

Expert Report

of

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I. SUMMARY

1. I have been asked by DECHERT LLP and CONSTANTAINE|CANNON LLP (collectively, “**Counsel**”), on behalf of Afilias Domains No. 3 (“**Afilias**”) n.k.a. Altanovo Domains, Ltd., to provide my independent expert analysis and opinions on the Domain Acquisition Agreement entered into between VeriSign, Inc. (“**Verisign**”) and NuDot Co LLC (“**NDC**”) dated 25 August 2015 (the “**DAA**”). More specifically, I was asked to provide an in-depth analysis and interpretation of the New gTLD Program Rules¹ and their underlying rationale, and on that basis to offer an opinion on whether the terms of the DAA violated the Rules in a manner that calls for the disqualification of NDC’s application for the .web generic top-level domain (“**gTLD**”).
2. I submit this report to offer my independent expert opinion regarding this matter.²
3. Based on my professional experience over the course of more than 25 years in matters relating to ICANN, my work in the development of the New gTLD Program and the Rules, and my review of the DAA, it is my opinion that NDC’s entry into the DAA, as well as NDC’s failure to inform ICANN about the existence of the DAA or certain of its key terms and conditions, constituted a clear violation of not only the explicit provisions of the Rules, but the entire policy foundation upon which the New gTLD Program Rules were based. The DAA unquestionably amounted to an effective change of control over NDC’s application for the .web top-level domain. It allowed Verisign to become the actual applicant for .web in a manner that was never disclosed to ICANN or anyone else, including, most importantly, the other .web contention set members and the Internet Community. ICANN cannot overlook this material violation of the Rules. To do so would be to treat NDC more favorably than other applicants, which would be contrary to ICANN’s Bylaws, which require equal treatment and non-discrimination.
4. In the case of the DAA, the violation of the Rules occurred in part because of NDC’s failure to report the change of control over critical aspects of its application to ICANN through the established application change request process, which not only would have required a new evaluation of the new applicant’s financials, background, and business model for the TLD, but would have also: (a) afforded the Internet Community the ability to submit comments on the proposed change of control, and (b) provided transparency to each of the other applicants for the .web TLD during the contention set resolution process.
5. Transparency, predictability, and fairness were three of the main lynchpins of the New gTLD Program upon which the Rules and in fact the entire New gTLD Program were based. The DAA effectively changed the applicant from NDC to Verisign and did so in complete secrecy. NDC’s lack of transparency about the change of control was a material

¹ For the purposes of this Expert Report, the “New gTLD Program Rules” are comprised of the rules, policies, and procedures related to the New gTLD Program – including the gTLD Applicant Guidebook, the Auction Rules for New gTLDs: Indirect Contention Edition, the New gTLD Auctions Bidder Agreement, and the supplement to the New gTLD Auctions Bidder Agreement.

² All of the sources used in the drafting of this opinion are contained in the footnotes associated with the specific content set forth therein.

violation of the Rules that should lead to the disqualification of NDC's application for .web.

II. DECLARATIONS AND RESTRICTIONS

6. I have been providing legal, policy, and implementation assistance and advice in the fields of internet governance, intellectual property protection, and domain name policy since the mid-1990s. In doing so, I have served in key business, policy, and legal roles in the domain name industry for more than 25 years. Currently, I am the Founder and CEO of JJN Solutions, LLC., a consultancy focusing on legal and policy services related to online brand protection, domain name management, intellectual property licensing, and enforcement.
7. I have served in a number of leadership positions within the ICANN community, including serving as the Chair of the gTLD Registries Stakeholder Group (2001 – 2004), a Council Member of the Generic Names Supporting Organization (“GNSO”) (2003 – 2004, 2010 – 2013) (including serving for two years as its Vice Chair on behalf of the Contracted Parties), and chair of the working group responsible for revising the policy development process culminating in PDP 2.0.
8. With respect to the addition of new gTLDs, I have been intimately involved in each of the rounds of new gTLDs since ICANN's inception from a policy, legal, and business perspective. This has included serving in several of the Working Groups prior to the first round of new gTLDs in 2000 (“**Proof of Concept Round**”), before leading Neustar, Inc.'s (“**Neustar**”) business development team in its applications for the .biz TLD with ICANN and for .us with this United States Department of Commerce, which were awarded in October 2000 and July 2001, respectively. In 2005, on behalf of Neustar, I led Neustar's team in drafting the technical documentation in support of Tralliance's application for the .travel TLD, which entered into an Agreement with ICANN on May 5, 2005. Although Neustar was not the initial back-end operator for Telnic's application for .tel, prior to its launch, Telnic switched to Neustar to operate its back end. I served on Telnic's Advisory Board responsible for assisting Telnic during its launch phases.
9. In support of the 2012 New gTLD Round, in addition to leading Neustar's policy team submitting comments to each version of the draft Applicant Guidebook, and on issues related to the Base Registry Agreement, the centralized Trademark Clearinghouse, and vertical integration for domain name registries and registrars, I served as the sole gTLD Registry member of the Implementation Review Team responsible for advising the ICANN Board on Intellectual Property issues relating to the introduction of new gTLDs. I also served as a leader of the legal committee responsible for the development of the ICANN new base gTLD Registry Agreement, and more recently as a Co-Chair of the New gTLD Subsequent Procedures Policy Development Process Working Group (“**SubPro**”), responsible for the review of the 2012 New gTLD Program and for developing policy recommendations for subsequent new gTLD rounds. I also served as the GNSO Liaison to the SubPro Operational Design Phase being conducted by ICANN Staff.

