses a dominant share of gTLD registrations, especially for those users involved in global commerce. VeriSign possesses “a virtual monopoly on Internet domains” that gives it “unrivalled power” in the marketplace.⁹ VeriSign admits as much. In a recent earnings call, VeriSign's CEO described .COM as “the brand that gives you credibility worldwide for your online presence” and “which support the majority of global e-commerce.”¹⁰ VeriSign enjoys remarkable profitability—despite long-standing government-imposed regulation of the price of .COM registrations, which are responsible for the lion's share of VeriSign's revenues. The price controls are necessary to prevent VeriSign from exploiting users, who lack meaningful alternatives to .COM.
- ICANN was established in 1998 to privatize the management of the Internet's core architecture (the “DNS”) “in a manner that increases competition”¹¹ by adopting “market mechanisms that support competition and consumer choice ... [to] promote innovation, [preserve diversity,] and enhance user choice and

⁹ M. Hargrave, “Profit from a ‘Monopoly on the Internet’ with 45% Upside,” *StreetAuthority* (6 Nov. 2013), available at <https://www.streetauthority.com/profit-monopoly-internet-45-upside-30422763> (last accessed on 14 Mar. 2018), [Ex. C-11], p. 1.

¹⁰ VeriSign Inc. (VRSN) - Q3 2018 Earnings Conference Call Transcript (25 Oct. 2018), [Ex. C-60], pp. 3, 8.

¹¹ ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1999), available at <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en> (last accessed on 14 Feb. 2018), [Ex. C-57], Sec. II(A).

satisfaction.”¹² ICANN’s Bylaws identify the introduction and promotion of competition as one of its six “Core Values.”¹³ These Core Values are intended to apply broadly and therefore must be reflected in ICANN’s decision-making process.¹⁴ ICANN’s New gTLD Program is a central facet of its longstanding efforts to “stimulate competition at the registry service level which is consistent with ICANN’s Core Value 6.”¹⁵

- The vast majority of the new gTLDs introduced to-date, however, do not provide meaningful competition for VeriSign, which has continued to grow in size and in profitability.¹⁶ .WEB is different due to properties inherent in its name. .WEB has the closest association with the Internet: users refer to the Internet as the “web” and “surf the web” by moving from one “website” to another, either by entering a “web address” into their browser or by performing a “web search.” .WEB is also truly generic, crossing all boundaries, geographies, and purposes. In short, .WEB is the most global and generic gTLD. For these reasons, .WEB is considered to be the closest and best potential competitor to .COM.
- VeriSign did not apply for the rights to .WEB when ICANN opened the New gTLD Program’s application window in 2012. Instead, four years later, VeriSign paid applicant NDC millions of dollars for (i) the ability to effectively (and secretly) submit bids at the .WEB Auction through NDC and (ii) NDC’s commitment to assign any and all acquired rights in .WEB to VeriSign.¹⁷ NDC intentionally concealed its deal with VeriSign from ICANN, interested governments, and the public, despite (i) its obligation as an applicant to promptly notify ICANN of any material changes to its application by submitting a change request form, and (ii) ICANN’s express demand that NDC

¹² ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1999), *available at* <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en> (last accessed on 14 Feb. 2018), [Ex. C-57], Sec. II(C)2.

¹³ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(b)(iv) (“[i]n performing its mission, the following ‘Core Values’ should also guide the decisions and actions of ICANN ... [including] [i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest.”).

¹⁴ Witness Statement of Ram Mohan (1 Nov. 2018), ¶ 10.

¹⁵ ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017), *available at* <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm> (last accessed on 13 Mar. 2018), [Ex. C-20], ¶ 13(iv) (at p. 5).

¹⁶ ICANN, Program Statistics (as of 31 Aug. 2018), *available at* <https://newgtlds.icann.org/en/program-status/statistics> (last accessed on 20 Sep. 2018), [Ex. C-28], p. 1 (stating that the New gTLD Program has introduced 1,232 new gTLDs to the Internet).

