Expert Report of Peter Cramton
On Verisign and NDC's Conduct regarding the ICANN Auction for .WEB

I.   INTRODUCTION

1.   At the request of Altanovo Domains Limited f/k/a Afilias Domains No. 3 Limited (**Afilias**), I have prepared this expert report to assist ICANN's Board in assessing the conduct of NuDot Co, LLC (**NDC**) and VeriSign, Inc. (**Verisign**) in relation to the ICANN auction of last resort for the .WEB top-level domain (**.WEB**).

2.   Specifically, Dechert LLP and Constantine | Cannon LLP, as counsel for Afilias, have asked me (i) to describe ICANN's objectives and on that basis the resulting design of the ICANN auction of last resort, and (ii) to provide my independent opinion on NDC and Verisign's conduct based on certain facts that I have been asked to assume.[1]

3.   I have also been asked by counsel to provide my independent opinion on whether Afilias violated an auction "blackout period."

4.   Although this expert opinion was requested by Afilias' counsel and counsel has provided me with materials, the opinions expressed are my own. I am being remunerated for my work on this report, however, this has not affected the independence of my analysis or conclusions.

II.   SUMMARY OF QUALIFICATIONS TO PROVIDE THIS OPINION

5.   I am a professor of economics at the University of Cologne (since 2018) and the University of Maryland (Emeritus since 2018). For twenty-eight years, I have researched auctions and market design, focusing on the design of complex markets to best achieve goals. Applications include electricity markets, financial markets, and auctions for radio spectrum and many other assets. I have introduced innovative market designs in many industries. I have advised many governments on market design and dozens of bidders in major auctions. I am an advisor and chief economist to several companies. Since 1993, I have advised regulators and system operators on electricity market design in North America, South America, and Europe. I received my B.S. in Engineering from Cornell University and my

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[1] To prepare this expert report, I reviewed several documents from the Independent Review Process initiated in 2018 by Afilias (the **.WEB IRP**), including the Final Decision of the Panel dated 20 May 2021, excerpts of the testimony of Jose Rasco and Paul Livesay at the hearing held in August 2020, and the Domain Acquisition Agreement between NDC and Verisign dated 25 August 2015 (the "**DAA**"), **(Ex. PC-2)**, as well as documents in the public domain, specifically the following: the Auction Rules for New gTLDs: Indirect Contentions Edition, Version 2015-02-24, https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf (the **Auction Rules**), **(IRP Ex. C-4)**; the New gTLD Auctions Bidder Agreement, Version 2014-04-03, https://newgtlds.icann.org/en/applicants/auctions/bidder-agreement-redline-03apr14-en.pdf (the **Bidder Agreement**), **(IRP Ex. C-5)**; and the gTLD Applicant Guidebook, Version 2012-06-04, https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf (the **AGB**), **(IRP Ex. C-3)**. For ease of reference, I refer to the AGB, the Auction Rules and the Bidder Agreement, collectively, as the **New gTLD Program Rules** or the **Rules**.

Ph.D. in Business from Stanford University. My full professional biography, as of the date of this report, is provided as **Exhibit PC-1**.

6. My work on the design and implementation of public sector auctions is especially relevant to this matter. Many of the auction innovations that my colleagues and I worked on, for example spectrum auctions, served as a model for the auction design eventually selected by ICANN. These auctions were designed to be efficient, transparent, simple, and fair. My work involved developing the auction design, establishing the auction rules, and often implementing the auction. Like ICANN, relevant government regulators put a high premium on a transparent, fair, and effective process. For example, the Federal Communications Commission's primary goal was to put the radio spectrum in the hands of companies best able to create value for consumers.[2]

7. My involvement with ICANN's New gTLD Program and the contention set resolution procedures dates back to July 2012 when my colleagues and I created a set of rules for private auctions that could be used by contention set members to resolve gTLD contention privately.[3] My work on designing the private auction contention set resolution mechanism necessarily involved familiarizing myself with the objectives and details of ICANN's last resort auction (the **ICANN Auction**). ICANN selected the simultaneous ascending clock auction for the ICANN Auction, which I have studied and written about extensively. I have also used this type of auction in different settings.

III.   THE ICANN AUCTION'S POLICY FRAMEWORK AND OBJECTIVES

8. ICANN's decision to use a well-designed auction for resolving gTLD contention sets was a sensible one. ICANN took advantage of recent innovations in state-of-the-art public-sector auctions, which emphasized the objectives of simplicity, transparency, efficiency, and fairness:

- Simplicity: the auction is simple and easy to understand based on clear, comprehensive and easy-to-understand rules. The rules are unambiguous and faithfully followed.

- Transparency: all competing applicants are known to ICANN, the Internet Community and each other.

- Efficiency: the auction maximizes total value by assigning the gTLD under contention to the qualified applicant who values it the most.

