INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD., Claimant, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	ICDR CASE NO. 01-18-0004-2702

ICANN'S RESPONSE TO AFILIAS' COSTS SUBMISSION

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INTRODUCTION

1. Afilias' request for an order requiring ICANN to pay all its costs and legal fees should be denied because it is legally and factually baseless. Afilias applies an incorrect legal standard by arguing that costs and legal fees should be awarded based on certain alleged ICANN actions, most of which occurred outside of the IRP, such as ICANN's approval of the Interim Supplementary Procedures and ICANN's alleged conduct during the Cooperative Engagement Process ("CEP"). Section 4.3(r) of the Bylaws, however, allows the Panel to shift legal expenses and costs ***only when*** a Party's IRP Claim[1] or IRP defense as a whole is found to be frivolous or abusive. Alleged extrinsic conduct cannot be the basis for a cost award in an IRP. Afilias does not contend that ICANN's defense as a whole is frivolous or abusive, it clearly is not. In fact, Afilias' arguments and assertions have consistently shifted throughout this proceeding in what can only be seen as a concession that ICANN's defense does have merit.

2. Further, Afilias bases its request for attorneys' fees and costs on a narrative of ICANN actions that is both misleading and wrong:

- ICANN's reliance on the deference owed to the Board's decision not to take action regarding .WEB while a related Accountability Mechanism was pending is not ICANN's "central defense," nor is it frivolous. It is a valid defense to Afilias' claim that ICANN violated its Bylaws by not disqualifying NDC in 2016, a claim that Afilias pressed throughout its pre-hearing submissions and then abandoned in its Post-Hearing Brief.

- Rule 4 was not drafted by "ICANN Legal" in response to Afilias' draft IRP Request. It was drafted by the IOT and published more than five months before Afilias even submitted its draft request.

- ICANN did not revise Rule 7 in October 2018 to create a right for Verisign and NDC to participate as *Amici*. The October 2018 revisions were not influenced by Afilias'

[1] As in ICANN's Post-Hearing Brief, the capitalized term "Claim" is used herein as defined by Section 4.3(d) of the Bylaws, while the lower-case "claim" is used, when referring to Afilias' claims, in its colloquial sense as synonymous with "cause of action" or "argument."

planned IRP and, in any event, the draft Interim Supplementary Procedures already provided a right for *amicus curiae* to participate before those revisions were made.

- ICANN did not "refuse" to keep .WEB on hold. On the contrary, ICANN has voluntarily kept .WEB on hold throughout this proceeding, although it had no legal obligation to do so, based on the unique aspects associated with Afilias' request.

3. In short, Afilias' request for an award of costs and legal fees has no merit and must be denied. ICANN is already paying all administrative costs of this IRP, including Panelist fees, but Afilias must bear its own attorneys' fees and costs, which are exorbitant due to Afilias' own wasteful litigation tactics.

I. AFILIAS APPLIES THE WRONG STANDARD.

4. Afilias does not meaningfully address Section 4.3(r) of the Bylaws, which governs and limits the Panel's authority to shift fees and costs in an IRP. Instead, Afilias cites inapposite arbitration cases decided under the ICSID, ICC and UNCITRAL rules.[2] But the cost-shifting provisions of those rules are not similar to Section 4.3(r) and the facts of those cases are not similar to those at issue in this IRP.

5. Section 4.3(r) states that each Party "***shall*** bear its own legal expenses." (Emphasis added.) Section 4.3(r), however, provides a narrow carve-out by allowing the Panel to shift costs and fees if it "identifies the losing party's Claim or defense as frivolous or abusive." "Claim" is defined as the "written statement of a Dispute" that initiates the IRP.[3] Thus, costs and legal expenses may be shifted onto the Claimant only if the Request for IRP as a whole is frivolous or abusive. The same standard applies, *mutatis mutandis*, to the Panel's authority to shift legal expenses onto ICANN. Thus, costs and legal expenses may be shifted onto ICANN only if its IRP defense as a whole is frivolous or abusive.

