

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

ICDR Case No. 01-18-0004-2702

**AFILIAS DOMAINS NO. 3 LIMITED'S RESPONSE TO
VERISIGN, INC.'S AND NU DOTCO LLC'S REQUESTS TO PARTICIPATE AS
AMICUS CURIAE IN INDEPENDENT REVIEW PROCESS**

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1. Afilias Domains No. 3 Limited (“**Afilias**”) hereby submits this response in opposition to VeriSign, Inc.’s (“**VeriSign**”) and Nu Dotco LLC’s (“**NDC**”) Requests to Participate as *Amicus Curiae* (the “**Requests**”) in the Independent Review Process (“**IRP**”) or in the proceeding before the Emergency Arbitrator, and ICANN’s support for such participation. This Response also supplements the accompanying letter submitted by Afilias which responds to the various questions posed by the Procedures Officer following the 4 January 2019 hearing.

2. As a consequence of VeriSign’s manipulation of ICANN’s rulemaking processes to advance its own interests, the Procedures Officer should bar VeriSign, as a matter of equity, from participating in the IRP that Afilias filed on 14 November 2018 and the Emergency Arbitrator proceeding that Afilias was forced to file on 27 November 2018 as a result of pressure from ICANN. Third Party Designated Confidential Information Redacted

Finally, because the Interim Supplementary Procedures (“**Interim Procedures**” or “**Rules**”) were not properly adopted by the ICANN Board on 25 October 2018, ICANN should be estopped from invoking them against Afilias and in support of the Requests.

3. In the alternative, should the Requests be considered on the merits under the Rules, the Procedures Officer should deny VeriSign and NDC the broad rights of intervention they seek and instead order that their participation in this IRP shall be (i) solely at “the discretion of the IRP Panel” and (ii) limited to the submission of briefs on the dispute and discrete questions posed by the Panel, “subject to such deadlines, page limits, and other procedural rules as the IRP PANEL

may specify in its discretion.”¹ Afilias understands that ICANN does not contest Afilias’ position in this regard.

1. BACKGROUND

1.1 The Independent Review Process Is an ICANN Accountability Mechanism

4. ICANN’s commitment to accountability is a “fundamental safeguard” for ensuring that its bottom-up, multi-stakeholder model remains effective.² Its Bylaws establish various accountability mechanisms for review of ICANN actions.³

5. The IRP is one such ICANN accountability mechanism.⁴ In short, an IRP is an independent third-party review of ICANN actions (or inactions) alleged by an affected party to be inconsistent with ICANN’s Articles or Bylaws.⁵ Any entity that is “materially affected” by such ICANN’s actions or inactions may, pursuant to Article 4.3 of the Bylaws, submit a request for an independent review of those actions or inactions. “Covered Actions” in an IRP are “actions or failures to act by or within ICANN ... committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”⁶ In the context of the New gTLD Program, standing to bring an IRP is thus restricted solely to entities that claim a direct injury as a result of ICANN’s

¹ Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), [Ex. [VRSN] 1], Sec. 7 (at p. 10).

² Recommendation of the Board Accountability Mechanisms Committee (BAMC), Reconsideration Request 18-8 (28 Aug. 2018), [Ex. 209], p. 12 (“ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders.”).

³ See ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4.

⁴ See ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3.

⁵ See ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(b).

⁶ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4(b)(ii).

breach of its Articles or Bylaws in its administration of the New gTLD Program.⁷

1.2 Relevant Background

6. ICANN’s New gTLD Program has been a core element of the organization’s workplan since its inception in 1998.⁸ The New gTLD Program was painstakingly developed over more than a decade, beginning with two test-bed rounds in 2000 and 2003 and continuing through the development of the Applicant Guidebook (“**AGB**”), which is a compendium of the rules, processes, and policies that govern the New gTLD Program.⁹

7. The New gTLD Program’s application window opened in 2012. ICANN received 1,930 applications, resulting in the introduction of 1,232 new gTLDs to date.¹⁰ Seven applicants sought the right to operate the registry for .WEB.¹¹ Afilias and NDC were among these seven .WEB applicants; *VeriSign was not*. ICANN grouped the seven .WEB applicants into a “contention set” pursuant to the AGB.¹² Under the AGB’s rules, members of the contention set were expected to negotiate among themselves to resolve their contention, that is, which of them would be awarded the rights to the registry.¹³ If no voluntary resolution was reached, ICANN

⁷ See ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(b)(i).

⁸ ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1998), available at <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en> (last accessed on 27 Jan. 2019), [Ex. 210], Art. V(C)(9) (requiring that ICANN “[c]ollaborate on the design, development and testing of a plan for creating a process that will consider the possible expansion of the number of gTLDs.”).

⁹ ICANN New gTLDs, *About the Program*, available at <https://newgtlds.icann.org/en/about/program> (last accessed on 28 Jan. 2019), [Ex. 211].

¹⁰ ICANN New gTLDs, *Program Statistics*, available at <https://newgtlds.icann.org/en/program-status/statistics> (last accessed on 24 Jan. 2019), [Ex. 212], p. 1.

¹¹ See ICANN, *Contention Set: WEB/WEBS* (20 June 2018), available at <https://gtdresult.icann.org/applicationstatus/contentionsetdiagram/233> (last accessed on 24 Jan. 2019), [Ex. 213].

¹² See ICANN, *Contention Set: WEB/WEBS* (20 June 2018), available at <https://gtdresult.icann.org/applicationstatus/contentionsetdiagram/233> (last accessed on 24 Jan. 2019), [Ex. 213].

¹³ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. [VRSN] 4], pp. 1-28, 4-6, 4-19.

would “break the tie” by auctioning the registry among the contention set members.¹⁴

8. Pursuant to the procedures and obligations set forth in the AGB, Afilias and the six other .WEB applicants sought to resolve their contention voluntarily by means of a private auction, the winner of which would have the right to operate the .WEB registry. These attempts failed, only because NDC ultimately refused to participate in the private auction.¹⁵ ICANN was forced to “break the tie” by administering an auction itself. At that auction, NDC submitted the winning bid, which exceeded the previous record bid at an ICANN auction by more than 200%.¹⁶ Shortly after the auction concluded, VeriSign admitted that it had provided the funds to NDC to win the auction and that NDC had agreed to assign .WEB to VeriSign.¹⁷ The details of NDC’s deal with VeriSign, however, were not disclosed to Afilias or anyone in the Internet community at the time.

9. Afilias immediately complained to ICANN that VeriSign’s participation in the .WEB auction appeared to violate the New gTLD Program rules and demanded that ICANN conduct an investigation. ICANN did so, closing its investigation nearly two years later in June 2018 without disclosing *any* of its findings. Through this IRP, however, Afilias has learned the truth of what VeriSign and NDC had agreed to, and what ICANN has known (and not disclosed) for more than two years.

10. Third Party Designated Confidential Information Redacted

¹⁴ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. [VRSN] 4], p. 4-19.

¹⁵ Email from J. Kane (Afilias) to H. Lubsen (7 July 2016), [Ex. 214].

¹⁶ See Witness Statement of John L. Kane (15 Oct. 2018), [Ex. 215] Annex A (Table of New gTLD Contention Set Resolutions, based on information provided by ICANN, see ICANN, *New gTLD Auction Results*, available at <https://gtldresult.icann.org/applicationstatus/auctionresults> (last visited 26 July 2018)).

¹⁷ VeriSign, *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. 216], Note 11 (at p. 13); VeriSign, *VeriSign Statement Regarding .Web Auction Results* (1 Aug. 2016), [Ex. 217].

Third Party Designated Confidential Information Redacted

11. Third Party Designated Confidential Information Redacted

¹⁸ Third Party Designated Confidential Information Redacted

¹⁹ Third Party Designated Confidential Information Redacted

²⁰ Third Party Designated Confidential Information Redacted

²¹ Third Party Designated Confidential Information Redacted

²² Third Party Designated Confidential Information Redacted

²³ Third Party Designated Confidential Information Redacted

²⁴ Third Party Designated Confidential Information Redacted

12. When ICANN closed its investigation without action in June 2018, Afilias immediately commenced a Cooperative Engagement Process (“CEP”)²⁶ with ICANN. Afilias then filed this IRP on 14 November 2018, one day after ICANN terminated the CEP. Afilias’ request for IRP alleges that ICANN’s failure to disqualify NDC for its numerous violations of the New gTLD Program rules, and ICANN’s willingness to allow VeriSign to acquire .WEB, violate its Bylaws.

2. VERISIGN AND NDC SHOULD BE BARRED FROM PARTICIPATING IN ANY CAPACITY IN THIS IRP

13. Fundamental principles of good faith and equity, including the principles of unclean

²⁵ Third Party Designated Confidential Information Redacted

²⁶ The CEP is a “non-binding” process “for the purpose of attempting to resolve and/or narrow the Dispute.” ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(e)(i).

hands and abuse of process, require that VeriSign be excluded from participating in any aspect of Afilias' dispute with ICANN. For the same reasons, VeriSign should not be allowed participate in the IRP or the Emergency Arbitrator proceeding through NDC. Third Party Designated Confidential Information Redacted

2.1 How VeriSign Subverted ICANN's Rulemaking Process for Its Own Benefit

14. Afilias' review of the drafting history of Rule 7 of the Interim Procedures reveals that, until Afilias' dispute with ICANN concerning .WEB became public in June 2018, the committee that was drafting the Rules had no intention to provide any rights of participation to third parties that lacked standing to proceed as a Claimant,²⁸ except in limited circumstances where the subject of an IRP concerned a "decision[] of [a] *process-specific expert panel*[]" that [is] claimed to be inconsistent with the Articles of Incorporation or Bylaws."²⁹ This carve-out applies specifically to IRPs that relate to expert or arbitral determinations relating to so-called "Legal Rights Objections," "Community Objections," and "String Confusion Objections." This IRP does not arise out of such an underlying process-specific expert panel proceeding.³⁰

²⁷ Third Party Designated Confidential Information Redacted

²⁸ Under ICANN's Bylaws, to have standing as a Claimant, an entity must claim that it was directly harmed by an action or inaction by ICANN's Board or Staff that breached its Articles or Bylaws. ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(b)(i).

²⁹ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(b)(iii)(A)(3) (emphasis added); Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), [Ex. [VRSN] 1], Sec. 1.

