

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 *Amicus Curiae*.

ICDR CASE NO: 01-18-0004-2702

**VERISIGN, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS REQUEST
TO PARTICIPATE AS *AMICUS CURIAE* IN INDEPENDENT REVIEW PROCESS**

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INTRODUCTION

1. The record before this Panel establishes unequivocally that Verisign is entitled to participate in this IRP as an *amicus curiae*. Section 7¹ of ICANN’s Interim Supplementary Procedures provides that if the briefings before the Panel “significantly refer to actions taken” by a person that is external to the dispute, such person “shall be permitted to participate as an amicus.” There is no reasonable dispute that Verisign meets the requirements of Section 7.

2. The relief Afiliias seeks in this IRP² is to vacate the auction award of .WEB in favor of NDC and to award .WEB to Afiliias. Afiliias seeks this relief based on ICANN’s alleged violation of its Bylaws by not disqualifying Verisign and NDC from participation in the auction because of their purported Guidebook violations—namely, Verisign’s and NDC’s entry into the Domain Acquisition Agreement (“DAA”), which Afiliias contends constitutes an assignment of .WEB to Verisign in violation of the Guidebook—and alleged competition concerns with Verisign’s operation of .WEB. Afiliias’ claims and requested relief seek directly and unequivocally to contravene NDC’s and Verisign’s legal rights and economic interests.

3. The truth or falsity of Afiliias’ claims regarding NDC’s and Verisign’s conduct is irrelevant to this Panel’s task in deciding *amici* participation; all that matters is that, in Section 7’s terms, NDC and Verisign have a “material interest” in the dispute or Afiliias has chosen to “significantly refer” to them. That said, NDC and Verisign deny Afiliias’ claims in the strongest terms. The DAA is explicit that it does not assign rights to .WEB or the .WEB application to Verisign. Instead, it provides only that NDC may request in the future, following execution of a registry agreement between ICANN and NDC, that ICANN consent to an assignment to

¹ ICANN’s Bylaws refer to “Rules of Procedure” for IRPs, while the Interim Supplementary Procedures (which are the “Rules of Procedure” for IRPs) use the term “section” to identify the rules set forth therein.

² Verisign uses the same defined and/or abbreviated terms here that it used in its initial Request.

Verisign. As for Afilias' competition claims, the Antitrust Division of the United States Department of Justice ("DOJ Antitrust Division") investigated Verisign's proposed operation of .WEB and ended its inquiry without taking any action—a fact Afilias conspicuously fails to mention in its over 1,000 pages of IRP filings.

4. The determination by any court, arbitration panel, or administrative body of the claims and defenses alleged in this IRP would require that NDC and Verisign be joined as indispensable parties and allowed to participate fully in those proceedings to protect their interests. Specifically, refusing such participation would deny NDC and Verisign due process of law. Neither the commercial realities presented by Afilias' claims, nor the requirements of fundamental fairness and due process, change because Afilias has chosen to pursue its claims in an IRP. NDC and Verisign must be granted status as *amici* and allowed full participation as necessary to protect their interests in these proceedings.³

5. Tellingly, Afilias has never disputed that Verisign and NDC have the requisite "material interest" to qualify as mandatory amici under the terms of Section 7. Instead, because it is so clear that NDC's and Verisign's applications must be granted, Afilias has been forced to manufacture a frontal assault on the procedure that led to adoption of Section 7, misrepresenting the drafting history of that section to claim that the IRP-IOT acted improperly in promulgating Section 7's *amicus* provisions. Notably, Afilias has never claimed that Section 7 itself violates ICANN's Bylaws. Equally fundamental, in attacking Section 7, Afilias failed to disclose that its representative on the ICANN Board—Ram Mohan, an Afilias executive officer who is a

³ The core task of an IRP Panel is to determine whether ICANN has exceeded the scope of its mission or otherwise failed to comply with its Bylaws, Articles or other internal policies or procedures. (Bylaws, § 4.3.) An IRP Panel is not empowered to substitute its judgment for that of the ICANN Board or staff, or make findings unnecessary to its core task of determining whether ICANN complied with its Bylaws. (*See Booking.com v. ICANN*, ICDR Case No. 50-2001400-0247 (Final Declaration, 3 March 2015), ¶115.) The affirmative relief Afilias seeks, including vacating the auction results and awarding the gTLD to Afilias, is beyond the scope of a Panel's authority under the Bylaws.

declarant in these proceedings—successfully moved ICANN’s Board to adopt the Interim Supplementary Procedures.⁴ For the reasons explained at length in previous submissions by Verisign, NDC, and ICANN, the Panel should reject Afiliás’ baseless attack on Section 7.