10. A complete description of my background and qualifications to provide this opinion, as well as my current CV, are attached at **Appendix A**.
11. In forming the opinions expressed in this report, I have considered the materials referenced in this report as well as materials from *Afilias v. ICANN*, ICDR Case. No. 01-18-004-2702 (“**web IRP**”). Further, I have relied on my own knowledge and training; my nearly 25 years of experience in the domain name industry; my previous employment with a domain name registry operator; my more than 25 years of participation in the ICANN (and pre-ICANN) community; and my previous and current work as an attorney who frequently works on numerous types of corporate legal agreements, including mergers & acquisitions, intellectual property licensing, information technology agreements, as well as a host of other forms of legal contracts.
12. I have discussed issues relevant to the matter with Counsel. However, the opinions expressed in this report are my own. My compensation is not related in any way to the outcome of this proceeding, and I have no other interest in this proceeding.
13. This report has been prepared solely for use in this matter. It should not be used for any other purpose without prior written authorization. I understand that it will be made available to the ICANN Board. I also understand that this report may be posted on ICANN’s website in accordance with Section 4(3)(u) of the ICANN Bylaws. As this report contains confidential and proprietary information, I have been asked by Counsel to submit both a redacted version of the report that may be posted on ICANN’s website and a non-redacted version, containing information that is designated by the Claimant as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE ATTORNEYS’ EYES ONLY” within the meaning of the Stipulated Protective Order, executed by the Parties on October 29, 2020, a copy of which was shared with me. I agree to be bound by the Stipulated Protective Order. I accept no responsibility to third parties for breaches of any confidentiality obligations.

III. DISCUSSION

A. ICANN’s Early New gTLD Programs

14. Prior to the first round of new gTLDs in 2000, most of the policy work performed by several ICANN working groups focused on the types of intellectual property protections that were to be included in any new gTLDs. This work resulted in two policy statements issued by the Domain Name Supporting Organization (“**DNSO**”), the precursor to what is now known as the GNSO. The DNSO recommended that the ICANN Board should use this so-called “proof-of-concept” round to evaluate if and how future rounds of new gTLDs should be conducted.
15. Although the DNSO Working Groups did substantial work related to the types of TLDs that could be selected, the qualifications for serving as a registry, and the policies that should be implemented by the registry, there was very little discussion relating to the process by which new TLDs should be selected. In other words, there was no effective

guidance given to the Board by the community on how it should select a registry in the event there was more than one applicant applying for a specific TLD.

16. In response to questions submitted by several applicants for new gTLDs in August 2000, regarding the process to be used by ICANN in the event there were multiple applications for the same string, ICANN provided little guidance other than the following:

FAQ #22: What is the procedure in the event of duplicate submission of a domain name by different parties? Which party would get preference? Would the fee be non-refundable for the party that is not selected?

Applications to sponsor or operate a TLD will be evaluated according to the Criteria for Assessing TLD Proposals, under which all aspects of the proposal (operational, financial, technical, etc.) will be considered. The particular TLD string requested is only one of many factors in the evaluation. Clearly, the same TLD cannot be established for both proposals; differences between the applications would be considered according to the criteria. The fee paid by a non-selected applicant would not be refundable.³

17. In response to the 2000 round RFP, 47 applications were received for new gTLDs. Multiple applications were received for several strings. There was no pre-determined mechanism for how the Board was to choose between applicants for the same string. As an attendee at that meeting working for Neustar in support of its application for .biz, I can best describe the selection process as chaotic. Although Neustar was selected to operate .biz, the process lacked any predictability or objectivity. ICANN itself has acknowledged the dissatisfaction with using a comparative evaluation process on numerous occasions, including as a response to public comments advocating the use of comparative evaluation for the 2012 New gTLD Program. It stated, “[c]omparative evaluations were used in the 2001 proof-of-concept round and the 2003 sponsored TLD round. Comparative evaluation was also used in the .NET rebid process and transition of .ORG. It was widely noted in the community that ICANN did not have a good experience with comparative evaluation in the .NET rebid process.”⁴
18. ICANN and the Internet Community’s experience with the gTLD application, evaluation, and delegation process in these earlier rounds directly informed the rules development process for the 2012 round.

³ ICANN, TLD Application Process FAQs (updated 10 October 2000), <https://archive.icann.org/en/tlds/tld-faqs.htm>.

⁴ ICANN, New gTLD Applicant Guidebook: Analysis of Public Comment (18 February 2009), <https://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>, p. 113.

B. 2007 GNSO Final Report on the Introduction of New gTLDs

19. On August 8, 2007, after a multi-year policy development process seeking to rectify the gaps and flaws of the prior selection rounds of new gTLDs, the GNSO Council released its Final Report on the Introduction of New Generic Top-Level Domains.⁵ The Final Report was divided into two parts: (a) a Comprehensive examination of the four Terms of Reference designed to establish a stable and ongoing process that facilitates the introduction of new top-level domains, and (b) supplementary materials used in the policy development process, including a series of Working Group Reports on important sub-elements of the committee’s deliberations.
20. Among the key principles approved unanimously by the GNSO Council with respect to the introduction of new gTLDs were: (a) “[n]ew generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way”; and (b) “[a] set of technical criteria must be used for assessing a new gTLD registry applicant to minimize the risk of harming the operational stability, security and global interoperability of the Internet.”⁶
21. In addition, the GNSO Council also issued a set of recommendations regarding the new gTLD process which were also adopted unanimously by the GNSO Council (except where explicitly referenced). Among those recommendations were:
 - A. “The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency[,] and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”⁷
 - B. “Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose the applicant sets out.”⁸
 - C. “Applicants must be able to demonstrate their financial and organizational operational capability.”⁹
 - D. “There must be a clear and pre-published application process using objective and measurable criteria.”¹⁰

⁵ ICAANN|GNSO, Final Report: Introduction of New Generic Top-Level Domains (8 August 2007), <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (the “GNSO Report”), (IRP Ex. C-20).

⁶ Id., Principles A and D.

⁷ Id., Recommendation 1.

⁸ Id., Recommendation 7.

⁹ Id., Recommendation 8.

¹⁰ Id., Recommendation 9.

