

INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

Proposed Intervenors.

ICDR CASE NO: 01-18-0004-2702

**NU DOTCO, LLC'S REPLY IN SUPPORT OF ITS REQUEST  
TO PARTICIPATE AS *AMICUS CURIAE* IN INDEPENDENT REVIEW PROCESS**

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CONTAINS **HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY** INFORMATION  
PURSUANT TO PROTECTIVE ORDER

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NDC hereby replies to Afilias' response to NDC's Request to participate as an *amicus curiae* in these IRP proceedings.<sup>1</sup>

## I. INTRODUCTION

1. The Supplementary Procedures adopted by ICANN unequivocally require that the Procedures Officer **must** permit NDC to participate in the IRP as an *amicus curiae*. Specifically, Section 7 of the Supplementary Procedures requires that members of a contention set are automatically deemed to have a material interest in the outcome of an IRP, and thus must be able to participate in that IRP. NDC was a member of the contention set (in fact, the **winning** member) and has a material interest in the outcome of this IRP. Nowhere in its nearly sixty-page Response does Afilias dispute the plain, unequivocal language of the rule.

2. Afilias, no doubt recognizing that the language of the rule is clear, tries to avoid it by urging the Procedures Officer to overstep his jurisdiction, defy IRP procedural rules, and exclude from participation entities directly impacted by its challenge to ICANN's actions. Afilias' position, if adopted, would turn this IRP proceeding into a kangaroo court devoid of fundamental due process rights. Afilias' position is untenable: the Procedures Officer cannot ignore ICANN's IRP rules, has no discretion to deny NDC's participation as an *amicus*, and cannot invalidate the Supplementary Procedures.

3. As a threshold matter, the Procedures Officer does not have the authority to invalidate or ignore an ICANN-approved rule. Afilias' Response is conspicuously unable to identify any ICANN bylaw, rule, agreement, or other source of law providing a Procedures Officer such authority. In fact, if the Procedures Officer were to agree with Afilias that the Supplementary Procedures are invalid, it would have no authority to do anything at all, as the Supplementary Procedures themselves are the Procedures Officer's sole source of jurisdiction.

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<sup>1</sup> Terms not defined herein are used as in NDC's initial Request.

4. If Afilias genuinely believed that the Supplementary Procedures “were not properly adopted” by ICANN, it could have filed an IRP to challenge ICANN’s rulemaking. Had it done so, an IRP Panel could have resolved that dispute. But Afilias has not initiated such an IRP, and the Procedures Officer is not an IRP Panel. The validity of any provision of the Supplementary Procedures is not at issue in this IRP, despite Afilias’ attempt to pretend that it is.

5. In any event, Afilias’ argument that the Supplementary Procedures are invalid is wrong. The Supplementary Procedures are consistent with ICANN’s commitment to ensuring that the IRP rules reflect fairness and due process. If ICANN had adopted IRP rules that prohibited interested parties from being heard, such rules would have violated that requirement. Furthermore, Afilias’ convoluted attack on ICANN’s approval of the Supplementary Procedures omits a critical fact: Afilias’ own liaison representative on the ICANN Board, Ram Mohan, affirmatively proposed the resolution for the Board to adopt them. Afilias has therefore waived any objection to those Supplementary Procedures and is estopped from challenging them now.

6. Even if the Procedures Officer were inclined to ignore the Supplementary Procedures adopted by ICANN – despite having no authority to do so – that still does not mean that NDC can be denied due process in violation of the ICANN bylaws, not to mention fundamental constitutional and international law. NDC must be permitted to participate in this IRP as the real party in interest, even if not as an *amicus* under the Supplementary Procedures.

## **II. NDC MUST BE ALLOWED TO PARTICIPATE AS AN *AMICUS* IN THE IRP.**

### **A. The Supplementary Procedures Unambiguously Require That the Procedures Officer Permit NDC To Participate As an *Amicus Curiae*.**

7. Section 7 of the Supplementary Procedures confers automatic *amicus curiae* standing on all members of the contention set for the New gTLD at issue in an IRP. Under Section 7, the Procedures Officer “shall” permit the participation of any entity if it was “was part of the contention set” or if the briefings “significantly refer to actions taken by” that entity. Such entities “shall be deemed” to have a “material interest relevant to the DISPUTE.”