6. The only real question for the Panel at this point should be the scope of Verisign’s and NDC’s participation in these proceedings. Section 7 entrusts that matter to the Panel’s discretion, providing that the Panel should exercise that discretion in favor of “broad participation by an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the Bylaws.” (Emphasis added.) Full participation as *amici* is the only outcome that is consistent with the purposes set forth in ICANN’s Bylaws and incorporated into Section 7. As stated in Section 4.3 of the Bylaws, an IRP must (i) “ensure fundamental fairness and due process”; (ii) “[s]ecure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes”; and (iii) “provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts” with ICANN. (Bylaws, §§ 4.3(a) & (n).) Each of these foundational principles requires that Verisign and NDC be allowed to participate fully in the determination of all issues that may affect their interests, including the opportunity to present evidence and argument and appear at hearings in order to contest Afiliás’ claims of NDC or Verisign wrongdoing or contest claims that otherwise may adversely affect NDC’s and Verisign’s legal or economic interests.

7. Afiliás’ argument that Verisign’s and NDC’s participation in this IRP should instead be restricted to the “traditional” *amicus* role of “the submission of ‘friend of the court’

⁴ This fact alone should estop Afiliás from claiming that Section 7 is invalid. (Verisign’s Reply in Support of Its Request to Participate as *Amicus Curiae* (5 Feb. 2019), at 8–9 (“Verisign Reply”).)

briefs” is inconsistent with these foundational principles.⁵ Neither the Interim Supplementary Procedures nor the Bylaws contain any limitation on participation by *amici* that would support Afilias’ position. To the contrary, as required by Section 4.3 of the Bylaws, Section 7 is specifically designed to have flexibility to fairly address the particular claims made in the IRP, including when those claims directly implicate third party interests. IRPs may vary widely in nature and purpose, from a simple complaint that ICANN staff acted contrary to an ICANN policy, to complex claims that purport to seek to contravene contracts and property interests of third parties, such as the specious claims here. ICANN’s Bylaws, and Section 7, were therefore designed to require that proceedings to resolve an IRP be designed to serve “fundamental fairness and due process” and as an “efficient” and “just resolution of Disputes” in light of the claims actually made in the IRP. (Bylaws, §§ 4.3(a) & (n).)

8. Accordingly, Verisign and NDC must be permitted to participate in the proceedings to defend against Afilias’ allegations and, to that end, to present their supporting argument and evidence. The Bylaws, Section 7, and due process require nothing less. The Declaration of the Procedures Officer presents no basis for doubting this conclusion. This “non-decision” says only that he lacked authority to address Afilias’ manufactured claims regarding Section 7 (his appointment was made under Section 7), while incompletely and inaccurately summarizing the positions of the parties.

FACTUAL OVERVIEW OF AFILIAS’ CLAIMS

9. At its core, this dispute concerns who will operate .WEB, which was awarded to NDC following an open and competitive public auction.⁶ NDC’s bid was financially supported

⁵ See Afilias Domains No. 3 Limited’s Sur-Reply to Verisign, Inc. and Nu Dotco, LLC’s Requests to Participate as *Amicus Curiae* in Independent Review Process (12 Feb. 2019), at 7 n.20 (“Afilias Sur-Reply”).

⁶ This IRP proceeding relates to the .WEB gTLD. .WEB is one of the new gTLDs that applicants applied for as part of ICANN’s New gTLD Program (the “Program”), under which entities submitted multiple applications to offer

by Verisign pursuant to the terms of the DAA. Under the DAA, NDC agreed that, if it won the auction and executed a registry agreement for .WEB, NDC would apply for ICANN's consent to assign that agreement to Verisign so that Verisign would become the registry operator of .WEB.

10. Both before and after the public auction, Afilias and other bidders acting in concert with it unsuccessfully attempted to block or set aside the public auction—both through unsuccessful litigation and coercive proceedings under ICANN's Bylaws—in order to force a private auction in which they (the losing bidders in the contention set) would split the proceeds of the auction among themselves. In a public auction, the proceeds go to ICANN, which is bound to use the proceeds for public interest, for example, for investment in Internet security and infrastructure. NDC was not cowed by Afilias' coercive misconduct and, moreover, all of the pre-auction claims were rejected, respectively, by a United States federal district court in preliminary injunction proceedings and final judgment, and by ICANN in accountability proceedings under the Bylaws, and the auction proceeded.

11. After the auction award to NDC, when Afilias apparently learned that Verisign provided financing for NDC's bid, Afilias added allegations regarding Verisign to its other baseless reasons for subverting the public auction and award to NDC. Although Afilias' claims regarding the DAA were made in writing to ICANN in both August and September 2016, Afilias never filed an IRP until November 2018, over two years later, a delay that not only prejudiced ICANN and proposed *amici*, but estops Afilias from advancing its claims in this IRP.

12. Afilias' allegations of Guidebook violations are based on the DAA between

new gTLDs to Internet users. Because there were multiple, qualified applicants for .WEB, the .WEB applications were placed in a "contention set" by ICANN, as provided for in ICANN's Applicant Guidebook for the Program, and ICANN ultimately implemented a public auction to resolve the contention set. The auction occurred in July 2016, and NDC was the prevailing bidder. (*See* Request by VeriSign, Inc. to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), at 5–15 ("Verisign Request").)