22. Further, the GNSO Council also issued a series of Implementation Guidelines which were intended to be used by ICANN for the New gTLD Program. The reason they were classified as implementation guidance as opposed to recommendations is that the Council recognized that certain of the guidelines may or may not be feasible to implement in exactly the way they were worded. However, the Council expected that any change implemented by ICANN should follow the “spirit” of the Guidelines. This included the notion that if there was contention for strings, applicants could resolve contention between themselves within a pre-established timeframe. On June 26, 2008, the ICANN Board adopted the GNSO policy recommendations for the introduction of new gTLDs and directed ICANN Staff to continue to develop and complete its detailed implementation plan and provide the Board with a final version of the Implementation proposals for the Board and Community to approve before the new gTLD introduction process was launched.¹¹

C. Implementation of the New gTLD Program

i. Development of the Applicant Guidebook

23. In accordance with the June 2008 Board resolution, ICANN Staff developed a more detailed implementation proposal which was released on October 8, 2008, entitled “Draft Applicant Guidebook version 1” (“**AGB v.1**”).¹² AGB v. 1, like all its successors, consisted of six parts (called modules).
24. Over the next 3.5 years, there were at least 9 other versions of the Applicant Guidebook, each of which was published for Community review. In addition, many of the topics within the Applicant Guidebook were the subject of dozens of face-to-face Community sessions in which each of the stakeholders were asked to provide their input to lay the foundation for an open, transparent, fair and predictable process.
25. This culminated in the approval of the final Applicant Guidebook (“**Applicant Guidebook**”)¹³ in June 2011. As stated in the Applicant Guidebook’s preamble, the Applicant Guidebook’s goal was to “create an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”¹⁴

¹¹ See ICANN, Adopted Board Resolution (26 June 2008), https://www.icann.org/resources/board-material/resolutions-2008-06-26-en#_Toc76113171.

¹² See New gTLD Program: Draft Applicant Guidebook (Draft RFP) (24 October 2008), <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.

¹³ gTLD Applicant Guidebook, Version 2012-06-04, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf> (the “**Applicant Guidebook**”), (IRP Ex. C-3).

¹⁴ Although the final Applicant Guidebook approved initially by the ICANN Board of Directors was version 7 (gTLD Applicant Guidebook (v7) (30 May 2011), <http://www.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf>), this version was modified in September 2011 (gTLD Applicant Guidebook, Version 2011-09-19, <https://archive.icann.org/en/topics/new-gtlds/rfp-clean-19sep11-en.pdf>), then again on January 11, 2012 (gTLD

ii. **Agreement to Terms and Conditions / Avoid Material Changes to Applications**

26. When applying for a new gTLD, applicants had to agree to a set of terms and conditions that were found in Module 6 of the Applicant Guidebook (“**Terms and Conditions**”).¹⁵ In effect, applicants entered into a contract with ICANN that bound them to follow the New gTLD Program Rules. I address some of the most pertinent rules for the purposes of my analysis below.
27. As had been the case in all previous application rounds, the Terms and Conditions for the 2012 round required applicants to certify that the information contained within their applications is “true, accurate and complete,” and that such information could be relied upon by ICANN in its evaluation. Further, a violation of such a representation could serve as the basis for the immediate disqualification of their applications. In previous rounds, this came in the form of a “Fitness Disclosure.”¹⁶
28. Commencing with the first New gTLD round in 2000, it was evident that ICANN sought to avoid applicants for new gTLDs from bait-and-switch tactics designed to conceal the identity of, and information about, new gTLD applicants and applications. Having complete up-to-date applications not only allowed ICANN to evaluate whether a Registry Operator had the necessary skills, expertise, and resources to operate a critical piece of Internet infrastructure, but it was the only way to allow the public to file informed comments about the applicant, the application, and its proposed use of the TLD.
29. The 2012 Terms and Conditions went further than previous rounds’ Fitness Disclosures and also required applicants to warrant:

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

Applicant Guidebook, Version 2012-01-11, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>), and finally on June 4, 2012 (gTLD Applicant Guidebook, Version 2012-06-04, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>). All references to the final Applicant Guidebook shall be to the version existing as of June 4, 2012.

¹⁵ See Applicant Guidebook, (**IRP Ex. C-3**), Module 6 (Top-Level Domain Application – Terms and Conditions).

¹⁶ See, for example, the Registry Operator’s Fitness Disclosure, which was required to be signed by all applicants during the original 2000 round of new gTLDs. It states: “[b]y signing this fitness disclosure, the undersigned certifies that he or she has authority to do so on behalf of the registry operator. On his or her own behalf and on behalf of the registry operator, the undersigned certifies that all information contained in this fitness disclosure, and all documents attached to this disclosure, is true and accurate to the best of his/her/its knowledge and information. The undersigned and the registry operator understand that any material misstatement or misrepresentation will reflect negatively on any application of which this disclosure is a part and may cause cancellation of any delegation of a top-level domain based on such an application.” ICANN, TLD Application: Registry Operator’s Fitness Disclosure (15 August 2000), <https://archive.icann.org/en/tlds/tld-app-registry-operator-disclosure-15aug00.htm>.

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.¹⁷

30. In addition, Paragraph 10 of the Terms and Conditions specifically stated that the “Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application.”¹⁸ This prohibition in some form was contained in every version of the draft Applicant Guidebook.¹⁹ This provision was added by the Community to ensure that there were no material changes to applications which would potentially require re-evaluation, the imposition of additional fees, or even the delaying of the resolution of contention sets.²⁰

iii. New gTLD Process / Applications for .Web

31. In order to ensure a consistent, predictable, transparent, and fair application process, the application window opened for the submission of new gTLD applications on January 12, 2012 and closed on May 30, 2012.²¹ In accordance with the Applicant Guidebook, following the application submission period, ICANN completed an “Administrative Completeness Check” and posted the public portions of each of the 1,930 applications received for public comment on June 13, 2012.²² The public portion of each of the applications included information about the applicant itself, the applied-for TLD, the type of TLD (e.g., standard, geographic, community, IDN, etc.), relevant policies of the TLD, the registry back-end of the registry operator, and an overview of the technical operations

¹⁷ Applicant Guidebook, (IRP Ex. C-3), Module 6, ¶ 1 (at p. 6-2).

¹⁸ See Applicant Guidebook, (IRP Ex. C-3), Module 6, ¶ 10 (at p. 6-6).

¹⁹ See, for example, gTLD Applicant Guidebook (v1), Module 6 (24 October 2008), <https://archive.icann.org/en/topics/new-gtlds/terms-24oct08-en.pdf>, ¶ 10 (at p. 6-4).

²⁰ This principle is illustrated by ICANN in its response to the question of whether those in contention sets could be allowed to combine their applications into new joint ventures and avoid an ICANN Auction of Last Resort. Although, as discussed below, private resolution of contention sets was encouraged, “material changes in applications (for example, combinations of applicants to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent application round. Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. **Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.**” Applicant Guidebook, (IRP Ex. C-3), Module 4, Section 4.1.3 (at p. 4-6) [Emphasis added].