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[2] Peter Cramton et al., "Using Spectrum Auctions to Enhance Competition in Wireless Services," *Journal of Law and Economics*, 54:4, S167-S188, 2011, http://www.cramton.umd.edu/papers2010-2014/cramton-kwerel-rosston-skrzypacz-spectrum-auctions-and-competition.pdf.

[3] I first developed the idea of using an efficient private auction (the **Private Auction**) to divide jointly held assets such as a partnership. Peter Cramton, Robert Gibbons, and Paul Klemperer, "Dissolving a Partnership Efficiently," *Econometrica*, 55, 615–632, 1987, http://www.cramton.umd.edu/papers1984-1989/87econ-dissolving-a-partnership-efficiently.pdf. Since then, I have used private auctions in other contexts.

- Fairness: no applicant is favored in any way.

9.   Governments, public sector agencies, and entities that oversee provisioning of public-interest goods and services have used auctions for centuries to fairly and transparently allocate assets to those seeking to become their stewards. ICANN has a public trust responsibility—it operates for the benefit of the Internet Community as a whole. The same objectives that guide the design of public sector auctions apply to ICANN in the context of "performing and overseeing functions related to the coordination of the [DNS], including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system[.]"[4]

10.   ICANN's objectives are also expressed in the New gTLD Program Rules. Among other things, and as discussed more fully below, the Rules reflect ICANN's core value of transparency, ICANN's preference that applicants resolve contention for a gTLD string privately, that the ICANN Auction was intended only to be a tie-breaking mechanism among directly competing applicants, that ICANN desired its "auction of last resort" to be final and binding on all competing applications, and that ICANN was not seeking to maximize revenue from the allocation of new gTLDs.

A.   Simplicity

11.   ICANN adopted a well-established auction procedure as a mechanism to resolve any competing applications that were not privately resolved: the simultaneous ascending clock auction. This is an auction design that has been used in many contexts, including radio spectrum, electricity, and minerals.

12.   The rules and procedures for the ICANN Auction are simple and clear, and were set out in a comprehensive set of Auction Rules and the associated Bidder Agreement. Both are clear as to who can participate, what the rules of participation are, how bids are submitted and how the auction will be run, including how the bids determine the winner and the winner's payment. ICANN held several educational sessions and published several documents to ensure that Bidders understood the purpose of the restrictions regarding, and the process involving, participation in the ICANN Auction. This type of comprehensiveness and clarity was critical to ensure the legitimacy of the outcome of the Auction.

13.   The rules and procedures were comprehensive, well-crafted, and well-communicated, something the Board should appreciate in assessing the conduct of NDC and Verisign.

B.   Transparency

14.   ICANN placed significant emphasis on the principle of transparency in the development and administration of the New gTLD Program, including the design and implementation of the ICANN Auction. This is completely understandable, as transparency is a core

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[4] ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers dated 25 November 1998, https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en, **(IRP Ex. C-57)**, Section III(B)(iii).

ICANN value, is reflected in its governance documents and my understanding is that ICANN strives to ensure enhanced transparency.

15.　　The New gTLD Program was based fundamentally on the premise of advancing competition and innovation in the DNS. In this regard, the New gTLD Program Rules reflect the possibility that several applicants might apply and be qualified to compete for a particular gTLD. The arena for this competition is the **Contention Set**, and the method for resolution either a private arrangement between Contention Set members or through the ICANN Auction of "last resort."[5]

16.　　The importance—by which I mean the composition and integrity—of the Contention Set in the ICANN gTLD delegation process is reflected in the following Rules:

- Rule 12 of the Auction Rules provides: "Participation in an Auction is limited to Bidders."[6]

- The Auction Rules and Bidder Agreement further provide that the universe of Bidders is limited to "Qualified Applicants."[7] A Qualified Applicant is defined as an applicant who is a member of a Contention Set for a gTLD, which is an entity that had submitted an application for a gTLD, passed ICANN's evaluation, passed through public comment, had no objections pending with respect to its application, and was therefore pre-approved to enter into a registry agreement.[8] Qualified Applicants could also use a Designated Bidder, but only upon proper disclosure, vetting and approval.[9] These restrictions—namely, that only Qualified Applicants or their Designated Bidders could participate in the resolution-by-auction mechanism—are completely aligned with the objectives of a straightforward and predictable resource allocation that is intended to ensure finality, as well as transparency.

- As in many other public sector auctions, applicants were required to promptly notify ICANN if any information previously submitted by the applicant became

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[5] The AGB defines contention sets as "groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings." AGB, **(IRP Ex. C-3)**, Module 4, Section 4.1.1.

[6] Auction Rules, **(IRP Ex. C-4)**, Rule 12.

[7] Auction Rules, **(IRP Ex. C-4)**, Rule 12; Bidder Agreement, **(IRP Ex. C-5)**, Section 1.1.

[8] Auction Rules, **(IRP Ex. C-4)**, page 19 (defining "Qualified Applicant" as "[a]n entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction").