Verisign and NDC. Contrary to Afilias' allegations that the DAA transferred NDC's application for .WEB to Verisign in alleged violation of the Guidebook, the DAA is an executory contract pursuant to which (i) NDC and Verisign would work together in connection with the resolution of the .WEB contention set consistent with the Guidebook, (ii) Verisign would provide funds necessary to such a resolution, including in connection with NDC's participation in an ICANN public auction (as ultimately transpired), and (iii) if NDC prevailed as the winner of the contention set and ultimately entered into a registry agreement with ICANN for the .WEB gTLD, then NDC would apply to ICANN for its consent to assign the registry agreement to Verisign in exchange for additional compensation to NDC.

13. The DAA did not transfer ownership, management or control of NDC to Verisign, and it did not sell, assign, or transfer NDC's .WEB application to Verisign. The DAA expressly contemplates only a possible future assignment of a registry agreement upon prior consent by ICANN. It also clearly contemplates that Verisign could provide the aforementioned funding and compensation to NDC and still not end up as the registry operator for the .WEB gTLD.⁷

14. Further, based on (false) public accusations by Afilias and other bidders that NDC had sold itself or its gTLD application, Verisign asked NDC to confirm in a written Confirmation specifically that (i) NDC had not transferred ownership or control of NDC to any party; (ii) NDC had not sold, assigned or transferred any of its rights or obligations in connection with the .WEB application to any party; and (iii) NDC would not undertake any such sale, assignment or transfer in the future, other than upon the prior consent of ICANN pursuant to the DAA.

15. Within days of the public auction, Afilias added purported competition claims to

⁷ See *Cockerell v. Title Ins. & Trust Co.*, 42 Cal. 2d 284, 291 (1954); *California Ins. Guarantee Ass'n v. Workers' Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1335 (2012) ("In determining whether an assignment has been made, the intention of the parties as manifested in the instrument is controlling.").

its attack on the auction based on the potential operation of .WEB by Verisign. Like its claims regarding the DAA, Afilias’ competition claims make no sense in light of the actual facts. On January 18, 2017, the DOJ Antitrust Division issued a civil investigation demand to Verisign, ICANN, NDC, and presumably others⁸ that participated in the auction for .WEB, seeking documents and information in connection with the DOJ’s investigation of Verisign’s proposed acquisition of NDC’s contractual rights to operate the .WEB gTLD. In or about January 2018, the DOJ Antitrust Division closed its investigation without taking any action. Despite Verisign’s public disclosure that the DOJ had ended its investigation, Afilias failed to disclose this investigation in any of its multiple filings in this proceeding, even as it claims that ICANN would violate its competition mandate if operation of .WEB were transferred to Verisign.

ARGUMENT

I. Verisign is a Mandatory Amicus Under Section 7.

16. The sole issue to have been decided by the Procedures Officer—and which should now be determined by this Panel—is whether NDC and Verisign have the required “material interest” to participate as *amicus curiae*. Section 7 provides that an entity shall be entitled to participate as an *amicus curiae* “[i]f the briefings before the IRP PANEL significantly refer to actions taken by a person, group, or entity that is external to the DISPUTE.” (Emphasis added). Afilias never disputes that its briefing “significantly refer[s]” to Verisign. Nor could it – Afilias mentions Verisign 56 times in its Request for Interim Relief and 93 times in its Amended Request for Independent Review Process (21 Mar. 2019) (“Amended IRP Request”). Indeed, Afilias could hardly avoid mentioning Verisign and NDC in its pleadings, as its complaint is fundamentally premised upon alleged actions by NDC and Verisign and seeks relief that is

⁸ Verisign is informed and believes that Afilias participated in the DOJ Antitrust Division’s investigation.

intended to cause severe harm to their interests, including reversal of the auction award to NDC. There can be no question, therefore, that NDC and Verisign qualify as *amici*. Plainly, they do.

II. Afilias' Challenge to the Supplementary Procedures Is Meritless.

17. In summary, Afilias' attack on the *amicus* provisions of Section 7 is based on its claim that David McAuley, a Verisign employee and chair of the IRP-IOT committee charged with formulating rules of procedure for IRPs allegedly knew about Afilias' CEP while working on the *amicus* rules and somehow intentionally "manipulated" them to allow Verisign and NDC to participate in this IRP. This is a false narrative that Afilias has manufactured for the sole purpose of denying NDC and Verisign the right to defend themselves against Afilias' attack.

18. First, the drafting history of the Interim Supplementary Procedures clearly shows that the concept of participation by potentially affected third parties in IRPs originated years earlier in public comments, and that some form of third party participation was always intended to be part of the Procedures.⁹ Second, the *amicus* provision originated with the IRP-IOT's counsel, Sidley Austin, and the final language was drafted by ICANN's counsel, Samantha Eisner. Third, Mr. McAuley did not know about Afilias' CEP or IRP until after the IRP-IOT had completed its work on the Interim Supplementary Procedures. *See infra* n.21. Finally, Afilias' own representative on the ICANN Board—its Chief Technology Officer Ram Mohan—seconded the resolution for the ICANN Board to adopt the Interim Supplementary Procedures.¹⁰

⁹ Attached hereto as Exhibit A is a demonstrative exhibit submitted by Verisign during the February 21, 2019 hearing before the Procedures Officer. The exhibit summarizes the relevant chronology of events with respect to Afilias' claim that the IRP-IOT acted improperly, and demonstrates unequivocally that Afilias' charge is baseless. In particular, the chronology makes clear that ICANN's counsel, Samantha Eisner, not Verisign, proposed the Section 7 *amicus* language disputed by Afilias, and that all the terms ultimately adopted were under consideration for many months prior to the adoption of Section 7.