²¹ See Applicant Guidebook, (IRP Ex. C-3), Module 1, Section 1.1.1 (at p. 1-2). Although the application period was originally set to expire on April 12, 2012, this time period was extended until May 30, 2012 due to a technical glitch with ICANN’s TLD Application System.

²² ICANN, New Generic Top-Level Domains, New Top-Level Domain Name Applications Revealed Historic Milestone for the Internet’s Domain Name System (13 June 2012), <https://newgtlds.icann.org/en/announcements-and-media/announcement-13jun12-en>.

of the registry. They also included the applicant’s mission statement, explaining why the applicant was seeking the string and how it intended to market and operate the string.

32. As ICANN has explained, its public notice and comment periods are a critically important element of ICANN’s Mission, as stated in its Bylaws. As a private-public partnership, “ICANN is dedicated to preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of the global Internet communities, and developing policy applicable to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.”²³ According to the Applicant Guidebook, evaluators performed due diligence on the application comments and took the information provided in these comments into consideration.²⁴ As the Applicant Guidebook states: “In the new gTLD application process, all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications.”²⁵
33. Of the 1,930 applications received by ICANN for new gTLDs, there were 7 applications for .web.²⁶
34. One of those applicants was NDC, located in Miami, Florida.²⁷ According to the public portions of the application, the Primary Contact was Jose Ignacio Rasco, Manager of NDC. The Secondary Contact was Nicolai Bezsonoff, also a Manager of NDC. NDC was incorporated in the State of Delaware as a limited liability company. The company’s officers were Juan Diego Calle, Mr. Rasco, and Mr. Bezsonoff. The shareholders holding at least 15% of the shares were Domain Marketing Holdings, LLC and NUCO LP, LLC. According to its application, Neustar, an unrelated third party to NDC at the time, was designated as the technical registry services back-end provider for its .web application.²⁸

²³ See Applicant Guidebook, (**IRP Ex. C-3**), Module 1, Section 1.1.2.3 (Comment Period) (at p. 1-5).

²⁴ Id., Module 1, Section 1.1.2.3 (Comment Period) (at p. 1-5).

²⁵ Id., Module 1, Section 1.1.2.3 (Comment Period) (at 1-6).

²⁶ See ICANN, New Generic Top-Level Domains, New Top-Level Domain Name Applications Revealed Historic Milestone for the Internet’s Domain Name System (13 June 2012), <https://newgtlds.icann.org/en/announcements-and-media/announcement-13jun12-en>. There were also two applications submitted by VistaPrint Limited for .webs. Web.com challenged VistaPrint’s applications based on string similarity to its application for .web. It prevailed in that objection on January 24, 2014. See New gTLD String Confusion Panel, ICDR Cases No. 50-504-221-13 and 50-504-246-13, String: <.webs>, Expert Determination (24 January 2014), <https://go.adr.org/rs/294-SFS-516/images/50%20504%20T%2000246%2013%20determination.pdf>. As a result, although not in contention with the six other applications for .web, it was determined that if Web.com prevailed in contention resolution for .web, there would have to be a second contention resolution process between Web.com and Vistaprint’s applications for .webs. For the purpose of this opinion, I will not be including the .webs applications in the discussion of the .web contention set.

²⁷ See ICANN, New Generic Top-Level Domains, Application Details: Application ID 1-1296-36138 (String: WEB) by NU DOT CO LLC, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1053>.

²⁸ ICANN, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012) (the “**NDC .WEB Application**”), (**Ex. JJN-1**), Section 23.

35. Verisign did not submit an application for .web.
36. According to ICANN’s Public Comment database, there were a total of 78 comments received for the 7 applications for .web.²⁹ Public comments were submitted about both the applicants for .web as well as on the specific policies and services included in the public portions of the .web applications. For example, there were a number of comments received objecting to Radix Registry’s background screening results,³⁰ Google’s application for .web,³¹ Donuts introduction of the Donuts Protected Marks List for each of its extensions including .web,³² as well as comments for additional rights protection mechanisms to include in NDC’s and Afilias’ applications for .web.³³ No GAC Early Warnings were submitted regarding any of the seven applications posted for .web, although the GAC had issued several Early Warnings on competition grounds regarding other applications.³⁴
37. Also concurrent with the public comment period, ICANN began its Initial Evaluation on each of the applications.³⁵ Initial Evaluation included reviews regarding both the string selected by the applicant, as well as a comprehensive review of the applicant itself, to determine whether the applicant “has the requisite technical, operational, and financial

²⁹ This can be seen at ICANN, New Generic Top-Level Domains, Application Comments, <https://gtldcomment.icann.org/applicationcomment/viewcomments> in doing a string search on .web.

³⁰ See, for example, ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID ywu8llsb, by Paul McGrady (26 September 2012, 23:29:09 UTC), <https://gtldcomment.icann.org/applicationcomment/commentdetails/11694>; ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID tkudyflhj, by Paul McGrady (26 September 2012, 23:32:07 UTC), <https://gtldcomment.icann.org/applicationcomment/commentdetails/11695>.

³¹ See ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID ycupgiw6, by Ivan Smirnov (24 September 2012, 03:00:27 UTC), <https://gtldcomment.icann.org/applicationcomment/commentdetails/7904> (comment about Google controlling a generic extension).

³² See, for example, ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID mjclg90q, by Bill Millner (25 September 2012, 21:53:08 UTC), <https://gtldcomment.icann.org/applicationcomment/commentdetails/9442>; ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID fo2imfq7, by Mette Andersen (8 August 2012, 08:01:41 UTC), <https://gtldcomment.icann.org/applicationcomment/commentdetails/3254>.

³³ See, for example, ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID x77a6fp4, by Ewa M Abrams (7 August 2012, 21:09:23 UTC), <https://gtldcomment.icann.org/applicationcomment/commentdetails/3123>; ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID v53v42i9, by Carol E Robbins (8 August 2012, 19:08:06 UTC), <https://gtldcomment.icann.org/applicationcomment/commentdetails/4124>; ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID wt3qpy7q, by Carol E Robbins (8 August 2012, 18:14:10 UTC), <https://gtldcomment.icann.org/applicationcomment/commentdetails/3885>.

³⁴ ICANN|GAC, GAC Early Warnings (last updated 7 February 2022), <https://gac.icann.org/activity/gac-early-warnings>.