[2] *See* Afilias' Costs Submission at 11, nn.5-9.
[3] Bylaws, Art. 4, § 4.3(d), Ex. C-1.

6. Afilias does not contend that ICANN's defense as a whole was frivolous or abusive. Instead, Afilias takes issue with particular positions taken by ICANN, many of which are extrinsic to the IRP. For example, Afilias asserts that ICANN did not participate in good faith in the CEP.[4] ICANN, however, participated in good faith in the CEP, and Afilias cites no evidence for its claim to the contrary. Indeed, the record is devoid of any information about the parties' conduct and positions during the CEP because CEPs are a confidential process aimed at attempting to resolve and/or narrow the issues in dispute prior to filing an IRP.[5] Moreover, the CEP is not ICANN's "defense" in this IRP and is thus irrelevant.

7. Similarly misplaced are Afilias' complaints that ICANN allegedly improperly approved the Interim Supplementary Procedures,[6] did not immediately agree to keep the .WEB contention set on hold,[7] and supported the *Amici*'s application to participate in this IRP,[8] which the Panel ***granted*** in its Phase I Decision. Afilias' complaints regarding these matters are baseless. More pertinently, however, none of these alleged actions and positions constitutes ICANN's "defense." They therefore provide no basis for cost shifting under Section 4.3(r).

8. ICANN's defense to this IRP is unquestionably not frivolous or abusive. Indeed, ICANN ***prevailed*** in Phase I, when the Panel agreed with ICANN that Afilias improperly sought to challenge the work of the IOT. ICANN also should prevail on the matters being addressed in Phase II. For example, Afilias has essentially abandoned its competition claim, which was

[4] Afilias' Cost Submission ¶ 2.
[5] Ex. 307 at 3 ("CEP is a process that is part of the IRP that allows parties to participate in non-binding cooperative engagement for the purpose of attempting to resolve and/or narrow the issues in dispute prior to filing an IRP. (See Bylaws, Art. 4, § 4.3(e), https://www.icann.org/resources/pages/governance/bylaws-en/#article4.) CEP is a confidential process between ICANN and the requesting party. (See https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf.)").
[6] Afilias' Cost Submission ¶ 2.
[7] *Id*. ¶¶ 3, 26-27.
[8] *Id*. ¶¶ 5, 25.

initially the *raison d'etre* of its entire case.[9] The only evidence Afilias submitted to support that claim consists of the reports of Mr. Zittrain and Dr. Sadowsky, yet Afilias largely ignores those reports in its Post-Hearing Brief, referring to them only once, in the text of an endnote. Further, five of Afilias' six substantive requests for relief—*i.e.,* Request Nos. 2, 3, 4, 5 and 7—are clearly outside the Panel's jurisdiction to grant, as shown in ICANN's Post-Hearing Brief at Section I.B (¶¶ 23-48).[10] In addition, Afilias' attempts to challenge ICANN actions or inactions in 2016 are clearly time-barred. Indeed, in its Post-Hearing Brief, Afilias' principal response to ICANN's time-bar defense is to assert—for the first time—that Rule 4 of the Interim Supplementary Procedures was improperly adopted. As shown below, that contention is based on a false and misleading account of Rule 4's genesis. It is also not properly before this Panel because Afilias cannot raise a substantive challenge to the validity of Rule 4 for the first time in its Post-Hearing Brief.