¹⁰ Afilias has now amended its IRP to bring a complaint regarding the process by which ICANN adopted Section 7, relying on the same arguments it made in its briefs to the Procedures Officer. (Amended IRP Request, ¶¶ 84–88.) At no point does Afilias allege that the substance of Section 7—allowing materially affected persons to participate as *amici*—violates any of ICANN's Bylaws. On the contrary, Section 7 is critical to effectuating the Bylaws'

III. The Panel Must Allow Verisign and NDC Broad Participation Rights in This IRP.

19. Section 7 gives the Panel the flexibility and discretion to permit *amici* such as Verisign and NDC to participate in these proceedings to the extent that this dispute places their conduct in issue or may affect their interests.¹¹ Denying Verisign or NDC such participation would violate ICANN's Bylaws and basic principles of fundamental fairness and due process.

A. Fundamental Fairness and Due Process Mandate Broad Participation Rights.

20. In certain cases, *amici* may have a distinct interest that is not co-extensive with the entirety of the parties' disputes. Here, however, as demonstrated *supra*, NDC's and Verisign's alleged conduct is a substantial focus of Afilias' briefing. Under these circumstances, Verisign and NDC should be allowed broad participation in this IRP.

21. Specifically, Verisign should be granted the right to participate in any proceedings relating to issues that may impact its interests, including: (i) the DAA and NDC's or Verisign's alleged failure to comply with the Guidebook or other ICANN rules based on the DAA; (ii) Verisign's alleged role in creation of the *amicus* rules of the Interim Supplementary Procedures; and (iii) the alleged competitive concerns with Verisign's proposed operation of .WEB.

22. Further, Verisign's participation should not be limited to briefing, but should include argument, evidence presentation, participation at hearings on relevant issues, and access (with reasonable confidentiality restrictions) to all pleadings and evidence filed in this IRP.

23. Afilias' briefing itself demonstrates that the scope of Verisign's participation must be broad, because virtually every claim made in its Amended Request alleges misconduct by

requirement that IRPs ensure "fundamental fairness and due process" and "secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes." (Bylaws, §§ 4.3(a) & (n).)

¹¹ To be clear, Verisign's position is not that every *amicus* in every IRP proceeding must be granted access to hearings or the opportunity to present evidence but, rather, that the particular circumstances presented here warrant broad participation by Verisign and NDC.

Verisign and NDC. More specifically, Afiliias' claims rest on allegations that (i) the DAA between Verisign and NDC impacted NDC's disclosure obligations and should disqualify NDC's gTLD application and participation in the .WEB auction; and (ii) an assignment of the registry agreement for .WEB to Verisign would raise competition concerns and thus violate ICANN's Bylaws. (Amended IRP Request, ¶ 5 (stating that "[b]ased on the terms of the DAA, it is evident that NDC violated the New gTLD Program Rules" and "[by] enabling VeriSign eventually to acquire the .WEB gTLD, ICANN has eviscerated ... one of ICANN's founding principles: to introduce and promote competition in the Internet namespace in order to break VeriSign's monopoly.").) Verisign is entitled to defend itself against these baseless allegations and to provide the Panel with the benefit of a complete and honest presentation of the facts and argument relating to Afiliias' allegations.

24. Similarly, Afiliias requests interim relief and a final award that would damage NDC's and Verisign's interests—far more than it would affect the interests of ICANN. Afiliias seeks to enjoin delegation or assignment of .WEB to NDC or Verisign for the entire pendency of this proceeding. As a final award, it seeks transfer of .WEB to itself, rather than to NDC or Verisign, in direct contravention of their existing contracts with ICANN and each other. (*See* Request for Emergency Panelist and Interim Measures of Protection (27 Nov. 2018), ¶ 4 (seeking "a stay of all ICANN actions that further the delegation of the .WEB gTLD during the pendency of the IRP"); Amended IRP Request, ¶ 89 (seeking a Binding Declaration "ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afiliias ...").)