¹⁷ *See* Request by Afilias Domains No. 3 Limited for Independent Review (14 Nov. 2018) (“**Request for Independent Review**”), ¶¶ 31-33.

disclose any material changes to its application in the weeks preceding the .WEB Auction.¹⁸

- Perhaps fearing ICANN’s response (or the response of others in the Internet community) to what was clearly a violation of NDC’s commitment not to assign any rights or obligations in its application to a third party, NDC lied to, misled, and intentionally concealed material information from ICANN, the other members of the .WEB contention set, interested governments, and the public. Indeed, by the time of the .WEB Auction, NDC’s application had become a complete fiction. NDC was no longer the “applicant” for .WEB in any real sense: NDC’s sole function was to act as a “front” to conceal from ICANN, the other bidders, and all other stakeholders that VeriSign was attempting to acquire the one registry that threatened its dominant market position.
- As a direct result of its duplicitous conduct, VeriSign, acting through NDC, was able to secure the presumptive rights to .WEB despite not having applied for it, not having been subject to the robust evaluation and comment period set forth in the AGB, and not having been a member of the .WEB contention set. On 1 August 2016, VeriSign announced that it had won the rights to .WEB at an auction reserved for entities that had applied for .WEB, that had passed ICANN’s robust evaluation and comment period, and that were members of the .WEB contention set.¹⁹

3. PROCEDURAL BACKGROUND

6. Following VeriSign’s announcement on 1 August 2016 regarding its acquisition of .WEB, Afilias wrote to ICANN, stating that VeriSign’s agreement with NDC violated the New gTLD Program Rules and asking that ICANN disqualify NDC’s bid and award .WEB to the next highest bidder, Afilias.²⁰ Afilias also lodged a complaint with the ICANN Ombudsman.²¹

7. Having received no response to its earlier letter, on 9 September 2016, Afilias again wrote to ICANN, requesting ICANN to specify what steps it had taken to disqualify NDC’s bid and to confirm that ICANN would not enter into a Registry Agreement with NDC for .WEB until

¹⁸ See Request for Independent Review, ¶¶ 25-28, 38-55.

¹⁹ VeriSign, *VeriSign Statement Regarding .Web Auction Results* (1 Aug. 2016), [Ex. C-46].

²⁰ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (8 Aug. 2016), [Ex. C-49]; Witness Statement of John L. Kane (15 Oct. 2018), ¶ 32.

²¹ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (8 Aug. 2016), [Ex. C-49], pp. 2-3.

the Ombudsman had completed its investigation, the ICANN Board had reviewed the matter, and any ICANN accountability mechanisms had been completed.²²

8. On 16 September 2016, instead of responding to the substance of Afilias' letters, ICANN sent Afilias, VeriSign, and NDC a questionnaire asking them to address how NDC's conduct should be assessed under the AGB, even though Afilias had already done this in its 8 August and 9 September letters.²³ Nonetheless, Afilias responded to ICANN's request by letter dated 7 October 2016.²⁴

9. On 30 September 2016, ICANN informed Afilias that it had placed the .WEB contention set "on hold" as a result of complaints received from the .WEB contention set.²⁵ ICANN kept the .WEB contention set "on hold" for the next **twenty months**.²⁶ This was, in fact, the second time that ICANN had voluntarily stayed the delegation process for .WEB: ICANN had voluntarily placed the .WEB contention set on hold for over **sixteen months** in order to resolve the *Vistaprint Limited v. ICANN* IRP relating to the .WEBS gTLD, which also implicated the .WEB gTLD.²⁷

10. Since receiving the letters of 16 September and 30 September 2016, Afilias has repeatedly asked ICANN to disclose various documents relevant to ICANN's negotiation of the .WEB gTLD registry agreement with NDC and VeriSign, as well as details of its investigation of

²² Witness Statement of John L. Kane (15 Oct. 2018), ¶ 33.

²³ Letter from C. Willett (Vice President, ICANN's gTLD Operations) to J. Kane (Vice President, Afilias' Corporate Services) (16 Sep. 2016), [Ex. C-50].

²⁴ Letter from J. Kane (Vice President, Afilias' Corporate Services) to C. Willett (Vice President, ICANN's gTLD Operations) (7 Oct. 2016), [Ex. C-51]; Witness Statement of John L. Kane (15 Oct. 2018), ¶ 34.

²⁵ Letter from A. Atallah (President, ICANN's Global Domains Division) to S. Hemphill (General Counsel, Afilias) (30 Sep. 2016), [Ex. C-61].

²⁶ See Email from ICANN Global Support to J. Kane (7 June 2018), [Ex. C-62].

