

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Altanovo Domains Limited,) ICDR CASE NO. 01-23-0003-2351
)
 Claimant,)
)
 and)
)
 INTERNET CORPORATION FOR ASSIGNED)
 NAMES AND NUMBERS,)
)
 Respondent.)
_____)

ICANN'S RESPONSE TO REQUEST FOR INDEPENDENT REVIEW PROCESS

Jeffrey A. LeVee
Eric P. Enson
Kelly M. Watne
JONES DAY
555 South Flower Street, 50th Fl.
Los Angeles, CA 90071
Tel: +1.213.489.3939

Counsel to Respondent
The Internet Corporation for
Assigned Names and Numbers

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to the Request for Independent Review Process (“IRP Request”) submitted by Altanovo Domains Limited (“Altanovo”) on 14 July 2023.

1. ICANN is a California nonprofit public benefit corporation formed in 1998 to oversee the technical coordination of the Internet’s Domain Name System (“DNS”) on behalf of the Internet community. In order to remain responsive to the Internet community, ICANN’s Bylaws contain several Accountability Mechanisms, including the Independent Review Process (“IRP”). Under the IRP, a party materially and adversely affected by an ICANN action or inaction may submit its claims to an independent panel to determine whether ICANN acted contrary to its Articles of Incorporation (“Articles”) or Bylaws in taking that action or inaction.

2. This is the second IRP brought by Altanovo (formerly Afilias Domains No. 3 Limited) challenging ICANN’s conduct as it relates to the .WEB generic top-level domain (“gTLD”). A gTLD is the portion of an Internet domain name to the right of the final dot, such as “.COM” or “.ORG.” .WEB is one of the new gTLDs sought in ICANN’s New gTLD Program (the “Program”), through which scores of entities submitted 1,930 applications to ICANN for the opportunity to operate various new gTLDs. Under ICANN’s stewardship, the Program has resulted in the introduction of over 1,200 new gTLDs into the DNS.

3. Altanovo’s previous IRP, initiated in 2018, alleged that ICANN violated its Articles and Bylaws by not disqualifying a competing .WEB applicant, Nu Dotco, LLC (“NDC”), based on NDC’s agreement with non-applicant Verisign, Inc. (“Verisign”), which Altanovo claimed violated the Program’s Applicant Guidebook (“Guidebook”) and other rules and policies (the “First .WEB IRP”). At that time, the ICANN Board had not yet considered whether that agreement between NDC and Verisign (the “Domain Acquisition Agreement” or

“DAA”) violated the applicable rules. After a lengthy and intensive IRP, the Panel ruled that ICANN violated its Articles and Bylaws by failing to address the question of whether the DAA violated the Guidebook and the New gTLD Auction Rules (“Auction Rules”), and the Panel recommended that the ICANN Board do so. The Panel, however, explicitly rejected Altanovo’s request that the Panel disqualify NDC’s bid for .WEB and delegate .WEB to Altanovo, which is the same relief Altanovo requests again in this IRP.

4. In light of the Panel’s determination and recommendations, the ICANN Board, as well as a subset of the Board known as the Board Accountability Mechanisms Committee (“BAMC”), thoroughly considered the DAA under the relevant provisions of the Guidebook and the Auction Rules. That process included seeking input from Altanovo, NDC, and Verisign, all three of which submitted lengthy written submissions and expert reports to the Board, and the BAMC’s and Board’s extensive consideration of those submissions. The BAMC and the Board convened several meetings to consider and evaluate the relevant materials. Following that comprehensive analysis, the ICANN Board resolved that the DAA did not violate the Guidebook or the Auction Rules, a decision that is entitled to deference under ICANN’s Bylaws provision modeled after the business judgment rule.

5. Altanovo then initiated this second IRP claiming that the Board’s decision violated various provisions of ICANN’s Bylaws and seeking the same relief from the First .WEB IRP. To be clear, ICANN’s interest in this matter is not in picking winners and losers, but because only one applicant can secure the right to operate .WEB, it was inevitable that only one applicant prevailed. In keeping with the First .WEB IRP Panel’s recommendation that the ICANN Board make a determination with regard to DAA, the Board conducted its analysis and determined that the DAA did not violate the Guidebook or the Auction Rules; thereby determining that NDC, as the prevailing bidder at the .WEB auction, is granted the right to

operate the .WEB registry. While Altanovo disagrees with the substance of that decision, it does not have any credible claims that the manner in which the Board reached that decision violated the ICANN Articles or Bylaws, which is the only issue properly before this IRP Panel. Therefore, ICANN respectfully requests that the Panel dismiss Altanovo’s claims, deny Altanovo the relief that it seeks, and declare ICANN the prevailing party in this IRP.

SUMMARY OF RELEVANT FACTS¹

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

6. ICANN is a California nonprofit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet’s DNS on behalf of the Internet community. The essential function of the DNS is to convert numeric Internet Protocol (“IP”) addresses understood by computers into easily remembered Internet domain names such as “icann.org”. ICANN’s core Mission is to ensure the stability, security, and interoperability of the DNS. To that end, among other things, ICANN contracts with entities that operate gTLDs in the DNS.

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

8. For instance, ICANN’s Bylaws provide for a process by which “any person or entity materially affected by an action or inaction” of ICANN may request review or

¹ Altanovo’s “Summary of Facts Underlying the Dispute” contains “facts” and information that are not relevant to the actual issues in this IRP. ICANN does not respond to, or address, each of these purported facts, but instead focuses its Response on facts relevant to the instant dispute. ICANN’s decision not to address a specific “fact” should not be misconstrued as agreement with Altanovo’s characterizations.

² Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 2 June 2022) (“Bylaws”), Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2, Ex. C-14.

