

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S SUPPLEMENTAL BRIEF REGARDING PHASE I ISSUES

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INTRODUCTION

1. ICANN submits this Supplemental Brief Regarding Phase I Issues pursuant to Chairman Bienvenu's letter dated September 9, 2019.

2. In accordance with the parties' agreement, this Independent Review Process ("IRP") proceeding has been bifurcated into two phases. Phase I addresses the *amicus curiae* requests and Claimant Afilias Domains No. 3 Ltd.'s ("Afilias" or "Claimant") claim in Section 6 of its Amended Request for Independent Review Process ("Amended IRP Request") that ICANN somehow violated its Bylaws by adopting Rule 7 of the Interim Supplementary Procedures, which allows *amicus* participation in an IRP by a party with a material interest in the proceedings ("Rule 7 Claim").¹ Phase II will address Afilias' other claims, which seek to disqualify Nu DotCo LLC ("NDC") as the winning bidder for the .WEB gTLD based on alleged wrongdoing by NDC and Verisign, Inc. ("Verisign"), and to compel ICANN to enter a Registry Agreement, at a price to be determined by the Panel, allowing Afilias to operate .WEB.

3. Afilias' Rule 7 Claim has the blatantly unjust goal of preventing NDC and Verisign from defending their conduct and protecting their interest in .WEB during Phase II of this proceeding. Afilias cannot plausibly argue that NDC and Verisign lack standing to participate under Rule 7 – indeed, it concedes that they both meet the requirements for mandatory participation as *amici* under Rule 7. Instead, Afilias has mounted a desperate attack on Rule 7 itself, arguing that it should be declared unenforceable and invalid due to certain alleged improprieties in the rule-making process. This strategy is driven by Afilias' view that, if Rule 7 is declared unenforceable, NDC and Verisign would be left with no procedural means to participate in Phase II and therefore would be completely shut out of those proceedings. The

¹ The Interim Supplementary Procedures are rules of procedures adopted by ICANN to supplement the ICDR International Arbitration Rules in accordance with Articles 4.3(g) and (n) of the Bylaws (Ex. C-59). The Interim Supplementary Procedures apply in all IRP proceedings filed after 1 May 2018, including this proceeding.

inequity of that goal is staggering. Afilias essentially seeks to try NDC and Verisign *in absentia*, and, in doing so, to deprive them of their substantial interest in .WEB.

4. The parties previously submitted extensive briefing and evidence to the Procedures Officer regarding the factual contentions underlying what is now Afilias' Rule 7 Claim. The parties agreed that they would submit the Rule 7 Claim to the Panel on the basis of that prior briefing, except that the parties and *amici* each would have an opportunity to file a supplemental brief of no more than 20 pages.

5. This supplemental brief addresses important differences between the issues briefed to the Procedures Officer and the Rule 7 Claim asserted in Afilias' Amended IRP Request, which is now before this Panel. In proceedings before the Procedures Officer, Afilias argued that the *amicus* requests should be denied as an exercise of the Procedures Officer's inherent equitable authority based on Verisign's purported misconduct in the drafting of Rule 7. In contrast, in its Amended IRP Request, Afilias asserts that ICANN somehow violated its Bylaws by approving Rule 7. Accordingly, while the parties and *amici* have previously addressed Afilias' factual allegations of wrongdoing in the rule-making process, they have never addressed the merits of Afilias' claim that ICANN violated its Bylaws by approving Rule 7 or Afilias' request for a declaration that Rule 7 is unenforceable.

6. ICANN demonstrates in this supplemental brief that, even if Afilias' allegations of improprieties by those participating in the rule-making process were accepted (and they should not be), they do not make out a claim that ICANN violated its Bylaws by approving Rule 7. Afilias' Rule 7 Claim also fails because the relief that it requests—a binding declaration that Rule 7 is unenforceable—is beyond the authority conferred on the Panel by the Bylaws. If the Panel were to find that ICANN acted inconsistently with the Bylaws during the rule-making

process, the proper remedy would be to issue a declaration to that effect. It would then be up to ICANN's Board to decide what action to take in response to that declaration. Finally, Afilias' Rule 7 Claim fails because it is untimely. The Interim Supplementary Procedures require Afilias to have brought its claim within 120 days of the Board's adoption of Rule 7. Afilias missed that deadline.