[9] The Auction Rules also provide that a Qualified Applicant can designate a third party to bid on its behalf, i.e., a Designated Bidder. The Designated Bidder rule is irrelevant for present purposes. NDC could not have acted as Verisign's Designated Bidder since Verisign was not a member of the .WEB Contention Set and thus was not a Qualified Applicant. And Verisign was not identified or approved as NDC's Designated Bidder.

untrue or inaccurate, including but not limited to "changes in ownership or control of the applicant."[10]

- Also reflecting the emphasis that ICANN placed on the identity of an applicant for a particular gTLD, I note that, per the AGB, an "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application."[11]

- Applicants were required to agree "to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading."[12] From a process design perspective, this language yet again reflects ICANN's emphasis on the identity of the applicant of a particular gTLD and the centrality of transparency in the new gTLD application process.

17. Transparency of Contention Set members was imperative to the successful implementation of this model. To reiterate, only those applicants for a gTLD that were included in a Contention Set were eligible to participate in a Private Auction or ICANN Auction.[13] Importantly, ICANN made public the names of all applicants for a particular gTLD by posting parts of completed applications on its website for public comment and objection for a period of 60 days.[14] By providing for transparency as to the identity of bidders in advance of an auction, any concerns regarding those bidders could be voiced and addressed *ex ante*.[15]

18. ICANN also made public portions of the applications for a gTLD[16] and the identities of those entities that were eventually included in a Contention Set.[17] In this way, the Internet Community knew which entities were pre-qualified to compete for a particular gTLD and all of the Contention Set members knew who they were competing against and could thus not only work towards private resolution of the contention, which ICANN strongly preferred, but could also develop their bidding strategies and financing arrangements knowing who was the competition.

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[10] AGB, **(IRP Ex. C-3)**, Module 1, Section 1.2.7

[11] AGB, **(IRP Ex. C-3)**, Module 6, paragraph 10.

[12] AGB, **(IRP Ex. C-3)**, Module 6, paragraph 1.

[13] The AGB provides that the ICANN Auction "is a tie-breaker method for resolving string contention among the applications within a contention set." AGB, **(IRP Ex. C-3)**, Module 4, Section 4.3.

[14] AGB, **(IRP Ex. C-3)**, Module 1, Section 1.1.2.3.

[15] The approach is also illustrated in Federal Communications Commission (**FCC**) spectrum auctions, which was the primary model for the ICANN Auction. The FCC discloses the applicant's identity and its short form application in advance of the auction so that there is time for other auction participants and the FCC to challenge or require changes to an application. In that regard, I note that the FCC has developed processes that are designed to prevent dominant communications companies, like AT&T or Verizon, from hiding behind other entities to secure rights in secret.

[16] AGB, **(IRP Ex. C-3)**, Module 1, Section 1.1.2.2.

[17] AGB, **(IRP Ex. C-3)**, Module 1, Section 1.1.4.

19.	Transparency in the process was critical not only for the sake of advancing an ICANN core value, but it also advanced the other goals of the application process: efficiency and fairness.

## C.	Efficiency

20.	The objective of efficiency in the context of auction design has two aspects: process efficiency and outcome efficiency. The design of the ICANN Auction reflects both aspects.

21.	From a process efficiency standpoint, the New gTLD Program Rules clearly reflect ICANN's strong preference for applicants to resolve Contention Sets by themselves. The AGB provides: "Applicants are encouraged to resolve string contention cases among themselves prior to the string contention resolution stage"[18] and that "[i]t is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants … ICANN expects that most contention cases will be resolved through other means before reaching the auction stage."[19] Elsewhere, ICANN stated: "Applicants in contention are encouraged to reach a settlement or agreement that results in resolution of the contention. This may occur at any stage of the process, once ICANN has posted the applications received"[20] and that "[c]ontending applicants should be given the opportunity to settle contention among themselves – this will result in innovative and economic solutions."[21] It was expected that the ICANN Auction would be a rarely invoked mechanism to "break the tie" as a last resort only.

22.	ICANN did not stipulate how the applicants were to resolve Contention Sets, intentionally leaving that open to applicants; however, ICANN did note that certain methods of resolution (such as forming a joint venture) would require the new entity to re-apply (again reflecting ICANN's emphasis on transparency) for the gTLD and were therefore disfavored.[22] Accordingly, the most popular method for resolving Contention Sets proved to be a formal process such as a Private Auction.[23]

23.	From an outcome efficiency standpoint, the design of the ICANN Auction also demonstrates that ICANN's objective was not to maximize the price paid by the winning applicant or otherwise maximize the revenue received by ICANN via the resolution-by-

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[18] AGB, **(IRP Ex. C-3)**, Module 1, Section 1.1.2.10.

[19] AGB, **(IRP Ex. C-3)**, Module 4, Section 4.3.

[20] ICANN, New gTLD Program Explanatory Memorandum dated 18 February 2009, https://archive.icann.org/en/topics/new-gtlds/string-contention-18feb09-en.pdf.