²⁷ See ICANN, *Vistaprint Limited v. ICANN (.WEBS)*: Case Information, available at <https://www.icann.org/resources/pages/vistaprint-v-icann-2014-06-19-en> (last accessed at 25 Nov. 2018), [Ex. C-63].

Afilias' complaints about NDC's conduct. ICANN however has refused to produce any of the requested information.

11. Despite the lengthy hold imposed by ICANN on the .WEB contention set, Afilias believes that ICANN has begun the delegation process for .WEB, including by negotiating the terms of a Registry Agreement for .WEB. Indeed, VeriSign's CEO has repeatedly confirmed that his company is participating in that process²⁸ while ICANN has steadfastly refused to provide any information as to the justification for removing the hold on the .WEB contention set on 6 June 2018 or, indeed, any information on its investigation of and interactions with NDC and/or VeriSign regarding .WEB since sending its questionnaire in September 2016.

12. On 18 June 2018 Afilias initiated a Cooperative Engagement Process ("CEP")—an ICANN accountability mechanism intended to allow the parties to amicably resolve their dispute or narrow the issues in dispute.²⁹ As a result of Afilias' initiation of the CEP, on 20 June 2018, ICANN again placed the .WEB contention set "on hold." In total, ICANN has voluntarily stayed further progress on the delegation of .WEB for **more than three years**. At no time during these lengthy stays did ICANN indicate that staying the delegation of .WEB would create any hardships for ICANN.

13. On 13 November 2018, Afilias and ICANN participated in a final CEP meeting, following which ICANN terminated the CEP. On 14 November 2018, Afilias filed its Request for IRP. Hours later, ICANN responded by informing Afilias that it intended to take the .WEB

²⁸ VeriSign (VRSN) Q1 2018 Results - Earnings Call Transcript (26 Apr. 2018), [Ex. C-48], p. 2 ("And for those who weren't here or aren't familiar with what the status is, we're engaged in ICANN's process to move the delegation forward for .web."); VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), [Ex. C-18], p. 6 ("Well, we're engaged in ICANN's process on .web to move the delegation forward but this is ICANN's process so we can't say exactly when it will conclude.").

²⁹ See Letter from A. Ali (Counsel for Afilias) to ICANN (18 June 2018), [Ex. C-52]; Email from ICANN to A. Ali (Counsel for Afilias) (20 June 2018), [Ex. C-53], p. 2.

contention set “off hold” on 27 November 2018 even though Afilias had commenced an ICANN accountability procedure that follows-on from a failed CEP.³⁰ ICANN provided Afilias with no explanation justifying its decision.

14. On 20 November 2018, Afilias wrote to ICANN about its decision to proceed with the delegation of .WEB despite Afilias’ commencement of the IRP.³¹ In its letter, Afilias questioned ICANN’s motives for removing the hold on .WEB, given that ICANN had voluntarily delayed the delegation of .WEB for several years and the lack of any apparent harm to ICANN if the .WEB contention set were to remain on hold for the duration of the IRP. Afilias requested an explanation justifying what appeared to be rash and arbitrary conduct by ICANN in proceeding with delegation of .WEB at this time, as well as the production of relevant documents. Afilias wrote to ICANN again on 24 November 2018 requesting a response to its 20 November 2018 letter.

15. ICANN did not respond to Afilias’ letter until after 9:00 pm EDT on 26 November 2018—quite literally the eve of the deadline that ICANN previously set for Afilias to submit this Interim Request to prevent ICANN from taking the .WEB contention set “off hold.”³² ICANN noted in its response that ICANN’s practice is to remove the hold on contention sets following CEP, notwithstanding the pendency of an IRP and despite the unanimous criticism of this practice in previous IRPs. ICANN also rejected Afilias’ request to produce documents related to its dealings with NDC and VeriSign about .WEB. Instead, ICANN inexplicably offered to keep the

³⁰ Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afilias) (14 Nov. 2018), [Ex. C-64], p. 1.

³¹ Letter from A. Ali (Counsel for Afilias) to Independent Review (ICANN) (20 Nov. 2018), [Ex. C-65].

³² Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afilias) (26 Nov. 2018), [Ex. C-66].