7. This supplemental brief also addresses the import of the Declaration of the Procedures Officer, Mr. Scott Donahey, dated February 28, 2019. Despite Rule 7's unambiguous requirement that the two *amicus* applications be decided by a Procedures Officer, Mr. Donahey concluded that Afilias' contention that Verisign and NDC should be barred from participating as *amici* due to their alleged improprieties in the rule-making process raised issues too important for him to decide. On that basis, the Procedures Officer purported to refer the requests to participate as *amici* to the IRP Panel. The Procedures Officer's Declaration did not make any findings of fact or reach any conclusions regarding any issue relevant to the matters before this Panel—and, even if any such findings had been made, they would be *obiter dictum* given the Procedures Officer's decision not to decide the matters before him. Thus, the Procedures Officer's Declaration has no import whatsoever to the Panel's determination of the matters now before it, and it should play no part in the Panel's consideration of those matters.

8. Lastly, this supplemental brief addresses the scope and nature of the participation that should be provided to Verisign and NDC as *amici*. Afilias does not dispute that Verisign and NDC satisfy the requirements for *amicus* participation in Rule 7. Once Afilias' request to invalidate Rule 7 is rejected (as it must be), it follows that NDC and Verisign must be allowed to participate as *amici*. Consistent with basic notions of fairness, the scope of their participation should be broad in light of their profound interests in this matter. Afilias' allegations of

wrongdoing relating to its .WEB claims, which are to be addressed in Phase II, are almost all allegations regarding the conduct by Verisign and NDC. The relief sought by Afilias is to have the Panel disqualify NDC's winning bid at the .WEB auction and to order ICANN to award .WEB to Afilias at a price to be determined by the Panel. Given the importance of their alleged conduct to the resolution of this dispute, as well as their significant legal interest in its outcome, Verisign and NDC should be allowed to introduce evidence to rebut Afilias' allegations about their conduct, submit briefing and argument concerning the import of the evidence presented to the Panel, and confront the witnesses against them at the final hearing.

9. This result is consistent with Rule 7, which directs the Panel to "lean in favor of broad participation," and with the directive of Rule 5 that the Panel must ensure fundamental fairness and due process. It will also result in providing the Panel with a more comprehensive record on which to evaluate and determine Afilias' .WEB claims, and will thus serve to enhance the rigor of the Panel's factual and legal analysis while also improving the quality of Panel's final decision.

ARGUMENT

I. Afilias' Rule 7 Claim Has No Merit.

10. While the *factual basis* of Afilias' Rule 7 Claim was addressed in the briefing before the Procedures Officer, the *legal basis* for Afilias' Rule 7 Claim is fundamentally different from the case it presented to the Procedures Officer. Afilias asked the Procedures Officer, "as a matter of equity," to reject Verisign and NDC's *amicus* applications based on Verisign's purported misconduct in connection with the rule-making process.² Specifically, Afilias asserted that David McAuley, the Chairman of the IRP Implementation Oversight Team

² Afilias' Response to Verisign and NDC's Requests to Participate as Amici ¶ 2; *see also id.* ¶¶ 13, 60, ¶¶ 64-65.

(“IRP-IOT”), who is an employee of Verisign, acted in bad faith by making changes to Rule 7 in September and October 2018, which, according to Afilias, expanded the *amicus curiae* rule for the purpose of allowing Verisign to participate in this proceeding. ICANN showed in its briefing before the Procedures Officer that Afilias’ assertions were objectively wrong. The changes to the draft *amicus* rule in September and October 2018 were done by Sidley Austin (outside counsel to the IRP-IOT) and Samantha Eisner (ICANN Deputy General Counsel and staff liaison to the IRP-IOT), not by Mr. McAuley. Mr. McAuley and Ms. Eisner have both submitted sworn declarations stating that they were not even aware of Afilias’ planned IRP in October 2018. Moreover, since at least February 2018, the draft of Rule 7 has permitted participation as *amicus* by any person with a material interest relevant to the dispute, which clearly would have authorized Verisign’s participation in this proceeding without any further revision to rule.

11. As Afilias’ assertions regarding Mr McAuley’s alleged misconduct were shown to be baseless, Afilias fell back on a series of alleged technical defects in the rule-making process. It contended that meetings of the IRP-IOT had been held without a proper quorum, that Rule 7 should have been put out for a second notice and comment period, and that *amicus* participation is not sufficiently well-founded in international arbitration norms to be included in the Interim Supplementary Procedures.

12. In the claim before this Panel, which is set out in Afilias’ Amended IRP Request, Afilias no longer seeks “as a matter of equity” to prevent Verisign and NDC from participating as *amici* based on Verisign’s alleged misconduct. Instead, Afilias alleges that ICANN violated its Bylaws by approving the Interim Supplementary Procedures proposed by the IRP-IOT.³

³ Amended Request by Afilias Domains No. 3 Limited for Independent Review § 6.