[21] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program dated 20 June 2011, https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf, **(IRP Ex. C-9)**.

[22] AGB, **(IRP Ex. C-3)**, Module 4, Section 4.1.3.

[23] Peter Cramton et al., *Applicant Auctions for Internet Top-Level Domains: Resolving Conflicts Efficiently* (University of Maryland, Working Paper, January 2013), http://www.cramton.umd.edu/aa/cramton-gall-sujarittanonta-wilson-applicant-auction.pdf, page 2.

auction process. In fact, ICANN publicly disclaimed any such goal, stating that "revenue maximization is not one of ICANN's goals with the new gTLD process."[24]

24.   Had revenue maximization been one of ICANN's primary goals, it could have organized the ICANN Auctions differently. Instead, ICANN prohibited certain bidding behaviors which would have resulted in ICANN receiving greater revenues. For example, the Rules restrict the Contention Set to applicants who had passed evaluation. This necessarily limited the pool of interested registry operators to those applicants who had demonstrated an interest in the gTLD, paid an application fee, completed an application, subjected themselves to evaluation, community objections and other vetting processes. Similarly, ICANN did not allow any entity, other than members of the Contention Set, to participate in an ICANN Auction.[25] Expressly restricting the ICANN Auction to those "Qualified Applicants" who were members of the Contention Set was consistent with ICANN's objective of selecting the applicant who would operate the registry to the best benefit of society and not maximizing revenue to ICANN. Obviously, ICANN could have received more revenue from an ICANN Auction opened up to the public generally (as increased competition could have led to a higher winning price).

25.   In my view, ICANN's first priority was to identify which applicant would best operate the applied-for registry for the greatest benefit of society. The New gTLD Program, including the ICANN Auction, was designed to efficiently achieve this goal. The process included a high application fee of $185,000, ensuring only applicants who had a strong incentive to operate the registry would apply. The qualification process also included an opportunity to reject applicants whose operation of the registry would be inconsistent with the public interest.

26.   Further, the design of the ICANN Auction reflects efficiency in that it is designed to result in the final and binding disposition of the Contention Set. One of the guiding principles behind virtually every auction is that it is final and binding on the participants, namely the organization (here ICANN) holding the auction and the bidders (here the members of the .WEB Contention Set).[26] Auction designs that do not provide for finality lead to bad outcomes and failed auctions. The need to redo an auction presents logistical problems, is wasteful from a cost perspective, and undermines faith in the process. Accordingly, one of the first principles of auction design is that the process must ensure finality, including by providing for a clear mechanism to correct irregularities in the auction process (*e.g.*, a default by the winning bidder).

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[24] ICANN, Economic Case for Auctions in New gTLDs dated 8 August 2008, https://archive.icann.org/en/topics/economic-case-auctions-08aug08-en.pdf, **(IRP Ex. C-27)**, page 3.

[25] See paragraph 16 above.

[26] Peter Cramton, "Spectrum Auctions," *in* Martin Cave, Sumit Majumdar, and Ingo Vogelsang, eds., *Handbook of Telecommunications Economics*, 605-639, Amsterdam: Elsevier Science B.V., 2002, http://www.cramton.umd.edu/papers2000-2004/01hte-spectrum-auctions.pdf, page 31.

27.   Bidding incentives are undermined if bidders anticipate that bids may be nonbinding. Inefficient gamesmanship may occur. For example, a bidder may raise its bid beyond its willingness to pay, knowing that it can back out later if desired.[27]

28.   The New gTLD Program Rules demonstrate that ICANN clearly intended the result of any ICANN Auction would be final. This is supported by the following rules:

- Ensuring that the bidders were limited to applicants who had already been approved to acquire the gTLD being auctioned.[28]

- Ensuring that all participants would be bound by the process: "By this Agreement, the Bidder agrees to be bound by the Auction Rules as published on ICANN's website."[29]

- Ensuring that all bids submitted could not be amended or withdrawn: "The valid Bids residing on the Auction Site at the Ending Time of the Round are binding on the respective Bidders and may not be amended or removed except pursuant to clause 39."[30]

- Ensuring the binding nature of all bids submitted: "At the end of each auction round, bids become the bidders' legally-binding offers to secure the relevant gTLD strings at prices up to the respective bid amounts, subject to closure of the auction in accordance with the auction rules."[31]

- Ensuring that the winning bidder was obligated to pay: "The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price."[32]

- Ensuring that the outcome of the auction would be the obligation to enter into a registry agreement with ICANN: "Any applicant that participates in an auction will be required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins (i.e., if its application is approved), and to enter into the prescribed registry agreement with ICANN -

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[27] Peter Cramton, "The FCC Spectrum Auctions: An Early Assessment," *Journal of Economics and Management Strategy*, 6:3, 431-495, 1997, http://www.cramton.umd.edu/papers1995-1999/97jems-fcc-spectrum-auctions.pdf, Section 5.7.