³⁰ A cover letter providing discrete answers to the Procedures Officer's questions is provided along with this brief.

2.1.1 The IRP-IOT Was Created to Implement the Recommendation of the ICANN Cross-Working Group on Enhancing ICANN Accountability

15. In **December 2014**, a working group of ICANN community members (“**CCWG-Accountability**”) began developing a set of proposed enhancements to ICANN’s accountability to the global Internet community. This effort was undertaken at a time when stewardship for the IANA functions (*i.e.*, control of the Internet) passed from the U.S. government to ICANN and in response to the consensus that improvements to ICANN’s accountability were necessary.³¹ As part of this effort, the CCWG-Accountability made several recommendations for strengthening ICANN’s Independent Review Process (“**IRP**”).³²

16. The IRP is designed to “ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.”³³ Accordingly, the CCWG-Accountability provided that standing to participate in an IRP be limited to “[a]ny person/group/entity ‘materially affected’ by an ICANN action or in action in violation of ICANN’s Articles of Incorporation and/or Bylaws.”³⁴ It also provided that “[d]etailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG.”³⁵ To that end, this new CCWG was tasked with developing rules “relating to

³¹ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. 219], ¶ 2 (at p. 5).

³² CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. 219], pp. 33-36.

³³ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. 219], ¶ 174 (at p. 33).

³⁴ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. 219], ¶ 178 (at p. 35).

³⁵ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. 219], ¶ 178 (at p. 36).

joinder and intervention ... based on consultation with the community.”³⁶

17. In **early 2016**, the CCWG-Accountability created the IRP Implementation Oversight Team (“**IRP-IOT**”).³⁷ The IRP-IOT was “tasked with drafting detailed rules of procedures for the [IRP] enhancements described in the CCWG-Accountability Supplemental Final Proposed Work Stream 1 Recommendations....”³⁸ ICANN’s Bylaws (adopted after the formation of the IRP-IOT) specifically recognized the committee and provided that the IRP-IOT “shall develop clear published rules for the IRP ... that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties.”³⁹

18. Although ICANN argues that the workings of the IRP-IOT were transparent, since the IRP-IOT’s meetings were public and its internal emails and transcripts of meetings were posted to ICANN’s website, no members of the public appear to have participated in any of the IRP-IOT’s several dozen meetings. This is likely, to large extent, because the IRP-IOT’s “wiki” page was and remains hidden within the bowels of ICANN’s website, dial-in information for IRP-IOT meetings were not easily obtained, and the website itself was hard to navigate and not updated in real time. Information about the IRP-IOT was not nearly as “public” as ICANN would pretend. As one member of the IRP-IOT itself complained: “I was not aware of the formation of this IOT until well after it was formed and had begun its work. And I pay pretty close attention to all

³⁶ CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 (Recommendation #7) (23 Feb. 2016), [Ex. 220], ¶ 20.

³⁷ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), available at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en> (last accessed 27 Jan. 2019), [Ex. 221].

³⁸ Draft IRP Updated Supplementary Procedures: Report of the IRP IOT (31 Oct. 2016), [Ex. 222], p. 1.

³⁹ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(n)(i).

ICANN missives about accountability.”⁴⁰

2.1.2 Drafting History Through the November 2016 Public Consultation: Third Party Participation Rights Limited to Entities with Claimant Standing under the Bylaws

19. On **14 January 2016**, the IRP-IOT was formed and held its first meeting.⁴¹

20. On **1 June 2016**, the IRP-IOT briefly discussed its obligation to propose rules for consolidation, intervention, and joinder in IRPs.⁴² Noting that “intervention ... is something we do want to think carefully about,” the then-committee chair stated that “[o]bviously, you don’t want to allow anyone 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.”⁴³ One committee member further floated the idea of providing for “something short of full intervention, such as an amicus brief.”⁴⁴ ICANN argues that these brief comments prove that the IRP-IOT “always intended” to provide for broad rights for third parties to participate in IRPs, including as *amicus curiae*. This is a gross overstatement. In fact, the drafting history (as set forth below) demonstrates that these suggestions, made in the context of the IRP-IOT’s early brainstorming, were rejected: the multiple ensuing drafts provided only for limited third party participation rights for those that had Claimant standing and, further, did not provide for any participation by *amicus curiae*.

21. On **19 July 2016**, counsel to the CCWG-Accountability provided a draft set of Rules to the IRP-IOT, which revised the Supplementary Procedures then in effect as recommended

⁴⁰ Email from M. Rodenbaugh to Members of the IRP-IOT (6 Dec. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-December/000478.html> (last accessed on 28 Jan. 2019), [Ex. 223], p. 1.

⁴¹ *Enhancing ICANN Accountability, WP-IOT Meetings* (modified on 11 Jan. 2019), *available at* <https://community.icann.org/display/acctcrosscomm/WP-IOT+Meetings> (last accessed on 25 Jan. 2019), [Ex. 224].

⁴² IRP-IOT Meeting #3 (1 June 2016), Transcript, [Ex. 225], pp. 25-27.

⁴³ IRP-IOT Meeting #3 (1 June 2016), Transcript, [Ex. 225], p. 26.

⁴⁴ IRP-IOT Meeting #3 (1 June 2016), Transcript, [Ex. 225], p. 26.

by the CCWG-Accountability report (the “**July 2016 Draft**”). Rule 7 (“Consolidation, Intervention and Joinder”) provided in full:

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. A CLAIMANT may join in a single written statement of a DISPUTE, as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.⁴⁵

22. For present purposes, the July 2016 Draft—the embarkation point for the IRP-IOT’s remit—thus reflected that participation in an IRP would only be available on the basis of consolidation, intervention or joinder to those who could satisfy the standing requirements to be a Claimant,⁴⁶ and that the determination regarding participation would be in the sole discretion of the Procedures Officer.

23. On **20 July 2016**, the IRP-IOT met to discuss the July 2016 Draft, which was described as “reflect[ing] consensus between ICANN legal and the CCWG Counsel with respect

⁴⁵ Draft as of 19 July 2016 – Updates to ICDR Supplementary Procedures, [Ex. 226], pp. 6-7.

⁴⁶ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(b)(i) (“A ‘Claimant’ is any legal or natural person, group, or entity ... that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.”). The limited categories of Disputes that may give rise to an IRP are defined at Section 4.3(b)(iii) of the Bylaws.

to the supplementary procedures that would need to be put in place to implement ... the CCWG recommendations.”⁴⁷ While the Chair noted that the intent of Rule 7 was to “make sure that all of the relevant parties were at the table,”⁴⁸ the IRP-IOT’s concept of “relevant parties” was not as broad as ICANN implies: the IRP-IOT made clear that “relevant parties” were expressly limited to “anybody who would be materially affected by the action or inaction of ICANN,”⁴⁹ *i.e.*, expressly limited to entities that had Claimant standing. This limited understanding of “relevant parties” reflects the rights of participation set forth in the July 2016 Draft of Rule 7.⁵⁰

24. The 20 July discussion of Rule 7 was long and detailed, yet no one suggested that participation rights should be afforded to third parties that lacked Claimant standing, nor was there any further discussion of providing for participation by *amicus curiae*. Over the next several months, as summarized in the bullets below, the IRP-IOT prepared and circulated several drafts of the rules, but the text of Rule 7 remained unchanged, reflecting a consensus within the IRP-IOT to limit third-party participation rights to those with Claimant standing:

- On **26 July 2016**, a further draft set of Rules was circulated to the IRP-IOT.⁵¹ The 26 July text of Rule 7 was unchanged, save for the addition of a new paragraph providing for briefing limits, which had been agreed during the 20 July meeting.

⁴⁷ IRP-IOT Meeting #5 (20 July 2016), Transcript, [Ex. 227], p. 1.

⁴⁸ ICANN’s Response to Procedures Officer’s Questions concerning the Drafting History of the Supplementary Procedures (16 Jan. 2019), ¶ 17; IRP-IOT Meeting #5 (20 July 2016), Transcript, [Ex. 227], p. 28.

⁴⁹ IRP-IOT Meeting #5 (20 July 2016), Transcript, [Ex. 227], p. 28.

⁵⁰ To that end, an ICANN lawyer noted that past IRP panels had actually denied participation rights to entities that lacked Claimant standing, not because the rules “didn’t have a mechanism for doing it” but rather because IRPs concern ICANN “Board conduct,” so the input of affected parties lacking Claimant standing “would not necessarily be relevant.” IRP-IOT Meeting #5 (20 July 2016), Transcript, [Ex. 227], pp. 28-29.

⁵¹ Draft as of 26 July 2016 – Updates to ICDR Supplementary Procedures, *available at* <https://mm.icann.org/pipermail/iot/attachments/20160817/8da70121/ICANNDraftIRPUpdatedSupplementalProceduresv.20-0001.pdf> (last accessed on 28 Jan. 2019), [Ex. 228].

- On **17 August 2016**, another draft set of Rules was circulated.⁵² Rule 7 was unchanged.
- On **22 August 2016**, yet another draft set of Rules was circulated. Again, Rule 7 was unchanged.⁵³
- On **29 August 2016**, another draft set of Rules was circulated, along with a slide deck that noted all open issues.⁵⁴ Rule 7 was again unchanged and no issues related to consolidation, intervention or joinder were noted in those slides.
- On **31 October 2016**, another draft set of Rules was circulated.⁵⁵ The text of Rule 7 again remained unchanged. A report that accompanied this draft confirmed that Rule 7 was not among the “three issues” where the IRP-IOT “was unable to reach full consensus.”⁵⁶

25. On **2 November 2016**, the CCWG-Accountability approved the 31 October 2016

⁵² Draft as of 12 August 2016 – Updates to ICDR Supplementary Procedures, [Ex. 229]; see Email from B. Burr (Neustar) to Members of the IRP-IOT (17 Aug. 2016), available at <https://mm.icann.org/pipermail/iot/2016-August/000049.html> (last accessed on 27 Jan. 2019), [Ex. 230] (circulating the 12 Aug. 2016 draft of the supplementary procedures).

⁵³ BB Draft as of 22 August 2016 – Updates to ICDR Supplementary Procedures, [Ex. 231].