.WEB contention set “on hold” for another two weeks, until 11 December 2018, something that Afiliias had not requested and that did not remotely address any of the concerns Afiliias had raised.³³

16. It is because of ICANN’s unreasonable conduct and refusal to act in a transparent manner—as required by its Articles and Bylaws—that Afiliias has been forced to file, at significant cost and expense, this Interim Request.

4. INTERIM MEASURES OF PROTECTION ARE WARRANTED IN THIS PROCEEDING

17. The Emergency Panelist should grant Afiliias’ Requested Stay, thereby maintaining the *status quo* regarding the delegation process for .WEB. If the Requested Stay is not granted, ICANN will proceed to execute a Registry Agreement and delegate .WEB, allowing VeriSign to control the initial marketing and competitive strategy for .WEB, leaving Afiliias without an effective remedy should it prevail in this IRP.³⁴ This Interim Request seeks to maintain the hold of the .WEB contention set, preventing further efforts to execute a Registry Agreement or otherwise take steps in the process for delegating .WEB, until the IRP Panel is constituted and issues a decision on the merits of this IRP.

18. Afiliias’ Interim Request meets all of the required elements for a grant of interim measures of protection. Pursuant to both the Bylaws³⁵ and the Supplementary Procedures:³⁶

Interim relief may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

³³ Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66], p. 1.

³⁴ Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afiliias) (14 Nov. 2018), [Ex. C-64].

³⁵ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), available at <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 4, Sec. 4.3(p).

³⁶ ICANN, Interim Supplementary Procedures for ICANN Independent Review Process (25 Oct. 2018), [Ex. C-59], Art. 10.

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.³⁷

If a Claimant satisfies each of these elements, the Emergency Panelist should grant interim relief in the form of “a stay ... to maintain the *status quo*” for the pendency of an IRP.³⁸

19. Where, as here, a claimant seeking IRP has requested interim measures to preserve the *status quo* and prevent ICANN from executing a registry agreement or otherwise granting the contested gTLD to a third party, panels have **always** granted the claimants’ request.³⁹ Afiliás’ Interim Request should likewise be granted.

4.1 Afiliás Will Suffer Irreparable Harm if the Interim Request Is Not Granted

20. Afiliás is entitled to a process that can provide a meaningful remedy if it prevails in this IRP. Indeed, under international law, Afiliás has a right to have the *status quo* preserved during the pendency of this IRP, where doing so is necessary to protect the effectiveness of a future possible award by the Panel.⁴⁰ Where, as here, a party enters into a proceeding that has jurisdiction

³⁷ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), available at <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 4, Sec. 4.3(p). The ICDR Rules provide a different standard for Interim Measures of Protection. ICDR Rules, Art. 6(1) (“[(1)] the nature of the relief sought, [(2)] the reasons why such relief is required on an emergency bases, and [(3)] the reasons why the party is entitled to such relief.”).

³⁸ ICANN, Interim Supplementary Procedures for ICANN Independent Review Process (25 Oct. 2018), [Ex. C-59], Art. 10.

³⁹ See *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Emergency Independent Review Panelist’s Order on Request for Emergency Measures of Protection (23 Dec. 2014), [Ex. CA-4]; see also *DotConnectAfrica (DCA) Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (12 May 2014), [Ex. CA-5]; *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6].

⁴⁰ See, e.g., *Burlington Resources Inc. and Others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (29 June 2009), [Ex. CA-7], ¶ 60 (indicating that the “general right to the *status quo* and to the non-aggravation of the dispute” are “self-standing rights” that a party is entitled to protect); see also *Certain Activities*

to award the relief it seeks, that party has a right to protect the ability of the tribunal to provide the relief requested.⁴¹ In particular, where a dispute concerns control or ownership of a unique asset, the claimant has the right to ensure that the tribunal will have the authority to award control or ownership of that asset should claimant prevail.⁴²

21. For these reasons, in each and every IRP where the claimant has requested that an Emergency Panelist issue a stay to prevent ICANN from executing a registry agreement or otherwise granting the contested gTLD to a third party, the Emergency Panelist has granted the stay because allowing ICANN to proceed would cause the claimant irreparable harm. For example, in *Gulf Corporation Council v. ICANN* (“GCC”), the Emergency Panelist found that the claimant’s right to a fair and effective IRP process would be lost entirely if ICANN proceeded to sign a Registry Agreement for the contested gTLD before the IRP proceeding could be completed.⁴³

Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order, 2011 I.C.J. Reports 6 (8 Mar.), [Ex. CA-8], ¶ 62.