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

9. In addition, the ICANN Bylaws set out the IRP under which a party materially and adversely affected by an ICANN action or inaction may submit its claims to an independent third-party for review.⁵ IRP claims are submitted to the International Centre for Dispute Resolution (“ICDR”), which is responsible for administering IRP proceedings. IRPs are conducted in accordance with the ICDR’s International Arbitration Rules, as modified by ICANN’s Bylaws and IRP Interim Supplementary Procedures (“Interim Supplementary Procedures”).⁶ The sole issue in an IRP is whether ICANN acted contrary to its Articles or Bylaws in taking the challenged action or inaction.

II. ICANN’S NEW GTLD PROGRAM.

A. ICANN’s Policy Development (2000-2007).

10. In its early years, ICANN focused on increasing the number of companies (known as “registrars”) that could sell domain name registrations to entities and individuals within the then existing gTLDs (for example, .COM, .NET, and .ORG). In its early years, ICANN accredited scores of companies that became new gTLD registrars.

11. ICANN also focused on expanding, although more slowly, the number of gTLDs in existence. In 2000, ICANN approved seven new gTLDs as a “proof of concept” test to confirm that the addition of new gTLDs would not negatively affect the stability and security of the Internet or the DNS. Following that successful “proof of concept” round, in 2004 and 2005,

³ *Id.*, Art. 4, § 4.2.

⁴ *Id.*

⁵ *Id.*, Art. 4, § 4.3.

⁶ Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (25 October 2018) (“Interim Supp. Procedures”), Ex. C-20.

ICANN approved a handful of additional gTLDs.

12. The 2012 round of the New gTLD Program resulted in ICANN’s most ambitious expansion of the Internet’s naming system to date. Under the Program, any interested entity could apply for the opportunity to operate new gTLDs that were not already in use in the DNS, meaning that there was no cap on the number of applications that could be submitted. The Program was designed to enhance diversity, creativity, and consumer choice in gTLDs, and to provide the benefits of innovation to consumers.⁷ The Program arose from policy recommendations by ICANN’s Generic Names Supporting Organization (“GNSO”), which were based on community input between 2005 and 2007.⁸ On 26 June 2008, the ICANN Board adopted the GNSO’s policy recommendations and directed ICANN to develop an implementation plan for the Program, to be provided to the Board for approval.⁹

B. ICANN’s Implementation of the Program (2008-2012).

13. The Guidebook, which enabled the implementation of the Program, was developed with significant input from the ICANN community over several years. ICANN published a first draft of the Guidebook in October 2008¹⁰ and distributed it for public comment. Numerous revisions were made based on the public comments, and additional comments were sought and received on the revisions. The process repeated many times, resulting in multiple versions of the Guidebook until ICANN adopted the operative, 338-page Guidebook in June 2012.¹¹

14. The Guidebook provides the evaluation procedures for new gTLD applicants. It

⁷ gTLD Applicant Guidebook (4 June 2012) (“Guidebook”), Preamble, Ex. C-5.

⁸ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 August 2007), Ex. C-18.

⁹ Adopted Board Resolutions | Paris (26 June 2008), Ex. R-1.

¹⁰ New gTLD Program: Draft Applicant Guidebook (24 October 2008 version), *available at* <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.

¹¹ Guidebook, Preamble.

specifies what documents and information are required, the financial and legal commitments of operating a gTLD, what applicants can expect during the application and evaluation periods, and the dispute resolution procedures that could be invoked to object to new gTLD applications.¹²

15. The Guidebook requires applicants to provide the names and positions of their “directors,” “officers and partners” and “shareholders holding at least 15% of shares,” as well as information about the applicants’ financial condition so that ICANN can assess the applicants and their technical and financial wherewithal to operate a gTLD.¹³ The Guidebook also requires applicants to inform ICANN if “information previously submitted by an applicant becomes untrue or inaccurate,” including “applicant specific information such as changes in financial position and changes in ownership or control of the applicant.”¹⁴ Importantly, an applicant’s failure to inform ICANN that previously submitted information has become untrue or inaccurate does not require denial of an application. Instead, the Guidebook gives ICANN discretion to determine whether the changed circumstances are material and what consequences, if any, should follow from a failure to disclose those circumstances.¹⁵

16. As noted above, only one applicant can be awarded a particular gTLD. When there is more than one qualified applicant for the same gTLD, the Guidebook mandates that the applications be placed in a “contention set.”¹⁶ When this occurs, the Guidebook encourages (but does not require) the applicants to agree among themselves on resolution of the contention set.¹⁷ To resolve a contention set privately, all applicants within the contention set must agree to a private resolution.¹⁸ If the contention set cannot be resolved through private resolution, the

¹² See generally, *id.*

¹³ *Id.*, Attachment to Module 2.

¹⁴ *Id.*, § 1.2.7.

¹⁵ *Id.*

¹⁶ *Id.*, § 4.1.1.

¹⁷ *Id.*, § 4.1.3.

¹⁸ See *id.*

Guidebook requires ICANN to conduct an auction among those contention set members wishing to proceed with their applications.¹⁹ The proceeds of this type of auction are provided to ICANN, but are earmarked for purposes consistent with ICANN’s Mission, Core Values and nonprofit status, based on Internet community input.²⁰

17. After a successful gTLD applicant passes initial evaluation and resolves any formal objection and/or contention set proceeding, and assuming no ICANN Accountability Mechanisms are pending, the applicant is offered a Registry Agreement with ICANN to become a new gTLD registry operator. A Registry Agreement is a formal, written agreement between a gTLD operator and ICANN that sets forth the rights, duties and obligations of the operator.²¹ After a Registry Agreement is fully executed, ICANN takes the technical steps necessary to delegate the new gTLD into the DNS. Once a gTLD has been fully delegated into the DNS, it can then become accessible on the Internet.

