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23 February 2022

VIA E-MAIL

Eric P. Enson, Esq.
JONES DAY LLP
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Re: Your communication dated 18 February 2022 invoking Rule 4.2 of the Model Rules of Professional Conduct

Dear Eric:

We are in receipt of your email dated 18 February 2022, in which you "demand" that counsel for Altanovo Domains Limited (**Altanovo**), f/k/a Afilias Domains No. 3 Limited (**Afilias**), "immediately cease from communicating with ICANN regarding the .WEB matter." In support of that demand, you cite Rule 4.2 of the American Bar Association's Model Rules of Professional Responsibility.[1] We take our responsibilities under the Rules of Professional Conduct seriously—as we hope you do in invoking them. Rule 4.2 has no application to the present situation for numerous reasons, including (without limitation) the following.

1. Rule 4.2 has no application where, as here, the Board purports to act as a first-instance adjudicator of the rights and obligations of ICANN stakeholders.

During the IRP, ICANN repeatedly argued that its Board must act as the first-instance adjudicator of alleged violations of the New gTLD Program Rules.[2]

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[1] The language of Model Rule 4.2 is similar to that of Rule 4.2(a) of the Rules of Professional Conduct of the District of Columbia (where most of the lawyers representing Altanovo in this matter are admitted to practice), as well as that of Rule 4.2(a) of the Rules of Professional Conduct of California (where, we understand, most of the lawyers representing ICANN are admitted to practice). For the sake of simplicity, we will refer simply to the obligations under "Rule 4.2"—recognizing that there may be differences as to how those obligations are interpreted under the respective Professional Conduct Rules in which they appear. Citations to Rule 4.2 in this letter are to the D.C. RULES OF PROFESSIONAL CONDUCT (1 Feb. 2007).

[2] *See, e.g.*, *Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702 ("***Afilias v. ICANN***"), ICANN's Response to Afilias' Article 33 Application (6 Aug. 2021), ¶ 16 ("***ICANN is the first instance decision-maker for disputes under the New gTLD Program.***") (emphasis added).

The IRP Panel agreed with ICANN on this issue—to the extent the Panel determined that the "serious" and "legitimate" questions raised by Altanovo are "better left, in the first instance," to ICANN—"subject to the ultimate independent review of an IRP Panel[.]"[3]

Accordingly, in the *dispositif* of its Final Decision, the Panel ruled that ICANN's "***Board***" must "consider" and "pronounce" on these questions in the first instance—after having "considered the opinion of the Panel in this Final Decision[.]"[4]

ICANN's Board is not acting here as a "person" "represented by another lawyer in the matter." Rather, the Board is—at ICANN's insistence—acting as the adjudicative body that will ***decide*** this matter in the first instance. ICANN—having demanded that its Board be allowed independently to decide the rights and obligations of ICANN's stakeholders in the first instance—cannot now seek to have its counsel block one of the stakeholders from communicating directly to the Board.

Rule 4.2 has no application to communications to the Board by counsel for stakeholders whose rights and obligations the Board is now determining as a first-instance decision maker.

2. The invocation of Rule 4.2 is contrary to ICANN's processes and practices.

Our letters to the Board are expressly authorized by ICANN's processes and practices, including ICANN's "Correspondence Process." According to the "Correspondence Process Handbook," as published on ICANN's website:

> The Correspondence process was created ***to support ICANN's commitment to operate in an open and transparent manner in regard to written communications to the ICANN Board*** and the ICANN organization. The process provides a centralized, standard and consistent manner in which to accept, process, and respond to letters received from external sources and track outgoing letters. ***As part of our commitment to transparency, ICANN publishes***

[3] *Afilias v. ICANN*, Final Decision (20 May 2021), ¶ 299.

[4] *Afilias v. ICANN*, Final Decision (20 May 2021), ¶ 413(5) (emphasis added).

> ***applicable written communications to the public Correspondence page*** ….”[5]

The Handbook further states: “A letter or piece of correspondence ***can be received by any person … within the ICANN organization or the ICANN Board***.”[6] There are no applicable exceptions here.

ICANN must therefore treat Altanovo in the same manner as any other ICANN stakeholder who is entitled to correspond directly to the Board—and must do so consistently.[7] For the reasons stated above, that is particularly so where the Board is purporting to act as the first-instance adjudicator of Altanovo’s rights and obligations under the New gTLD Program—and where (as discussed below) ICANN does not appear to have made any objection when counsel for Verisign and NDC recently corresponded directly to the Board concerning .WEB.

3. ICANN is invoking Rule 4.2 in a manner that discriminates against Altanovo and in favor of Verisign/NDC.

For the reasons stated above, Rule 4.2 has no application to Altanovo’s communications to the Board. Moreover, it is particularly troubling that ICANN’s counsel is invoking Rule 4.2 in connection with communications from Altanovo when it did not do so against Verisign and NDC, when they recently communicated directly to the ICANN Board about .WEB.