⁴¹ See *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6], ¶ 50 (“It is generally accepted that interim or provisional measures are intended to safeguard the rights of the parties, to avoid serious injury pending the hearing of a dispute and to thereby ensure that the dispute process may function in a fair and effective manner.”); see also *Burlington Resources Inc. and Others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (29 June 2009), [Ex. CA-7], ¶ 71 (“Thus, at least *prima facie*, a right to ... the protection of the effectiveness of a possible future award” could exist under the circumstances.); United Nations General Assembly, Resolution 811, *Universal Declaration of Human Rights* (16 Dec. 1948), [Ex. C-67], Art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).

⁴² See, e.g., United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (2010), [Ex. C-68], Art. 26(2) (“An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party [to] ... [p]rovide a means of preserving assets out of which a subsequent award may be satisfied.”); *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 Oct. 1999) reprinted in 16 ICSID Rev.—FILJ 207 (2001), [Ex. CA-9], ¶ 14 (“[a]n example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property”).

⁴³ *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6], ¶ 59 (holding that “the right

22. ICANN’s refusal to keep the .WEB contention set “on hold” threatens the very viability of this IRP. The IRP is designed to provide a meaningful and independent review of ICANN actions. Indeed, as the *Dot Registry, LLC v. ICANN* (“**Dot Registry**”) Emergency Panelist observed, the very Terms and Conditions of the New gTLD Program, which require applicants to waive the right to contest ICANN’s actions in court, give rise to a strong right to a meaningful IRP process: “[t]he structure of the broad [litigation] waiver ... suggests that the availability of [the IRP process] is the *quid pro quo* for the relinquishment of substantial rights.”⁴⁴ As explained by the Emergency Panelist in *GCC*:

If ICANN proceeds to sign the agreement, the integrity of the IRP process itself will be undermined. The Claimant’s right of review will be of no consequence whatsoever. The signing of the registry agreement will frustrate the Claimant’s IRP Request, rendering the issue of injunctive relief moot as no IRP Panel would then make a decision that ICANN refrain from signing. This constitutes clear irreparable harm which will be suffered by the Claimant absent interim relief at this stage of the process. This harm is not simply a possibility but is a reasonable likelihood if no interim is granted.⁴⁵

to an independent review is a significant and meaningful one under the ICANN’s Bylaws” and that “[i]f ICANN proceeds to sign the [registry] agreement, the integrity of the IRP process will be undermined.”); *see also DotConnectAfrica (DCA) Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (12 May 2014), [Ex. CA-5], ¶¶ 44-45 (finding that “if a stay is not granted and the registry agreement ... is implemented further, the chances of [claimant] having its Request for an independent review heard and properly considered will be jeopardized”).

⁴⁴ *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Emergency Independent Review Panelist’s Order on Request for Emergency Measures of Protection (23 Dec. 2014), [Ex. CA-4], ¶ 47; *DotConnectAfrica (DCA) Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (12 May 2014), [Ex. CA-5], ¶ 47 (finding that claimant “enjoys, according to ICANN’s own Bylaws, the right to have ICANN’s ... decisions reviewed by an independent panel, a right which will be lost if interim relief is not granted in this case.”).

⁴⁵ *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6], ¶ 59; *see also DotConnectAfrica (DCA) Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (12 May 2014), [Ex. CA-5], ¶ 45 (“[I]f a stay is not granted and the registry agreement between ICANN and ZACR is implemented further, the chances of DCA Trust having its Request for an independent review heard and properly considered will be jeopardized.”).

23. As in these prior IRPs, here, ICANN seeks to undermine the IRP by proceeding to execute a Registry Agreement, complete any outstanding pre-delegation testing, and delegate .WEB, thereby allowing VeriSign to control .WEB at its launch. Should ICANN not be restrained, the IRP Panel would be unable to reverse that decision: as the *GCC* Emergency Panelist found, since “the terms of the standard registry agreement do not entitle or permit ICANN to terminate the agreement, without breach or compensation, if an IRP is successful and an IRP Panel declares that ICANN should not have signed that particular agreement[,] [t]he execution of the registry agreement cannot be readily and lawfully undone.”⁴⁶ Thus, as the *GCC, Dot Registry*, and *DotConnectAfrica Trust v. ICANN (“DCA Trust”)* panelists found with respect to similarly situated claimants, Afiliis would suffer an irreparable injury should ICANN proceed to execute a Registry Agreement for .WEB with NDC or VeriSign.