18. Registry Agreements can be assigned (and often have been assigned) to third parties. Assignments and transfers of Registry Agreements to operate gTLDs must be approved by ICANN, and ICANN follows a known procedure in evaluating such requests.²² ICANN also has published materials explaining how a Registry Agreement can be assigned from one registry operator to another.²³ Because ICANN administers, rather than regulates, the DNS,²⁴ ICANN’s focus in evaluating a proposed gTLD transfer is whether the transferee organization has the requisite financial and technical ability to operate a gTLD.

¹⁹ *Id.*, § 4.3.

²⁰ *Id.*, § 4.3 n.1.

²¹ Contracting & The Registry Agreement, Ex. R-2.

²² Assignment of a Registry Agreement, Ex. R-3.

²³ User Documentation on Delegating and Redelegating a Generic Top-Level Domain, Ex. R-22.

²⁴ Bylaws, Art. 1, § 1.1(c), (“ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”).

III. THE .WEB CONTENTION SET.

19. ICANN received seven applications for .WEB from sophisticated companies, including Altanovo and NDC, Ruby Glen LLC (“Ruby Glen”), a subsidiary of Donuts Inc. (now known as Identity Digital), Charleston Road Registry, Inc., a subsidiary of Google, Web.com Group, Inc., DotWeb Inc., and Schlund Technologies GmbH. The seven applications for .WEB passed all applicable evaluations and were placed in a contention set, pursuant to the procedures set forth in the Guidebook.²⁵

20. Per the Guidebook, ICANN scheduled an auction for 27 July 2016 to resolve the .WEB Contention Set if it could not be privately resolved by the applicants before then. As the date of the auction approached, the members of the .WEB Contention Set had not resolved the contention set privately, and the members as a whole did not request a postponement of the auction. Accordingly, ICANN proceeded with plans for the auction.²⁶

21. The .WEB auction proceeded on 27-28 July 2016. NDC prevailed at a bid price of \$135 million.²⁷ Days later, Verisign, the entity that operates .COM and .NET, publicly stated that it had “entered into an agreement with [NDC] wherein [Verisign] provided funds for [NDC’s] bid” and that, if NDC entered into a Registry Agreement with ICANN to operate .WEB, NDC “will then seek to assign[] the Registry Agreement to VeriSign upon consent from ICANN.”²⁸

IV. THE FIRST .WEB IRP.

22. Since the auction concluded, the .WEB Contention Set and auction has been the subject of numerous disputes and evaluations. On 22 July 2016, a competing applicant, Ruby

²⁵ Approved Board Resolutions, Regular Meeting of the ICANN Board, Resolutions No. 2023.04.30.12 – 2023.04.30.14 (30 April 2023) (“30 April 2023 Board Resolution”) at p. 56, Ex. C-17.

²⁶ *Id.*

²⁷ ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB / WEBS, Ex. R-4.

²⁸ Verisign Statement Regarding .Web Auction Results (1 August 2016), Ex. R-5.

Glen, filed a Complaint against ICANN in Federal District Court, making claims that NDC violated the Guidebook and should have been disqualified from the .WEB auction.²⁹ On 28 November 2016, the Federal District Court dismissed with prejudice Ruby Glen’s First Amended Complaint regarding the .WEB auction based on the covenant not to sue in the Guidebook, which requires applicants to use ICANN’s Accountability Mechanisms instead of filing lawsuits against ICANN. The Ninth Circuit affirmed the District Court’s decision.³⁰

23. In early 2017, the Antitrust Division of the United States Department of Justice (“DOJ”) issued a civil investigative demand (“CID”) to ICANN, Verisign, and others involved in the .WEB auction, seeking documents and information “in connection with DOJ’s investigation of Verisign’s proposed acquisition of NDC’s contractual rights to operate the .WEB gTLD.”³¹ A year later, in January 2018, DOJ formally closed its investigation without taking any action.³² Such a decision typically is interpreted as meaning the government did not find a threat to competition that warranted further action.

24. Altanovo then initiated an IRP in November 2018 against ICANN regarding the exact issues it is raising in this IRP, namely that the DAA violated the Guidebook and the Auction Rules. Following two years of hard fought proceedings, the First .WEB IRP Panel declared, in relevant part, that ICANN violated its Articles and Bylaws by “failing to pronounce on the question of whether” the DAA “complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules.”³³ The Panel then recommended that ICANN “consider[] and pronounce[] upon the question of whether the DAA complied with the New gTLD Program Rules” and “determine[] whether by reason of any

²⁹ *Ruby Glen v. ICANN*, Plaintiff’s Amended Complaint, ¶¶ 68-69, 71, Ex. R-6.

³⁰ *Ruby Glen v. ICANN*, Order Granting Motion to Dismiss, Ex. R-7; *Ruby Glen v. ICANN*, Memorandum, Ex. R-8.

³¹ Afilias Domains No. 3 Ltd. Response to DIDP Request No. 20180223-1 (24 March 2018), at p. 11, Ex. R-9.

³² Excerpts from Verisign 10-K (for the fiscal year ended 31 December 2017), Ex. R-10.