II. AFILIAS' COST-SHIFTING ARGUMENTS ARE MISPLACED AND BASELESS.

A. ICANN's Reliance on the Business Judgment Rule Is Not Its "Central Defense," Nor Is It Frivolous or Abusive.

9. Contrary to Afilias' contention, the deference owed to the Board's business judgment to take no action regarding the .WEB contention set while a related Accountability Mechanism was pending is not ICANN's "central defense." Although valid and important, it is only one part of ICANN's multi-faceted defense. In addition to the deference owed to the Board's business judgment, ICANN's defense includes, *inter alia*:

- ICANN has discretion to determine whether the Guidebook and Auction Rules have been violated and the consequences of any such violation. Contrary to Afilias' case, the Articles and Bylaws do not dictate how ICANN is to exercise that discretion. As a result, whether the DAA violates the Guidebook and Auction Rules cannot properly be resolved

[9] ICANN's Post-Hearing Brief ¶¶ 86-135 (Sec. III.A).
[10] Afilias Request No. 6 is not tied to a substantive claim, but instead seeks post-decision cost shifting.

by the Panel, whose jurisdiction is limited to determining whether ICANN acted inconsistently with its Articles and Bylaws.

- ICANN is not a competition regulator, and its Articles and Bylaws do not require it to award new gTLDs based on an assessment of which applicant will most effectively promote competition. And in any event, Afilias has not established that Verisign's potential operation of .WEB would be anticompetitive, a contention soundly refuted by the DOJ's decision to not intercede.

- The remedies that Afilias seeks are almost all beyond the Panel's authority to grant.

10. Afilias does not contend that any of these arguments are frivolous or abusive, and it could not plausibly do so. In fact, these arguments have caused Afilias to change course, on several occasions, in the case it has presented to this Panel. For instance, and as set forth above, after ICANN's Rejoinder Memorial fully responded to Afilias' competition claim, Afilias chose not to pursue it at the hearing and gave it little mention in its Post-Hearing Brief.

11. Likewise, Afilias has apparently dropped its claim that ICANN violated its Articles and Bylaws by not disqualifying NDC in 2016, thereby implicitly acknowledging that ICANN's defense to that claim is meritorious. Afilias asserts in its Post-Hearing Brief that:

> ICANN misrepresents Afilias' claims as claims that "ICANN had an immediate, absolute and unqualified obligation to disqualify NDC" in 2016. But this is not an accurate statement of Afilias' claim. Afilias claims that ICANN had an obligation to disqualify NDC prior to proceeding with delegation, which ICANN proceeded to do in June 2018—not that ICANN had to do so specifically in 2016.[11]

12. Afilias' re-characterization of its claim in its Post-Hearing Brief, however, is in stark contrast with all of Afilias' pre-hearing pleadings, which claimed that ICANN's actions or inactions in 2016 were in violation of its Articles and Bylaws. For example, in its Reply Memorial, Afilias stated:

- "This IRP, however, claims that ICANN was required to disqualify NDC's application and bid in August 2016 when ICANN first learned of NDC's violations, whether as a matter of automatic disqualification pursuant to the applicable standards, or as a matter of the reasonable exercise of ICANN's discretion pursuant to those

[11] Afilias' Post-Hearing Brief ¶ 180.

same standards (i.e., those set out in the new gTLD Program Rules and ICANN's Articles and Bylaws)."[12]

- "In its Amended Request, Afilias described the various violations of the New gTLD Program Rules by NDC—which *required* ICANN to disqualify NDC's application and bid when ICANN learned of the violations in August 2016."[13]

- "ICANN violated its Articles and Bylaws when it failed to disqualify NDC's bid and application upon receiving the DAA in August 2016."[14]

- "[T]he Panel's mandate necessarily requires the Panel to issue a final decision declaring that ICANN breached its Articles and Bylaws by: (a) failing to disqualify NDC's application and bid upon receiving the DAA in August 2016 . . ."[15]