13. Afilias made this change in an attempt to bring its claim within the limited jurisdiction of this Panel. An IRP may only address a “Dispute” as defined by Section 4.3(b)(i) of the Bylaws, which includes three specific categories of claims. The category relevant here is a claim “that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”⁴ “Covered Actions” is defined as “actions or failures to act by or within ICANN committed by the Board, individuals Directors, Officers, or Staff members that give rise to a Dispute.”⁵ Afilias’ Rule 7 Claim in this IRP is—and can only be—that ICANN’s Board, Directors, Officers or Staff members somehow violated the Bylaws by approving Rule 7 of the Interim Supplementary Procedures. Afilias did not assert this claim before the Procedures Officer.

14. The relief sought by Afilias has also changed fundamentally. Afilias asked the Procedures Officer to refuse to enforce Rule 7 as a matter of equity, without making any broader determination about the Rule’s validity.⁶ Afilias now asks this Panel to issue a “Binding declaration . . . that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC.”⁷ Afilias never requested this relief from the Procedures Officer.

15. For these reasons, no prior briefing has addressed the merits of Afilias’ claim that its allegations of wrongdoing in the rule-making process establish a violation of ICANN’s Bylaws by its Board, Directors, Officers or Staff, the propriety of Afilias’ request for a

⁴ Bylaws, Art. 4 § 4.3(b)(iii)(A), Ex. C-1.

⁵ Bylaws Art. 4. § 4.3(b)(ii), Ex. C-1.

⁶ Afilias’ Sur-Reply to Requests to Participate as Amicus Curiae ¶ 29.

⁷ Amended Request by Afilias Domains No. 3 Limited for Independent Review ¶ 89(5).

declaration that Rule 7 is unenforceable, or Afilias' request for an award of costs. ICANN addresses those issues below.

A. ICANN Did Not Violate Its Bylaws by Approving the Interim Supplementary Procedures.

16. Afilias' Amended IRP Request alleges that, by approving Rule 7, ICANN violated Section 4.3(n) of the Bylaws in four ways.⁸ ICANN addresses these in turn.

17. *First*, Afilias relies on the provision of Article 4.3(n)(i) stating that the IRP-IOT shall be "comprised of members of the global Internet community."⁹ Afilias asserts that ICANN personnel are not "members of the global Internet community" and therefore should not have counted towards a quorum during meetings of the IRP-IOT. But Afilias does not explain how this alleged breach purportedly constitutes a violation of the Bylaws by ICANN's Board, Directors, Officers or Staff members. Because Afilias is seeking a declaration that Rule 7 is unenforceable, it presumably contends that the ICANN Board violated the Bylaws by approving provisions of the Interim Supplementary Procedures that were adopted at a meeting of the IRP-IOT at which a quorum would not have existed but for the participation of ICANN personnel.

18. ICANN showed in its briefing before the Procedures Officer that Afilias is wrong in contending that ICANN personnel are not "members of the global Internet community" and may not be counted towards a quorum in the IRP-IOT.¹⁰ Even if there were any merit to Afilias' position (which there is not), however, that would not compel the Board to refuse to approve any provision of the Interim Supplementary Procedures that was adopted during a meeting of the IRP-IOT at which ICANN personnel were counted towards a quorum.

⁸ Amended Request by Afilias Domains No. 3 Limited for Independent Review ¶ 86.

⁹ *Id.*

¹⁰ ICANN's Reply to Afilias' Response to Requests of Verisign and NDC to Participate as Amicus Curiae ¶¶ 56-58.

19. Indeed, there is nothing in the Bylaws requiring any particular quorum for meetings of the IRP-IOT. To the extent any such requirement may exist, it is a matter of IRP-IOT procedure and has no impact on the Board. There is nothing in ICANN’s Bylaws compelling the Board to reject any provision of the Interim Supplementary Procedures that was agreed by the IRP-IOT at an allegedly non-quorate meeting.

20. **Second**, Afiliias relies on the provision of Section 4.3(n)(i) stating that the IRP-IOT “shall develop clear published rules for the IRP (‘Rules of Procedure’) that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties.”¹¹ Afiliias asserts that the *amicus* rights created by Rule 7 “are wholly foreign to all forms of international arbitration.”¹² Again, Afiliias does not explain how this allegation amounts to a violation of the Bylaws by ICANN’s Board, Directors, Officers or Staff.