³⁵ The order in which ICANN initially reviewed all applications was intended to be decided by a time-system skills-based competition called “digital archery.” However, due to the ease with which such a system could be gamed, ICANN abandoned that approach and moved to determining the order in a prioritization draw that was held on December 17, 2012.

capabilities to operate a registry.”³⁶ More specifically, background screening of the applicant consisted of a general business due diligence and criminal history check as well as whether the applicant had a “history of cybersquatting behavior.”³⁷ During the Initial Evaluation, most Registry Operators received “Clarifying Questions” seeking additional clarifications on subject matter sought by the evaluators. A common area for clarifying questions was with respect to the specific “Registry Services” being offered by the applicant. Most notably this included any “other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator.”³⁸ The additional Registry Services was a common focal point for public comment as described above.³⁹ Not only were additional registry services different amongst Registry Operators, but they were also highly dependent on the back-end registry system used by the Registry Operator. For example, as detailed in the NDC application for .web, Neustar’s back-end service offered an extensive abuse mitigation program (described in NDC’s response to question 28 of its application), which it considered to be much more extensive than what Verisign offered in any of the TLDs for which it proposed to serve as the back-end.⁴⁰

38. Each of the applications were determined to have passed Initial Evaluation based on the information contained in their applications.⁴¹ NDC’s application passed Initial Evaluation on June 7, 2013. Afilias completed its Initial Evaluation on July 26, 2013. The last of the .web applicants to pass Initial Evaluation was the one submitted by Radix Registry on August 15, 2014.
39. It is important to note that NDC’s application passed initial evaluation using Neustar’s back-end registry system, not Verisign’s. Therefore, not only was it Neustar’s back-end services that were evaluated, but also NDC’s proposed Registry Services using the Neustar back-end. Thus, none of the Registry Services that were to be provided by Verisign with respect to .web were either subject to public comment or evaluated.
40. ICANN publicly identified the members of the .web contention set on its website.

iv. Application Change Process

41. Prior to the 2012 launch of the new gTLD Application window, ICANN had expected approximately 500 applications to be submitted. Even with that number of applications, ICANN understood that the evaluation, dispute, and contention resolution processes could

³⁶ Applicant Guidebook, (**IRP Ex. C-3**), Module 1, Section 1.1.2.5 (at p. 1-9).

³⁷ Id., Module 2, Section 2.1.1 (at p. 2-2).

³⁸ Id., Module 2, Section 2.2.3.1 (at p. 2-24).

³⁹ See Paragraph 32 above.

⁴⁰ See, for example, NDC .WEB Application, (**Ex. JJN-1**), Response to Question 28; ICANN, New gTLD Application for Hebrew transliteration of .com submitted by VeriSign Sarl, Application ID 1-1254-29622 (13 June 2012), (**Ex. JJN-2**), Response to Question 28.

⁴¹ See ICANN, New Generic Top-Level Domains, New gTLD Current Application Status, <https://gtdresult.icann.org/applicationstatus/viewstatus>.

take many months, if not years. It also knew there could be changes that occur in the ordinary course of business to the entities that had submitted applications, including management changes, employee turnover, mergers and acquisitions (unrelated to the gTLD application), address changes, etc. and that such changes might occur after Initial Evaluation had been completed. Therefore, ICANN had to develop a process to review such changes. That process needed to provide ICANN time to determine whether such changes could render previously submitted information submitted by the applicant to be untrue or inaccurate, and if so, what the consequences should be. Section 1.2.7 of the Applicant Guidebook entitled “Notice of Changes to Information” was added to “maintain the integrity of application materials.”⁴² It states:

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.

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.⁴³

42. Here, too, the purpose of this provision was to ensure transparency and, as stated in the provision, the “integrity” of the process. Applicants who had passed through the public notice and comment period and the initial evaluation were not allowed to make changes that would render any of the application information untrue or inaccurate, without ICANN reviewing the changes to determine if they were material and would require re-evaluation or other remedies. In order to undertake this evaluation of changes, ICANN developed an Application Change Request process (“ACR”) for applicants to notify ICANN of any changes to the information contained within or pertaining to the application and to evaluate those changes to determine whether they were material. If the changes were deemed material, ICANN reserved the right to require a re-evaluation of the application, which could involve additional fees or even an application being deferred until the next subsequent round of new gTLDs.⁴⁴

⁴² See ICANN, Program Implementation Review (29 January 2016), <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> (“PIR”), Section 1.4.3 (at p. 35).

⁴³ Applicant Guidebook, (IRP Ex. C-3), Module 1, Section 1.2.7 (at p. 1-30).

⁴⁴ See ICANN, New Generic Top-Level Domains, New gTLD Application Change Request Process and Criteria, <https://newgtlds.icann.org/en/applicants/global-support/change-requests>, (IRP Ex. C-56).

43. The published ACR reiterated what was in the Applicant Guidebook, namely that “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.”⁴⁵
44. The determination of whether changes would be approved by ICANN was based on a balancing of factors according to the ACR process. These factors “were carefully developed to enable applicants to make necessary changes to their applications while ensuring a fair and equitable process for all applicants.”⁴⁶ These included: (a) whether the change affected other third parties materially (e.g., how the change request would impact the status of the application and its competing applications, the string, the contention set, and any additional Program processes that it or its competing applications must complete), (b) were other similar changes previously approved, (c) whether allowing the change would be construed as fair to the general community, (d) would the change affect the evaluation score or require re-evaluation of some or all of the application, (e) would the change affect string contention or community priority consideration, and (f) would the timing interfere with the evaluation process in some way?
45. If ICANN approved the changes to the application, certain information was required to be posted for a 30-day public comments period.⁴⁷ In conjunction with the posting of such information for public comment, ICANN also informed applicants whether the applications required re-evaluation (and additional fees). This re-posting underscores how important transparency is in the New gTLD Program and how seriously ICANN takes this obligation to the public.
46. Numerous change requests were made pursuant to this process. As of July 31, 2015, ICANN reported having processed 2,587 change requests.⁴⁸ In a presentation made on May 31, 2022, during ICANN 74 “Prep Week”, ICANN reported that a total of 2,772 change requests have been processed for applications from the 2012 round.⁴⁹
47. The ICANN new gTLD portal does not show that any change requests were filed regarding NDC’s application for .web prior to string contention resolution.⁵⁰

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ In general, the changes that were not required to be posted consisted of the changes made to the confidential portions of the new gTLD application for which the original application information was not posted for public comment. This included the changes to particular officers, directors, employees, address information, and changes related to the security portions of the application.