8. There is no dispute that the IRP concerns the .WEB contention set, or that NDC is a member of that contention set. There is no dispute that the Request and briefings “significantly refer” to NDC. Thus, by the plain terms of Section 7, NDC *must* be afforded the opportunity to participate as an *amicus*.

9. As the Procedures Officer noted during the telephonic conference on January 4, 2019, “it seems to me the language is clear.” And so it is. If the applicant is a part of the relevant contention set, like NDC here, a Procedures Officer has no discretion: he or she “shall” permit the applicant to appear as an *amicus*. Supplemental Procedures § 7.

10. Interpretation of a clear and unambiguous rule does not require resort to external evidence such as the drafting history. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (“we do not resort to legislative history to cloud a statutory text that is clear”); *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 808, n. 3 (1989) (“Legislative history is irrelevant to the interpretation of an unambiguous statute”); SCALIA & GARNER, *READING LAW* (2012) at 56-58 (“the purpose must be derived from the text, not from extrinsic sources such as legislative history”). We understand that the Procedures Officer is curious about the “legislative history” of the rule, including why certain mandatory language was underlined in the published document (as well as whether the history clarifies the intended role of a Procedures Officer in these proceedings). However, such external evidence is unnecessary and improper to interpret the clear and unambiguous language of the rule here. Even if the underlined language had never been added to Section 7, NDC would nonetheless be entitled to participate in the IRP because Afilius does not dispute that NDC has a “material interest” in this IRP as the winner of the .WEB public auction. As such, the unquestioned language of Section 7 still provides that NDC “may participate” in the IRP.

11. Afilius does not dispute the plain language of Section 7, instead urging the Procedures Officer to disregard it. As we explain next, this attack is improper.

**B. Afilias' Challenge To The Supplementary Procedures Is Improper And May Not Be Considered By The Procedures Officer.**

12. The role of a Procedures Officer is solely to “adjudicate requests for consolidation, intervention, and/or participating as an *amicus*” under Section 7. Supplementary Procedures § 1 (“Definitions”) at 3. The IRP Panel, in contrast, consists of “three neutral members appointed to decide the relevant DISPUTE,” *i.e.*, whether an action or inaction by ICANN or its Board “violated ICANN’s Articles of Incorporation or Bylaws.” *Id.*

13. The Procedures Officer in this matter was appointed by the ICDR for the limited purpose of considering NDC’s and Verisign’s applications to participate as *amici curiae*. The Procedures Officer is not the IRP Panel tasked with deciding the merits of the case – two members of the IRP Panel have been nominated by the parties, and the third has yet to be nominated. The Procedures Officer also is not tasked with resolving an IRP challenging the adoption of the Supplementary Procedures, as no such IRP is even pending.

14. The Procedures Officer has no authority to invalidate or ignore the Supplementary Procedures. Nothing in the ICANN bylaws, the Supplementary Procedures themselves, or the “legislative history” even remotely suggests as much. Afilias certainly provides no citation to any support for that proposition in its Response. Accordingly, any challenge to the Supplementary Procedures themselves is beyond the Procedures Officer’s jurisdiction.

15. Furthermore, U.S. and international law would void any decision by the Procedures Officer taken beyond the scope of the IRP rules. An arbitration award or decision may be set aside if the arbitrator exceeds the authority set forth in the agreement or other provision creating the right to arbitration. 9 U.S.C. § 10(a)(4) (a court may vacate an award where “the arbitrators exceeded their powers”); *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d. 258, 262 (9th Cir. 1992) (ordering trial court to vacate arbitration award because panel “exceeded its authority”); *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256, 265 (5th Cir. 2015) (vacating arbitration award because arbitrator failed to apply the specified rules, which “tainted the entire process”); *In the Matter of an Independent Review Process*

*Between Donuts, Inc. and ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration, ¶136 & n.177 (May 5, 2016) (panel’s “role in this IRP includes assessing whether the applicable rules . . . were followed, not whether such rules are appropriate or advisable”). The Procedures Officer should therefore reject Afiliás’ invitation to exceed his authority here.