21. More importantly, Afiliias’ argument is wrong. In requiring the Rules of Procedure to “conform” to international arbitration norms, the Bylaws do not mandate that every provision of the Rules of Procedure be based on an extant international arbitration norm. The very next Section of the Bylaws (Sec. 4.3(n)(ii)) states: “The Rules of Procedure shall be ***informed by*** international arbitration norms ***and consistent with the Purposes of the IRP.***” (Emphasis added.) An IRP is a unique dispute resolution process and, unlike international commercial arbitration, has a public-facing aspect that is crucial to its procedural legitimacy.¹³ As such, the IRP Supplementary Procedures are necessarily bespoke and unique. The Bylaws mandate that the Rules of Procedure should conform to (*i.e.*, be informed by) international

¹¹ Amended Request by Afiliias Domains No. 3 Limited for Independent Review ¶ 86. The “Rules of Procedure” referred to in Section 4.3(n)(i) are the Supplementary Procedures.

¹² *Id.*

¹³ For example, Section 4.3(u) of the Bylaws provides that “[a]ll IRP Panel proceedings shall be conducted on the record,” and all documents filed in connection with the proceedings, including all Claims, petitions and decisions, “shall promptly be posted on the [ICANN] Website when they become available.”

arbitration norms while also dealing with interests unique to the IRP process. There is no provision of ICANN's Articles of Incorporation or Bylaws that requires the Board to reject any Rule of the Interim Supplementary Procedures that does not derive directly from an established norm of international arbitration.

22. Further, *amicus* participation is not “wholly foreign to all forms of international arbitration,” as Afilias incorrectly states. While *amicus* participation may be foreign to international commercial arbitration, which is a private, confidential *inter partes* process, it is an established procedure in investor-State arbitration, where there is a growing trend towards greater *amicus* participation.¹⁴ NAFTA, the U.S. and Canadian model Bilateral Investment Treaties, the International Centre for Settlement of Investment Disputes (“ICSID”) rules, and the United Nations Commission on International Trade Law (“UNCITRAL”) rules all provide for *amicus* participation.¹⁵ The trend towards growing *amicus* participation in investor-State arbitration is often associated with a growing demand for transparency,¹⁶ which is among the fundamental purposes of the IRP process.¹⁷ Similarly, international tribunals, such as the European Court of Human Rights and the World Trade Organization, allow for third-party participation.¹⁸

¹⁴ See, e.g., Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION at 602 (Kluwer Law International; Kluwer Law International 2012) (“it is not uncommon for third parties to now seek to make submissions to international arbitration tribunals, in particular in investor-State investment disputes.”); Levine, *Amicus Curiae in International Investment Arbitration*, 29 Berkeley J. Int’l L. 200, 208 (2011) (“In recent years, there has been an undeniable shift in investor-State arbitration toward greater tolerance of limited third-party participation, perhaps in response to continuing public pressure and criticism.”).

¹⁵ Levine, *Amicus Curiae in International Investment Arbitration*, 29 Berkeley J. Int’l L. 200 at 209-212 (referring to, for example, Rule 37(2) of the ICSID Rules of Arbitration that came into effect in April 2006). Similarly, in July 2013, UNCITRAL adopted new UNCITRAL Arbitration Rules on Transparency in investor-State arbitrations to permit submissions by “third persons” who are neither disputing parties or a non-disputing Party to the governing bilateral or multilateral treaty. See Article 4 of the UNCITRAL Rules on Transparency.

¹⁶ *Id.* at 200.

¹⁷ Bylaws, Art. 4 § 4.3(a)(vii), Ex. C-1.

¹⁸ *Id.* at 207.

23. **Third**, Afiliias relies on the provision of Section 4.3(n)(ii) of the Bylaws, which states that “[t]he Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN[.]” There is no dispute that the Interim Supplementary Procedures went through a period of public comment that complies with ICANN’s designated practice for public comment periods.¹⁹ Afiliias’ contention is that Rule 7 should have been put out for a second public comment period after it was revised following the first public comment period. ICANN showed in its briefing to the Procedures Officer that there is no “designated practice for public comment periods” that mandates such a second public comment period.²⁰

24. But even if a second public comment period would have been proper, there is nothing in the Bylaws that requires the Board to reject any provisions of the Interim Supplementary Procedures that were revised without going through a second public comment period. ICANN adopted new Bylaws that significantly revised the IRP process effective October 1, 2016. By October 2018, two years had passed without the IRP-IOT having completed Rules of Procedure (*i.e.*, Supplementary Procedures) governing the newly revised IRP process. The IRP-IOT finally sent **Interim** Supplementary Procedures to the Board in October 2018. The Board acted well within the bounds of reasonable business judgment and the Bylaws by adopting the Interim Supplementary Procedures without further delay so that Rules of Procedure would be in place in case an IRP were to be initiated (as in fact occurred shortly thereafter when Afiliias initiated this IRP). Any additional comments and proposed revisions can

¹⁹ ICANN’s Response to Procedures Officer’s Questions Concerning the Drafting History of the Supplementary Procedures ¶¶ 12.