24. The urgent need to preserve the *status quo* here is more than simply theoretical. There is a unique moment in time when a new product and service is first introduced to the public: gTLDs are no different. .WEB is uniquely positioned to compete in a meaningful way with VeriSign. VeriSign, naturally, has no interest in marketing .WEB as a competitor to its own offering. Specifically:

- VeriSign would likely position and market .WEB as a flanking product that is intended to complement, rather than directly compete with, .COM. This could be accomplished in myriad ways. For example, in addition to tailoring an advertising campaign to focus on .WEB as a domain to use when a first-choice domain is not available in .COM, NDC/VeriSign could also ensure that any promotional periods for .WEB both do not overlap with .COM’s promotions and last for a far shorter window; this strategy has, after all, worked for VeriSign regarding its marketing of .NET to ensure that .NET does not cannibalize VeriSign’s .COM “cash cow.” Even if Afiliis were to prevail in this IRP, therefore, .WEB would be forever tainted in the marketplace as a complementary product, rather than a substitute, for .COM,

⁴⁶ *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6], ¶ 56.

artificially depressing demand for .WEB domains and irreparably harming its long-term competitive prospects.

- VeriSign would also use initial pricing to damage Afilias’ ability to successfully operate .WEB in the future. On the one hand, VeriSign could set .WEB’s initial price far below market price, impeding Afilias’ future ability to operate the registry without incurring substantial losses. Alternatively, NDC/VeriSign could price .WEB far above market price, discouraging registrants from purchasing .WEB domains. Even if it were to prevail in this IRP, Afilias would encounter difficulties changing registrants’ perception of .WEB’s premium price, even if Afilias later prices .WEB at a more competitive value.
- VeriSign would position .WEB to target a narrow group of potential consumers, discouraging broader adoption of the domain. Afilias has first-hand experience in trying to grow .PRO beyond its narrow initial marketing target. Although .PRO is an open, unrestricted domain, it continues to be largely used by entities that fit its initial marketing (certified professionals). Indeed, users are unaware that .PRO is fully unrestricted today. Focusing initial marketing on a similar subset of users would forever taint .WEB as a niche domain that complements, rather than competes with, .COM.

25. For the foregoing reason, this Emergency Panelist should grant the Interim Request, thereby preserving the *status quo* and ensuring that, should Afilias prevail on the merits of this IRP, the IRP Panel will have the power to award a meaningful remedy.⁴⁷

4.2 The Request for IRP Raises “Sufficiently Serious Questions” Related to the Merits of this IRP

26. The “serious questions” standard permits the grant of interim measures where, as here, the Emergency Panelist “cannot determine with certainty that the [claimant] is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the [interim measures].”⁴⁸ Afilias’ Request for IRP raises several serious questions

⁴⁷ *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6], ¶ 50. Interim measures of protection are intended to “safeguard the rights of the parties, to avoid serious injury pending the hearing of a dispute and to thereby ensure that the dispute process may function in a fair and effective manner.” *Id.*

⁴⁸ *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010), [Ex. CA-10].

regarding ICANN's conduct regarding its administration of the New gTLD Program, the .WEB contention set, and the .WEB Auction:

- **First**, did ICANN breach its Bylaws by failing to fully investigate complaints made about NDC prior to ICANN's administration of the .WEB Auction?
- Confidential Information Redacted
- Confidential Information Redacted
- **Fourth**, to the extent that ICANN did not learn of VeriSign's agreement with NDC prior to ICANN's administration of the .WEB Auction, did ICANN breach its Bylaws by failing to fully investigate the circumstances that led to VeriSign's announcement that would acquire .WEB just three days following the conclusion of the .WEB Auction?
- **Fifth**, to the extent that ICANN did not learn of VeriSign's agreement with NDC prior to ICANN's administration of the .WEB Auction, did ICANN breach its Bylaws by failing to disqualify NDC's bids at the .WEB Auction?
- **Sixth**, does ICANN's current plan, which will result in VeriSign's control over .WEB, violate ICANN's Core Value to introduce and promote competition,⁴⁹ thereby negating the primary policy that underlies the New gTLD Program?
- **Seventh**, whether ICANN has administered the New gTLD Program through "open and transparent processes" as required by ICANN's Bylaws,⁵⁰ as regards its conduct of the .WEB Auction and its investigations of NDC's violations of the AGB?