⁵⁴ *Presentation: IRP IOT, Updated Supplementary Procedures, Open Issues 29 August 2016*, [Ex. 232]; BB Draft as of 29 August 2016 – Updates to ICDR Supplementary Procedures, [Ex. 233]; Email from B. Burr (Neustar) to Members of the IRP-IOT (29 Aug. 2016), available at <https://mm.icann.org/pipermail/iot/2016-August/000082.html> (last accessed on 26 Jan. 2019), [Ex. 234].

⁵⁵ Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, [Ex. 235].

⁵⁶ Draft IRP Updated Supplementary Procedures: Report of the IRP IOT (31 Oct. 2016), [Ex. 222], pp. 1-2. The report stated that Rule 7 was drafted to address the CCWG-Accountability’s recommendation concerning joinder and intervention, as reflected at Section 4.3(o)(ii) of ICANN’s Bylaws. Contrary to ICANN’s assertion that this draft of Rule 7 only “permitted *some* of the ‘relevant parties’ to ‘join the table,’” the IRP-IOT’s report **did not** state that Rule 7 was incomplete, required further revision, or otherwise did not fully implement the CCWG-Accountability recommendation in this regard. ICANN’s Response to Procedures Officer’s Questions concerning the Drafting History of the Supplementary Procedures (16 Jan. 2019), ¶ 20. To the extent that a committee member proposed broad participation rights for anyone interested in the subject matter of an IRP during the initial 20 June 2016 meeting, the drafting history of Rule 7 amply demonstrates that this recommendation was soundly rejected: such broad rights do not appear in any of the drafts of Rule 7 and were not discussed by the IRP-IOT at any time following 20 June. The IRP-IOT made abundantly clear that, consistent with the Bylaws, intervention rights would be premised on *claimant standing* alone.

draft set of Rules for “publication for community input.”⁵⁷ It was then subsequently published for public review and comment on 28 November 2016 (the “**Public Comment Draft**”).⁵⁸

26. In the Public Consultation, the IRP-IOT stated:

Following the public comment proceeding, the inputs will be analyzed by the IRP-IOT who will consider amending [the rules] in light of the comments received. *If there are no significant issues, the final version [of the rules] along with the analysis of the public comments will be presented to the CCWG-Accountability for approval.* Once approved, the CCWG-Accountability will forward [the rules] to the ICANN Board of Directors for final approval.⁵⁹

27. Thus, by of the **end of 2016**, the IRP-IOT had been working for almost a year and had prepared *six* draft sets of Rules, all with identical provisions for third party participation in IRPs. In sum, the IRP-IOT had agreed to limit third party presentation to only those entities who had Claimant standing in the context of an IRP, *i.e.*, only those entities that had been directly harmed by an action or inaction by ICANN that breached its Bylaws or Articles. Moreover, third party participation was further entrusted to the unfettered discretion of the Procedures Officer.

2.1.3 The Public Comments Requested Additional Rights for Parties to Underlying “Process-Specific Expert Panel” Proceedings Conducted Pursuant to Bylaws Section 4.3(b)(iii)(A)(3)

28. On **1 February 2017**, the Public Comment period closed. While ICANN is correct that three sets of comments proposed broadening participation rights under Rule 7, ICANN misstates the scope and breadth of these proposals. In short, the Public Comments requested a

⁵⁷ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), available at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en> (last accessed 27 Jan. 2019), [Ex. 221], p. 2.

⁵⁸ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), available at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en> (last accessed 27 Jan. 2019), [Ex. 221].

⁵⁹ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), available at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en> (last accessed 27 Jan. 2019), [Ex. 221], p. 2 (emphasis added).

very limited expansion of third party participation rights in the context of “IRP actions that may be taken pursuant to ‘decisions of *process-specific expert panels*’”⁶⁰ as provided by ICANN Bylaws Section 4.3(b)(iii)(A)(3).⁶¹ Prior to October 2016, such decisions of expert panels could not be challenged in an IRP and the CCWG-Accountability was clear in its report that, pursuant to this new Bylaws provision, “[a]n IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN’s Bylaws.”⁶² Given this reference in the CCWG-Accountability report, the IRP-IOT agreed that it could amend Rule 7 in this regard to reflect the Public Comments.

29. The underlying proceedings that the Public Comments referred to were limited to arbitration proceedings in which a panel had rendered a decision based upon arguments made by the parties. Specifically, the Fletcher law firm noted that ICANN had created three such specific “process-specific expert panels” for the New gTLD Program:

- i. Panels constituted by the World Intellectual Property Organization (WIPO), for new gTLD Legal Rights Objections;
- ii. Panels constituted by the International Chamber of Commerce (ICC), for Community Objections; and,
- iii. Panels constituted by the International Center for Dispute Resolution (ICDR), for String Confusion Objections.⁶³

⁶⁰ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 47. The term “process-specific expert panels” is referenced both at Bylaws Section 4.3(b)(iii)(A)(3) and in the definition of Disputes in the Interim Procedures at Section 1.

⁶¹ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], pp. 47-56. The Fletcher firm also proposed intervention rights for IRPs that result from actions taken in response to advice by an Advisory Committee or Supporting Organization pursuant to Section 4.3(b)(iii)(A)(2) of the Bylaws. This part of the Fletcher comments is irrelevant to the discussion here but is referenced for completeness. Other than these “two specific circumstances” the Fletcher firm did not propose any other rights of participation.

⁶² CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. 219], ¶ 179 (at p. 36). See also ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], 4.3(b)(iii)(A)(3).

⁶³ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 47.

Each of these categories—Legal Rights Objections, Community Objections, and String Confusion Objections—has a specific meaning and purpose in the New gTLD Program. As previously mentioned, none are relevant to .WEB, to the .WEB auction, or to this dispute.

30. The concern identified by the Fletcher firm regarding these new kinds of IRPs that challenged the decisions of these “process-specific expert panels” was straightforward and clear:

The Applicant Guidebook expressly rejected any avenue of appeal from the *decisions of these arbitration tribunals*. Upon losing the dispute, the rules required an applicant to withdraw their New gTLD Applications. A few applicants nonetheless were permitted to use the IRP to challenge the decisions – but without the Winning Parties’ who had prevailed in the original dispute being present! As a matter of fundamental fairness and due process, winning parties must be given notice of, and be allowed to participate in, such challenges.⁶⁴

Recognizing that some of these “winning parties” to the arbitration below may not want to incur the expense of full participation in an IRP, Fletcher proposed allowing them to have the option of participating by submission of a “friend of the IRP brief” where an IRP was brought challenging the panel’s decision.⁶⁵

31. The other two sets of comments received on Rule 7 made narrow recommendations along the same lines. The Noncommercial Stakeholders Group also recommended broadening Rule 7 for the limited purpose of allowing “*all parties* to the *underlying proceeding*” the right to intervene.⁶⁶ The NCSG took a similarly narrow view of the scope of an “underlying proceeding,” stating that “those who los[t] *arbitration decisions*, e.g., Community Objections at the

⁶⁴ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 47 (emphasis added).

⁶⁵ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 50.

⁶⁶ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], pp. 35-36 (emphasis added).

International Chamber of Commerce” may challenge those decisions in an IRP that does not include the winning party below.⁶⁷ The NCSG’s comments clearly only referred to challenges to “arbitration decisions” and not to other procedures (such as auctions):

It only makes sense as ICANN was not a party to the underlying proceeding and does not know *the arguments made*. Working with ICANN, a winning party or Community must have the right to represent its own interests.

Should the winning party not have the time or resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant the proceeding and of which the winning party may be in sole possession.⁶⁸

32. Finally, the only other comments submitted on Rule 7, by the Intellectual Property Constituency of the GNSO, were of a similar vein:

In particular, *where the IRP is being brought effectively to challenge the decision of an ICANN-appointed panel, such as in the case of a Legal Rights Objection (LRO)*, the IRP would be brought by the losing party. The LRO itself, however, would have been an action between two or more parties and the winning party or parties have a direct interest in the outcome of the IRP and it is inequitable to deny them the opportunity to request permission to intervene.

To rectify these concerns, the IPC suggests that any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).⁶⁹

33. These comments (and in particular, the Fletcher Comments) were discussed at

⁶⁷ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 34 (emphasis added).

⁶⁸ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 36 (emphasis added).

⁶⁹ CCWG-Accountability WS2 IRP-IOT Public Consultation Responses Compendium, [Ex. 236], p. 30 (emphasis added).

length during subsequent meetings of the IRP-IOT, which was now being led by David McAuley, a VeriSign employee. In his summary of the comments to Rule 7, McAuley acknowledged that the Public Comments were limited to situations where an IRP had been brought to challenge a decision rendered by a “process-specific expert panel:”

Getting back to the joinder issue, let me just speak to it. We really don’t need to put it on the screen right now. I’m using Fletcher as a catalyst – they’re certainly not the only part that talked about joinder and parties – for instance, the Non-Commercial Stakeholders Group made a similar comment. But Fletcher basically pointed to the fact that the Applicant Guidebook from the 2012 round of new gTLDs basically did not provide an appeal to people who lost before an expert panel. *Those were the panels that heard legal rights objections, string confusion objections, and community objections. But now the Bylaw explicitly says that expert panel decisions can be brought to IRP.*

And so Fletcher is making the point that we in the rules need to be clearer and explicit about parties who won before the expert panel, therefore they’re not likely to bring a claim. Parties that lost are likely to bring a claim. And in doing that, Fletcher’s question is – what about the parties that won? How are they going to be heard?

...

So Fletcher suggested three safeguards: 1) that we should have a rule that provides actual notice to all the original parties before the expert panel, 2) that we should provide a mandatory right to intervene to all the parties – they can decline it but they would have a right to do it, and 3) require the IRP panel to hear from everybody that was involved below before they give any interim relief.

Frankly, I think these are sensible provisions.⁷⁰

34. A few weeks later, McAuley repeated his view that the Public Comments were limited to proposing rights for third parties to participate in IRPs that challenged decisions rendered by underlying process-specific expert panels:

We have join[d]er issues raised in the context of parties that were involved in other *panel decisions below*. For instance, *we’re talking*

⁷⁰ IRP-IOT Meeting #15 (2 Mar. 2017), Transcript, [Ex. 201], pp. 30-31 (emphasis added).

here about expert panel decisions which are now subject to IRP review. These are things like string confusion and legal rights objections, those kind of things. And so there is a request of *people who effectively won their cases below*, are not ignored, if a claimant is unsatisfied with that panel's decision, goes to IRP, and c[an] have a right to join.

...