25. Under these circumstances, anything less than the substantial participation Verisign proposes would violate the lodestar guiding the creation of the Supplementary Procedures—that they provide for "fundamental fairness and due process" in IRP proceedings,

as required by ICANN’s Bylaws. (*See* Bylaws, § 4.3(n)(iv) (“The Rules of Procedure are intended to ensure fundamental fairness and due process”).) Whether or not an IRP is binding upon non-parties, less than full participation plainly further exposes an IRP decision to collateral attack by those excluded from full participation and whose interests are impacted by the IRP. (*See, e.g., Miracle Adhesives Corp. v. Peninsula Tile Contractors’ Ass’n*, 157 Cal. App. 2d 591 593 (1958) (“Persons ‘whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action’ are indispensable parties, and *the action cannot proceed without them.*”) (emphasis added); *Westra Constr., Inc. v. U.S. Fid. & Guar. Co.*, No. 1:03-cv-0833, 2006 WL 1149252, at *2 (M.D. Pa. Apr. 28, 2006) (a nonparty to an arbitration can challenge an arbitration award “when the nonparty is adversely affected by the decision.”).)¹²

B. ICANN’s Bylaws and Section 7 Favor “Broad Participation” and Do Not Limit the Scope of Participation as Afilias Argues.

26. Section 7 contemplates extensive *amicus* participation in IRPs when the interests of third parties warrant it. Section 7 defines “*amicus curiae*” broadly to include “[a]ny person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws.” Only a party asserting a claim against ICANN comes within the definition of “Claimant.” Here, Afilias attacks the results of the auction, which it lost, and thus qualifies as a Claimant. Since NDC won the auction, its interests (and those of Verisign as a potential assignee) may be critically impacted by the success

¹² In an analogous situation, participation by impacted parties is also widely allowed in challenges to licensing decisions by administrative agencies such as the FCC, FAA, or FERC. In *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), the Supreme Court determined that a party facing “economic injury” from a licensing decision had standing to challenge such a decision in court. This grant of standing, in turn, provides a basis for intervention by such a party in the original licensing proceeding at the agency. *See Elm City Broadcasting Corp. v. FCC*, 235 F.2d 811 (D.C. Cir. 1956) (FCC abused its discretion by denying intervention to party with economic interest solely on basis the Commission did not think party would assist in decision-making).

or failure of Afiliás' claim. But, NDC, having won the auction, does not dispute the award in its favor and thus is not a "Claimant" on that basis under Section 7. Therefore, NDC and Verisign can only protect their interests in defending the award by participating as an *amici*, and Section 7 was written specifically to provide such broad participation under the *amici* provisions.

27. Section 7 places no limits on the scope of an *amicus*' participation in the proceedings. Instead, once it is determined that the proposed *amicus* has a material interest that permits it to participate in the proceedings, the IRP Panel has the discretion to define the scope of that participation. (*See also* Verisign Reply at 28.) The Panel should exercise that discretion here to permit Verisign to participate fully in these proceedings, at least to the extent that Afiliás' claims place Verisign's conduct or interests at issue.

28. On its face, Section 7 favors "broad" *amicus* participation. The text of Section 7 provides that, "in exercising its discretion in ... 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 set forth at Section 4.3 of the ICANN Bylaws." (Emphasis added.) Those purposes include, among other things, achieving "fundamental fairness and due process," "ensur[ing] that ICANN is accountable to the global Internet community and Claimants," and "secur[ing] the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes." (Bylaws, §§ 4.3(a) & (n).) Section 7 thus provides the IRP Panel wide berth to decide what form of participation is most appropriate for a party with a material interest in the dispute, in light of the characteristics of the particular dispute and the underlying purposes of the IRP.

29. Afiliás incorrectly contends that this language simply "references the Panel's discretion in allowing further briefing and should not be deemed to allow for broader rights

reserved for parties in the Interim Procedures or otherwise expand the traditionally limited role of *amicus curiae* in the context of international arbitrations.” (Afilias Domains No. 3 Ltd.’s Response to Verisign, Inc.’s and Nu Dotco LLC’s Requests to Participate as *Amicus Curiae* in Independent Review Process (28 Jan. 2019) at 56 n.171 (“Afilias Response”).) Contrary to Afilias’ argument, Section 7 does not limit the Panel’s discretion to directing briefing.¹³ Rather, Section 7 requires the Panel to tailor participation to achieve fundamental fairness to non-parties—who in this case are unable fully to defend their interests because of the definition of “Claimant”—and ascertainment of the truth. In the latter regard, only NDC and Verisign are in a position to ensure the Panel’s decision is based on a complete evidentiary record.

30. In some cases, written submissions by an *amicus curiae* may be sufficient to “further the purposes of the IRP.” Those cases, however, will typically involve submissions by organizations or entities that have general interests or broad perspectives that may assist the Panel in reaching its decision, but whose own rights and interests are not specifically at issue.

31. In this case, however, furthering the purposes of the IRP – including “efficiency, transparency, and the just resolution of disputes”—requires that NDC and Verisign be allowed to participate fully in the proceedings, not just through written submissions, but also by presenting evidence and argument in hearings.¹⁴ Evidence refuting Afilias’ allegations regarding the DAA

¹³ While the IRP Panel has the prerogative to decide what issues will be covered in briefing, and the procedures, deadlines, and page limits for such briefing, Section 7 does not in any way limit the IRP Panel’s discretion on these issues; nor does it provide that *amici* are limited to written briefing. In the absence of an express prohibition in the applicable rules of an ADR institution, the panel or tribunal may exercise its discretion in determining the procedures for a particular matter. *See, e.g.*, Gary Born, *International Commercial Arbitration* 2145 (2d ed. 2014) (“Filling in the considerable gaps in the framework provided by institutional rules is left to the subsequent agreement of the parties or, if they cannot agree, the arbitral tribunal. The arbitrators’ discretion to determine the arbitral procedure, in the absence of agreement between the parties on such matters, is one of the foundational elements of the international arbitral process.” (Emphasis added).)