[28] Auction Rules, **(IRP Ex. C-4)**, Rule 12.

[29] Bidder Agreement, **(IRP Ex. C-5)**, Section 1.4.

[30] Auction Rules, **(IRP Ex. C-4)**, Rule 36.

[31] AGB, **(IRP Ex. C-3)**, Module 4, Section 4.3.1.6.

[32] AGB, **(IRP Ex. C-3)**, Module 4, Section 4.3.1.8.

together with a specified penalty for defaulting on payment of its winning bid or failing to enter into the required registry agreement."[33]

- Providing for the disqualification of a winning bidder.[34]

- Providing for a method for resolving the auction in the event of a default by the winning bidder.[35]

- Providing for a method of resolving the auction in the event of the disqualification of the winning bidder.[36]

29. In short, the ICANN Auction was designed—with the evaluation of bidders' eligibility being completed *before* the auction—so that the winner of the auction could immediately be declared the successful applicant.[37] If the winner of the auction was unable to pay the winning price or otherwise disqualified, the outcome of the auction is still final and binding on all the participants.

D.   Fairness

30. Finally, the ICANN Auction was designed to achieve fairness, reflecting ICANN's Core Value that documented policies should be applied "consistently, neutrally, objectively and fairly,' as well as best practice in the context of public sector auction design; in particular, the importance of this principle in spectrum auctions.

31. The objective of fairness is reflected in the requirement that only Qualified Applicants that were still part of the Contention Set for a particular gTLD by the applicable deadline for the ICANN Auction could participate in the auction. To participate in an ICANN Auction, an applicant must have passed evaluation, had no pending objections, no pending GAC advice, and no pending change requests. All of those who were eligible to participate were thus on an equal footing insofar as ICANN screening was concerned. This ensured, if the Rules were followed, that the winner would be qualified to enter into a registry agreement post-auction.

32. The objective of fairness was also advanced by the requirement that all Qualified Applicants would be known to each other, given the requirement of public disclosure of members of the same Contention Set, and of those who would be participating in the ICANN Auction. Furthermore, for those bidders who would be using a Designated Bidder in the ICANN Auction, the identities of the Designated Bidder also had to be disclosed. In this way, no Qualified Applicant had an unfair advantage.

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[33] AGB, **(IRP Ex. C-3)**, Module 4, Section 4.3.2.

[34] AGB, **(IRP Ex. C-3)**, Module 4, Section 4.3.3.

[35] Auction Rules, **(IRP Ex. C-4)**, Rule 59.

[36] Auction Rules, **(IRP Ex. C-4)**, Rule 62.

[37] Auction Rules, **(IRP Ex. C-4)**, Rules 51-54; AGB, **(IRP Ex. C-3)**, Module 4, Section 4.3.8.

33. The principle of fairness is also reflected in the fact that the ICANN Auction treats all bids equally under the rules. The AGB provides that any bids that fail to comply with all aspects of the Auction Rules must be declared to be invalid. The Rules therefore do not allow any discretion in determining bid invalidity and ensure that all bids are assessed under the same standard.

34. Finally, I note that fairness can only be achieved if the Rules are followed and applied within the spirit of how they were drafted. As noted above, a failure to enforce the Rules, delegitimizes the process and the outcome, leads to reduced incentives to participate in future auctions, ultimately leading to inefficient results. This is because applicants will perceive the auction process as unfair.

IV. ASSESSMENT OF NDC AND VERISIGN'S CONDUCT IN RELATION TO THE ICANN AUCTION

35. At the request of counsel, I have reviewed the DAA between Verisign and NDC. Also, at the request of counsel, I have reviewed the testimony of Jose Rasco of NDC and Paul Livesay of Verisign. I have been informed that Mr. Rasco and Mr. Livesay negotiated the DAA and were responsible for its performance.

36. In my view, any objective observer would conclude that NDC violated the New gTLD Program Rules in both letter and spirit. I do not provide any form of legal opinion in expressing this opinion but express my views from the perspective of someone who designs auctions and who has firsthand knowledge of the policy objectives that ICANN sought to achieve.

37. As an economist, it is my view that NDC effectively transferred performance rights to Verisign (e.g.   Redacted - Third Party Designated Confidential Information

                   that NDC was granted by virtue of its application and the New gTLD Program Rules, as well as various obligations it owed to ICANN and the New gTLD Program process (e.g., the obligation to make disclosures to ICANN about changes to NDC's application and of information pertaining to the application). NDC transferred these rights and obligations without seeking approval from ICANN. NDC's highest winning bid in the ICANN Auction was effectively not its own bid, but that of a party that was not approved to be a part of the .WEB Contention Set. As discussed above, the ICANN Auction process was fundamentally premised on the requirement that only those who were still in the Contention Set at the time of the auction, or their Designated Bidders, could participate in it. There was no allowance for "indirect"[38] or undisclosed participation in a Contention Set or in the ICANN Auction. And, as far as I have been informed, Verisign was not disclosed or qualified as a Designated Bidder for NDC, and NDC could not be a Designated Bidder for Verisign, as the latter was not a member of the .WEB Contention Set.