One is, they would like actual notice to go to all the original parties in the expert panel decision that's being challenged. Two, they ask for a mandatory right of intervention, that is for people to be able to join, to *people who were parties in the panel*. That doesn't mean they have to intervene, that means they have a right to intervene.

And then three, there would be a right for parties to be heard prior to an IRP panel making an award of some intermediate remedy, like putting an action on hold, intermediate relief. Those are the things that motivated them and they thought that these rules [should] address. The IPC said, and by the way, the non-commercial stakeholder group followed very much along those lines.

The IPC did, as well, using the words, "*directly involved*" in the *action below*, it should have a right to intervene, and I believe it was the IPC that said anybody that comes in as a party should have the ability to file equally detailed statements, whatever the limit is, I think it's 25 pages.

So, there are ways that we can approach this. I think it's a fair request that *[those] involved below who won at the expert panel, and now see their win being challenged*, should be able to be parties, and should have a right to be parties, I can see that. We can also consider whether there are *ancillary parties that might have a right to file an amicus brief*, a friend of the court kind of brief.⁷¹

Thus, the **state of play as of March 2017**, when the IRP-IOT began to amend the text of Rule 7 in light of the public comments, was as follows:

- The IRP-IOT had published for public comment a rule that allowed for third-party intervention in IRPs, but only if the intervenor could establish Claimant

⁷¹ IR-IOT Meeting #16 (23 Mar. 2017), Transcript, [Ex. 237], pp. 27-29 (emphasis added). The official transcript for this, and other, meetings of the IRP-IOT contain numerous typographical and other errors. We have corrected these transcripts as set forth in the various block quotes in this brief, by reference to the audio recordings of same, and reflect the corrected language in brackets.

standing, *i.e.*, by making a claim against ICANN for injuries suffered as a result of ICANN’s action or inaction which breached its Articles or Bylaws.

- The Public Comments requested additional third-party rights of participation, but only where an IRP had been brought to challenge the decision of an underlying “process-specific expert panel,” as set forth in the Bylaws.
- The IRP-IOT was also considering suggestions made in the Public Comments that “ancillary parties” to the underlying “process specific expert panel proceeding” should have a right to file an *amicus* brief with the IRP Panel.
- The IRP-IOT discussed these Public Comments and agreed to so modify Rule 7 along these lines.

2.1.4 The Post-Public Comment Drafting History: New Joinder Language Provides for Third Party Participation Rights Where IRPs Challenge Decisions of Underlying “Process-Specific Expert Panels”

2.1.4.1 The IRP-IOT Proposed and Agreed to Joinder Language Narrowly Tailored to Address the Public Comments

35. ICANN cites selective excerpts from the IRP-IOT meeting transcripts to give the false impression that the scope of *amicus* participation was a central point of discussion in the committee’s deliberations.⁷² The actual language that the IRP-IOT drafted and agreed to, however, reflected the limited request set forth in the Public Comments.

36. On **3 May 2017**, McAuley circulated a first draft of the proposed joinder language.⁷³ McAuley’s proposed language responded directly to the three suggestions made in the Fletcher Comments discussed above:

1. That all ***those who participated in the underlying proceeding as a “party”*** receive notice from a claimant (in IRPs under ***Bylaw section 4.3(b)(iii)(A)(3)***) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents)

⁷² ICANN’s Response to Procedures Officer’s Questions concerning the Drafting History of the Supplementary Procedures (16 Jan. 2019), ¶¶ 23-27.

⁷³ *Presentation: Suggestions for disparate Joinder comments* (3 May 2017), available at <http://mm.icann.org/pipermail/iot/attachments/20170503/5c99d640/IRPdisparatejoindercomments-0001.pptx> (last accessed on 26 Jan. 2019), [Ex. 238]; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (3 May 2017), available at <https://mm.icann.org/pipermail/iot/2017-May/000209.html> (last accessed on 26 Jan. 2019), [Ex. 239] (attaching “Suggestions for disparate Joinder comments”).

contemporaneously with the claimant serving those documents on ICANN.

2. That *all such parties* have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.

3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

4. Persons/entities participating in IRPs as amici shall each, for the purposes of bylaws section 4.3(r) only, be considered “parties” to the IRP.⁷⁴

37. The 3 May joinder language thus provided for a modest expansion of third-party rights of participation, in line with the limited concern raised in the Public Comments:

- Parties who participated in an underlying “process-specific expert panel” proceeding would receive notice if an IRP were commenced challenging the decision of that panel.
- “All such parties” would have the right to intervene in that IRP.
- The Procedures Officer would have the sole discretion to determine whether “such parties” could intervene as a party or as an *amicus curiae*.

In sum, no third-party rights of participation were provided for any IRP other than those where a decision of an underlying “process-specific expert panel” was being challenged.

38. On **4 May 2017**, McAuley led a brief discussion of his proposed joinder language.

No substantive comments on the draft language were made. As summarized below, over the

⁷⁴ *Presentation: Suggestions for disparate Joinder comments* (3 May 2017), available at <http://mm.icann.org/pipermail/iot/attachments/20170503/5c99d640/IRPdisparatejoindercomments-0001.pptx> (last accessed on 26 Jan. 2019), [Ex. 238], pp. 1-2 (emphasis added). In his proposed text, McAuley provided that *amicus curiae* do not enjoy the rights or obligations of parties to an IRP, save for liability for costs pursuant to Section 4.3(r) of the Bylaws.

following several weeks, McAuley’s further comments reveal that he and the committee were in agreement that there would be only limited rights of participation in IRPs that challenged decisions of “process specific expert panels,” as provided for by Section 4.3(b)(iii)(A)(3) of ICANN’s

Bylaws:

11 May 2017: “Where I think we are on joinder, and it’s as follows: I think we’ve agreed that *anybody that has participated in the underlying expert panel proceedings*, and with respect to a certain section of the bylaw, that they would get – if they participated as a party there and another person challenges that, then those participants below would get full notice of the IRP and the request for IRP And all of *those parties would have a right* – a right – to intervene in the IRP.”⁷⁵

* * * *

18 May 2017: “And, on the joinder issue, you’ve seen the slides that I sent before, and basically *where we have come down on joinder is that anybody that participated in an underlying expert panel proceeding as a party* would receive notice from an IRP claimant, and they would receive a copy of the notice and a request for an IRP, two separate things, but together they constitute the body of the request for IRP.

And, they would be to get the documents, that they would have *such people that participated below would have a right to intervene in the IRP, but the [procedures] officer of the panel would have the final say on how that is executed, whether as a party or as an amicus brief*, and the [procedures] officer would be exhorted to do their best to stick within the timeframes that the bylaws call for in handling IRPs.”⁷⁶

* * * *

5 June 2017: “Our agreed approach at first reading deals with joinder issues concerning *entities that participated in an underlying proceeding (process-specific panel) as contemplated in Bylaw Section 4.3(b)(iii)(A)(3)*.

Our approach was agreed at first reading following consideration of

⁷⁵ IRP-IOT Meeting #21 (11 May 2017), Transcript, [Ex. 206], p. 6 (emphasis added).

⁷⁶ IRP-IOT Meeting #22 (18 May 2017), Transcript, [Ex. 240], p. 8 (emphasis added).

various public comments received from the first draft public comment period.”⁷⁷

* * * *

21 July 2017: “*The intent is to allow all ‘parties’ at the underlying proceeding to have a right of intervention*, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. *It is not envisioned to allow non-parties from below (or others) to join under these provisions - noting that these provisions just deal with parties below*. We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules ... that went out for comment.”⁷⁸

2.1.4.2 ICANN Proposes Minor Tweaks to the Joinder Provisions

39. On **7 September 2017**, the IRP-IOT again discussed the joinder provisions of Rule 7. McAuley opened that discussion recalling that joinder rights were limited to participants in IRPs that challenged the decisions of underlying process-specific expert panels:

[W]hat I’m doing is suggesting *only those persons or entities participating in the underlying proceedings* receive notice from a claimant, this is the expert panel challenge instance, of the full notice of IRP and the request for IRP The second point I’m suggesting *all such parties have a right to intervene in the IRP*. ... The manner [of intervention] should be up to the procedure officer who may allow such intervention through granting IRP party status or by allowing such parties to file amicus [] briefs.⁷⁹

During the discussion of the joinder provisions, however, ICANN Legal raised a concern that providing all parties to the underlying proceeding with a right to intervene *as a party in the IRP*

⁷⁷ Email from D. McAuley to Members of the IRP-IOT (5 June 2017), available at <https://mm.icann.org/pipermail/iot/2017-June/000251.html> (last accessed on 17 Dec. 2018), [Ex. 241], p. 1 (emphasis added).

⁷⁸ Email from D. McAuley to Members of the IRP-IOT (21 July 2017), available at <https://mm.icann.org/pipermail/iot/2017-July/000279.html> (last accessed on 26 Jan. 2019), [Ex. 207], p. 2 (emphasis added).

⁷⁹ IRP-IOT Meeting #28 (7 Sep. 2017), Transcript, [Ex. 204], pp. 3-4 (emphasis added).

could significantly expand the scope of IRPs generally:⁸⁰

SAMANTHA EISNER: ... [O]ne [of the] things [that] I reflect on when I read [this] is that I [would] anticipate [that] for someone to achieve party status [in the IRP that] someone must [actually] have appropriate standing to assert a claim in an IRP and so I'm wondering if we have that reflected anywhere because otherwise it's [-] it seems to expand the IRP if we allow people to join as party without having a requirement of standing....

DAVID McAULEY: I guess where I'm coming from Sam is [] that the [rule is] with respect to people who were parties at the expert panel decision. And the bylaw[] provides for appeals from those decisions. And so.

SAMANTHA EISNER: Well, the bylaw[] allows for those that believe that there was a [--] that ICANN violated its bylaws and article[s] in accepting the expert opinion to take that ma[tt]er to IRP [--] it's not necessarily an appeal.⁸¹

40. Later that day, Eisner “proposed language to address the concern raised about making sure that only those who satisfy the definition of ‘claimant’ and would otherwise have standing under the IRP are given ‘party’ status. Otherwise, allowing persons or entities to achieve ‘party’ status could risk the expansion of the IRP to issues not tethered to the violations of ICANN’s articles or bylaws.”⁸² Eisner proposed to insert the following in the joinder language: “A person or entity seeking to intervene in an IRP can only be granted party status if that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at

⁸⁰ Under the Bylaws, IRPs may only be brought for specific types of claims, *e.g.*, that an ICANN Board or Staff action or inaction breached ICANN’s Articles or Bylaws. ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(b). ICANN Legal repeatedly raised concerns within the IRP-IOT that efforts to provide entities with “party” or “Claimant” rights, based only on a showing of a “material interest” in the subject matter of the IRP, could greatly expand the scope of IRPs to include, for example, claims that that ICANN actions or inactions injured the Claimant, even if those actions or inactions did not breach ICANN’s Articles or Bylaws.