⁴⁸ See PIR, Section 1.4.3 (at p. 37).

⁴⁹ ICANN, Presentation, New gTLD Subsequent Procedures: Operational Design Phase (ODP) (31 May 2022), https://cdn.filestackcontent.com/content=t:attachment,f:%22SubProODP_ICANN74_PrepWeek.pdf%22/1LiJb1oAQCOODHkzcfDY, Slide 17.

⁵⁰ If there had been any change requests, those would have been visible when clicking “View Application Update History” on the top right portion of NDC’s .web application page (n. 27 above).

v. **String Contention / Auction of Last Resort**

48. Section 4.1 of the Applicant Guidebook sets forth the overarching process for string contention resolution when there are two or more applicants for a string in a contention set that pass each of the requisite evaluations and for which there is no applicant given priority for achieving “community” status. In such a case, as described in Section 4.1.3, applicants were encouraged to “reach a settlement among themselves that resolved the contention.”⁵¹ Here, too, the principles of transparency, predictability, and fairness required that applicants could not enter into a settlement that would materially change the application that had originally been submitted and had passed through the notice and comment period and initial evaluation. As stated above, applicants could settle a contention set only in a manner that did not materially alter any of existing applications for the string and where the settlement resulted in the withdrawal of all but one application.⁵²
49. Absent private resolution of the contention set, the Applicant Guidebook set forth a process to conduct auctions of last resort.⁵³ This was the case for the applicants for the .web gTLD, as they were apparently unable to resolve the contention set amongst themselves. They were therefore forced to participate in the ICANN Auction of Last Resort.
50. Any applicant that participated in an auction was required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction.⁵⁴ ICANN further revised the Auction Rules for New gTLDs on February 24, 2015 (“**Auction Rules**”), so that those Auction Rules applied to the ICANN Auction for .web, which took place in July 2016.
51. The New gTLD Auctions Bidder Agreement was released on April 3, 2014. It sets forth the legal obligations undertaken by each new gTLD Applicant involved in an auction of last resort (“**Qualified Applicant**” or “**Bidder**”).⁵⁵ The Bidder Agreement not only incorporates the applicable sections of the Applicant Guidebook, but also the Auction Rules, and contains additional legal terms and conditions. It contains standards anti-collusion rules prohibiting the bidders from discussing with each other their bidding strategies, or collaborating with each other on negotiating strategies.⁵⁶ The Bidder Agreement also reserved the right for ICANN to conduct due diligence on the Qualified Applicant to ensure compliance with all applicable laws, regulations and rules governing the auction.⁵⁷ Further, each Qualified Applicant must confirm that all representations, warranties, covenants, indemnities, and other provisions made by the parties shall be considered to have been relied upon by the parties, shall be true and correct as of the date

⁵¹ Applicant Guidebook, (**IRP Ex. C-3**), Module 4, Section 4.1.3 (at p. 4.6).

⁵² Id., Module 4, Section 4.1.3 (at p. 4.6).

⁵³ See, generally, id., Module 4, Section 4.3.

⁵⁴ See id., Module 4, Section 4.3.2 (Winning Bid Payments) (at pp. 4-25 – 4-26).

⁵⁵ New gTLD Auctions Bidder Agreement, Version 2014-04-03, <https://newgtlds.icann.org/en/applicants/auctions/bidder-agreement-03apr14-en.pdf>, (**IRP Ex. C-5**).

⁵⁶ Id., Section 2.6 (Anti-Collusion Rules).

⁵⁷ Id., Section 2.7 (Compliance).

of the execution of the Bidder Agreement.⁵⁸ Finally, ICANN is designated as an intended third party beneficiary of the of Bidder Agreement and is entitled to enforce the Bidder Agreement against a Bidder or the manager of the auctions.⁵⁹

52. As stated above, all of the applications for .web passed Initial Evaluation and were placed into the contention set. ICANN scheduled an auction of last resort was scheduled for the .web gTLD on April 27, 2016.⁶⁰ ICANN posted the results of the auction for the .web gTLD on July 28, 2016, in which NDC was declared the winning bidder at a price of \$135,000,000.⁶¹

D. The Domain Acquisition Agreement

53. Nearly 1 year prior to the ICANN Auction, NDC had entered into an agreement with Verisign called a “Domain Acquisition Agreement”, dated August 25, 2015 (“**DAA**” or “**Agreement**”). Under this Agreement, Redacted - Third Party Designated Confidential Information

54. Redacted - Third Party Designated Confidential Information

I consider that the execution of the DAA between NDC and Verisign unquestionably amounted to a change of working control of NDC’s rights and obligations in connection with the application for .web, all private resolution of the .web gTLD, and in the event of an ICANN auction, all control over every aspect of the auction process.

55. The following elements of the DAA support the opinion I have expressed above. The DAA:

⁵⁸ Id., Section 7.1 (Survival; Successors and Assigns).

⁵⁹ Id., Section 7.10 (Third Party Beneficiary).

⁶⁰ ICANN, New Generic Top-Level Domains, ICANN New gTLD Auction Schedule (27 April 2016), <https://newgtlds.icann.org/en/applicants/auctions/schedule-27apr16-en.pdf>.

⁶¹ ICANN, Announcements: Results Available for 27 July 2016 New gTLD Program Auction (28 July 2016), <https://www.icann.org/en/announcements/details/results-available-for-27-july-2016-new-gtld-program-auction-28-7-2016-en>.

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effectively mooted what ICANN intended to be the primary mechanism by which contention would be resolved. Redacted - Third Party Designated Confidential Information

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⁶² See Domain Acquisition Agreement between NDC and Verisign (25 August 2015) (the “DAA”), (Ex. JJN-3), § 4(j).

⁶³ See id., § 4(f).

⁶⁴ See id., § 4(i).

⁶⁵ See id., § 6(a).

⁶⁶ Id., § 6(a).

⁶⁷ See id., § 6(b).

⁶⁸ See id., § 8.

- Expressly stated that NDC Redacted - Third Party Designated Confidential Information

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⁶⁹ See id., Exhibit A, § 1.

⁷⁰ See id., Exhibit A, § 1(a).