**C. Afiliás’ Arguments Ignore ICANN’s Requirement That IRP Rules Must Ensure Due Process.**

16. It is a basic tenet of due process that “[p]arties whose rights are to be affected are entitled to be heard.” *Baldwin v. Hale*, 68 U.S. 223, 233 (1863); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Schafer v. Multiband Corp.*, No. 12-cv-13152, 2016 WL 1665153 at \*6 (E.D. Mich. April 27, 2016) (“If an arbitrator renders a decision without allowing a party the opportunity to present pertinent and material evidence, the arbitration award lacks fundamental fairness. . .”); *see also* GARNER, BLACK’S LAW DICTIONARY (10th ed.) (“Due process”: “includ[es] notice and the right to a fair hearing before a tribunal with the power to decide the case”). The results of any arbitration are suspect without participation by parties with an interest in the outcome. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349-50 (2011) (“And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied [without their participation].”).

17. ICANN’s bylaws require that any IRP procedural rules must “ensure fundamental fairness and due process.” ICANN Bylaws, § 4.3(n)(iv). It is unsurprising, therefore, that the legislative history shows a deliberate effort to protect the due process rights of non-Claimants whose interests are materially affected by an IRP. ICANN’s Response to Procedures Officer’s Questions Concerning the Drafting History of the Supplementary Procedures, Jan. 16, 2019, at 8-21. Inclusion of *amicus* provisions in the Supplementary Procedures allow IRPs to “dispose of [disputes] by involving as many concerned parties as is compatible with efficiency and due process.” 6 Moore’s Federal Practice § 24.03(2)(a) (2018).

18. Other procedures analogous to Section 7 *amicus* participation similarly protect the due process rights of those with interests in a dispute. For instance, under the Federal Rules of Civil Procedure “anyone” with an interest that “as a practical matter [would be] impair[ed] or impede[d]” by the proceedings must be permitted to litigate their rights and interests. Fed. R. Civ. Proc. 24(a)(2); *see, e.g., Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (Rule 24(a)(2) “construe[d] . . . broadly” to ensure resolution of disputes with “efficiency and due process”); *100 Reports LLC v. United States Dep’t of Justice*, 307 F.R.D. 269, 278 (D.D.C. 2014) (individual may intervene regardless of participation of an aligned party, as the individual “should have an opportunity to litigate the merits of his [own] interest”).

19. NDC’s interest in this IRP is direct and substantial. Afilias seeks to disqualify NDC’s application and force ICANN to assign NDC’s rights in the .WEB registry to Afilias. Request ¶¶ 69(2)-(3). Afilias’ success in this IRP would deprive NDC of its right to contract for the .WEB registry, even though NDC won the .WEB auction. Furthermore, NDC has an interest in defending itself against Afilias’ spurious allegations. Even a cursory review of Afilias’ Request indicates that its claims rest on NDC’s alleged misconduct. Request ¶¶ 3, 22-37, 44-59, 63-64, 67, 69. NDC has already defended these actions against investigations by ICANN and the Department of Justice, and must be allowed to do so in the IRP, as well.

20. Because of its direct and substantial interest in the IRP, NDC must be given an opportunity to participate, including presenting evidence and argument to the IRP Panel. *See, e.g., Constantineau*, 400 U.S. at 433; *James Daniel Good Real Property*, 510 U.S. 43, 48-49 (1993). Any proceeding without full and fair participation by NDC risks *vacatur*. *See* 9 U.S.C. § 10(a)(3) (an award may be vacated “where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy”); *Savannah Children’s LLC v. Jarvis Consulting & Investment, Inc.*, No. 16-MC-203-JAR, 2016 WL 3014965 (D. Kan. May 26, 2016) (vacating award for failure to provide for interested party to attend hearing and have evidence heard); *Schafer*, 2016 WL 1665153, at \*6 (vacating arbitral ruling where arbitrator failed to allow presentation of “pertinent and material evidence”).