⁸¹ IRP-IOT Meeting #28 (7 Sep. 2017), Transcript, [Ex. 204], pp. 3-4 (corrected pursuant to audio transcript of the meeting); IRP-IOT Meeting #28 (7 Sep. 2017), Audio Recording, *available at* <http://audio.icann.org/mssi/irp-iot-07sep17-en.mp3> (last accessed on 26 Jan. 2019), [Ex. 242].

⁸² Email from S. Eisner (ICANN) to D. McAuley (VeriSign) (7 Sep. 2017), *available at* <https://mm.icann.org/pipermail/iot/2017-September/000306.html> (last accessed on 26 Jan. 2019), [Ex. 243], p. 1.

Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures.”⁸³

41. On **3 October 2017**, Eisner’s edit was incorporated into the draft of Rule 7.⁸⁴ In response to this new language, a member of the IRP-IOT noted that winning parties in the underlying proceeding would not have Claimant standing, since they would take the position that ICANN had not breached its Bylaws or Articles, and asked that the rule be broadened to ensure that those that had prevailed in the underlying proceeding could also participate, in accordance with the requests made in the Public Comments.⁸⁵

42. On **10 October 2017**, McAuley circulated what he deemed to “final” joinder language:

SUGGESTED JOINDER LANGUAGE:

1. That *only those persons/entities who participated in the underlying proceeding as a “party” receive notice* from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That, subject to the following sentence, *all such parties have a right to intervene in the IRP*. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP *can only be granted “party” status if* (1) that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, or (2) that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute.

⁸³ Email from S. Eisner (ICANN) to D. McAuley (VeriSign) (7 Sep. 2017), available at <https://mm.icann.org/pipermail/iot/2017-September/000306.html> (last accessed on 26 Jan. 2019), [Ex. 243], p. 1.

⁸⁴ Email from D. McAuley (VeriSign) to Members of the IRP-IOT (3 Oct. 2017), available at <https://mm.icann.org/pipermail/iot/2017-October/000315.html> (last accessed on 27 Jan. 2019), [Ex. 244]. ICANN’s language amounts to only a tweak, further limiting participation rights by clarifying that participants in underlying proceedings may intervene as “parties” in an IRP only to the extent that they have standing as a Claimant under ICANN’s Bylaws.

⁸⁵ Email from M. Hutto (Linx) to D. McAuley (VeriSign) (4 Oct. 2017), available at <https://mm.icann.org/pipermail/iot/2017-October/000316.html> (last accessed on 26 Jan. 2019), [Ex. 245], p. 1.

The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this *limited intervention right* shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.⁸⁶

43. The 10 October draft language did not expand third party participation rights, but rather further limited them. Consistent with all prior drafts, the 10 October joinder provisions:

- i. Applied only where an IRP had been brought to challenge a decision of an underlying “process specific expert panel;”
- ii. Provided that parties to that underlying proceeding would receive notice; and,
- iii. Provided that “all such parties” (to the underlying proceeding) would have a right to intervene.

In response to ICANN’s concerns about expanding the scope of IRPs generally, a new provision was added to limit the “right to intervene” as a “party:”

- iv. “Such parties” could only intervene as parties to the IRP where they had Claimant standing or otherwise had a material injury related to the violation

⁸⁶ Email from D. McAuley (VeriSign) to Members of the IRP-IOT (10 Oct. 2017), *available at* <https://mm.icann.org/pipermail/iot/2017-October/000321.html> (last accessed on 26 Jan. 2019), [Ex. 246], pp. 1-2 (emphasis added).

identified by the Claimant.

44. On **23 October 2017**, hearing no objections to the 10 October draft, McAuley circulated the same language again for a second reading.⁸⁷

2.1.4.3 The May 2018 Draft Reflects the Limited Joinder Language Agreed in 2017

45. On **8 May 2018**, the first full set of draft Rules since the Public Comment Draft were circulated within the IRP-IOT (the “**May 2018 Draft**”), along with a redline against the Public Comment Draft.⁸⁸ The May 2018 Draft was consistent with the provisions of the Public Comment Draft, as modified to reflect the limited concern raised in the Public Comments received on Rule 7. First, the May 2018 Draft provided for a general right of intervention, retaining the exact language of the Public Comment Draft:

Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER.⁸⁹

46. A new section (“Intervention and Joinder”) was inserted to directly respond to the Public Comments by providing for specific rights of intervention in IRPs that were brought to challenge the decisions of underlying “*process-specific expert panels*” under the new Bylaws provision:

If a person, group, or entity *participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3))*, (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. *Such a person, group, or entity* shall have a right to intervene in the IRP as a CLAIMANT or as an *amicus*, as per the following:

i. (S)he/it/they may only intervene as a party if they satisfy

⁸⁷ Email from D. McAuley (VeriSign) to Members of the IRP-IOT (23 Oct. 2017), *available at* <https://mm.icann.org/pipermail/iot/2017-October/000325.html> (last accessed on 26 Jan. 2019), [Ex. 247].

⁸⁸ Email from S. Eisner (ICANN) to Members of the IRP-IOT (8 May 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-May/000390.html> (accessed on 26 Jan. 2019), [Ex. 248] (attaching 1 May 2018 draft set of supplementary procedures); Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, [Ex. 1].

⁸⁹ Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, [Ex. 1], p. 8.

the standing requirement to be a CLAIMANT as set forth in the Bylaws.

ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an *amicus*.

Any person, group, or *entity that did not participate in the underlying proceeding* may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an *amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed *amicus* has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.⁹⁰

47. Given the general right for entities with Claimant standing to intervene in IRPs, this new “Intervention and Joinder” section makes sense only when read as providing specific rules in the limited situations where IRPs were brought to challenge decisions rendered by underlying “process-specific expert panels” pursuant to the new Section 4.3(b)(iii)(A)(3) of ICANN’s Bylaws. This is the only interpretation that is consistent with the requests made in the three Public Comments on Rule 7, the discussions within the IRP-IOT over the preceding 15 months, and,

⁹⁰ Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, [Ex. 1], pp. 8-9 (emphasis added).

importantly, the text⁹¹ of the May 2018 Draft of Rule 7 itself.⁹² Reflecting the long-held consensus within the IRP-IOT on the limited changes to the Public Comment Draft’s version of Rule 7 that were needed to respond to the Public Comments, an ICANN lawyer noted during the 7 June 2018 IRP-IOT meeting:

I THINK THE [JOINER] LANGUAGE THAT WE HAVE IN THE DRAFT INTERIM RULES THAT SAM CIRCULATED IS PRETTY MUCH THE LANGUAGE THAT[,] BASED UPON OUR VARIOUS DISCUSSIONS, [WE] SEEMED TO HAVE AGREED UPON. I DON’T RECALL THERE BEING ANY OPPOSITIONS OR DISCUSSIONS TO THE CONTRARY ON THE CURRENT LANGUAGE.⁹³

48. Following the meeting on 7 June 2018, the IRP-IOT adjourned for the summer and did not meet again until 9 October 2018. No meetings were held over the summer, and the IRP-IOT’s email archive is devoid of any substantive correspondence for the entirety of July, August, and most of September.

⁹¹ Rules of English grammar may guide the interpretation of rules. See *Wronke v. Marsh*, 787 F.2d 1569, 1574-76 (Fed. Cir. 1986), [Ex. 249] (interpreting statutory language “[o]n the basis of English grammar”); *ConocoPhillips Co. v. U.S. E.P.A.*, 612 F.3d 822, 839 (5th Cir. 2010), [Ex. 250] (interpreting statute based on “the rules of English grammar”).

⁹² The drafter refers to “an underlying proceeding” in the first reference by using the indefinite article “an.” In other words, notice of an IRP will not be provided, unless there was “an underlying proceeding” and, if so, only to entities that participated in that proceeding. The second reference, however, uses the definite article “the.” Had the drafter intended to provide for participation rights, regardless of whether there was an underlying proceeding or not, the drafter would have used indefinite article “an” in the second reference as well. The drafter did not do so, consistent with the drafting history and the understanding of the joinder language that had accrued over the prior 15 months, namely that third party participation rights in an IRP were conditioned on the existence of an underlying “process-specific expert panel.” A drafter’s choice between the definite and indefinite article therefore affects the meaning of the text. See, e.g., *Reid v. Angelone*, 369 F.3d 363, 367 (4th Cir. 2004), [Ex. 251] (“[B]ecause Congress used the definite article ‘the,’ we conclude that ... there is only one order subject to the requirements...”); *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003), [Ex. 252] (reference to “the” use of a drug is a reference to an FDA-approved use, not to “a” use or “any” use).

The definite article (“the”) is used before a noun to indicate that **the identity of the noun is known to the reader**. *Chicago Manual of Style Online*, ¶ 5.71 (Definite article), available at <https://www.chicagomanualofstyle.org/book/ed17/part2/ch05/psec071.html> (last accessed 26 Jan. 2019), [Ex. 253]. The indefinite article (“an”) is used before **a noun that is general or when its identity is not known**. *Chicago Manual of Style Online*, ¶ 5.72 (Indefinite article), available at <https://www.chicagomanualofstyle.org/book/ed17/part2/ch05/psec072.html> (last accessed on 26 Jan. 2019), [Ex. 254].

⁹³ IRP-IOT Meeting #41 (7 June 2018), Transcript, [Ex. 255], p. 12 (emphasis added).