²⁰ ICANN’s Response to Procedures Officer’s Questions Concerning the Drafting History of the Supplementary Procedures ¶¶ 52-56; ICANN’s Reply to Afiliias’ Response to the Requests of Verisign and NDC to Participate as *Amicus Curiae* ¶¶ 52-55.

be considered and addressed in the course of developing the final Supplementary Procedures that will replace the Interim Supplementary Procedures.²¹

25. **Fourth**, Afiliias relies on the provision in Section 4.3(n)(ii) stating that the Rules of Procedure will “take effect upon approval by the Board, such approval not to be unreasonably withheld.”²² Afiliias contends that this provision allows the Board to reasonably withhold approval and asserts that the Board should have done so. But this provision imposes only a negative obligation on the Board not to withhold approval unreasonably. It does not impose a positive obligation on the Board to withhold approval. As a matter of basic logic, the obligation not to withhold approval unreasonably cannot be violated where the Board has not withheld approval.

26. For these reasons, even if there were merit to Afiliias’ allegations of improprieties in the rule-making process, those allegations do not amount to an action or inaction by ICANN’s Board, Directors, Officers or Staff members that violates ICANN’s Bylaws. For this independent reason, Afiliias’ claim seeking to invalidate the *amicus* provisions of Rule 7 should be denied.

B. The Panel Does Not Have Jurisdiction to Invalidate Rule 7.

27. As shown above, Afiliias has changed not only the legal basis for its claim, but also the relief it is seeking. Afiliias does not even attempt to show in its Amended IRP Request that the Panel has authority to declare Rule 7 “unenforceable.” The Panel does not have such authority.

²¹ In adopting the Interim Supplementary Procedures, the Board specifically noted that, because “the current Supplementary Procedures in effect do not correspond to the Bylaws as updated on 1 October 2016, the IRP IOT has developed a set of Interim Supplementary Procedures that align with the current Bylaws, in order to apply to an IRP if one is initiated before all issues are addressed to meet a final set of Updated IRP Supplementary Procedures.” (<https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.e>).

²² Amended Request by Afiliias Domains No. 3 Limited for Independent Review ¶ 86.

28. The scope of authority accorded to the Panel is set out in Section 4.3(o) of the Bylaws, which states:

- (o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:
 - (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
 - (ii) Request additional written submissions from the Claimant or from other parties;
 - (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
 - (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
 - (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;
 - (vi) Determine the timing for each IRP proceeding; and
 - (vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

29. Nothing in Section 4.3(o) empowers the Panel to declare parts of the Interim Supplementary Procedures unenforceable or invalid. Section 4.3(i)(iii) states that “the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.” If the Panel finds that there is merit to Afiliás’ claim that ICANN’s Board, Officers, Directors or Staff members violated the Bylaws, then the proper remedy is to issue a declaration to that effect pursuant to Section 4.3(o)(iii). It will then be up to the Board to exercise its business judgment and decide what

action to take in light of any such declaration. This conclusion is also mandated by well-settled case law applying a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.”²³

30. At the time the Board adopted Rule 7, there were no pending accountability mechanisms (or any other claims) alleging improprieties in the rule-making process in relation to Rule 7. Indeed, Afilias’ own Chief Technology Officer and Executive Vice President, Ram Mohan, who also served as a member of ICANN’s Board, seconded the resolution to adopt the Interim Supplementary Procedures.²⁴ ICANN’s Board therefore has never considered the appropriate action to take (if any) in response to Afilias’ allegations of improprieties in the rule-making process.

C. Afilias’ Claim Is Time-Barred.

31. Rule 4 of the Interim Supplementary Procedures states, in pertinent part:

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

32. Because Afilias seeks a declaration that Rule 7 is unenforceable, the “material effect” of the asserted violation must be the Board’s allegedly wrongful adoption of Rule 7. The Interim Supplementary Procedures, including Rule 7, were adopted on October 25, 2018. Afilias was immediately aware of this: as noted, the ICANN Board member who seconded the motion to adopt the Interim Supplementary Procedures was Afilias’ Executive Vice President and Chief

²³ *Berg & Berg Enters., LLC v. Boyle*, 178 Cal. App. 4th 1020, 1045 (2009) (“[A] court will not substitute its judgment for that of the board if the latter’s decision can be attributed to any rational business purpose.”) (internal quotation and citation omitted).