¹⁴ *Cf. United States v. City of Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 1988) (“A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the

and competition concerns (as well as evidence of Afiliás' own violations of the Auction Rules and the Bidder Agreement that would deprive Afiliás of standing to bring this IRP), is in Verisign's and NDC's custody. ICANN, moreover, lacks the interest in and the practical ability to defend NDC's and Verisign's interests. As ICANN has explained, "ICANN's interest in this matter is not in picking winners and losers, but in ultimately completing the rollout of .WEB pursuant to the terms of the Guidebook and consistent with ICANN's Articles and Bylaws." (ICANN's Response to Amended Request for Independent Review Process (31 May 2019), ¶ 10.) Verisign's interest, on the other hand, is to offer evidence that its conduct was not wrongful, that the DAA does not violate the Guidebook, that its operation of .WEB would not harm competition, and that the award of .WEB to NDC was proper. For each of these reasons, it is essential that Verisign and NDC be permitted full participation and opportunity to ensure that the Panel is provided evidence critical to the proper evaluation of Afiliás' claims.

C. Section 7, Including Its Drafting History, Supports a Broad, Flexible Interpretation of the Scope of Amicus Participation.

32. The drafting history of Section 7 confirms that the Interim Supplementary Procedures' provisions on *amicus* participation are designed to accommodate broader third party involvement in IRP proceedings than the term "*amicus*" is traditionally understood to include either in domestic practice or in international arbitration. Specifically, there are numerous statements by members of the IRP-IOT throughout the drafting process that reflect the intention that third parties with a material interest affected by an IRP proceeding be afforded the

court.") (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995)). Afiliás has previously argued that domestic U.S. case law regarding intervention is "irrelevant" because Verisign and NDC are not seeking "intervention" under the Interim Supplementary Procedures, but rather *amicus curiae* status. (See Afiliás Sur-Reply, at 7.) These labels are not significant here. As explained in further detail below, the IRP-IOT intended the concept of "*amicus curiae*" status in Section 7 to encompass the kind of participation known as intervention under Rule 24 of the Federal Rules of Civil Procedure.

opportunity to participate in the proceedings.

33. The IRP-IOT intended specifically that the *amicus* provision of Section 7—rather than the intervention provision in the Interim Supplementary Procedures—have the flexibility to encompass the kind of third-party participation contemplated by Federal Rule of Civil Procedure 24. The members of the IRP-IOT had no objection to permitting parties with a material interest in the subject of the dispute to participate in the proceeding,¹⁵ and recognized that such participation would not necessarily fall within the narrow concept of “intervention” in the context of an IRP because of the peculiar definition of “Claimant” under the Procedures.

34. Unlike under Federal Rule of Civil Procedure 24, in order to intervene in an IRP, which is a unique form of proceeding, a party must be “qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws.” That is, the party seeking to intervene under Section 7 must itself “suffer an injury or harm that is directly and causally connected to [ICANN’s] alleged violation” of the Articles of Incorporation or Bylaws. (Bylaws, §§ 4.3(b)(i) & (iii).) As discussed above, NDC, having won the auction, is not a Claimant for purposes of this dispute and thus is not in a position to invoke this particular intervention procedure. The reality is that many third parties seeking to participate in an IRP proceeding to defend their own interests would not meet that requirement.

35. Thus, as Ms. Eisner explained, “[t]he IRP differs from regular litigation because an IRP has very limited standing rules. I think it’s very important that if we have a right for someone to come in as a claimant, language such as significant interest here doesn’t align with the standing requirements of the bylaws which require an allegation of material harm [from

¹⁵ See Meeting Minutes, October 11, 2018, Afilias Response Ex. 205, at 13 (“[H]aving just a significant interest related to [the action], doesn’t actually require that someone have an IRP claim against ICANN. ... I think we don’t have any concern with allowing those people to be [p]art of a proceeding.”) (statement of Samantha Eisner) (“October 11 Meeting”).

ICANN’s failure to comply with its Bylaws and Articles].” (October 11 Meeting, at 14 (statement of Samantha Eisner).) Indeed, some parties might “actually support the action that ICANN took,” rather than take the position that ICANN breached its obligations under the Bylaws and Articles. (*Id.* at 13.)