⁷¹ Id., Exhibit A, §1(b).

⁷² Id., Exhibit A, §1(c).

⁷³ Id., Exhibit A, §1(e).

⁷⁴ See id., Exhibit A, § 1(f).

⁷⁵ Id., Exhibit A, § 1(h).

⁷⁶ Id., Exhibit A, § 1(i).

⁷⁷ Id., Exhibit A, § 2(e).

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E. Violations of the Terms and Conditions (Module 6) and of the Applicant Guidebook

i. Violation of Terms and Conditions, Section 1

60. As stated in above,⁸¹ the Terms and Conditions required NDC to warrant “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.”⁸² In addition, NDC acknowledged 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 NDC. NDC also agreed to notify ICANN in writing of “any change in circumstances that would render any information provided in the application false or misleading.”⁸³

⁷⁸ Id., Exhibit A, § 3.

⁷⁹ See id., Exhibit A, § 3(c).

⁸⁰ See id., Exhibit B.

⁸¹ See Paragraph 29 above.

⁸² Applicant Guidebook, (IRP Ex. C-3) Module 6, ¶ 1 (at p. 6-2).

⁸³ Id., Module 6, ¶ 1 (at p. 6-2).

61. These Terms and Conditions were to further the principles of transparency that the Program was meant to achieve. The application that each applicant submitted at the outset of the Program was not supposed to change, and if it did, the applicant had to notify ICANN in writing of *any changes in or changes in circumstances relating to NDC's application*, so that ICANN could determine if the changes were material and, if so, what the consequences should be. In my assessment, there can be no question that NDC was required to notify ICANN of the existence and terms of the DAA.

62. The DAA entered into between NDC and Verisign committed NDC to: Redacted - Third Party Designated Confidential Information

Although the name of the “Applicant” was to remain the same, the execution of the DAA made it clear that NDC no longer had any intention in serving as the registry operator for .web. At that moment all of NDC’s submitted information contained within its application (filed several years prior) was no longer “true, accurate and complete in all material respects.” Moreover, the DAA prohibited NDC Redacted - Third Party Designated Confidential Information

s a result:

- The technical evaluation of NDC’s application was no longer valid because the evaluation was of Neustar’s back-end solution, not of Verisign’s.
- The due diligence performed by ICANN’s evaluators on NDC itself, the policies proposed by NDC, and the business and financial information provided by NDC was no longer valid.
- There was (at best) uncertainty as to whether all the registry services proposed by NDC that were the subject of extensive public comment (e.g., domain name anti-abuse services, RPMs, etc.) would continue to be provided by the new back-end solution.
- The Community was not afforded the ability to file any comments on or objections to NDC’s new application information (including that the entity seeking the string was no longer NDC but was now Verisign).
- ***In sum, in my opinion the DAA amounted to a “bait and switch” rendering the results of the Initial Evaluation invalid.***

63. The execution of the DAA triggered a duty to file an application change request with ICANN under Section 1.2.7 of the Applicant Guidebook. The failure to file such an application change request is in itself a violation of the Applicant Guidebook, and therefore should be grounds for the disqualification of NDC’s application. Not only was no change request filed, none of these fundamental changes caused by the DAA to NDC’s application was disclosed to ICANN or anyone else.

ii. Violation of Terms and Conditions, Section 10

64. The DAA also violated Section 10 of the Terms and Conditions which prohibits an applicant from reselling, assigning, or transferring any of the applicant's rights or obligations in connection with its application for a new gTLD. Although the Terms and Conditions do not elaborate further on the precise definition of what constitutes reselling, assigning, or transferring any of applicant's rights or obligations in connection with the application, these types of clauses in a contract are generally intended to prohibit the change of control over the entities subject to the agreement, or over the entity that is controlling the performance of the contract.
65. When a contract does not specifically define certain terms, the most common approach to interpreting those terms is through an examination of how they are generally defined and used in the industry. Control is often defined as the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person, whether through the ability to exercise voting power, by contract or otherwise.⁸⁴ Black's Law Dictionary defines "Control" as "[t]he direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee <the principal exercised control over the agent>."⁸⁵ Further, it defines "working control" as "[t]he effective control of a corporation by a person or group who owns less than 50% of the stock."⁸⁶ The AGB defines "control" as the "possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities . . . by serving as a member of a board of directors . . . , by contract . . . or otherwise."⁸⁷ This same definition appears in ICANN's base Registry Agreement - the contract between ICANN and an approved registry operator governing the terms and conditions for the operation and management of a top-level domain.⁸⁸
66. Thus, the New gTLD Program Rules themselves contemplate that a change of control may be effected by contract that allows one party to direct the conduct of another, even if a formal change of legal control via a stock sale has not occurred.
67. A copy of a near final draft of the base Registry Agreement was included in the final Applicant Guidebook for review by each applicant prior to filing an application for a TLD during the 2012 New gTLD application process.⁸⁹ That Registry Agreement contained the

⁸⁴ See, for example, 17 CFR § 230.405 (Securities Act of 1933), <https://www.govinfo.gov/content/pkg/CFR-2011-title17-vol2/pdf/CFR-2011-title17-vol2-sec230-405.pdf>.

⁸⁵ *Black's Law Dictionary* (11th ed. 2019): **Control**, (Ex. JJN-4), p. 1.

⁸⁶ *Id.*, p. 1.

⁸⁷ Applicant Guidebook, (IRP Ex. C-3), Module 5, Section 5.1 (at pp. 5-2 – 5-3).

⁸⁸ See ICANN Registry Agreement (31 July 2017), <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html>, (IRP Ex. C-26), Section 2.9(c).

⁸⁹ See Applicant Guidebook, (IRP Ex. C-3), Module 5, Attachment (New gTLD Agreement) (at [PDF] p. 229).

same definition of control as set forth in Paragraph 65 above and in other sections of the AGB. Therefore, NDC was on notice of the definition and should have been fully aware of what ICANN considered a “change of control.”

68. As explained above,⁹⁰ there is no doubt that the execution of the DAA amounted to a change of control by contract of the rights and obligations in connection with NDC’s .web application. Redacted - Third Party Designated Confidential Information

In short, from the moment the DAA was executed, NDC ceded all effective control of its .web application and rights to participate in the .web contention set to Verisign.