21. Afilias' opposition to NDC's Request to participate in the IRP is in direct contravention of the mandate in ICANN's bylaws. Remarkably, Afilias argues that the Procedures Officer should deny NDC *any* participation in the IRP, insisting that NDC is "not entitled fully to be heard and participate on any issue that may materially affect its interests." Email from Litwin (Counsel for Afilias) to Donahey (Procedures Officer), January 31, 2019, at 11:57 am (PST) (quotation marks omitted). Afilias opposes NDC's request to join the IRP as an interested party; opposes NDC's ability to be heard by the Emergency Officer for an interim order affecting NDC's contractual interests; and even openly objects to NDC's "participation in the hearing" on **NDC's own Section 7 amicus application**. *Id.* Afilias' position is, quite frankly, appalling, running counter to the due process requirements of ICANN's bylaws and concepts of fundamental fairness underpinning modern legal theory.

22. Each of Afilias' demands violates due process. Interested parties have due process rights in adjudications determining their rights and properties. *Baldwin*, 68 U.S. at 233; *Constantineau*, 400 U.S. at 437; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Any order by the Emergency Officer granting interim relief to Afilias without NDC's participation is voidable under the FAA. 9 U.S.C. § 10(a)(3). In addition, the Procedures Officer cannot exclude NDC from participation in the hearing on NDC's *amicus* request. *See Adams v. Baldwin County Bd. of Educ.*, 628 F.2d 895, 897 (5th Cir. 1980) (ruling on a Rule 24 motion without hearing from prospective intervenors violates due process because denial of Rule 24 motion "often will deprive those parties of their only opportunity to be heard"). Because Afilias' positions cannot be squared with due process, they must be rejected.

23. One wonders whether Afilias would take the same position if the roles were reversed. If NDC were to bring its own IRP on the grounds that ICANN is required to enter into a registry agreement with NDC, under Afilias' reasoning Afilias itself would not be able to participate in that IRP, even though it was a member of the contention set. Afilias' arguments here reflect a disregard for fairness and precedent in favor of a myopic focus on winning the .WEB rights it could not win in the public auction.

24. Afilias' disregard for due process has serious consequences, including distorting the record. Afilias would have the Procedures Officer and panelists in this matter make a determination based on Afilias' version of disputed facts without even entertaining NDC's evidence or hearing NDC's argument. Afilias' desire to distort the record without rebuttal from NDC is further illustrated by Afilias' omission from its voluminous Response of the critical fact that Afilias' own executive endorsed and approved those procedures. *See* Part D, *infra*. Afilias cannot simply wish away bad facts, including evidence contradicting its assertions or proving its own wrongdoing. *See e.g.*, Response at 59 n.176. Due process – and the Procedures Officer – should not allow it.

25. Afilias cites no authority – because there is none – that an individual can be denied its right to appear and be heard concerning its own legal interests. NDC must be given an opportunity to be heard on its *amicus* application and on the merits of the dispute determining the validity of its own contractual rights. Afilias' claims to the contrary should be firmly rejected.

**D. Afilias' Challenge To The Supplementary Procedures Has No Substantive Merit.**

26. Afilias' 60-page attack on the adoption of the Supplementary Procedures neglects to mention that Afilias' own representative on the ICANN Board – its Chief Technology Officer, Ram Mohan, who also is a declarant in this IRP – seconded the resolution to adopt the Supplementary Procedures. Annex A (ICANN Public Board Meeting transcript 10/25/2018) at 25-26. Mr. Mohan served on the ICANN Board since 2008 and has been Afilias' Chief Technology Officer since 2001. *See* <https://afilias.info/biographies/ram-mohan>. Given that its own officer urged the adoption of the Supplementary Procedures, Afilias cannot now argue that the ICANN Board acted improperly in adopting them.

27. When a board member induces the board to take action, the board member cannot later complain that the action was improper. In *City of Fairmont v. Fairmont General Hospital, Inc.*, 231 W.Va. 264, 744 S.E.2d 662 (W. Va. 2013), an entity sought to challenge the actions of