³³ Final Decision (as corrected 15 July 2021) (“Corrected Final Declaration”) ¶ 413.1, Ex. C-1.

violation of the Guidebook and Auction Rules, NDC’s application for .WEB should be rejected and its bids at the auction disqualified.[.]³⁴ The Panel dismissed Altanovo’s other claims for relief, including its request that the Panel order ICANN to disqualify NDC’s bid for .WEB and proceed to contracting with Altanovo instead.³⁵ In so doing, the Panel noted that “it would be improper for the Panel to dictate what should be the consequences of NDC’s violation of the New gTLD Program Rules, assuming a violation is found[.]” and that ICANN “enjoy[s] some discretion in addressing violations of the Guidebook and Auction Rules.[.]”³⁶

25. Dissatisfied with the result, Altanovo filed a Rule 33 Application for An Additional Decision and For Interpretation.³⁷ Altanovo challenged the Panel’s decision not to award Altanovo the affirmative relief it sought (namely requiring ICANN to disqualify NDC and proceed to contracting with Altanovo) and instead to refer Altanovo’s claims regarding NDC’s alleged violation of the Guidebook and the Auction Rules “back to the ICANN Board and Staff to ‘pronounce’ upon ‘in the first instance.’”³⁸

26. The Panel rejected Altanovo’s Rule 33 challenge as frivolous on 21 December 2021, and the Panel’s declaration was then deemed “final.”³⁹ The Panel also awarded ICANN its costs in having to respond to Altanovo’s Rule 33 challenge:

179. The Panel has dismissed the [Rule 33] Application in its entirety. In the opinion of the Panel, under the guise of seeking an additional decision, the Application is seeking reconsideration of core elements of the Final Decision. Likewise, under the guise of seeking interpretation, the Application is requesting additional declarations and advisory opinions on a number of questions, some

³⁴ *Id.*, ¶ 413.5

³⁵ *Id.*, ¶ 413.7.

³⁶ *Id.*, ¶ 363.

³⁷ Afiliat Domains No. 3 Limited’s Rule 33 Application for an Additional Decision and for Interpretation (21 June 2021), Ex. R-11.

³⁸ *Id.*, ¶ 2.

³⁹ Decision on Afiliat’s Article 33 Application (21 December 2021), ¶ 138, Ex R-12.

of which had not been discussed in the proceedings leading to the Final Decision.

180. In such circumstances, the Panel cannot escape the conclusion that the Application is “frivolous” in the sense of it “having no sound basis (as in fact or law)”. This finding suffices to entitle [ICANN] to the cost shifting decision it is seeking and obviates the necessity of determining whether the Application is also “abusive”.⁴⁰

V. THE ICANN BOARD CONSIDERS THE FINAL DECLARATION AND PRONOUNCES ON THE DAA.

27. Shortly after the Panel’s declaration was finalized, the ICANN Board convened a meeting to consider the Final Declaration. On 16 January 2022, the ICANN Board acknowledged the IRP Panel’s binding declarations and also determined that “further consideration is needed” regarding the Panel’s recommendation that ICANN consider and pronounce upon the question of whether the DAA violated the Guidebook and the Auction Rules, or otherwise determine whether NDC’s application should be disqualified.⁴¹ The Board requested that the BAMC “review, consider, and evaluate the IRP Panel’s Final Declaration and recommendation” and provide the Board with its findings to consider.⁴²

28. The BAMC met to consider the First .WEB IRP Panel’s recommendation on 24 February 2022, and the full Board discussed the BAMC’s initial evaluation and recommendations at the Board’s meeting on 10 March 2022.⁴³ At that meeting, the ICANN Board decided to ask the BAMC “to review, consider and evaluate the allegations relating to the [DAA] between NDC and Verisign and the allegations relating to [Altanovo’s] conduct during the Auction Blackout Period” and “to provide the Board with its findings and recommendations

⁴⁰ *Id.* at ¶¶ 179–80.

⁴¹ Approved Board Resolutions | Special Meeting of the ICANN Board (16 January 2022) at p. 19, Ex. C-46.

⁴² *Id.*

⁴³ Minutes | BAMC Meeting (24 February 2022), Ex. R-13; Approved Board Resolutions | Regular Meeting of the ICANN Board (10 March 2022), Ex. R-14.

as to whether the alleged actions of NDC and/or [Altanovo] warrant disqualification or other consequences, if any, related to any relevant .WEB application[.]”⁴⁴ Thereafter, the BAMC convened another meeting on 12 April 2022, and decided “to request that the interested parties provide a comprehensive summary of their allegations to the BAMC.”⁴⁵

29. On 19 May 2022, the BAMC sent a letter to Altanovo, NDC, and Verisign requesting as follows:

In order to ensure that the BAMC is reviewing a complete picture of the parties’ positions, as well as the supporting materials regarding each issue (the DAA and the Auction Blackout Period), the BAMC hereby requests that Altanovo, NDC and Verisign provide a comprehensive written summary of their claims and the materials supporting their claims. These submissions are meant to supersede both the submissions in the .WEB Independent Review Process (IRP) as well as the correspondence on these topics; and these submissions will represent the basis upon which the BAMC will review, consider, and evaluate the allegations relating to the DAA and the allegations relating to the Auction Blackout Period.⁴⁶

Altanovo, NDC and Verisign submitted lengthy submissions, including expert reports and exhibits on 29 July 2022, as well as replies to the other party’s submissions on 29 August 2022.

30. The BAMC convened four additional meetings from November 2022 through March 2023 to discuss the parties’ submissions and to prepare a proposed recommendation to the ICANN Board.⁴⁷ Ultimately, the BAMC recommended that the Board: “(a) determine that NDC did not violate the Guidebook or the Auction Rules, either through entering into the DAA or

⁴⁴ Ex. R-14. NDC and Verisign also raised issues regarding Altanovo’s conduct leading up to the .WEB Auction. They alleged that Altanovo violated the “Blackout Period” set forth in the Auction Rules. Altanovo’s alleged violation of the Blackout Period is not at issue in this IRP because the Board determined that it need not decide that issue, having decided to continue processing NDC’s application.

⁴⁵ Minutes | Meeting of the BAMC (12 April 2022), Ex. R-15.