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[38] DAA, **(Ex. PC-2)**, Section 10(a).

38.   In my view, the DAA undermined ICANN's preference for applicants to resolve contention privately, without resorting to an ICANN Auction of last resort. For example, the DAA prohibits NDC   Redacted - Third Party Designated Confidential Information
[39]   The DAA also prohibits NDC   Redacted - Third Party Designated Confidential Information
[40]   I understand from the testimony of Mr. Rasco and Mr. Livesay that these provisions were in fact followed by NDC.

39.   It is also my view that Verisign participated in the ICANN Auction for .WEB (the **.WEB Auction**) as an undisclosed bidder in violation of the Rules. My opinion is supported by several key provisions of the DAA:

- A bidder would want to control the terms by which it participated in an auction. Redacted - Third Party Designated Confidential Information
  .[41] Moreover,
  Redacted - Third Party Designated Confidential Information
  [42] This is consistent with Verisign being the true bidder in interest for .WEB.

- A bidder would also want to control the timing and amount of all bids made. But Verisign ensured that it had total control over the bidding process. Redacted - Third Party Designated Confidential Information
  "[43] which included   Redacted - Third Party Designated Confidential Information
  "[44] This is also consistent with Verisign being the true bidder in interest for .WEB.

- A bidder would want to control all of the externalities that could affect the submission of bids. While NDC and Verisign could have communicated by email or phone during the .WEB Auction, Redacted - Third Party Designated Confidential Information

  .[45] These controls are consistent with Verisign being the true bidder in interest.

40.   I note that the two individuals responsible for performing the terms of the DAA testified that, at the .WEB Auction,   Redacted - Third Party Designated Confidential Information

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[39] DAA, **(Ex. PC-2)**, Section 4(j) and Exhibit A, Section 1(i).

[40] DAA, **(Ex. PC-2)**, Section 8.

[41] The DAA provides that NDC   Redacted - Third Party Designated Confidential Information
            DAA, **(Ex. PC-2)**, Exhibit A, Section 1(a).

[42] DAA, **(Ex. PC-2)**, Exhibit A, Section 1(b).

[43] DAA, **(Ex. PC-2)**, Exhibit A, Section 1(c).

[44] DAA, **(Ex. PC-2)**, Exhibit A, Section 1(h).

[45] DAA, **(Ex. PC-2)**, Exhibit A, Section 1(f).

;[46] and that he (Mr. Livesay) " Redacted - Third Party Designated Confidential Information

[47] Mr. Rasco confirmed in his testimony that he
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"[48] This is consistent with my view that Verisign was an undisclosed bidder at the .WEB Auction.

41. The identity of the true bidder in interest can be ascertained by determining which party bore the economic risk of the bids that were submitted. The DAA is clear in this regard:
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.[49]   Redacted - Third Party Designated Confidential Information

This is again consistent with my view that Verisign was an undisclosed bidder at the .WEB Auction.

42. Finally, I observe that a winning bidder in interest retains an economic interest in the subject of the auction. But, as I understand the terms of the DAA, NDC does not
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[50] This is again consistent with Verisign being the true bidder in interest and NDC

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[46] *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Paul Livesay in Support of ICANN's Rejoinder and Amici's Briefs dated 1 June 2020 (**Livesay Witness Statement**), **(Ex. PC-3)**, paragraph 37. Also *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing Transcript (Day 7) dated 11 August 2020 (**Merits Hearing Transcript Day 7**), **(Ex. PC-4)**, pages 1234-1241.

[47] Livesay Witness Statement, **(Ex. PC-3)**, paragraph 37.

[48] *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Jose Ignacio Rasco III dated 1 June 2020 (**Rasco Witness Statement**), **(Ex. PC-5)**, paragraph 98. Also *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Hearing Transcript (Day 5) dated 7 August 2020 (**Merits Hearing Transcript Day 5**), **(Ex. PC-6)**, pages 828-833.

[49] Merits Hearing Transcript Day 5, **(Ex. PC-6)**, pages 829-833; Merits Hearing Transcript Day 7, **(Ex. PC-4)**, pages 1213, 1217 and 1234-1238.

[50] DAA, **(Ex. PC-2)**, Exhibit A, Section 9.

being effectively a service provider to Verisign. There is no circumstance in which NDC would remain the registry for .WEB as a result of the DAA.

43. In my view, the DAA violates the purpose of the ICANN Auction—to be a tie-breaker *among Contention Set members*—by inserting a new and undisclosed bidder into the mix. Verisign fundamentally distorted the process by resolving the tie in favor of itself, despite not having applied for .WEB, not having passed evaluation, not being a member of the .WEB Contention Set, not being a Qualified Applicant and was therefore ineligible to be a Bidder at the .WEB Auction. NDC's agreement to cede control over its application to Verisign fundamentally distorts the ICANN Auction process.