13. Afilias' post-hearing recrafting of its claim is yet another attempt to avoid the business judgment rule and the repose and limitations periods. Afilias' new assertion—***raised for the first time in its Post-Hearing Brief***—is based principally on ICANN staff's sending a draft Registry Agreement to NDC in June 2018. Up until now, Afilias' only claim regarding that event had been that it purportedly violated ICANN's "competition mandate."[16] Afilias cannot fundamentally alter its claims through its post-hearing submission. Afilias' attempt to do so is not only expressly precluded by Sections 4.3(b) and (d) of the Bylaws—which define the "Dispute" and "Claim" over which the Panel has jurisdiction—and Rule 6 of the Interim Supplementary Procedures,[17] it also violates the most fundamental principles of good faith, fairness and due process. And, of course, the fact that Afilias felt it necessary to change course so dramatically demonstrates not only that ICANN's defense is meritorious, but also that Afilias has no basis to argue that ***ICANN*** should be liable for Afilias' legal fees.

[12] Afilias' Reply Memorial ¶ 20.
[13] *Id*. ¶ 19.
[14] *Id*. ¶ 86.
[15] *Id*. ¶ 155.
[16] ICANN's Post-Hearing Brief ¶¶ 190, 191.
[17] *Id*. ¶¶ 15-20.

14. Even if the business judgment rule was ICANN's "central argument" (and it is not), that defense is not frivolous or abusive. On the contrary, Section 4.3(i)(iii) of the Bylaws ***mandates*** that the Panel "shall not replace the Board's reasonable judgment with its own[.]" The Board decided in November 2016 that it would not take action at that time due to the pendency of a related Accountability Mechanism. That was an objectively reasonable business decision. Section 4.3(i)(iii) is not limited to Board actions taken by formal resolution at a duly convened Board meeting, as Afilias wrongly argues. By its plain terms, 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." The Board considered the matter and made a reasonable business judgment ***not*** to act in November 2016, an action that did not require a formal resolution. That judgment is entitled to deference, and completely refutes Afilias' claim that ICANN violated the Bylaws by not disqualifying NDC as an applicant for .WEB upon learning of its arrangement with Verisign in 2016.

15. Afilias is also wrong in accusing ICANN of "hid[ing]-behind-the-rock" by purportedly not disclosing until its Rejoinder Memorial that the Board had decided not to take action with regard to the .WEB contention set while a related Accountability Mechanism was pending.[18] In ICANN's ***first pleading*** in the main IRP proceeding—its Response to the Amended IRP Request—ICANN stated that the Board had decided not to fully evaluate Afilias' claims due to the pendency of a related Accountability Mechanism and that the Board's decision was entitled to deference.[19]

[18] Afilias' Cost Submission ¶¶ 6, 13.

[19] ICANN's Response to Amended IRP Request ¶ 66 ("Due to the pendency of DOJ's investigation and a series of Accountability Mechanisms, the Board has not yet had an opportunity to fully address most of the issues that Afilias now pursues in its Amended IRP Request. Deferring such consideration until this Panel renders its final decision is well within the realm of reasonable business judgment.").

B. ICANN's Approval of the Interim Supplementary Procedures Is Not Part of its "Defense" and Was Not Improper.

16. Afilias asserts that ICANN improperly approved the Interim Supplementary Procedures to ensure the *Amici* were entitled to participate in this proceeding and to provide itself a time bar defense to Afilias' draft IRP Request, which Afilias shared with ICANN on 10 October 2018 in the context of a CEP.[20] As noted above, actions extrinsic to the IRP, such as drafting and approval of the Interim Supplementary Procedures, cannot be the basis for cost shifting. Costs and fees may be shifted only on a finding that a Party's Claim or defense is frivolous or abusive. ICANN's approval of the Interim Supplementary Procedures is not its "defense," and therefore cannot be a valid basis for cost shifting.

17. In addition, Afilias' argument that Rule 4 was wrongly added to the Interim Supplementary Procedures is a wholly new claim improperly made for the first time in Afilias' Costs Submission and Post-Hearing Brief. This claim is therefore not properly before the Panel.