36. Accordingly, the IRP-IOT decided to subsume Federal Rule 24-type intervention into the *amicus* provision, at least pending the implementation of final rules. (*Id.* (“So I think we could move that down either to *amicus*. So I think we put some things into the *amicus* section that cover[] this type of interest in a proceeding.”) (statement of Samantha Eisner).) As one IRP-IOT member put it in summarizing the effect of the provisions of Section 7: “All this paragraph is intending to say, is that if you are otherwise qualified to be a claimant[,] [i]f you additionally satisfy the situation described in this paragraph you should be able to intervene as a claimant as of right. Rather than wait for another case. Similarly if you—even if you don’t qualify as a claimant, but you satisfy the conditions in this paragraph you should be allowed to intervene as an *amicus* and it shouldn’t be merely discretionary. That’s the aim.” (*Id.* at 15 (statement of Malcolm Huty).)¹⁶

¹⁶ October 11 Meeting, at 16 (statement of Malcolm Huty) (noting reliance on the Federal Rules of Civil Procedure for Section 7); Meeting Minutes, June 1, 2016, Afilias Response Ex. 225, at 25–26 (“Obviously you don’t want to allow anybody to intervene in a dispute, but you also do want to make sure that all of the parties and interests are before the panel at the right time. And so that, I think, is something that, as we go through the documentation, we really want to think about, that we are making sure that there’s an efficient way for other parties who have an interest in the dispute to make their views known or to be participants.”) (statement of IRP-IOT Chair Becky Burr); Comments of the Intellectual Property Constituency on the Draft Independent Review Process Updated Supplementary Procedures, February 1, 2017, Afilias Response Ex. 236, at 29–30 (“In addition, although the IPC understands that IRPs are directed against ICANN, there may be third parties who wish to intervene in support of ICANN’s position or to safeguard their own position.”). As relevant here, the Federal Rules—specifically, Rule 24—require a court to “permit anyone to intervene who ... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24. “[T]he intervenor is entitled to litigate fully on the merits once intervention has been granted.” Wright & Miller, 7C Federal Prac. & Proc. § 1920 (3d ed. 2019); see *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1304 (9th Cir. 1997). Indeed, “[a]n intervenor of right under Rule 24(a) ‘is treated as if he were an original party and has equal standing with the original parties.’” *Donovan v. Oil, Chemical, & Atomic Workers Int’l*

37. This drafting history leaves no doubt that Section 7 should be given a broad interpretation, and should be understood to authorize not only the most minimal forms of *amicus* participation (*i.e.*, the submission of written briefs), but also more extensive roles for third parties that more closely resemble intervention in the federal context in appropriate circumstances. Consistent with the express intent of the IRP-IOT, the Panel should allow Verisign and NDC participation sufficient to allow for a full and fair hearing on the allegations made against them.

D. Norms of International Arbitration Do Not Preclude Broad Participation by Verisign in These Proceedings.

38. Afiliis concedes, as it must, that Section 7 was modeled after Federal Rule 24. (Afiliis Response, at 49 n.147; Afiliis Sur-Reply, at 22 n.60.) Afiliis nevertheless contends that Rule 24 participation, as a concept drawn from the Federal Rules of Civil Procedure rather than from international arbitration, “may not inform the drafting of the Interim Procedures” (emphasis added). (Afiliis Sur-Reply, at 20 n.54, 22 n.60.) Afiliis is wrong. “Norms of international arbitration” do not dictate the scope of *amicus* participation in IRP proceedings, and such norms in any event do not restrict *amicus* participation to the filing of a written submission.¹⁷

39. Unlike international arbitration, an IRP is designed exclusively for the purpose of reviewing ICANN Board actions (or inactions) alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. (Bylaws, § 4.3(b) (defining the IRP's scope and jurisdiction).) Thus, whereas international arbitration is broadly concerned with dispute resolution as between any two consenting counter-parties, IRP proceedings were designed with a particular focus on a process for resolving claims against ICANN. Within such proceedings,

Union & Its Local 4-23, 718 F.2d 1341, 1350 (5th Cir. 1983) (citing Wright & Miller, Federal Practice and Procedure § 1920).

¹⁷ See, e.g., Afiliis Response at 56 n.171 (arguing that Section 7 “should not be deemed to allow for broader rights reserved for parties in the Interim Procedures or otherwise expand the traditionally limited role of *amicus curiae* in the context of international arbitrations”).

Section 7 is intended specifically to address the protection of third-party interests where, for example, a claim against ICANN may implicate the legal rights or economic interests of a third party, such as a claim against ICANN in the context of a contested auction.

40. Insofar as IRPs involve parties from multiple jurisdictions and may implicate questions of international law and conflict of laws, they can naturally seek to borrow from international arbitration, which is a system that has evolved to deal with issues that arise in transnational disputes.¹⁸ However, nothing in the ICANN Bylaws or elsewhere mandates rigid or exclusive application of “norms of international arbitration” in IRP proceedings. ICANN’s Bylaws provide only that the Supplementary Procedures “conform with” or “be informed by” norms of international arbitration.¹⁹ They do not equate IRP proceedings with arbitration or require that every element of international arbitration practice be transposed to the ICANN context. On the contrary, due to the unique nature of IRPs, an IRP Panel should decline to adopt any practice that would undermine the IRP’s express mandate of “fundamental fairness and due process” or the “accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes” with ICANN. (*See* Bylaws, §§ 4.3(a) & (n).)