V. CONSEQUENCES OF NDC'S VIOLATION OF THE AUCTION RULES AND BIDDER AGREEMENT

44. I have also been asked by Afilias to address what should be the remedy for NDC and Verisign's conduct. In my opinion, the integrity of the New gTLD Program, and especially of the ICANN Auction, would be best served by ICANN disqualifying NDC's bids in the ICANN Auction, or applying any other solution that would result in NDC being denied the right to operate the .WEB gTLD. I believe this to be the appropriate remedy given the seriousness of NDC's violations of the New gTLD Program Rules.

45. If NDC is disqualified, the New gTLD Program Rules are clear regarding what should happen next. As noted above, consistent with the objective of finality, both the Auction Rules and the AGB state that, if the winning bidder is declared ineligible, the gTLD string should be offered to the next highest bidder at the price of its exit bid.[51] In the .WEB Auction, this was Afilias.

VI. ALLEGATIONS REGARDING BLACKOUT PERIOD VIOLATIONS

46. I understand that Verisign and NDC have alleged that Afilias violated the Blackout Period associated with the .WEB Auction. Contention Set members were prohibited from discussing bids, discussing bid strategies, negotiating settlement agreements during the Blackout Period or negotiating a post-auction transfer of .WEB during that period.[52] In the case of .WEB, the Blackout Period ran from 20 July 2016 to 1 August 2016. As I understand the allegation, Verisign and NDC claim that Afilias engaged in prohibited

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[51] Auction Rules, **(IRP Ex. C-4)**, Rule 62; AGB, **(IRP Ex. C-3)**, Module 4, Section 4.3.3.

[52] Auction Rules, **(IRP Ex. C-4)**, Rule 68(a) ("During the Blackout Period, all applicants for Contention Strings within the Contention Set are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction."). See also Bidder Agreement, **(IRP Ex. C-5)**, Section 2.6.

communications with other Contention Set members during the .WEB Contention Set Blackout Period.[53]

47.   Blackout Periods are relatively common in auction design, and are intended to prevent bid rigging or other forms of collusion among bidders. As such, Blackout Periods are generally considered to be an important part of auction design that should be enforced strictly. In the context of the .WEB Auction, I note that a violation of the Blackout Period is deemed to be a "serious violation" of the Auction Rules, which may lead to a bidder forfeiting its deposit and application.[54]

48.   Based on the materials that I have reviewed,[55] I do not consider that Afilias violated the Blackout Period rules associated with the .WEB Auction. NDC and Verisign point to three texts sent by Afilias employees to NDC employees as violative of the Blackout Period. I have reviewed these texts. Two of these texts[56] were sent prior to the start of the Blackout Period[57] and therefore were sent during a time when the New gTLD Program Rules allowed and indeed encouraged Contention Set members to communicate about the resolution of contention without any restrictions. Hence, I do not see how these communications violate the plain terms, or spirit, of the applicable rules. Rather, they strike me as consistent with the letter and spirit of the rules.

49.   A third text was sent by Mr. John Kane of Afilias to Mr. Jose Rasco of NDC during the Blackout Period, on 22 July 2016. In his message, Mr. Kane asked Mr. Jose Rasco: "If ICANN delays the auction next week would you again consider a private auction? Y-N."[58] I understand that Mr. Rasco did not respond.[59] Mr. Kane's offer to resolve contention by Private Auction, by its very words, is contingent on a delay in the ICANN Auction and an associated lifting of the Blackout Period.[60] If there is no delay, and the Blackout Period remains in effect, there is no offer. In other words, Mr. Kane's text could have no effect on the .WEB Auction, in the event it was not delayed and the Blackout Period remained in

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[53] Letter from S. Marenberg to ICANN Board dated 23 July 2021, **(Ex. PC-7)**. I have reviewed a copy of the letter in which Verisign and NDC have raised their allegations.

[54] Auction Rules, **(IRP Ex. C-4)**, Rule 61.

[55] I have reviewed the three text messages identified in the following footnote and analyzed them in accordance with the AGB and Auction Rules.

[56] Text messages between S. Heflin (Afilias) and J. Calle (NDC) dated 7 June 2016, **(Ex. PC-8)**; Text messages between J. Kane (Afilias) and J. Rasco (NDC) dated 7 June 2016, **(Ex. PC-9)**; Text messages between J. Kane (Afilias) to J. Rasco (NDC) dated 21 & 22 July 2016, **(Ex. PC-10)**.

[57] Under Rule 68 of the Auction Rules, the Blackout Period begins on the day of the Deposit Deadline for the relevant ICANN Auction, and ends when ICANN has received payment for the winning Bidder. In the .WEB Auction, the Blackout Period began on 20 July 2016 (*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Final Decision dated 20 May 2021, **(Ex. PC-11)**, paragraph 92) and ended on 1 August 2016 (Rasco Witness Statement, **(Ex. PC-5)**, paragraph 103).