⁴⁶ Letter from B. Burr to Altanovo, NDC, and Verisign (19 May 2022), Ex. R-16.

⁴⁷ Minutes | Meeting of the BAMC (10 November 2022), Ex. R-17; Minutes | Meeting of the BAMC (13 December 2022), Ex. R-18; Minutes | Meeting of the BAMC (31 January 2023), Ex. R-19; Minutes | Meeting of the BAMC (2 March 2023), Ex. R-20.

through its participation in the .WEB auction; (b) direct the Interim President and CEO, or her designee(s), to continue processing NDC's .WEB application; and (c) in light of the above, conclude that is not necessary to make a final determination at this time as to whether Altanovo violated the 'Blackout Period' of the .WEB auction."⁴⁸

31. On 30 April 2023, the ICANN Board considered the BAMC's recommendations. Prior to and during the meeting, the Board was presented with and considered the submissions and supporting materials by Altanovo and NDC and Verisign, the DAA, NDC's .WEB application, the relevant provisions of the Guidebook, Auction Rules and Bidder Agreement, and the BAMC's analysis and recommendations.⁴⁹ After a thorough and comprehensive analysis, the ICANN Board resolved that NDC did not violate the Guidebook or the Auction Rules by entering into the DAA with Verisign. As set forth in the publicly posted Board resolution and rationale, some of the key reasons why the Board issued this resolution include (with emphasis added):

- "After careful review of and discussion regarding the Guidebook and Auction Rules, the BAMC, and the Board, found that there is no Guidebook or Auction Rules provision that directly addresses arrangements such as the DAA, despite the parties' respective contentions. The BAMC believes, and the Board agrees, that *the DAA falls into a gray area* that the Guidebook and Auction Rules do not specifically address. Thus, while both sides make plausible arguments, none of those arguments exactly fits the DAA and the parties' conduct under the current Guidebook and Auction Rules."
- "[N]o assignment of NDC's application has occurred and the information provided in NDC's application has not been rendered false. Instead, *the DAA contemplates a possible future assignment of the Registry Agreement* that NDC might enter into with ICANN, not an assignment of NDC's .WEB application. *NDC remains the applicant* and, if NDC enters into a Registry Agreement with ICANN, NDC will become the Registry Operator for .WEB."
- "*Registry Agreements for new gTLDs have been assigned dozens of times*, if not more, following contracting and/or delegation of the gTLD and . . . , generally,

⁴⁸ 30 April 2023 Board Resolution at p. 53.

⁴⁹ *Id.*, at p. 55.

there have been no formal objections regarding possible pre-contracting agreements that provided for a post-delegation transfer subject to ICANN approval.”

- “[I]f such pre-contracting agreements occurred between private companies, **ICANN might not have any direct knowledge of the extent of those agreements because private companies do not have a public disclosure requirement and the Guidebook does not contain a disclosure requirement for such agreements.** The primary reason that ICANN and Altanovo became aware of the DAA was due to the fact that Verisign is a public company that was required to make a public disclosure. Verisign should not be treated differently because it is a public company that has a disclosure requirement as compared to private companies that do not have a public disclosure requirement.”
- “In terms of the Auction Rules and the Bidder Agreement, the BAMC and the Board found that NDC did not violate those provisions because **NDC always remained the bidder, the bids that it submitted were legitimate,** and NDC was in fact able to fulfill its bid when it became the prevailing party at the auction. The Auction Rules and Bidder Agreement primarily relate to the mechanics of the auction, not the qualifications of an applicant.”
- The Board “does note the claims asserted regarding NDC’s non-disclosure of its arrangement with Verisign . . . and, thus, has directed ICANN organization to carefully consider such issues when developing the Guidebook and the auction rules for the next round of the New gTLD Program. It would be beneficial to both the applicants and the application process as a whole to provide greater clarity in the next iteration of the Guidebook and auction rules regarding the transparency and notification requirements throughout the application and auction processes, in particular with regard to proposed registry agreement assignments and/or arrangements similar to the DAA.”⁵⁰

32. Several months later, Altanovo initiated this second .WEB IRP challenging the Board’s 30 April 2023 resolutions.

STANDARD OF REVIEW

33. An IRP Panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN’s Articles, Bylaws, and internal policies and procedures.⁵¹ With respect to IRPs challenging the ICANN Board’s exercise of its fiduciary duties, an IRP Panel is not

⁵⁰ *Id.* at pp. 55, 73-76.

⁵¹ Bylaws, Art. 4, § 4.3.

empowered to substitute its judgment for that of ICANN’s: “[f]or Claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.”⁵²

ARGUMENT

I. THE ICANN BOARD EXERCISED ITS REASONABLE BUSINESS JUDGMENT IN DECIDING THAT NDC DID NOT VIOLATE THE GUIDEBOOK OR THE AUCTION RULES, AND THE BOARD’S DECISION IS ENTITLED TO DEFERENCE UNDER ICANN’S BYLAWS.

34. The ICANN Board exercised its reasonable business judgment in determining that NDC did not violate the Guidebook or the Auction Rules, either through entering into the DAA or through its participation in the .WEB auction, and therefore the Board’s decision is entitled to deference by this Panel. Under California law, boards of directors owe their corporation the fiduciary duties of loyalty and care.⁵³ These fiduciary duties include the obligation to operate “in good faith, in a manner [the] director believes to be in the best interests of the corporation and its shareholders.”⁵⁴ Because the Board is obligated to exercise its fiduciary duties whenever it operates as the ICANN Board, claims relating to Board conduct, both action and inaction, inherently arise from the Board’s exercise of its fiduciary duties.