18. Because no claim challenging Rule 4 was ever previously raised, the record is devoid of any examination of that Rule's genesis. Without citing any supporting evidence, Afilias asserts that Rule 4 was added by "ICANN Legal—in possession of Afilias' draft Request for IRP;" that the IOT's intention to include Rule 4 in the Interim Supplementary Procedures was "***never made public***" (emphasis in original); and that, prior to the adoption of Rule 4, Afilias' claims had never been subject to limitations periods.[21]

19. Each of these statements is demonstrably false. The Interim Supplementary Procedures were: (i) drafted by the IOT, not "ICANN Legal"; and (ii) published on 1 May 2018 more than five months before Afilias shared its draft IRP Request with ICANN and before

[20] Afilias' Cost Submission ¶¶ 19, 21-23.
[21] *Id*. ¶ 22.

Afilias even initiated its CEP. The version of Rule 4 in the 1 May 2018 draft tracks—word for word—the version submitted by the IOT to the Board and adopted in the Interim Supplementary Procedures.[22] Thus, Rule 4 ***was not added by ICANN Legal***; the IOT ***unequivocally made public its intention to adopt Rule 4***; and a draft set of the Interim Supplementary Procedures that included ***Rule 4 was published in May 2018*** (a month before Afilias even initiated CEP).

20. Afilias' further assertion that Ms. Eisner pushed for approval of the Interim Supplementary Procedures in response to pressure from "ICANN Legal" arising from Afilias' 10 October 2018 draft IRP Request is yet another Afilias invention.[23] Ms. Eisner had been pushing for the IOT to adopt Interim Supplementary Procedures since at least 1 May 2018.[24] Moreover, the testimony that Afilias cites from Ms. Eisner contradicts Afilias' assertion: Ms. Eisner testified that she was ***not*** aware of Afilias' draft IRP Request and that she felt pressure to approve Interim Supplementary Procedures "based on the totality of not having supplementary procedures in place for two years," not based on Afilias' draft IRP Request.[25]

21. Finally, ICANN's Post-Hearing Brief and prior submissions fully address and completely refute Afilias' contentions that Rule 7 of the Interim Supplementary Procedures was improperly drafted by the IOT and that Ms. Eisner proposed revisions to Rule 7 "at the behest of Verisign's David McAuley" to give Verisign a right to participate in this IRP.[26] ICANN stands by those submissions and will not repeat its prior explanations here.

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[22] *Compare* Ex. 1 (1 May 2018 draft Interim Supplementary Procedures), *with* Ex. C-59 (final Interim Supplementary Procedures).
[23] Afilias' Cost Submission ¶ 20.
[24] https://mm.icann.org/pipermail/iot/2018-May/000390.html, Ex. 248.
[25] Hearing Tr. at 453:11-25.
[26] Afilias' Cost Submission ¶ 24; ICANN's Post-Hearing Brief ¶¶ 220-231; ICANN's Reply to Afilias' Response to the Requests of Verisign and NDC to Participate as *Amicus Curiae* (submitted 5 February 2019) ¶¶ 36-58.

C. ICANN's Decision of Whether to Keep .WEB On Hold is Not Part of its "Defense" and ICANN *Did* Ultimately Decide to Keep .WEB On Hold.

22. Afilias falsely asserts that ICANN "refused to suspend delegation of .WEB voluntarily during the pendency of the IRP" in an "attempt to defeat the Panel's authority by mooting Afilias' claims."[27] As an initial matter, a decision of whether to keep .WEB on hold during this IRP is not part of ICANN's "defense," and therefore cannot be a valid basis for cost shifting. Nevertheless, ICANN did voluntarily keep .WEB on hold throughout this proceeding.

23. Afilias' CEP closed on 13 November 2018, leaving Afilias free to initiate an IRP. In accordance with normal practice, ICANN stated that if, after filing an IRP, Afilias sought interim relief to keep .WEB on hold, then ICANN would not remove the hold until the request for interim relief was resolved.[28] Afilias filed its Request for IRP on 14 November 2018 and filed a Request for Interim Relief on 27 November 2018. Although an Emergency Panelist was appointed, Afilias' Request for Interim Relief was never resolved because, before the matter came up for hearing, ICANN agreed to keep .WEB on hold until this IRP concluded.