²⁴ ICANN Public Board Meeting Transcript (25 October 2018), at pp. 25–26, available at <https://www.icann.org/en/system/files/files/irp-afili-as-annex-a-05feb19-en.pdf>

Technology Officer, Ram Mohan.²⁵ To be timely, Afilias was required to file any claim challenging the validity of the *amicus* provisions of the Interim Supplementary Procedures by February 22, 2019. Afilias did not file its Amended IRP Request until March 21, 2019. Accordingly, Afilias' claim is time-barred.²⁶

D. Afilias' Request for Costs Is Baseless.

33. Afilias' claim regarding Rule 7 includes a request for an award of "all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC." Section 4.3(o)(vii) of the Bylaws gives the Panel authority to "[d]etermine the shifting of IRP costs and expenses consistent with Section 4.3(r)." Section 4.3(r) states:

ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), *each party to an IRP proceeding shall bear its own legal expenses*, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. *Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.* (Emphasis added).²⁷

34. Afilias has made no contention that ICANN's defenses to its Rule 7 claim are "frivolous or abusive." They clearly are not. Further, under no circumstances would Section 4.3(o)(vii) authorize the Panel to shift to ICANN the costs incurred by Afilias in responding to

²⁵ ICANN Public Board Meeting Transcript (25 October 2018), at pp. 25–26, available at <https://www.icann.org/en/system/files/files/irp-afili-as-annex-a-05feb19-en.pdf>.

²⁶ At the very latest, the material effect of the Board's adoption of Rule 7 would have occurred when Afilias filed its Request for Independent Review on November 14, 2018, as it was then that the *amicus* provisions of the Interim Supplementary Procedures became applicable to the Afilias IRP. Even under this more forgiving analysis, Afilias' Rule 7 claim is still time-barred, as it did not file its Amended Request for Independent Review until 127 days later.

²⁷ Section 4.3(e)(ii) does not apply to Afilias' claim. It states that if a Claimant files an IRP without participating in good faith in a Cooperative Engagement Process ("CEP"), and ICANN prevails in the IRP, then "the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees."

arguments and filings by Verisign and NDC, as Afilias requests. Accordingly, Afilias' request for costs must be rejected.

II. The Procedures Officer's Declaration Has No Import for the IRP Panel.

35. The Procedures Officer's Declaration is 38 pages long yet makes no findings or conclusions, other than the conclusion that the matters raised were too important for him to decide. The first 37 pages set forth who ICANN, Afilias, NDC, and Verisign are;²⁸ provide the procedural history of the IRP and the requests for *amicus* status;²⁹ summarize the arguments made by the parties and the two *amicus* applicants;³⁰ provide a chronology of the development of ICANN's Bylaws and the Interim Supplementary Procedures³¹; and describe the issues the Procedures Officer was meant to decide.³²

36. The Procedures Officer's summary of these matters contains significant inaccuracies. For example, paragraph 2 of the Procedures Officer's Declaration mischaracterizes Afilias' claim as being that "ICANN violated its Bylaws in preparing to award the registry operating rights to Verisign, Inc." Afilias makes no such claim. Rather, Afilias asserts that ICANN is preparing to award registry operating rights to NDC, and that NDC is contractually bound to assign those rights to Verisign if ICANN approves of such an assignment.³³ Similarly, in paragraph 63, the Procedures Officer summarizes Verisign's position as being that: "The fact that David McAuley, the Oversight Committee chair and Verisign's employee, had 'knowledge of Afilias's CEP or IRP prior to the ICANN Board unanimously approving the Interim

²⁸ Declaration of the Procedures Officer (28 February 2019) at pp. 1–6, Ex. C-70.

²⁹ *Id.* at pp. 6–10.

³⁰ *Id.* at pp. 10–15.

³¹ *Id.* at pp. 15–34.

³² *Id.* at pp. 34–37.

³³ *See, e.g.*, Afilias IRP Request ¶¶ 32, 57.

Supplementary Procedures is inapposite and should make no difference to the enforceability of the amici rule.” In fact, Verisign’s position (supported by Mr. McAuley’s sworn declaration) is that Mr. McAuley *did not have knowledge* of Afilias’ CEP or IRP prior to the Interim Supplementary Rules being adopted.³⁴ ICANN notified the Procedures Officer of these errors,³⁵ but the Procedures Officer refused to correct them.³⁶

37. After summarizing the parties’ and *amici*’s positions, the Procedures Officer states, under the heading “DECLARATION OF THE PROCEDURES OFFICER” that appears on the final page of his Declaration, that:

As one of the principal purposes of the IRP is to “[e]nsure that ICANN is accountable to the global Internet community and Claimants” (Bylaws, Section 4.3(a)(iii)), the Procedures Officer declares that the issues raised in the present matter are of such importance to the global Internet community and Claimants that they should not be decided by a “Procedures Officer,” and therefore the issues raised are hereby referred to the Standing Panel, and, until such time as the Standing Panel is formed, to the IRP Panel for determination.”