[58] Text messages between J. Kane (Afilias) to J. Rasco (NDC) dated 21 & 22 July 2016, **(Ex. PC-10)**.

[59] Rasco Witness Statement, **(Ex. PC-5)**, paragraph 96.

[60] The Blackout Period starts seven days prior to the relevant auction (Auction Rules, **(IRP Ex. C-4)**, Rules 28 and 68). Thus, if the .WEB Auction was delayed, the Blackout Period would also have been delayed.

effect. I do not consider that the transmission of this text or its contents can be viewed as a violation of the Blackout Period. The substance of Mr. Kane's text does not fit into any of the categories prohibited by the Blackout Period rule. Mr. Kane does not disclose the substance of Afilias' or any other bidder's bids or otherwise discuss any bidding strategy for the .WEB Auction. Mr. Kane's text also is clearly not an attempt to negotiate a transfer of .WEB after the auction.

Peter Cramton
Date: 29 July 2022

LIST OF EXHIBITS

Exhibit No.	Description
PC-1	Professional Biography of Peter Cramton
PC-2	Domain Acquisition Agreement between NDC and Verisign dated 25 August 2015 (the **DAA**)
PC-3	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Paul Livesay in Support of ICANN's Rejoinder and Amici's Briefs dated 1 June 2020 (**Livesay Witness Statement**)
PC-4	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing Transcript (Day 7) dated 11 August 2020 (**Merits Hearing Transcript Day 7**)
PC-5	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Jose Ignacio Rasco III dated 1 June 2020 (**Rasco Witness Statement**)
PC-6	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Hearing Transcript (Day 5) dated 7 August 2020 (**Merits Hearing Transcript Day 5**)
PC-7	Letter from S. Marenberg to ICANN Board dated 23 July 2021
PC-8	Text messages between S. Heflin (Afilias) and J. Calle (NDC) dated 7 June 2016
PC-9	Text messages between J. Kane (Afilias) and J. Rasco (NDC) dated 7 June 2016
PC-10	Text messages between J. Kane (Afilias) to J. Rasco (NDC) dated 21 & 22 July 2016
PC-11	*Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Final Decision dated 20 May 2021

LIST OF REFERENCES AND IRP EXHIBITS

Ref. No.	Description
--	Peter Cramton, Evan Kwerel, Gregory Rosston, and Andrzej Skrzypacz "Using Spectrum Auctions to Enhance Competition in Wireless Services," *Journal of Law and Economics*, 54:4, S167-S188, 2011, http://www.cramton.umd.edu/ papers2010-2014/cramton-kwerel-rosston-skrzypacz-spectrum-auctions-and-competition.pdf
--	Peter Cramton, Robert Gibbons, and Paul Klemperer, "Dissolving a Partnership Efficiently," *Econometrica*, 55, 615–632, 1987, http://www.cramton.umd.edu/papers1984-1989/87econ-dissolving-a-partnership-efficiently.pdf
--	Peter Cramton et al., *Applicant Auctions for Internet Top-Level Domains: Resolving Conflicts Efficiently* (University of Maryland, Working Paper, January 2013), http://www.cramton.umd.edu/aa/cramton-gall-sujarittanonta-wilson-applicant-auction.pdf
--	Peter Cramton, "Spectrum Auctions," *in* Martin Cave, Sumit Majumdar, and Ingo Vogelsang, eds., *Handbook of Telecommunications Economics*, 605-639, Amsterdam: Elsevier Science B.V., 2002, http://www.cramton.umd.edu/ papers2000-2004/01hte-spectrum-auctions.pdf
--	Peter Cramton, "The FCC Spectrum Auctions: An Early Assessment," *Journal of Economics and Management Strategy*, 6:3, 431-495, 1997, http://www.cramton.umd.edu/papers1995-1999/97jems-fcc-spectrum-auctions.pdf
--	ICANN, New gTLD Program Explanatory Memorandum dated 18 February 2009, https://archive.icann.org/en/topics/new-gtlds/string-contention-18feb09-en.pdf
IRP Ex. C-3	gTLD Applicant Guidebook, Version 2012-06-04, https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf (the **AGB**)
IRP Ex. C-4	Auction Rules for New gTLDs: Indirect Contentions Edition, Version 2015-02-24, https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf (the **Auction Rules**)
IRP Ex. C-5	New gTLD Auctions Bidder Agreement, Version 2014-04-03, https://newgtlds.icann.org/en/applicants/auctions/bidder-agreement-redline-03apr14-en.pdf (the **Bidder Agreement**)
IRP Ex. C-9	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program dated 20 June 2011, https://www.icann.org/en/system/files/ bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf
IRP Ex. C-27	ICANN, Economic Case for Auctions in New gTLDs dated 8 August 2008, https://archive.icann.org/en/topics/economic-case-auctions-08aug08-en.pdf

Ref. No.	Description
IRP Ex. C-57	ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers dated 25 November 1998, https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en