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⁹⁰ See Paragraphs 53-58 above.


IV. CONCLUSION

70. The protections included in the Applicant Guidebook were not only put in there to ensure that the technical operator would be qualified to run a registry (as Verisign clearly would be having run the .com registry for decades). They were put in place so that the ICANN community would know the identity of each applicant and have a chance to comment on each application; so that objections could be filed; and so that governments could evaluate whether to issue early warnings or provide GAC Advice. The application materials were also used to define the policies of the specific TLD, the actions a registry would (or would not be taking) with respect to rights protection mechanisms, and which registry services would be offered. This is not analogous to just substituting a technical back-end operator.
71. To restate from the Applicant Guidebook, “ICANN is dedicated to preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of the global Internet communities, and developing policy applicable to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.”⁹¹
72. NDC’s unreported application changes fundamentally altered the entire nature and purpose of its .web application. By enabling Verisign to indirectly participate in the .web contention set, NDC changed the dynamics of that contention set, the possibility of its private resolution, and the ICANN Auction. By failing to notify ICANN of these changes, it not only deprived evaluators the opportunity to evaluate all the aspects of the application, but also deprived the Community of “a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications.”⁹² Moreover, by entering into the DAA, NDC secretly changed the very nature of the .web contention set. Simply put, by virtue of NDC’s and Verisign’s unfair behavior, the other contention set members were deprived of a fair opportunity to compete for .web. All of the applicants in the contention set were not playing by the same rules. The changes wrought by NDC’s material violations of the Rules should therefore lead to the disqualification of NDC’s application for .web.
73. NDC has claimed that even if it had a duty to notify ICANN about the changes to its application, there was no harm because Verisign would have passed its initial evaluation had they notified ICANN. This reasoning, however, ignores the fundamental truth that the DAA not only violated the Applicant Guidebook and ultimately altered the outcome of the .web contention set. If this were allowed to move forward, it would set a precedent for future applicants to enter into an arrangement with an entity that appears to meet all of the qualifications for serving as a Registry Operator to apply for a TLD and immediately upon execution of a Registry Agreement with ICANN be required to transfer its application to the concealed entity. Even if that concealed entity were “qualified” to operate a TLD, it would have avoided being evaluated by ICANN Evaluators and more significantly would have avoided (a) public comment on its true application, (b) potential objections by the

⁹¹ See Applicant Guidebook, (**IRP Ex. C-3**), Module 1, Section 1.1.2.3 (Comment Period) (at p. 1-5).

⁹² Id., Module 1, Section 1.1.2.3 (at p. 1-6).

community, and (c) a review of the actual registry services being proposed. All of the detailed rules that ICANN provided and the work the Community did concerning these requirements, criteria, and procedures would be meaningless.



Jeffrey J. Neuman
29 July 2022

LIST OF EXHIBITS

Exhibit No.	Description
JJN-1	ICANN, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012) (the “ NDC .WEB Application ”)
JJN-2	ICANN, New gTLD Application for Hebrew transliteration of .com submitted by VeriSign Sarl, Application ID 1-1254-29622 (13 June 2012)
JJN-3	Domain Acquisition Agreement between NDC and Verisign (25 August 2015) (the “ DAA ”)
JJN-4	<i>Black’s Law Dictionary</i> (11th ed. 2019): Control

LIST OF IRP EXHIBITS AND REFERENCES

Exhibit No.	Description
IRP Ex. C-3	gTLD Applicant Guidebook, Version 2012-06-04, https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf (the “ Applicant Guidebook ”)
IRP Ex. C-5	New gTLD Auctions Bidder Agreement, Version 2014-04-03, https://newgtlds.icann.org/en/applicants/auctions/bidder-agreement-03apr14-en.pdf
IRP Ex. C-20	ICAANN GNSO, Final Report: Introduction of New Generic Top-Level Domains (8 August 2007), https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm (the “ GNSO Report ”)
IRP Ex. C-26	ICANN Registry Agreement (31 July 2017), https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html
IRP Ex. C-56	ICANN, New Generic Top-Level Domains, New gTLD Application Change Request Process and Criteria, https://newgtlds.icann.org/en/applicants/global-support/change-requests
--	ICANN, New gTLD Applicant Guidebook: Analysis of Public Comment (18 February 2009), https://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf
--	ICANN, Adopted Board Resolution (26 June 2008), https://www.icann.org/resources/board-material/resolutions-2008-06-26-en#_Toc76113171

Exhibit No.	Description
--	New gTLD Program: Draft Applicant Guidebook (Draft RFP) (24 October 2008), https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf
--	gTLD Applicant Guidebook (v7) (30 May 2011), http://www.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf
--	gTLD Applicant Guidebook, Version 2011-09-19, https://archive.icann.org/en/topics/new-gtlds/rfp-clean-19sep11-en.pdf
--	gTLD Applicant Guidebook, Version 2012-01-11, https://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf
--	ICANN, TLD Application: Registry Operator's Fitness Disclosure (15 August 2000), https://archive.icann.org/en/tlds/tld-app-registry-operator-disclosure-15aug00.htm
--	gTLD Applicant Guidebook (v1), Module 6 (24 October 2008), https://archive.icann.org/en/topics/new-gtlds/terms-24oct08-en.pdf
--	ICANN, New Generic Top-Level Domains, New Top-Level Domain Name Applications Revealed Historic Milestone for the Internet's Domain Name System (13 June 2012), https://newgtlds.icann.org/en/announcements-and-media/announcement-13jun12-en
--	New gTLD String Confusion Panel, ICDR Cases No. 50-504-221-13 and 50-504-246-13, String: <.webs>, Expert Determination (24 January 2014), https://go.adr.org/rs/294-SFS-516/images/50%20504%20T%2000246%2013%20determination.pdf
--	ICANN, New Generic Top-Level Domains, Application Comments, https://gtldcomment.icann.org/applicationcomment/viewcomments
--	ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID ywu8llsb, by Paul McGrady (26 September 2012, 23:29:09 UTC), https://gtldcomment.icann.org/applicationcomment/commentdetails/11694
--	ICANN, New Generic Top-Level Domains, Application Comment Details, Comment ID tkudyfhj, by Paul McGrady (26 September 2012, 23:32:07 UTC), https://gtldcomment.icann.org/applicationcomment/commentdetails/11695
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