38. Thus, the Procedures Officer’s only finding or conclusion was that the issues presented were too important for him to decide and therefore should be referred to the Standing Panel and/or this IRP Panel. The Procedures Officer’s conclusion has no import to this Panel.

39. Moreover, the Procedures Officer lacked authority to make this finding or referral. Rule 7 of the Interim Supplementary Procedures states that “requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER,” not to the IRP Panel. Under the Interim Supplementary

³⁴ See, e.g., Verisign’s Reply in Support of Request to Participate as *Amicus Curiae* in Independent Review Process ¶ 2 (“Mr. McAuley had no personal knowledge of the CEP and he could not have acted with an ulterior motive somehow to ‘manipulate’ the rule-making process.”).

³⁵ ICANN’s Request for Corrections to the Declaration of the Procedures Officer (March 26, 2019).

³⁶ Response by Afilias Domains No. 3 Limited to ICANN’s Request for Corrections to the Declaration of the Procedures Officer (March 28, 2019).

Procedures, only a Procedures Officer may determine a request to participate as *amicus curiae*. The Interim Supplementary Procedures do not give the Procedures Officer the authority to assign his responsibilities to the IRP Panel.

40. After receiving the Procedures Officer's Declaration, ICANN wrote to the ICDR asking it to appoint a replacement Procedures Officer who would properly discharge his or her obligations.³⁷ However, Afilias opposed that request and the ICDR ultimately refused to appoint a replacement Procedures Officer.

41. This put the matter at a procedural dead-end: the IRP could not proceed until the *amicus* requests had been resolved, but the only person with jurisdiction to resolve those applications refused to do so, and the ICDR refused to appoint a replacement. To escape this impasse, ICANN consented to give the Panel authority to resolve the *amicus* requests, notwithstanding the clear lack of such authority under the Interim Supplementary Procedures.

42. In sum, the Procedures Officer came to no conclusions of fact other than that the matters presented were too important for him to decide, and the Procedures Officer's summary of the parties' positions contains significant errors and is unreliable. The Procedures Officer's Declaration has no import to the matters before the Panel and should have no influence over the Panel's determination of those issues.

III. The Scope and Nature of Appropriate *Amicus* Participation in this Proceeding Should be Broad.

43. Section I of this brief demonstrates that the Panel does not have authority to invalidate Rule 7 of the Interim Supplementary Procedures. If the Panel finds that any of Afilias' allegations have merit (which they do not), the proper remedy is to issue a decision in the form of a declaration that specific actions or inactions by ICANN's Board, Directors,

³⁷ Letter from ICANN to the ICDR (8 March 2019).

Officers or Staff violated particular provisions of the Bylaws. It will then be for ICANN’s Board to determine what action (if any) to take as a result. The Panel is obligated to apply Rule 7 according to its terms unless and until ICANN’s Board amends or withdraws it.

44. There is no dispute that Verisign and NDC are entitled by the terms of Rule 7 to participate as *amici*. This is not a close call, which is why Afilias acknowledges that NDC and Verisign qualify as “mandatory *amici*” and that the Interim Supplementary Procedures provide no discretion to reject their requests to participate.³⁸

45. In addition to falling under Rule 7’s categories of mandatory *amici*, Verisign and NDC clearly have a “material interest relevant to the dispute.” Afilias’ IRP claims are based principally on allegations of wrongdoing by NDC and Verisign, and the remedy that Afilias seeks is to disqualify NDC as the prevailing party in the .WEB auction, and to require ICANN to enter into a Registry Agreement with Afilias at a price to be determined by the Panel.³⁹ NDC is referred to 120 times in Afilias’ Amended IRP Request, and Section 3 of the Request is dedicated entirely to NDC’s alleged conduct. Verisign is referred to 93 times, and Section 2.4 is dedicated entirely to Verisign’s alleged conduct. It is difficult to imagine circumstances in which non-parties could more clearly have material interests in an IRP.⁴⁰

46. Verisign and NDC’s rights of participation as *amici* should be broad to reflect the extent to which Afilias’ claims are based on allegations of misconduct by NDC and Verisign,

³⁸ See Letter to M. Scott Donahey from Arif Ali dated 28 January 2019 at p. 5; see also Afilias’ Response ¶ 56 (stating that the “categories of mandatory participants” in Rule 7 “covered NDC’s and Verisign’s situation with respect to Afilias’ IRP against ICANN”).