35. Although the Bylaws and the Interim Supplementary Procedures do not define “reasonable business judgment,” that term has a well-established legal meaning. Every United States jurisdiction, including California, recognizes the “business judgment rule,” which provides a “judicial policy of deference to the business judgment of corporate directors in the

⁵² *Id.*, § 4.3(h)(i)(iii).

⁵³ Cal. Corp. Code § 309(a), Ex. R-LA-3.

⁵⁴ *Id.*

exercise of their broad discretion in making corporate decisions.”⁵⁵

36. Here, the ICANN Board exercised due diligence and conducted a thorough analysis before determining that NDC did not violate the Guidebook by entering into the DAA with Verisign. Specifically, the Board tasked a subset of the ICANN Board (the BAMC) to consider and evaluate this issue in the first instance, which the BAMC did. The BAMC requested submissions from Altanovo, NDC, and Verisign, which submitted lengthy briefs, expert reports, and reply briefs in July and August 2022. The BAMC then met four additional times to discuss the submissions and to consider whether NDC violated the Guidebook or the Auction Rules by entering into the DAA. Following its review, the BAMC made a recommendation to the ICANN Board based on its comprehensive analysis. In April 2023, the Board then considered these issues, after reviewing the relevant materials—including the submissions by the parties, the DAA, the relevant portions of the Guidebook and applicable rules, and the BAMC’s analysis—and determined that NDC entering into the DAA did not violate the applicable rules. The Board explained its reasoning in a lengthy and publicly posted resolution and rationale, addressing in detail many of the arguments that Altanovo now raises in this IRP.

37. The Board’s thorough, well reasoned, and comprehensive analysis is entitled to deference under ICANN’s Bylaws, such that the Panel should not supplant the decisions made by the ICANN Board.⁵⁶ That Altanovo disagrees with the Board’s decision does not somehow

⁵⁵ *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)), Ex. R-LA-2. The California Supreme Court has noted “that rule of judicial deference to corporate decision making ‘exists in one form or another in every American jurisdiction.’” *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass’n*, 42 Cal. 3d 490, 507 n.14 (1986)), Ex. R-LA-1.

⁵⁶ This is especially true in the context of Altanovo’s requested relief, which essentially requires that the Panel replace the Board’s discretion with its own and award Altanovo affirmative relief (i.e., “offering” .WEB to Altanovo), which is inappropriate under the Bylaws.

mean that the ICANN Board’s decision was outside the realm of reasonable business judgment or that it violated the Articles or Bylaws.

II. EACH OF ALTANOVO’S CHALLENGES TO THE ICANN BOARD’S RESOLUTION LACKS MERIT.

38. Notwithstanding that the ICANN Board’s resolutions are entitled to deference under the business judgment rule, Altanovo’s claims still fail because each of its individual challenges lacks merit.

A. The Board Appropriately Determined That Arrangements Such As The DAA Are Not Specifically Addressed By The Guidebook.

39. Altanovo first claims that ICANN violated its Bylaws and applicable rules by finding that “there is no Guidebook or Auction Rules provision that directly addresses arrangements such as” the DAA.⁵⁷ Altanovo’s argument is nonsensical because, in fact, there is no Guidebook provision or Auction Rule that specifically addresses agreements like the DAA, and Altanovo does not identify any such provision or rule. Nor could ICANN have been treating Altanovo in an inequitable manner, as Altanovo contends. Rather, the Board acknowledged that “both sides ma[de] plausible arguments” as to whether the Guidebook prohibits agreements like the DAA.⁵⁸ And after careful consideration, the ICANN Board impartially decided that the DAA falls into a gray area that the ICANN Board needed to evaluate, which it did in accordance with the Guidebook and the Auction Rules and consistent with the Articles and Bylaws, as set forth below.⁵⁹ The ICANN Board cannot have violated its Bylaws, or any other applicable rules, in reaching this conclusion.

⁵⁷ IRP Request ¶ 43.

⁵⁸ 30 April 2023 Board Resolution at p. 73.

⁵⁹ The Board also directed ICANN staff to consider the issues implicated by the DAA for the next round of the New gTLD Program “to provide greater clarity to applicants regarding the transparency and notification requirements throughout the application and auction processes.” 30 April 2023 Board Resolution at p. 81. This demonstrates the Board’s careful consideration of the fact that the DAA does not fall squarely within the Guidebook or Auction Rules and the Board’s intention to provide further clarity moving forward.

B. The Board Properly Determined That The DAA Is Likely Similar To Other Agreements Among Applicants.

40. Altanovo next argues that ICANN violated its obligation to apply its Bylaws and applicable rules in a consistent, neutral, and equitable manner by reasoning that the DAA was similar to other agreements entered into by new gTLD applicants. This argument, however, is nothing more than a disagreement with the Board's reasoning; it does not amount to a violation of any applicable Bylaws provision.

41. The Board appropriately acknowledged that Registry Agreements for new gTLDs have been assigned dozens of times following contracting or delegation of the gTLD. In fact, in 2012, Demand Media announced an agreement regarding 107 of a new gTLD applicants' applications before any Registry Agreements even were executed.⁶⁰ No punitive actions were taken by ICANN against Demand Media or the applicant.

42. Additionally, the Board recognized that there were a number of requests for assignment submitted to ICANN shortly after contracting (suggesting that agreements had been reached prior to contracting), including for gTLDs that had gone through auctions, like .WEB.⁶¹ Altanovo's predecessor, Afilias, itself transferred over 200 gTLDs for which it was the registry operator to another entity, Donuts, when Donuts acquired Afilias.⁶²

43. The Board also recognized that there is no way for ICANN to know whether additional pre-contracting agreements occurred because such agreements are not required to be shared with ICANN under the Guidebook.⁶³ It follows that there is no way for ICANN to know whether all such agreements to transfer new gTLD Registry Agreements contain identical terms to the DAA. The primary reason that ICANN was aware of the DAA is because Verisign is a

⁶⁰ 30 April 2023 Board Resolution at p. 74, n.20.