27. As set forth more fully in the Request for IRP and supporting submissions (including Afiliás' Witness Statements, the Expert Report of Professor Jonathan Zittrain, and its

⁴⁹ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), available at <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(b)(iv).

⁵⁰ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), available at <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on 21 Sep. 2018), [Ex. C-1], Art. 1, Sec. 1.2(a).

exhibits), Afiliás has demonstrated, *inter alia*, the following: NDC violated material provisions of the AGB, including (i) its obligation to submit, prior to the .WEB Auction, a change request pursuant to Section 1.2.7 of the AGB notifying ICANN and the Internet community of its deal with VeriSign⁵¹ and (ii) its commitment, pursuant to the Terms and Conditions contained in Section 6.10 of the AGB, to refrain from assigning or transferring any of its rights and obligations to VeriSign.⁵² ICANN violated its Bylaws by condoning NDC’s violations and refusing to either reject NDC’s application or disqualify the bids it made in the .WEB Auction. Finally, independent of NDC’s numerous AGB violations—and ICANN’s failure to do anything about them—ICANN has breached its Bylaws by sanctioning an arrangement that will result in VeriSign acquiring its next best (and likely last) potential competitor through a scheme that was wholly lacking in fairness, openness, and transparency.

4.3 Since ICANN Will Not Suffer Significant Hardships Should a Stay Be Granted, the Balance of Hardships Decidedly Tips in Afiliás’ Favor

28. While Afiliás will suffer severe and irreparable harm should its Interim Request be denied, ICANN will suffer no hardship if the Requested Stay is granted. Indeed, in granting interim measures, the panelists in both *GCC* and *DCA Trust* noted that granting a stay for the duration of an IRP proceeding would not significantly prejudice ICANN.⁵³

⁵¹ As set forth in Afiliás’ Request for IRP, NDC violated the AGB by failing to notify ICANN about its deal with VeriSign, which constituted a “change in circumstances that would render any information provided in the application false or misleading.” Request for Independent Review, ¶ 63 (citation omitted).

⁵² As set forth in Afiliás’ Request for IRP, NDC violated Paragraph 10 of the AGB’s Terms and Conditions by (1) transferring its right to elect to voluntarily resolve the .WEB contention set to VeriSign, (2) assigning its right to bid at the ICANN auction to VeriSign, and (3) transferring its obligation to negotiate a registry agreement for .WEB with ICANN to VeriSign. Request for Independent Review, Section 3.3.

⁵³ *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6], ¶ 64 (“There is no evidence that a few more months of delay during the IRP will cause any specific prejudice or harm to Asia Green[,]” the registry operator ICANN wants to delegate .PERSIANGULF instead of GCC.); *DotConnectAfrica (DCA) Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (12 May 2014), [Ex. CA-5], ¶ 46 (“Indeed, neither ICANN, nor ZACR [the registry operator that ICANN intended to delegate

29. This is not surprising, particularly since in this case ICANN itself is responsible for delaying the introduction of .WEB by voluntarily placing the .WEB contention set “on hold” on three separate occasions for over three years.

30. ICANN has not—and indeed cannot—explain why removing the hold on .WEB is so urgent at this time, prior to the conclusion of this IRP. As the IRP panel in *DCA Trust* held, any prejudice that might be caused “by [the] delay to the gTLD application [that] may arise from the granting of the requested interim relief ... is in part counterbalanced by the advancement of the integrity in and legitimacy of the IRP process.”⁵⁴

31. As a non-profit corporation, ICANN has no commercial interest in .WEB; a stay of the delegation proceedings for .WEB with NDC will not cause ICANN any financial harm. ICANN’s sole interests here should be (1) ensuring the legitimacy of the IRP process contained in the Bylaws; (2) protecting the transparent and fair operation of its New gTLD Program; and (3) ensuring that its actions in this regard further the creation of a competitive environment in the DNS. These significant interests will not be harmed by a stay that will allow an IRP Panel to fairly resolve this dispute.