a hospital board on which one of its members sat. The court held that neither the entity nor its member had standing to challenge the actions, because the member “could not [challenge the board’s actions] as he voted in favor of the very actions challenged.” *Id.* at 269. *See also Suttons Bay Yacht Village Condominium Ass’n v. Board of Representatives Port Sutton Community*, No. 325327, 2016 WL 2942225, at \*7 (Mich. Ct. App. May 19, 2016) (“[A] board member who acquiesces or participates in business transactions may not later challenge the validity of the transactions in court.”); *Williams v. 5300 Columbia Pike Corp.*, 103 F.3d 122, 1996 WL 690064, at \*5 (4th Cir. Dec. 3, 1996) (table opinion) (“principles of estoppel and acquiescence ordinarily would not permit them to challenge a transaction they supported fully, only after it was a *fait accompli*”); *Radell v. Towers Perrin*, 172 F.R.D. 317, 320 (N.D. Ill. 1997) (former board member’s membership on the board posed an incurable conflict of interest in his prospective class action suit against the company). Insofar as the Procedures Officer intends to apply equitable remedies and principles in response to an *amicus* request – and nothing in the bylaws or Supplementary Procedures actually conveys such power to a Procedures Officer – Afilias should be estopped from attacking its own executive’s endorsement of the Supplementary Procedures.

28. In any event, there was nothing improper about ICANN’s deliberations or adoption of the Supplementary Procedures. Although NDC was not involved in the rulemaking process for the Supplementary Procedures, a review of materials submitted by Afilias and ICANN demonstrates that nothing improper occurred – at all. (*See* Response at 8-37, 41-42; ICANN’s Response to Procedures Officer’s Questions Concerning the Drafting History of the Supplementary Procedures, Jan. 16, 2019, at 8-21.) After multiple initial drafts, one was made available for public comment. Several commenters suggested that parties affected by certain IRPs should be permitted to participate, and one comment expressly suggested “*amicus*” treatment for such parties. After considering the comments, the relevant committee further discussed the proposed rules, including provisions regarding intervention and *amicus* participation. That committee – following the mandate in the bylaws to adopt rules ensuring due

process – concluded that persons who have a material interest relevant to the dispute in the IRP should be able to participate in the IRP in some capacity, either as an intervenor or *amicus*. The final version of the Supplementary Procedures reflecting that conclusion was then passed along to the ICANN Board, which unanimously adopted it. Nothing about this sequence of events is suspicious or nefarious.

29. Afilias’ objection to David McAuley’s involvement in this process ignores two critical points. First, no party to this proceeding had better knowledge of Afilias’ intent to initiate an IRP than Afilias itself, and Afilias’ own executive sponsored the Supplementary Procedures containing the *amicus* provisions to which Afilias now objects. Thus, it was Afilias that ultimately approved these rules with this particular IRP in mind. Second, Afilias admits that Mr. McAuley disclosed to the other members of the committee that he was supporting additional *amicus* language in Section 7 in his capacity as a “participant,” *i.e.*, that he was doing so on behalf of Verisign. Response at 32 (quoting Mr. McAuley: “I had my hand up because I want to speak as a participant here.”). This was entirely proper and transparent.

30. Afilias does not even attempt to criticize the wisdom or fairness of the *amicus* rules in the Supplementary Procedures. Had the Supplementary Procedures been adopted without any due process protection for parties whose rights are directly implicated, then they would have been an easy target for a challenge that they violated ICANN’s bylaws requiring the rules to comply with due process.

31. Once one cuts through Afilias’ bluster about having too many ICANN lawyers on the drafting committee and other picayune bureaucratic quibbles, Afilias’ only real objection is that ICANN should have sought further public comment. Afilias is wrong. There is no requirement for additional public comment. Afilias concedes that ICANN’s bylaws only require public comment for policies that “substantially affect the operation of the Internet” – a standard not nearly implicated here. *See* Response at 44-45 (quoting ICANN Bylaws § 3.6(a)). (“With respect to any policies that are being considered by the Board for adoption that substantially

affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN . . . shall (i) provide public notice . . .”).

32. Moreover, and in any event, even if the Procedures Officer concludes that the better practice would have been for ICANN to have solicited additional public comment, that is hardly a reason to deny *NDC* the ability to participate in this case. It offends all traditional notions of “equity” to deny NDC an opportunity to be heard based solely on an alleged technical violation by someone else.