⁶¹ *Id.* at pp. 74–75.

⁶² CircleID Reporter, *Donuts to Acquire Afilias*, CircleID (19 November 2020), Ex. R-21.

⁶³ 30 April 2023 Board Resolution at p. 75.

public company and is subject to public disclosure requirements by the U.S. Securities and Exchange Commission. The Board reasoned that it would be inequitable to treat Verisign differently simply because it is a public company, when there may be other agreements similar to the DAA about which ICANN would have no knowledge. The Board’s analysis in this respect fully complied with its Bylaws. It should also be noted that hundreds of new gTLDs have been assigned to entities that did not originally apply for the respective new gTLD, demonstrating that the possible assignment of a Registry Agreement is not a unique concept.

C. **The Board Appropriately Determined That NDC Did Not Violate Paragraph 10 Of The Guidebook.**

44. Altanovo also challenges the ICANN Board’s resolution that the DAA did not violate Paragraph 10 of the Guidebook. Module 6, Paragraph 10 of the Guidebook provides in relevant part that an “Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application.”⁶⁴

45. When considering this issue, the ICANN Board acknowledged that, under the DAA, NDC did grant Verisign certain rights with respect to *how* NDC will proceed through the evaluation process, including with respect to a possible private or ICANN auction. NDC, however, did not in fact “resell, assign, or transfer” any of NDC’s actual *rights* or *obligations* with regard to the .WEB application itself. NDC retained the right to communicate with ICANN and to provide information “to the extent required to preserve [NDC’s] rights with respect to the Application or being the registry operator for the Domain.”⁶⁵

46. The Board also found persuasive that NDC is, and at all times remained, the applicant for .WEB, insofar as the DAA contemplates a *future* assignment of the Registry

⁶⁴ Guidebook, Module 6 ¶ 10.

⁶⁵ 30 April 2023 Board Resolution at p. 73; Domain Acquisition Agreement between VeriSign Inc. and Nu Dotco LLC (25 August 2015), § 10, Ex. C-2.

Agreement that NDC could enter into with ICANN if NDC secures the right to operate .WEB. In fact, if NDC enters into a Registry Agreement with ICANN for .WEB, NDC would then need to submit an assignment request to ICANN under the applicable rules, which is a process that has not occurred and conceivably may not occur.⁶⁶ ICANN has processes in place to review such assignment requests, which again cannot occur until after NDC has a valid Registry Agreement with ICANN.⁶⁷ Altanovo itself is quite familiar with this process, as it has been involved in many assignments of Registry Agreements, including the recent assignment of dozens of Registry Agreements that constituted nearly all of the TLDs that Altanovo (then Afilias) had in its portfolio.⁶⁸ Accordingly, the Board's decision in this respect was fully informed, was in accordance with its interpretation of the Guidebook, and was within the realm of reasonable business judgment.

D. The Board Appropriately Determined That NDC Did Not Violate The Guidebook's Disclosure And Change Request Requirements.

47. Altanovo claims that the DAA rendered NDC's application false and misleading in a material way, such that NDC was required to update its application and submit a change request to ICANN. The ICANN Board disagreed with Altanovo's position, and Altanovo does not actually identify anything in the Board's decision that violates any Article or Bylaws provision.

48. Section 1.2.7 of the Guidebook provides:

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

⁶⁶ 30 April 2023 Board Resolution at p. 74.

⁶⁷ *Id.* at p. 79.

⁶⁸ Ex. R-21.

ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round.

Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading *may* result in denial of the application.⁶⁹

49. Additionally, Module 6, Paragraph 1 provides:

Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) *may* cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.⁷⁰

50. The ICANN Board considered the above-quoted provisions and determined that NDC had not violated those provisions by entering into the DAA. The Board explained in its rationale that, first and foremost, NDC—not Verisign—is and always has been the applicant; “[a]nd, if NDC enters into a Registry Agreement with ICANN, NDC will become the Registry Operator for .WEB.”⁷¹

51. With regard to the Mission/Purpose section of NDC’s application, the Board noted that many other applicants have changed the mission and purpose for their new gTLDs during the course of the evaluation period without revising their applications and without any punitive response by ICANN.⁷² The Board also acknowledged that it is not uncommon for an applicant to assign a Registry Agreement to a third party, which may have a different mission or

⁶⁹ Guidebook, § 1.2.7 (emphasis added).

⁷⁰ *Id.*, § 6.1 (emphasis added).

⁷¹ 30 April 2023 Board Resolution at p. 76.

⁷² *Id.*

purpose for the new gTLD.⁷³ According to the Board, “[s]uch an assignment does not equate to a ‘circumvention’ of the application process, but rather, is a necessary component for servicing Registry Operators and allowing the continued operation of gTLDs.”⁷⁴

52. In addition, the Board noted that the Mission/Purpose section is not part of the evaluation process under the Guidebook.⁷⁵ Rather, each application is subject to the following evaluations: (1) string similarity; (2) reserved names; (3) DNS stability; (4) geographic names; (5) technical and operational capability of the applicant; (6) financial capability of the applicant; and (7) registry services for DNS stability.⁷⁶ The Board’s reasoning in this regard is consistent with one of the purposes of Sections 1.2.7 and 6.1, which is to allow ICANN to reevaluate an application following a material change, as needed.⁷⁷ Changes to the mission or purpose section of the application would not automatically trigger a reevaluation of the application.