32. Therefore, the balance of harms heavily weights in favor of Afilias, requiring the grant of the Interim Request.

5. RELIEF REQUESTED

33. For these reasons, Afilias respectfully requests that a timely appointed Emergency Panelist issue an order granting the Interim Request.

.AFRICA instead of DCA Trust] will suffer from a few more months of delay if a stay of processing of ZACR’s .AFRICA application is ordered.”).

⁵⁴ *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015), [Ex. CA-6], ¶ 61.

34. Afilias further requests the Emergency Panelist to order ICANN to produce documents responsive to the following requests which are relevant and material to the issues in dispute in this proceeding and in the IRP:

- a. all documents relevant to the status of the delegation of the .WEB gTLD—including internal ICANN communications and communications between (1) ICANN and (2) either or both of NDC and VeriSign—including, but not limited to, documents regarding (a) the negotiation of a Registry Agreement concerning .WEB, (b) the pre-delegation testing for the .WEB registry, (c) Afilias’ invocation of CEP concerning .WEB, (d) the conduct of CEP concerning .WEB, and (e) Afilias’ request for IRP concerning .WEB;
- b. documents sufficient to show that there are in fact underlying circumstances of urgency and necessity sufficient to justify taking the .WEB contention set off hold and forcing Afilias to file this Interim Request; and
- c. all documents, including internal memoranda and policy positions, addressing ICANN’s decisions to place a contention set “on hold” or to take a contention set off the “on hold” status. In this regard, we request that ICANN provide any and all documents, including internal emails and memoranda, relating to the justifications as to why a specific gTLD contention set was put “on hold” or was taken off the “on hold” status. This request includes all documents related to ICANN’s decision to put the .WEB contention set “on hold” pending the .WEBS IRP concerning Vistaprint’s application for .WEBS.

35. Afilias further requests an order awarding Afilias a sum equal to all costs and expenses Afilias has incurred in bringing this Interim Request, as well as any other relief that the Emergency Panelist may consider necessary or appropriate in the circumstances.

Respectfully submitted,



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LIST OF EXHIBITS

Exhibit No.	Description
C-59	ICANN, Interim Supplementary Procedures for ICANN Independent Review Process (25 Oct. 2018)
C-60	VeriSign Inc. (VRSN) - Q3 2018 Earnings Conference Call Transcript (25 Oct. 2018)
C-61	Letter from A. Atallah (President, ICANN's Global Domains Division) to S. Hemphill (General Counsel, Afilias) (30 Sep. 2016)
C-62	Email from ICANN Global Support to J. Kane (7 June 2018)
C-63	ICANN, <i>Vistaprint Limited v. ICANN (.WEBS)</i> : Case Information, available at https://www.icann.org/resources/pages/vistaprint-v-icann-2014-06-19-en (last accessed at 25 Nov. 2018)
C-64	Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afilias) (14 Nov. 2018)
C-65	Letter from A. Ali (Counsel for Afilias) to Independent Review (ICANN) (20 Nov. 2018)
C-66	Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afilias) (26 Nov. 2018)
C-67	United Nations General Assembly, Resolution 811, <i>Universal Declaration of Human Rights</i> (16 Dec. 1948)
C-68	United Nations Commission on International Trade Law, <i>UNCITRAL Arbitration Rules</i> (2010)

LIST OF LEGAL AUTHORITIES

Authority No.	Description
CA-4	<i>Dot Registry, LLC v. ICANN</i> , ICDR Case No. 01-14-0001-5004, Emergency Independent Review Panelist’s Order on Request for Emergency Measures of Protection (23 Dec. 2014)
CA-5	<i>DotConnectAfrica (DCA) Trust v. ICANN</i> , ICDR Case No. 50-117-T-1083-13, Decision on Interim Measures of Protection (12 May 2014)
CA-6	<i>Gulf Cooperation Council (GCC) v. ICANN</i> , ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request for Interim Measures of Protection (15 Feb. 2015)
CA-7	<i>Burlington Resources Inc. and Others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador</i> , ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (29 June 2009)
CA-8	<i>Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)</i> , <i>Provisional Measures</i> , Order, 2011 I.C.J. Reports 6 (8 Mar.)
CA-9	<i>Emilio Agustín Maffezini v. Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 Oct. 1999) <i>reprinted in</i> 16 ICSID Rev.—FILJ 207 (2001)
CA-10	<i>Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.</i> , 598 F.3d 30 (2d Cir. 2010)