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5 ICANN, Correspondence Process Handbook (6 Mar. 2018), p. 1, available at https://www.icann.org/en/system/files/files/icann-correspondence-process-handbook-06mar18-en.pdf (emphasis added) (last visited on 21 Feb. 2022).

6 *Id*., p. 2 (emphasis added).

7 During the IRP, we wrote directly to the Board on behalf of Altanovo (then Afilias) regarding the Interim Supplementary Procedures—without any complaint from ICANN or its counsel. ICANN posted that letter to its website. *See* Letter from A. Ali to ICANN Board of Directors (21 Dec. 2018), available at https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-21dec18-en.pdf (last visited on 22 Feb. 2022). We wrote again directly to the ICANN Board on 15 March 2019 to request the Board to post and disclose transcripts and materials from an ICANN Board meeting. *See* Letter from A. Ali to the ICANN Board of Directors (15 Mar. 2019). Here, too, neither ICANN nor its counsel objected to that letter—because that letter (like our other letters to the Board) are specifically authorized by ICANN’s practices and processes. Moreover, during the IRP, we also served DIDP requests directly on ICANN (as authorized by ICANN’s DIDP procedure). And for the purposes of CEP, Jones Day specifically directed us to communicate directly with ICANN on these matters. That is consistent with the notion that ICANN is acting as the regulator (and here, the adjudicator) of the rights and obligations of stakeholders appearing before it.

As you will recall, Mr. Steven A. Marenberg—outside counsel for NDC—sent a letter dated 23 July 2021 directly to Mr. Maarten Botterman in his capacity as Chair of the ICANN Board.[8] Mr. Marenberg stated in the letter that he was sending it on behalf of both NDC and Verisign. On its face, the letter appears to have been emailed directly to Mr. Botterman. The letter restates the same bogus allegations of a "blackout" violation by Altanovo that Verisign and NDC asserted as "*Amicus curiae*" in the IRP proceedings (which Altanovo rebutted in those proceedings).

ICANN proceeded to publish Mr. Marenberg's 23 July letter to Mr. Botterman on its website in full (i.e., with no redactions to the letter's text) on 14 September 2021.[9] Until that date, no one at Altanovo (including its counsel) was aware of it, given that Mr. Marenberg did not copy us when he sent the letter to Mr. Botterman in July 2021. Nor are we aware of anyone invoking Rule 4.2 (or raising any other objection) on behalf of ICANN with respect to Mr. Marenberg's letter to Mr. Botterman.

To respond to Mr. Marenberg's 23 July letter, we prepared a letter to Mr. Botterman and the Board dated 3 November 2021.[10] We did not, however, send our letter directly to Mr. Botterman. Instead, we sent it to Jones Day and asked for the letter to be forwarded to Mr. Botterman as Chair of the Board. We sent it care of Jones Day not because we were required to do so, but in the interest of transparency and as a courtesy to you as counsel.

More than two months later, with no response from Jones Day, we emailed you on 6 December 2021, asking if you had provided the letter and its exhibits to Mr. Botterman and the Board. You did not respond to that question.

In the meantime, ICANN finally posted our 3 November letter on its website on 23 December 2021 in highly redacted form—making numerous pages impossible to read. We then asked Jones Day for confirmation that you had provided the letter to Mr. Botterman and the ICANN Board in unredacted form. You did not respond. As a result, even today, we have no idea whether the Board has access to our 3 November letter beyond what is posted (in highly redacted form) on the ICANN website. As you will also recall, on 28

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8 *See* Letter from S. Marenberg to M. Botterman (23 July 2021), posted to ICANN website on 14 September 2021, available at https://www.icann.org/en/system/files/correspondence/marenberg-to-botterman-23jul21-en.pdf (last visited 21 Fe. 2022).

9 Interestingly, on the same day that ICANN posted Mr. Marenberg's letter to its website, Verisign published a "blog" on the Verisign website, written by an in-house lawyer at Verisign, making the same allegations and providing a link to Mr. Marenberg's letter.

10 *See* Letter from A. Ali to M. Botterman (23 July 2021), posted to ICANN website on 14 September 2021, available at https://www.icann.org/en/system/files/correspondence/ali-to-botterman-03nov21-en.pdf (last visited on 21 Feb. 2022).

May 2021, we wrote to Jones Day, specifically objecting to the numerous redactions made to the version of the IRP Panel's Final Decision as posted on ICANN's website.[11] We also never received a response to that letter.

In letters to Jones Day dated 20 December 2021 and 12 January 2022, we also asked for basic information as to how and when the Board intended to make its "first-instance" review and pronouncement on the questions raised by Altanovo concerning .WEB. You did not respond to those letters either. By our count, dating back to 28 May 2021, we have raised important issues concerning .WEB in correspondence to Jones Day in ***five separate communications dating back over nine months***, including the letter that we sent to Mr. Botterman care of Jones Day. No one at Jones Day (or anyone else acting on behalf of ICANN) has responded to them.