53. Moreover, even if the Board had found that NDC’s application was inaccurate in material respects by virtue of the DAA (which it did not), Section 1.2.7 and Section 6.1 both establish that providing false or misleading information *may* result in denial of the application; it does not automatically require denial of an application. The Board would have been well within its authority not to disqualify NDC even if the Board had found a violation of either Section 1.2.7 or 6.1. For the same reasons, Altanovo’s claims that NDC allegedly “hid” information from ICANN also fail.⁷⁸

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Guidebook, Module 2.

⁷⁷ *See id.*, § 1.2.7 (“ICANN reserves the right to require a re-evaluation of the application in the event of a material change.”); Section 6.1 (“ICANN may rely on those statements and representations fully in evaluating this application.”).

⁷⁸ Moreover, Altanovo raised similar issues with the First .WEB IRP Panel, which found that ICANN staff “promptly investigated” whether there was a “change of control within NDC,” and that “in light of the representations made by [NDC], it was reasonable for [ICANN] to conclude” that there was “no basis to initiate the application change request process or postpone the auction.” Corrected Final Declaration ¶ 298.

54. Therefore, the Board’s reasoning in this respect is not only consistent with the Bylaws and applicable rules, but also well within the realm of reasonable business judgment such that it is entitled to deference by this Panel.

E. The Board Appropriately Determined That NDC Did Not Violate The Auction Rules.

55. Altanovo next argues that ICANN violated its Bylaws by not applying the Auction Rules as Altanovo wished. Again, however, Altanovo’s disagreement with the substance of the Board’s resolution does not establish that the Board violated the Bylaws in any way.

56. The ICANN Board evaluated the respective provisions of the Auction Rules and the Bidder Agreement and concluded that these rules primarily apply to the technical mechanics of the auction, not the qualifications of the applicant. The Board further found that the language Altanovo relies upon was not intended to disqualify applicants such as NDC on the basis of the DAA. The Board found that “NDC always remained the bidder, the bids that it submitted were legitimate, and NDC was in fact able to fulfill its bid when it became the prevailing party at the auction.”⁷⁹ That Altanovo interprets the Auction Rules in a different manner does not amount to a violation of the Bylaws. It should also be noted that there may have been any number of agreements between bidders and third parties relating to financial backing during an auction or other financing arrangements, which are not prohibited by the Auction Rules or the Bidder Agreement.

F. The Board Appropriately Determined That ICANN May Continue Processing NDC’s .WEB Application.

57. Altanovo’s argument regarding the Board’s decision to proceed with delegating .WEB to NDC overlooks a critical fact that renders its argument meritless. Altanovo

⁷⁹ 30 April 2023 Board Resolution at p. 76.

argues that, under the Auction Rules, the Board was required to offer the .WEB gTLD to Altanovo, the next highest bidder at the auction.⁸⁰ Those Auction Rules, however, apply only if the auction winner is “declared” to be “in default” or “determined by ICANN to be ineligible to sign a Registry Agreement.”⁸¹ Here, the Board expressly determined that NDC was *not* in default of the Auction Rules (or the Bidder Agreement or the Guidebook for that matter) or ineligible to sign a Registry Agreement, meaning that there was no requirement to award .WEB to Altanovo.

58. Even further, the Auction Rules on which Altanovo relies make clear that “default” in this context refers to an auction winner that does not remit the net balance of the winning price for the gTLD, which is not relevant here. Under the circumstances applicable to this IRP, there is no requirement under the Auction Rules that the ICANN Board grant .WEB to Altanovo. Accordingly, there can be no dispute that the Board properly exercised its reasonable business judgment in determining that NDC did not violate the Auction Rules.

G. ICANN Has Afforded Altanovo Equal Treatment.

59. Altanovo’s final argument is that, by resolving not to disqualify NDC, ICANN somehow has treated Altanovo inequitably. Not so.

60. In administering the New gTLD Program, ICANN is not focused on picking winners and losers. Instead, it is interested in overseeing the appropriate and equitable implementation of the applicable rules. That is exactly what the ICANN Board did here when it “pronounced upon the question of whether the DAA complied with the New gTLD Program Rules” at the recommendation of the First .WEB IRP Panel.⁸² The Board’s resolution

⁸⁰ IRP Request, § 4.8.

⁸¹ Auction Rules for New gTLDs: Indirect Contentions Edition (24 February 2015), Rules 58, 62, Ex. C-3.

⁸² Corrected Final Declaration ¶ 413.5.

demonstrates that the ICANN Board interpreted the Guidebook and the Auction Rules in a sound, impartial manner based on the relevant evidence.⁸³ Simply because Altanovo did not obtain the relief it wanted—namely the right to operate .WEB—does not mean that it was treated inequitably.

61. Accordingly, for the reasons set forth above, the ICANN Board exercised its reasonable business judgment in determining that NDC did not violate the terms of the Guidebook, and that reasoned decision was fully compliant with ICANN’s Articles and Bylaws.

CONCLUSION

62. After an exhaustive First .WEB IRP, and an extremely thorough evaluation process following that IRP, ICANN determined that NDC did not violate the Guidebook or the Auction Rules. ICANN fully complied with its Articles, Bylaws, and internal policies and procedures when it made that determination, and the Board’s resolution is entitled to deference under the Bylaws’ enshrinement of the business judgment rule. Accordingly, Altanovo’s IRP Request should be denied.

Respectfully submitted,
JONES DAY

Dated: August 30, 2023

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Counsel for Respondent ICANN

⁸³ Throughout its IRP Request, Altanovo argues in cursory fashion that the ICANN Board did not act in an unbiased manner because it likely received legal advice from ICANN staff and ICANN’s outside counsel. It is unclear how that could ever make an organization biased. The ICANN Board is undoubtedly entitled to seek legal advice from its in-house and external counsel prior to issuing a resolution.