49. As of 7 June, therefore, the status of Rule 7’s joinder language was as follows:

- On **28 November 2016**, the IRP-IOT had agreed upon and published for Public Comment rules that would only permit intervention in an IRP if the intervenor possessed Claimant standing.
- By **1 February 2017**, three Public Comments had been received on Rule 7, each requesting that the rules on intervention be broadened for IRPs that challenged decisions of underlying “process-specific expert panels” as provided for by ICANN’s Bylaws at Section 4.3(b)(iii)(A)(3). In such IRPs, the commentators requested that those entities that had participated below be granted rights of participation in the IRP. The Public Comments also raised the possibility of “ancillary parties” to the underlying proceeding having a right to submit *amicus* briefs.
- Between **March and October 2017**, the IRP-IOT produced several drafts of joinder rules designed to provide for the limited rights of participation requested in the Public Comments.
- On **8 May 2018**, a full set of rules was circulated and which provided for third party participation rights in IRPs brought to challenge the decisions of underlying process-specific expert panels, as had been requested by the Public Comments and reflecting the consensus within the IRP-IOT that had been reached over the course of 2017.
- On **7 June 2018**, the IRP-IOT described the joinder language as “agreed upon.”

2.1.5 After Afilias’ Invocation of CEP Was Publicly Disclosed, VeriSign Manipulated the IRP-IOT Process to Ensure that It (and NDC) Could Participate in this IRP

50. On **20 June 2018**, ICANN publicly disclosed Afilias’ request for CEP concerning .WEB that had been made two days earlier.

51. On **5 October 2018**,⁹⁴ McAuley circulated a new draft set of rules within the IRP-IOT (the “**5 October Draft**”). The 5 October Draft, in relevant part, contained a new section addressing “Participation as an *Amicus Curiae*,” reflecting participation rights that had never been discussed by the committee.⁹⁵

⁹⁴ Although the draft was circulated on 5 October, the draft itself bears a date of 25 September 2018.

⁹⁵ Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 25 September to 8 May 2018 versions), [Ex. 256].

Any 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 may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) ***shall be deemed to have a material interest relevant to the DISPUTE*** and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.⁹⁶

52. The May 2018 Draft, consistent with the Public Comments, had provided that *amicus curiae* could only participate in IRPs where decisions made by underlying “process-specific expert panels” were being challenged (and even then, only with the consent of the Procedures Officer). The 5 October Draft, however, provided that ***any entity*** that has a material interest related to ***any*** Dispute that was the subject of an IRP may intervene as an *amicus curiae*. In other words, the right to participate as an *amicus curiae* was no longer restricted to IRPs where decisions rendered by underlying “process-specific expert panels” were being challenged. This change did not reflect the limited intervention rights set forth in the Public Comment Draft, nor

⁹⁶ Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 25 September to 8 May 2018 versions), [Ex. 256], p. 10 (emphasis added).

was this change requested by any of the Public Comments received on Rule 7.

53. On **9 October 2018**, the IRP-IOT met to discuss the 5 October Draft, with a view to finalizing the rules for Board approval at the end of the month.⁹⁷ Despite the importance of this meeting, which ICANN describes in its brief as “intensive,”⁹⁸ very few IRP-IOT members attended and a quorum was only established by counting ICANN Legal and Jones Day lawyers who were participating in that meeting.⁹⁹ Consistent with the October 5 Draft that he had circulated, McAuley sought to push the language of the already substantially revised Rule 7¹⁰⁰ even further beyond the limited Public Comments that had been received on Rule 7 and which had only concerned third-party rights of participation in IRPs that challenged decisions of underlying process-specific expert panels:

I had my hand up because *I want to speak as a participant here.*

And I do have [a] concern about this and what I believe is that on joinder, intervention, whatever we are going the call it[,] *it's essential that a person or [an] entity have a right to join an IRP if they feel that a significant – if they claim that a significant interest [that] they have relates to the subject of the IRP.*

And that adjudicating the IRP in their absence would impair or

⁹⁷ IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202], p. 1.

⁹⁸ ICANN’s Response to Procedures Officer’s Questions concerning the Drafting History of the Supplementary Procedures (16 Jan. 2019), ¶ 50.

⁹⁹ As discussed below, members of the IRP-IOT have stated that the participation of ICANN Legal and Jones Day as full participants of the IRP-IOT presents serious conflicts of interest. Those conflicts were most apparent in the October 2018 meetings, where ICANN’s lawyers *outnumbered* those participants who were independent of ICANN and VeriSign. ICANN’s CEO and President confirmed at the 25 October 2018 Board Meeting that ICANN in-house and external lawyers “should not be regarded as members of the community for the purpose of participation in community processes....” Email from M. Hutton (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), available at <https://mm.icann.org/pipermail/iot/2018-December/000472.html> (last accessed on 27 Jan. 2019), [Ex. 257], p. 2. Minus ICANN’s lawyers, the IRP-IOT would have lacked a quorum for each of the 9 and 11 October “intensive” meetings that resulted in the substantial and material expansion of the *amicus curiae* provisions of Rule 7 that was sought by VeriSign’s David McAuley.

¹⁰⁰ The breadth and scope of the edits to Rule 7’s joinder provisions is evident from the redline against the May 2018 version. See Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 25 September to 8 May 2018 versions), [Ex. 256].

impede their ability to protect that [interest].

And [additionally] when there's a question of law or fact that the IRP is going [to] decide that is common to all that [] are similarly situated.

And especially given the finality of these kinds of proceedings it's my view that intervention, whatever term we are using[,] needs to capture that.

So I'm putting that on, I would be happy to provide specific language with respect to this concept tomorrow on list. And we [could] talk about it on Thursday. ***But that's what I wanted to mention as a participant with respect to this particular rule.***¹⁰¹

This was a significant departure from McAuley's repeated insistence that the joinder language concerned ***only*** those entities that had participated in underlying proceedings. He provided no explanation for his changed position,¹⁰² or for that matter as to his position as "a participant" as opposed to as the Chair of the IRP-IOT. His comments a few days later, however, are revealing in this regard:

But if it was moved to an amicus thing I would like to look at the language you [came] up with. You can tell between this and rule 8, ***where I'm coming from is a [competitive] situation.*** Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that [are] effected by ICANN have to be able to [protect] their interest in ***competitive situations.*** [So I] use[d] language [that] largely followed U.S. federal rules of [procedure]. But these rules are fairly -- I think, a least I common law countries -- fairly routinely accepted that someone has an interest can defend themselves [because] they can't look [for] the defendant to make [their] argument for them.¹⁰³

¹⁰¹ IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202], p. 15 (emphasis added).

¹⁰² An exhibit comparing McAuley's views on joinder rights both before and after Afiliias' invocation of CEP was publicly disclosed is attached hereto as Annex A.

¹⁰³ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], p. 14. The transcripts of IRP-IOT meetings contain multiple typographical and other errors of translation. Where important, we have corrected these quotes by reference to the audio recordings and reflect those corrections in brackets.

54. On **11 October 2018**, McAuley, as he promised, proposed alternative language:¹⁰⁴

In addition, any person, group or entity shall have a right to *intervene as a CLAIMANT* where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group or entity's absence might impair or impede that person, group or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.¹⁰⁵

McAuley's proposal yet again expanded Claimant standing significantly.¹⁰⁶

55. On **Friday 19 October 2018**, following an offline consultation with Samantha Eisner of ICANN Legal,¹⁰⁷ McAuley emailed a full new set of the Rules to members of the IRP-IOT (the "**October 19 Draft**").¹⁰⁸ The October 19 Draft contained yet even more expansive third-party participation rights, and removed any discretion from the Procedures Officer insofar as applications for participation were made by certain categories of applicant:

Public Comment Draft	May 2018 Draft	October 19 Draft
<i>Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the</i>	<i>Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of</i>	<i>Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in</i>

¹⁰⁴ Email from D. McAuley (VeriSign) to Members of the IRP-IOT (11 Oct. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-October/000449.html> (last accessed on 25 Jan. 2019), [Ex. 258] (attaching new joinder language).

¹⁰⁵ New Joinder language from D. McAuley (VeriSign) to Members of the IRP-IOT (11 Oct. 2018), [Ex. 259], p. 2.

¹⁰⁶ IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205], pp. 12-15. Again, a quorum at the 11 October meeting was achieved only by including members of ICANN's legal team. Other than VeriSign's McAuley, only two other participants independent of ICANN attended.

¹⁰⁷ The several emails appended to the Declaration of Samantha Eisner were not publicly disclosed until 19 January 2019, when they were finally posted to ICANN's website as a result of Afiliias' DIDP Request. *See* Letter from A. Ali (Counsel for Afiliias) to ICANN Board (21 Dec. 2018), [Ex. 260]; *Independent Review Process – Implementation Oversight Team (IRP-IOT), Off-List Correspondences* (modified on 19 Jan. 2019), *available at* <https://community.icann.org/display/IRPIOTI/Off-list+Correspondences> (last accessed on 26 Jan. 2019), [Ex. 261].

¹⁰⁸ Email from B. Turcotte (on behalf of D. McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-October/000451.html> (last accessed on 26 Jan. 2019), [Ex. 262]; Draft as of 19 October 2018 – Interim IRP Supplementary Procedures, [Ex. 263].

<p>permission of the PROCEDURES OFFICER.¹⁰⁹</p>	<p>the PROCEDURES OFFICER.</p> <p>...</p> <p>If a person, group, or <i>entity participated in an underlying proceeding</i> (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)), (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. <i>Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an amicus</i>, as per the following:</p> <p>i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws.</p> <p>ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an <i>amicus</i>.</p> <p>Any person, group, or <i>entity that did not participate in the underlying proceeding</i> may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an <i>amicus</i> if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed <i>amicus</i> has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.¹¹⁰</p>	<p>the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. <i>This applies whether or not the person, group or entity participated in an underlying proceeding</i> (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).</p> <p>...</p> <p>Any person, group, or <i>entity that has a material interest relevant to the DISPUTE</i> but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws <i>may participate as an amicus curiae</i> before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or <i>entities shall be deemed to have a material interest relevant to the DISPUTE</i> and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an <i>amicus</i> before the IRP PANEL:</p> <p>i. A person, group or entity that <i>participated in an underlying proceeding</i> (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));</p> <p>ii. <u>If the IRP relates to an application arising out of ICANN’s New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and</u></p> <p>iii. <u>If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that</u></p>
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¹⁰⁹ Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, [Ex. 235], p. 8.