**E. Afilias’ Attack On NDC’s Independence Is Baseless.**

33. Afilias does not accuse NDC of doing anything – let alone anything wrong – with respect to the ICANN Board’s adoption of the Supplementary Procedures. Instead, Afilias argues that Verisign – not NDC – supposedly exerted undue influence on ICANN’s rulemaking, and that if Verisign is estopped from participating as an *amicus*, then NDC should vicariously be precluded because (according to Afilias) “NDC lacks any independence from Verisign in this IRP.” Response at 38. This argument is unprecedented and makes no sense. It is also wrong.

34. Afilias’ assertion that “NDC lacks any independence from Verisign” is based on incomplete and cherry-picked provisions of the Third Party Designated Confidential Information between NDC and Verisign. Third Party Designated Confidential Information Redacted

Response ¶¶ 62-63. Third Party Designated Confidential Information Redacted

*Id.* ¶ 64; Third Party Designated Confidential Information Redacted

Third Party Designated Confidential Information Redacted

35. There is nothing wrongful or unusual about NDC agreeing to have Verisign finance its bids in the .WEB auction in exchange for agreeing, subject to ICANN’s approval, to assign .WEB to Verisign in the event NDC won the auction. As ICANN has pointed out in this IRP proceeding, Afilias itself has entered into similar agreements. *See* ICANN’s Opposition to [Afilias’] Request for Emergency Panelist and Interim Measures of Protection, December 17, 2018, ¶¶ 26-30; Declaration of Christine Willet in support thereof, ¶ 35 (describing that Afilias has both transferred, and been transferred, registry agreements before delegation).

36. In contrast, Afilias does not and cannot cite any provision of the DAA giving Verisign the right to dictate NDC’s arguments to an arbitrator in an IRP – because no such provision exists. *Afilias wrongly conflates the fact that NDC’s interests with Verisign are largely aligned on the bidding and transfer of .WEB with the notion that NDC is not independent from Verisign for purposes of this IRP.* In fact, NDC has separate and discrete interests at stake in this IRP. Among other things, NDC has a separate and independent interest in defending its conduct, as Afilias has accused NDC of wrongdoing. For example, Afilias has essentially accused NDC of fraud, *see, e.g.*, Request ¶¶ 37, 47-55, and NDC has an interest – independent of any contractual relationship with Verisign – in answering these allegations. Afilias also alleges that NDC violated the New gTLD Applicant Guidebook by supposedly “reselling, transferring or assigning its application.” *Id.* at ¶ 56. But, in fact, the DAA did no such thing. Curiously, Afilias concedes this point later in its Response, and even attempts to use it as a basis for arguing that Verisign has no interest in the outcome of this IRP. *See* Response at 49-50.

37. NDC also has an independent interest in defending itself from Afilias’ false accusations. Indeed, NDC’s participation in the IRP may be essential for the true facts to be presented to the IRP Panel. Certainly Afilias cannot be trusted to be forthright with the IRP Panel – as evidenced by its blatant omission of the fact that its own executive seconded the vote

for the Supplementary Procedures – and ICANN itself may lack the information or incentive to fully challenge Afiliás’ false allegations.

38. NDC has other rights under the DAA that are independent of Verisign’s.

Third Party Designated Confidential Information Redacted

These provisions show that NDC does, in fact, have interests independent from Verisign.

39. Furthermore, in the event that ICANN does not approve the transfer of .WEB to Verisign, NDC has independent interests in selling or operating the .WEB domain.

Third Party Designated Confidential Information Redacted

40. NDC was the winning bidder in the .WEB auction. Thus, it is NDC, not Verisign, that currently has the right to enter into a Registry Agreement with ICANN. Thus, to exclude NDC from this proceeding would be improper, irrespective of whatever the Procedures Officer decides with respect to Verisign’s separate application. Third Party Designated Confidential Information Redacted

Nor does it justify excluding NDC from meaningful participation in this IRP, given that it is NDC’s rights, first and foremost, that are at issue here. Indeed, for purposes of the IRP, NDC and Verisign are separately represented by different counsel in this matter, which would not be necessary if NDC were Verisign’s agent or if Verisign controlled NDC.