Accordingly, with Jones Day having failed to respond to any of the communications set forth above—and still not knowing whether our 3 November letter has ever been provided to Mr. Botterman and the Board in unredacted form—we exercised our right under ICANN's "Correspondence Process" to write directly to the Board in a letter dated 11 February 2022. Among other things, we asked the Board to correct misstatements and omissions in the Board's Resolutions and Rationale dated 16 January 2022. Based on your failure to respond to any of our letters on similar issues over the past few months, we reasonably concluded that any letters addressed to you on these points would simply be ignored. Again, ICANN's Correspondence Process specifically authorizes stakeholders to write directly to the Board, as Mr. Marenberg did in his 23 July 2021 letter to Mr. Botterman on behalf of Verisign and NDC.

Under the circumstances, your invocation of Rule 4.2 regarding our correspondence to the ICANN Board is not only unfounded; it further demonstrates the disparate treatment which Altanovo has consistently suffered at the hands of ICANN's counsel and staff. That treatment dates back at least to the confidential communications between outside counsel for ICANN and Verisign in August 2016 (which we learned of only through discovery in the IRP) and the 16 September 2016 "Questionnaire" (which, as we also learned in the IRP, was drafted largely by ICANN counsel based on information provided by Verisign counsel in its confidential communications to you).[12]

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[11] Letter from A. Ali to J. LeVee (28 May 2021).

[12] *See Afilias v. ICANN*, Final Decision (20 May 2021), ¶¶ 8, 315, 413(3) (describing the confidential communications between outside counsel for ICANN and Verisign in August 2016 and the 16 September 2016 Questionnaire and concluding that ICANN's conduct "violated [ICANN's] commitment, under the Bylaws, to operate in an open and transparent matter and consistent with procedures designed to ensure fairness.").

4. The ICANN Board must make its first-instance decision independently.

Rule 4.2 provides in relevant part that "[d]uring the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation ***with a person known to be represented by another lawyer in the matter***[.]"[13] For the reasons stated above, Rule 4.2 is not applicable here.

Nonetheless, we are troubled by the premise of your 18 February email—which is that Jones Day is "representing" the ICANN Board in making its first-instance consideration and pronouncement on the questions raised by Altanovo concerning .WEB, and should therefore be able to act as a "gatekeeper" to the information provided to the Board as it makes its first-instance pronouncement.

We have great respect for you and your colleagues as disputes lawyers and advocates. But Jones Day—presumably at the direction and/or with the approval of ICANN's in-house legal team—took vigorous positions adverse to Altanovo on the very issues on which the Board will now consider and pronounce upon in the first instance. The entire premise on which the IRP Panel remanded these questions to ***the Board*** is that the Board will undertake its first-instance review independently, objectively, and fairly—without being advised by those who publicly advocated that Altanovo's concerns have no merit.

As the IRP Panel noted, ICANN asserted at the outset of the IRP that ICANN "ha[d] [already] evaluated [Altanovo's] complaints" and that the "time ha[d] therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers."[14] In its Response to Altanovo's Amended IRP Request, ICANN asserted:

> As the party that made a significant financial investment in .WEB over two years ago, Verisign is determined to proceed pursuant to its agreement with NDC so that it can operate .WEB. ***Afilias, on the other hand, is determined to use this proceeding to seize control of .WEB for itself – at a bid price set by this Panel – even though it did not prevail in the auction***.[15]

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[13] D.C. RULES OF PROFESSIONAL CONDUCT (1 Feb. 2007), Rule 4.2(a) (emphasis added).

[14] *Afilias v. ICANN*, Final Decision (20 May 2021), ¶ 346 (quoting ICANN's Opposition to Afilias' Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 3).

[15] *Afilias v. ICANN*, ICANN's Response to Amended IRP Request (31 May 2019), ¶ 10 (emphasis added).

Indeed, throughout the IRP, ICANN's counsel consistently argued that Altanovo's arguments concerning NDC's violations of the New gTLD Program had no merit—even as the IRP Panel found that the questions raised by Altanovo were "legitimate, serious, and deserving of [ICANN's] careful attention."[16]

It is neither reasonable nor plausible to expect that the Board will conduct its first-instance review in an independent, fair, and neutral manner if it is advised by the same counsel and Staff who made these manifestly biased arguments against Altanovo in the IRP. Nor it is fair to expect that those counsel and Staff will now retract the arguments they zealously advocated on ICANN's behalf in the IRP.

For all these reasons, we restate our objection to the involvement of any member of ICANN's Staff, in-house counsel or outside counsel in the independent assessment that the BAMC and Board must undertake pursuant to the IRP Panel's Final Decision.

And we reiterate our position that Rule 4.2 has no application to our communications to the Board as the first-instance adjudicator of Altanovo's complaints.

Very truly yours,

Alexandre de Gramont
Counsel for Altanovo Domains Limited,
f/k/a Afilias Domains No. 3 Limited

cc: *Counsel for ICANN*
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[16] *Afilias v. ICANN*, Final Decision (20 May 2021), ¶ 300.

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