¹¹⁰ Draft as of 1 May 2018 - Draft Interim ICDR Supplementary Procedures, [Ex. 1], pp. 8-9.

		is external to the DISPUTE, such external person, group or entity. ¹¹¹
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56. The October 19 Draft is strikingly dissimilar to the prior drafts of Rule 7. Not only could *amicus curiae* now participate in IRPs upon a showing of a material interest in the Dispute, the Procedures Officer’s discretion to allow such participation was greatly restricted. Two additional categories of mandatory participants had been added, which specifically covered NDC’s and VeriSign’s situation with respect to Afilias’ IRP against ICANN. Indeed, NDC and VeriSign subsequently invoked those very provisions to argue that they have a mandatory right to participate in the IRP and Emergency Arbitrator proceedings. In light of Afilias’ filing of its IRP, the inclusion of two new categories of mandatory *amicus* participation, at VeriSign’s insistence, cannot be considered coincidental or a natural evolution of the joinder text.

57. Late in the evening on Friday 19 October 2018, McAuley asked the IRP-IOT to comment on the substantial new revisions to Rule 7 in 48 hours, by midnight on *Sunday 21*

October 2018:

[T]he [joinder] language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list – a way to try to take advantage of board action at next week’s meeting.

Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21.¹¹²

¹¹¹ Draft as of 19 October 2018 – Interim IRP Supplementary Procedures, [Ex. 263], pp. 9-10.

¹¹² Email from B. Turcotte (on behalf of D. McAuley (VeriSign)) to Members of the IRP-IOT (19 Oct. 2018), available at <https://mm.icann.org/pipermail/iot/2018-October/000451.html> (last accessed on 26 Jan. 2019), [Ex. 262], p. 2 (emphasis added).

58. Unsurprisingly, no one submitted comments.¹¹³ McAuley, who while “wearing his participant hat” had been the driving force behind these new edits, deemed the October 19 Draft to have been approved by the IRP-IOT while “wearing his leader hat,” even though this new joinder language had substantially and materially revised the May 2018 text, which had been “approved” after discussion within the IRP-IOT and which bore no resemblance to the solitary sentence on this subject from the Public Comment Draft. Thus, without any discussion or debate, McAuley submitted the draft to the Board for approval the next day on 22 October 2018. The October 19 Draft was not sent to CCWG-Accountability for review and approval prior to its submission to the Board.

2.2 VeriSign Should Not Be Allowed to Benefit from Its Malfeasance

59. The Procedures Officer has the inherent equitable power to punish bad faith conduct.¹¹⁴ In short, equity “require[s] that [litigants] shall have acted fairly and without fraud or deceit as to the controversy at issue.”¹¹⁵

60. Having manipulated ICANN’s rulemaking processes to serve its own ends, VeriSign does not come before this Panel with clean hands. The Procedures Officer has the equitable power to deny VeriSign’s Request, and should do so because VeriSign “is guilty of

¹¹³ Given the admitted lack of interest in the IRP-IOT (aside from McAuley, ICANN Legal, and one or two others), it was fanciful to believe that any committee members would review the draft in sufficient detail to respond over the weekend.

¹¹⁴ *Aptix Corp. v. Quickturn Design Sys. Inc.*, 269 F.3d 1369, 1378 (Fed. Cir. 2001), [Ex. 264] (invoking unclean hands doctrine to dismiss claims based on court’s inherent power to punish bad faith conduct); *Precision Instr. Mfg. Co. v. Auto Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945), [Ex. 265] (equity “necessarily gives wide range to the equity court’s use of discretion in refusing to aid the unclean litigant. It is ‘not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.’”); *Aris-Isotoner Gloves Inc. v. Berkshire Fashions, Inc.*, 792 F.Supp. 969, 969-70 (S.D.N.Y. 1992), [Ex. 266] (same).

¹¹⁵ *Precision*, 324 U.S. at 815 [Ex. 265]; see also *Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC*, 149 F.3d 85, 90 (2d Cir. 1998), [Ex. 267].

conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party.”¹¹⁶

61. ICANN is an organization in which participants from the Internet community are expected to act in the public’s benefit.¹¹⁷ McAuley, especially in his role as a leader, therefore had a duty to participate in the IRP-IOT for the public’s benefit, not for the benefit of his employer. At a minimum, therefore, McAuley had a duty to disclose to the other members of the IRP-IOT that his proposed revisions to Rule 7 would immediately benefit his employer, VeriSign, allowing it to participate in the .WEB IRP.¹¹⁸

2.3 As NDC Lacks Any Independence from VeriSign in this IRP, NDC Must Also Be Barred from Participating in this IRP

62. Third Party Designated Confidential Information Redacted

¹¹⁶ *Estate of Lennon v. Screen Creations, Ltd.*, 939 F.Supp. 287, 293 (S.D.N.Y. 1996), [Ex. 268].

¹¹⁷ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 1, Sec. 1.2(a) (“ICANN . . . must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole. . .”).

¹¹⁸ In this regard, VeriSign’s participation in the IRP-IOT resembles the participation of private actors in a standard-setting organization. As courts have ruled, such participants have a duty to disclose relevant patents where adoption of a standard may trigger one or more of that parties’ patents. See *Multimedia Patent Trust v. Apple Inc.*, 2012 WL 6863471, *21 (S.D. Cal. 2012), [Ex. 269] (citing *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1348 (Fed. Cir. 2011), [Ex. 270]).

¹¹⁹ Third Party Designated Confidential Information Redacted

Third Party Designated Confidential Information Redacted

63. Third Party Designated Confidential Information Redacted

64. Third Party Designated Confidential Information Redacted

¹²⁰ *See, e.g.*, Restatement (Third) Of Agency § 1.01 (2006), [Ex. 271].

¹²¹ Third Party Designated Confidential Information Redacted

¹²² Third Party Designated Confidential Information Redacted

¹²³ Third Party Designated Confidential Information Redacted

¹²⁴ Third Party Designated Confidential Information Redacted

¹²⁵ Third Party Designated Confidential Information Redacted

Third Party Designated Confidential Information Redacted

65. Third Party Designated Confidential Information Redacted

3. BECAUSE THE INTERIM PROCEDURES WERE IMPROPERLY ADOPTED, ICANN MAY NOT RELY UPON THEM

66. The ICANN Board adopted the Interim Procedures despite significant deviations from ICANN's custom and practice regarding its rule-making activities. *First*, the IRP-IOT ignored its mission statement by presenting the draft set of Interim Procedures to the Board without first reporting back to the CCWG-Accountability. *Second*, contrary to ICANN's practice, the material and significant changes to Rule 7 were not properly published for public comment prior to its adoption. *Third*, members of the IRP-IOT itself have called into question the validity of the Interim Procedures, as, in their view, the wrongful participation of multiple representatives from ICANN's Legal Department and Jones Day, its external counsel, in the IRP-IOT gave rise to a serious conflict of interest.

67. For these reasons, ICANN should not be allowed to rely on the Interim Procedures to support VeriSign's and NDC's Requests.

3.1 The IRP-IOT Presented the Draft Interim Procedures Directly to the Board Without First Reporting Back to the CCWG-Accountability

68. The IRP-IOT's brief mission statement provides: "The IOT will review the outcome produced by our legal counsel *and report back to CCWG-Accountability*."¹²⁶ This was, in fact, how the IRP-IOT proceeded in the months leading up to the Public Consultation in November 2016. Counsel to the CCWG-Accountability prepared a draft set of Rules (the 19 July 2016 Draft), which was debated and revised by the IRP-IOT over several months, culminating in the 31 October 2016 Draft. The 31 October 2016 Draft was dutifully presented, along with a report, to the CCWG-Accountability, which subsequently voted on 2 November 2016 to publish that draft for public comment. The IRP-IOT thereupon commenced the Public Consultation on 28 November 2016.

69. In the Public Consultation, the IRP-IOT stated:

Following the public comment proceeding, the inputs will be analyzed by the IRP-IOT who will consider amending [the rules] in light of the comments received. *If there are no significant issues, the final version of the Updated Supplementary Procedures for Independent Review Process along with the analysis of the public comments will be presented to the CCWG-Accountability for approval.* Once approved, the CCWG-Accountability will forward the Updated Supplementary Procedures to the ICANN Board of Directors for final approval.¹²⁷

This was not, however, how the IRP-IOT ultimately proceeded. After the closure of the Public Consultation on 1 February 2017, the IRP-IOT revised the Rules to account for the various Public Comments it had received. Following that drafting process, however, the IRP-IOT choice not to

¹²⁶ *Independent Review Process - Implementation Oversight Team (IRP-IOT) Home* (modified on 19 Jan. 2019), available at <https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home> (last accessed on 25 Jan. 2019), [Ex. 272], p. 1.

¹²⁷ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), available at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en> (last accessed 27 Jan. 2019), [Ex. 221], p. 2 (emphasis added).

present a “final version” of the rules to the CCWG-Accountability “for approval.” Instead, McAuley, of his own accord, unilaterally deemed the 19 October Draft to have been “approved” by the IRP-IOT and directly sent to the revised Rules to the Board for adoption on 22 October 2018.¹²⁸ This was not how the IRP-IOT was intended to proceed, as per its mission statement, nor how the public reasonably expected the IRP-IOT to proceed, given the representations made by the IRP-IOT in its November 2016 Public Consultation.

70. By failing to report back to the CCWG-Accountability as per its mission statement and public representations, the IRP-IOT had removed one avenue that would have provided much needed transparency into its workings. Reflecting the obscurity in which the IRP-IOT worked, McAuley’s suggested revisions to the joinder language, which were circulated to the IRP-IOT on 11 and 19 October, were not publicly disclosed until after the Board vote less than a week later. Moreover, McAuley’s correspondence with Eisner between 16 and 19 October, which are appended to the Eisner Declaration and upon which ICANN places much emphasis, were only publicly disclosed in January 2019 in response to Afilias’ DIDP request.

71. In sum, the IRP-IOT’s failure to report back to the CCWG-Accountability on these significant and material changes to Rule 7 violated its mission statement and its commitment to do so in the November 2016 Public Consultation. This failure compromises the legitimacy of the Interim Procedures.

3.2 The IRP-IOT Was Obligated to Seek a Further Public Comment on Rule 7

72. The entire set of Interim Procedures had been published for public comment in

¹²⁸ As noted below, by this time, other than ICANN’s lawyers, active participation in the IRP-IOT had dwindled to McAuley and two or three others. The rules for the conduct of IRPs are intended to reflect the views of the Internet community. In reality, as regards Rule 7, they reflected only the views of VeriSign and ICANN Legal.