³⁹ The relief requested by Afilias is beyond the scope of the Panel’s authority. As discussed above (*supra* at 28), the remedial authorities of the Panel are defined and circumscribed by Article 4.3(o) of ICANN’s Bylaws. Article 4.3(o)(iii) authorizes the Panel to “Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.” Afilias’ request for a declaration disqualifying NDC and requiring ICANN to enter a Registry Agreement with Afilias clearly exceeds this limited authority.

⁴⁰ See Interim Supp. Proc., Rule 7, Ex. C-59 (entities that are deemed to have a material interest in the dispute “shall be permitted to participate as an *amicus* before the IRP Panel”).

and the fact that the relief that Afilias seeks is to deprive NDC of its rights as the winning bidder in the .WEB contention set. Broad participation is also mandated by the Interim Supplementary Procedures. Footnote 4 to Rule 7 states that “in then considering the scope of participation from *amicus curiae*, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP.”⁴¹

47. One of the principal “Purposes of the IRP” set forth at Section 4.3(a) of the Bylaws is to “[s]ecure the accessible, transparent, efficient, consistent, coherent and just resolution of Disputes.”⁴² In addition, Section 4.3(n)(iv) states that the IRP Rules of Procedure should “ensure fundamental fairness and due process[.]”⁴³ This is echoed in Rule 5, which directs the IRP Panel to consider fairness and accessibility in its conduct of the IRP.⁴⁴ These goals will all be furthered by allowing broad participation by Verisign and NDC, and would be stymied by disallowing such broad participation.

48. The Panel’s resolution of this dispute will be more just, transparent, coherent and consistent with due process if the persons charged with wrongdoing—*i.e.*, Verisign and NDC—are allowed to present evidence in their defense, confront the evidence against them, and present their positions and arguments to the Panel, orally and in writing. ICANN therefore maintains that Verisign’s and NDC’s participation as *amici* in this IRP should be broad and should include the right to: (1) submit written briefs to the Panel addressing the merits of Afilias’ Amended IRP Request; (2) submit evidence and written witness statements, subject to an agreement that any witnesses proffered will be made available for cross-examination at the IRP hearing; (3) cross-

⁴¹ Interim Supp. Proc., n.4, Ex. C-59.

⁴² Bylaws Art. 4 §§ 4.3(a), 4.3(a)(vii), Ex. C-1.

⁴³ Bylaws Art. 4 § 4.3(n)(iv), Ex. C-1.

⁴⁴ Interim Supp. Proc. Rule 5, Ex. C-59.

examine Afilias' witnesses; (4) participate in the IRP hearing, including by making arguments to the Panel; and (5) participate in post-hearing briefing, if requested by the Panel.⁴⁵

49. In prior submissions, Afilias has taken the position that the scope of *amicus* participation must be determined by reference to the practice of some international arbitration institution or rules, where participation is limited to filing a "friend of the court" brief.⁴⁶ In ICANN's view, international arbitration practice provides little helpful guidance in these circumstances. First, *amicus* participation in international arbitration is a relatively new development and is still evolving. Second, as discussed above, an IRP is a unique accountability mechanism customized in light of ICANN's quasi-public role in the global Internet community. *Amicus* practices in investor-State arbitration provide an inapt analogy. In such matters, *amici* generally seek to protect an abstract interest in the legal principles at issue. Here, NDC and Verisign are the principal alleged wrongdoers and have a substantial interest in the property at issue. Because NDC's and Verisign's interests are far more direct and substantial than typical *amici* in investor-State arbitration, their rights to participate should be broader than are typically accorded to *amici* in that setting.

CONCLUSION

50. For these reasons, the Panel should reject Afilias' Rule 7 Claim and issue an order allowing broad participation by Verisign and NDC as *amicus curiae* in Phase II.

⁴⁵ The scope of participation in this IRP is unique to the claims at issue and reflects the extensive nature of Afilias' claims against Verisign and NDC and the significant impact to their legal rights of the relief Afilias is requesting. The scope of *amicus* participation in this IRP, therefore, has no precedential effect on any future IRP or on any future request to participate as *amicus curiae*.

⁴⁶ Afilias Domains No. 3 Limited's Response to Verisign, Inc.'s and Nu Dotco LLC's Requests to Participate as Amicus Curiae in Independent Review Process, at pp. 53–57; Afilias Domains No. 3 Limited's Sur-Reply to Verisign, Inc.'s and Nu Dotco LLC's Requests to Participate as Amicus Curiae in Independent Review Process, at p. 21.

Respectfully submitted,

JONES DAY

By



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