41. Adherence to preconceived ideas about “norms of international arbitration” is particularly inappropriate for the question of *amicus* or other third-party participation. Afilias argues that international arbitration has (at least historically) taken a narrow approach to *amicus*

¹⁸ See Caroline Simson, *ICANN To Hew to Int’l Arbitration Norms for Review Panel*, Law360 (Aug. 15, 2017), <https://www.law360.com/articles/954515/icann-to-hew-to-int-l-arbitration-norms-for-review-panel> (last visited Sept. 27, 2019) (“Although ICANN is incorporated in California, it is effectively a global organization. ... The sorts of issues that ICANN has to deal with are not just based on various state or federal law[s]. It’s often necessary to consider cross-border issues and international law issues ... and therefore you need, in reviewing them, to have an organization that’s not based on U.S. law, but has some understanding of international law and conflict of law issues.”).

¹⁹ Bylaws, § 4.3(n)(i) (“the IRP Implementation Oversight Team ... shall develop clear published rules for the IRP (“Rules of Procedure”) that conform with international arbitration norms”); Bylaws, § 4.3(n)(ii) (“The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP [set forth in § 4.3(a)].”).

interventions. (Afilias Response, ¶ 95.) That, however, is because international arbitration has traditionally aimed to resolve disputes as between the parties only and based on legal claims between them, with privacy and confidentiality of the proceedings as a “key attraction” of the system.²⁰ By contrast, the IRP system is designed for the very purpose of ensuring that ICANN’s operations are “accountable to the global Internet community” and claimants, as well as, in appropriate cases, to third parties who may be affected by the dispute. (Bylaws, § 4.3(a).) For this reason alone, the participation of third parties in IRP proceedings—to whatever extent necessary to further the goals of public accountability, transparency, and due process—warrant treatment that can be very different from the historical arbitration context and should be favored.

IV. The Procedures Officer’s Opinion Contains Factual Inaccuracies and Is Not Binding in Any Event.

42. The sole task entrusted to the Procedures Officer under the Interim Supplementary Procedures was to determine whether Verisign and NDC are entitled to participate as *amicus curiae* in this IRP. The Procedures Officer declined to make that decision. Instead, after describing (incompletely and, at times, inaccurately) the parties’ positions and the factual background of the dispute, the Procedures Officer concluded that “the issues raised in the present matter ... 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.” (Declaration of the Procedures Officer, 28 February 2019, § VII). Having failed to render the one decision he was authorized to make, the Procedures Officer’s Declaration is not relevant to the matters put before this IRP Panel.

²⁰ Eugenia Levine, *Amicus Curiae in International Investment Arbitration*, 29 Berkeley J. Int’l L. 200, 204, 205 (2011) (“[T]he institutional rules and consent-based nature of arbitration have traditionally provided disputing parties with the advantage of fashioning the investment arbitration proceedings to preserve privacy and confidentiality.”).

43. The inaccuracies in the Procedures Officer's Declaration also render it unusable even as a summary of the background of this matter. The Declaration fails to summarize the issues presented and the parties' positions in an accurate manner. In particular, the inaccuracies identified in ICANN's Request for Corrections to the Procedures Officer's Declaration highlight the unreliable nature of the Declaration. For example, Verisign did not "acquire" the rights to .WEB through the DAA; on the contrary, Verisign financed NDC's bid in exchange for the opportunity to operate .WEB following a *future* assignment, upon consent of ICANN, of the .WEB registry agreement to Verisign. Similarly, and contrary to the recitation in the Declaration, David McAuley was not aware of Afilias' CEP or IRP prior to ICANN's Board's approval of the Supplementary Procedures.²¹ Any conclusions drawn by the Procedures Officer based on these faulty assumptions are suspect, and should be disregarded by the Panel.

CONCLUSION

44. For the foregoing reasons, and those set forth in Verisign and NDC's previous submissions in support of their *amici* requests, Verisign and NDC should be allowed to participate as *amici* in this IRP and should be permitted to participate fully in the proceedings.

Dated: September 27, 2019

ARNOLD & PORTER KAYE SCHOLER LLP

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Ronald L. Johnston
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²¹ Mr. McAuley's Declaration unequivocally denies knowledge of Afilias' CEP or IRP: "I was not aware that Afilias had filed a Cooperative Engagement Process ("CEP") on any subject, including with respect to the .WEB gTLD while any of the proceedings described in this declaration [the IRP-IOT's consideration of Section 7]. I do not, in my personal or professional capacities, check ICANN's website to find out information regarding CEPs or IRPs. I first learned that Afilias had filed an IRP regarding .WEB a couple of weeks after it had been filed. None of my proposed edits or comments to the Interim Supplementary Procedures were made because of a CEP or IRP by Afilias with respect to .WEB." (Declaration of David McAuley in Support of Verisign, Inc.'s Request to Participate as *Amicus Curiae* in Independent Review Process (5 February 2019), ¶ 32.) The Procedures Officer's suggestion to the contrary flatly contradicts the record.