### **III. NDC SHOULD BE ALLOWED TO PARTICIPATE AS AN *AMICUS* BEFORE THE EMERGENCY PANELIST.**

41. Because the Supplementary Procedures are clear that NDC can participate in the IRP before the full IRP Panel, it necessarily follows that NDC must be allowed to participate in all aspects of the IRP, including Afilias' request for interim relief. The Supplementary Procedures could have been clearer in this regard by including a reference to the Emergency Panelist in the *amicus* provisions, but one cannot reasonably infer from the language of Section 7 that ICANN intended to permit a real party in interest to defend its interests in an IRP but intended to exclude the same real party in interest from defending the same interests whenever the claimant seeks emergency relief.

42. The clear intent of the Supplementary Procedures is to ensure fairness and due process. NDC argued that due process requires its full participation in the IRP, including in any "emergency" claim for interim relief. NDC's Application ¶ 4. Afilias completely ignores this argument in its Response, thereby conceding that its position would deny NDC due process in violation of ICANN's bylaws. Notwithstanding Afilias' strained and hyper-technical interpretation of the Supplementary Procedures, Response at 51-52, NDC has a due process right to participate before the Emergency Panelist.

43. Excluding *amici* from participating in emergency applications that impact their rights would encourage gamesmanship and forum shopping. Claimants could choose to seek interim relief, even in non-emergency situations, simply as a tactical maneuver to prevent the real parties in interest from briefing the merits. Indeed, it appears that this is precisely what Afilias intended in this case. The Procedures Officer should not allow Afilias to subvert due process through such naked gamesmanship.

44. Indeed, there is no "emergency" here at all, and there is no reason the IRP Panel itself could not, once fully empaneled, consider Afilias' request for interim relief. The Emergency Panelist is unnecessary given ICANN's agreement to forebear delegation to NDC until Afilias' interim request can be heard.



**IV. THE SCOPE OF NDC's *AMICUS* PARTICIPATION IN THE IRP MUST BE DECIDED BY THE IRP PANEL, NOT THE PROCEDURES OFFICER.**

45. NDC and Afilias agree on one procedural point: the IRP Panel, not the Procedures Officer, should decide the scope of NDC's participation as an *amicus*. See Response at 56, n. 171 (the scope of *amicus* participation is subject to the "discretion of the IRP Panel"). NDC reserves its rights to raise the scope of its participation in this IRP before the full Panel.

46. Afilias tries to ignore the clear guidance in Section 7 of the Supplementary Procedures that "the IRP Panel shall lean in favor of broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws." Supplementary Procedures § 7, at 10, n. 4. Afilias buries its discussion of this clear guidance in a footnote of its Response, presumably in the hope that the Procedures Officer might miss it. Afilias asserts, without any support whatsoever, that "broad participation" should actually mean "limited to the briefing." Response at 56, n. 171. This argument is plainly wrong, given the mandate of the Supplementary Procedures (*see* footnote 4) requiring "broad participation" and the bylaws' requirements of fairness and due process.

47. Notably, the Supplementary Procedures' use of the phrase "*amicus curiae*" is a term of art that clearly encompasses real parties in interest, and therefore differs from the more traditional use of that term in litigation. Afilias recognizes this, and tries to argue that an *amicus* in an IRP should be limited to the more traditional role of an *amicus* in litigation or international arbitration. Response at 53-55. But a careful reading of Section 7 shows that Afilias is, once again, incorrect.

48. As described in Section 7, an "*amicus*" in an IRP proceeding is a unique status that can cover a broad category of litigants with a wide range of interests. At one end of the spectrum, Section 7 *amici* could be individuals with direct and substantial interests in the outcome of an IRP, but who are not "Claimants" because, for instance, they may support an ICANN decision. These, for example, could be gTLD contention set members or participants in process-specific expert panels. Such *amici* are more analogous to intervenors under Federal Rule

of Civil Procedure 24 or indispensable parties under Federal Rule of Civil Procedure 19. Other *amici* may have particular facts or perspective to offer the IRP Panel in a limited role, much like more traditional *amicus curiae* practice. Afilias' strained attempt to pigeonhole every Section 7 *amicus* into the latter, limited role has no basis in the text of Section 7 and raises serious due process concerns. Further, it completely ignores the fact that Section 7 provides the IRP Panel with the power (to be exercised consistent with due process) to widen the participation of Section 7 *amici* based on the interests involved.

## V. CONCLUSION

49. For the reasons discussed herein, NDC's application to participate in all phases of the IRP should be granted.

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