24. Afilias' true complaint appears to be, not that ICANN refused to keep .WEB on hold, but that ICANN did not make this decision immediately at the outset of this IRP.[29] ICANN, however, had no legal duty to keep .WEB on hold without an order from the Panel or an Emergency Panelist. ICANN's decision to keep .WEB on hold was wholly voluntary and was based on the unique aspects of Afilias' request and the delays in schedule due to involvement of the Procedures Officer.

[27] Afilias' Cost Submission ¶ 26.
[28] Ex. C-64.
[29] Afilias' Cost Submission ¶ 27.

III. AFILIAS' LEGAL FEES AND COSTS ARE UNREASONABLE.

25. Afilias' legal fees and costs are unreasonable as to both their total amount and their allocation. Afilias claims to have devoted a team of at least 17 lawyers to this matter and incurred total fees and costs of USD 10,248,227.02. Both the number of lawyers and the total fees are patently unreasonable in a matter where Afilias had no fact witnesses; the number of witnesses from ICANN (4) and *Amici* (2) was relatively small; there were only five non-fact witnesses, each of whom submitted only one report and none of whom was cross-examined; and the hearings for both Phase I and Phase II amounted to a total of eight days.

26. Moreover, Afilias' eye-popping legal fees can be explained in part as a result of its wasteful litigation tactics. Afilias' claims have been a constantly moving target throughout this IRP, most recently in its Post-Hearing Brief, with each new round of submissions multiplying the issues, rather than narrowing them. Afilias fought tooth and nail in a losing battle to prevent the *Amici* from participating in this proceeding, notwithstanding that *Amici*'s conduct, rights and interests are directly at issue. This led to the bifurcation of this IRP, with ensuing inefficiencies and added costs. If that were not enough, Afilias engaged in a sustained practice of filing unauthorized and lengthy briefs on matters that had already been submitted and in some cases decided. Afilias also filed multiple unsuccessful challenges to ICANN's document production, including unsuccessful attempts to obtain ICANN's privileged documents.

27. Afilias' allocation of costs is also unreasonable and arbitrary. For example, Afilias submits an alternative claim for costs incurred "in relation to the *Amici* participation" and in filing an application for emergency interim relief. As shown above, costs cannot be awarded on either basis. In addition, Afilias' allocation of costs to these matters is entirely arbitrary. With respect to *Amici* participation, Afilias seeks all costs associated with Phase I even though the Panel granted *Amici*'s request and ICANN prevailed with regard to claims related to the IOT.

Afilias also seeks all costs associated with its Response to the *Amici* Briefs, even though the *Amici* were granted leave to make those submissions and Afilias admits that it used its Response in part to reply to ICANN's Rejoinder Memorial.

28. Afilias' request for its attorneys' fees in connection with its Request for Interim Relief is equally bizarre and untenable. There, Afilias has requested 33% of its total fees from 11 December 2018 through 31 March 2019, and 50% of its total fees from 14 November 2018 to 10 December 2018 and from 1 April 2019 through 14 May 2019. Afilias filed only one brief in support of its Request for Interim Relief, which was submitted on 27 November 2018. Afilias also submitted requests for production of documents on 3 December 2018, but those requests were resolved by 12 December 2018. Afilias provides no analysis to support the percentage allocations and no explanation for how it can claim between 33% and 50% of its total legal costs for more than five months after the submissions on its Request for Interim Relief were complete.

CONCLUSION

29. For the foregoing reasons, Afilias' request for an order requiring ICANN to reimburse Afilias' claimed costs and legal fees should be denied in its entirety.

Respectfully submitted,
JONES DAY

Dated: October 23, 2020

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