November 2016, as described above. Despite the many significant and material changes from the Public Comment Draft, however, the IRP-IOT sought a second public comment on Rule 4 only.¹²⁹ No public comment was sought on any other provision of the draft Rules, including Rule 7.

73. Contrary to ICANN’s position, the IRP-IOT absolutely had an obligation to seek further public comments on Rule 7, which by October 2018 bore no resemblance to the Public Comment Draft version.¹³⁰ When the IRP-IOT was formed, the CCWG-Accountability specifically tasked the committee with developing Rule 7 “*based on consultation with the community*.”¹³¹ As regards Rule 7, the IRP-IOT followed this mandate in only the most superficial sense. In sum:

- A version of Rule 7 was published for public comment in November 2016. This version did not provide for *amicus curiae* representation and conditioned all third-party participation rights on having Claimant standing under the Bylaws.
- The Public Comments proposed that Rule 7 be broadened for the limited purpose of providing participation rights for entities that had participated in a “process-specific expert panel proceedings,” even if those entities lacked Claimant standing under the Bylaws. The Public Comments further suggested that “ancillary parties” to these underlying proceedings should have the opportunity to submit an *amicus* brief.
- The IRP-IOT spent the next 15 months discussing and drafting language to provide for such limited third-party participation.
- The text of the Rule 7, as of 7 June 2018, remained consistent with the Public Comment Draft version, but also included a new section (“Intervention and Joinder”) that provided that third-parties could participate in the limited circumstances where IRPs challenged decisions of underlying “process-specific expert panels” as suggested by the Public Comments. Accordingly, the IRP-IOT determined that the new version of Rule 7 did not need to be published for

¹²⁹ See ICANN, *The Independent Review Process Implementation Oversight Team (IRP-IOT) Draft Recommendations* (22 June 2018), available at <https://www.icann.org/public-comments/irp-iot-recs-2018-06-22-en> (last accessed on 26 Jan. 2019), [Ex. 273].

¹³⁰ See Draft as of 25 September 2018 – Updated Draft Interim ICDR Supplementary Procedures (REDLINE of 31 October 2017 to 25 September 2018 versions), [Ex. 274], pp. 8-10.

¹³¹ See CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 (Recommendation #7) (23 Feb. 2016), [Ex. 220], ¶ 20 (emphasis added).

public comment a second time.

- In October 2018, after the second public comment period had ended (and which did not include Rule 7), McAuley engaged in an aggressive campaign to radically expand third-party participation rights in IRPs far beyond anything suggested in the Public Comments.
- The October 19 Draft of Rule 7 was a material and substantial departure from both the Public Comment Draft and the May 2018 Draft, but was never published for public comment, contrary to ICANN’s practices.
- Compounding the problem, the IRP-IOT was not given a meaningful opportunity to discuss the October 19 Draft. As a result, McAuley, acting as the “leader” of the IRP-IOT, simply deemed to be approved the language that he had pushed for as a “participant” without any discussion within the IRP-IOT whatsoever.
- Contrary to its mission statement and its prior practice, the October 19 Draft was not submitted to the CCWG-Accountability before being submitted to the Board for adoption.
- The October 19 Draft itself was not posted to the IRP-IOT website until after the Board had adopted it on 25 October 2018.

74. Specifically, the IRP-IOT was inconsistent in seeking further public comments on language that had been significantly and materially changed since the Public Comment Draft.

Regarding approval of the Interim Procedures specifically, ICANN’s Bylaws provide:

The Rules of Procedure shall be published and *subject to a period of public comment that complies with the designated practice for public comment periods within ICANN* ..., and take effect upon approval by the Board, such approval not to be unreasonably withheld.¹³²

Regarding ICANN’s “designated practice for public comment periods,” the Bylaws themselves provide some guidance in other contexts:

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,

¹³² ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.3(n)(ii) (emphasis added).

ICANN ... shall: (i) *provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board*[.]¹³³

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second scheduled meeting of the Board after such results have been *posted for 30 days*.¹³⁴

The IRP-IOT did not follow these practices: it relied solely on the publication of a very early draft of Rule 7 for public comment, which nearly two years later had been significantly and materially revised.

75. Moreover, the IRP-IOT ignored ICANN’s practice of seeking public consultations regarding all “significant changes” to the Rules themselves, which had been specifically referenced by the IRP-IOT in its first public consultation in November 2016: “Given the IRP IOT is recommending *significant changes* to the Rules of Procedures it is publishing these for public comments.”¹³⁵

76. Indeed, members of the IRP-IOT repeatedly raised the likelihood that the IRP-IOT would need to seek a second public comment on rules that had been significantly changed since the Public Comment Draft. For example, as an ICANN lawyer opined: “I think ... we’d want to evaluate the rules across to see where the substantial changes have been and if they’re so

¹³³ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 3, Sec. 3.6(a) (emphasis added).

¹³⁴ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. [VRSN] 2], Art. 4, Sec. 4.4(a) (emphasis added).

¹³⁵ ICANN, *Updated Supplementary Procedures for Independent Review Process (IRP)* (28 Nov. 2016), available at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en> (last accessed 27 Jan. 2019), [Ex. 221], p. 3 (emphasis added). The November 2016 public comment, as drafted by the IRP-IOT itself, also provided that the final set of rules, along with all of the public comments, “will be presented to the CCWG-Accountability for approval. Once approved, the CCWG-Accountability will forward the [final set of rules] to the ICANN Board of Directors for final approval.” *Id.*, p. 2. This is not the procedure that was followed. To the contrary, following the 11th hour revision of Rule 7, McAuley sent the rules directly to the Board for approval days later.

substantial that another public comment is warranted and that's a typical process from ICANN."¹³⁶

Other ICANN representatives opined more specifically on ICANN's practice in this regard:

So just as a quick reminder, no recommendations can be approved without having gone to public comment at least once. ***If there are significant changes that are brought as a result of the first comment, meaning material changes, it is usually the practice to go back out for a second round of public comments to see what is there.*** Also, though in such cases, it's acceptable to say that we are not throwing the whole thing open. Meaning, we don't necessarily, we can say we don't want comments on things that have not been commented on and we may not [accept] comments on things where there were no material changes and the group has come to a change. So that we don't get caught in an endless cycle. And this may actually be the best approach in this case. As to focus on places where may be there's not a 100% agreement ***or where there have been material changes and go back out for a second public comment as specifically on those points.***¹³⁷

An independent committee member advocated an even more rigorous standard for seeking a second public comment:

Some of the changes that we have made, perhaps arising from individual comments, may not have [been] foreseeable: if we picked up an idea raised in one response to the last comment round, nobody else would have had reason to address that. ***We don't know what people might think about an issue we didn't consult on last time.***

...

To my mind, a big part of the point of a consultation is to give people a chance to raise a point we have not properly considered. That would suggest we focus on the new ideas we've adopted, rather than those have already attracted the most attention.¹³⁸

77. By 22 October 2018, it was undeniable that Rule 7 had been redrafted in its entirety

¹³⁶ IRP-IOT Meeting #22 (18 May 2017), Transcript, [Ex. 240], p. 7.

¹³⁷ IRP-IOT Meeting #31 (7 Dec. 2017), Transcript, [Ex. 275], p. 8 (emphasis added).

¹³⁸ Email from M. Hutto (Linx) to D. McAuley (7 Dec. 2017), available at <https://mm.icann.org/pipermail/iot/2017-December/000346.html> (last accessed on 26 Jan. 2019), [Ex. 276], pp. 1-22 (emphasis added).

from what had been presented to the public in November 2016.¹³⁹ The changes to Rule 7 were certainly “significant” or “substantial” by any definition, as evidenced not only by the scope and breadth of changes made to the text itself, but also by how hard McAuley fought for them. Yet, contrary to ICANN’s practice, no second public consultation was sought.

3.3 Members of the IRP-IOT Questioned the Validity of the Interim Procedures

78. At ICANN|63, a member of the IRP-IOT raised concerns about the participation of members of the ICANN Legal Department and Jones Day, ICANN’s external counsel, in the IRP-IOT as full members of the committee.¹⁴⁰ This IRP-IOT member argued that the degree to which ICANN’s lawyers had participated in and had directed the drafting of rules that govern an accountability mechanism designed to hold ICANN accountable to the Internet community raises obvious conflicts of interest:

An IRP case can only be brought on the basis that ICANN has acted inconsistently with the Bylaws. Usually, ICANN will have taken the advice of its lawyers before acting in a manner that might give rise to such a claim. Accordingly, an IRP case will quite commonly be a direct challenge to the advice that Samantha, Elizabeth and the team have previously given, personally. It is quite wrong to involve them in directly in the decision-making as to how such a challenge can be brought. This is not to impugn their professional integrity: any lawyer would recognise this as an irreconcilable conflict of interests and obligations. *Your decision places them in an impossible and untenable position, that fundamentally compromises the legitimacy of this group’s output.*¹⁴¹

79. Another committee member agreed with this assessment:

¹³⁹ A redline comparing the final version of Rule 7 against the Public Comment Draft version is attached hereto as Annex B.

¹⁴⁰ Email from M. Hutto (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-December/000472.html> (last accessed on 27 Jan. 2019), [Ex. 257], pp. 1, 2.

¹⁴¹ Email from M. Hutto (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-December/000472.html> (last accessed on 27 Jan. 2019), [Ex. 257], pp. 1-2 (emphasis added).

I wholeheartedly agree that ICANN Legal has had far too much input and ‘weight’ in this group, and that should never have been allowed to have happened. *Frankly it calls into question all of the ‘interim’ conclusions that have been adopted by the Board already*, which should be revisited by a broader team from the community.¹⁴²

80. As these IRP-IOT members noted, ICANN’s lawyers tended to be the most active members of the committee and, in fact, the IRP-IOT had satisfied its quorum requirements (five participants) on several occasions only because of the presence of ICANN’s lawyers. These IRP-IOT members noted that the IRP-IOT was supposed to be comprised of “members of the Internet community” and that ICANN was not part of that community:

It seems to me that ‘comprised of members of the Internet community’ ought to exclude ICANN Staff and Board Members, and include literally everyone else in the world.¹⁴³

Göran Marby, President and CEO of ICANN, agreed when these concerns were brought to his attention at ICANN|63, and confirmed that ICANN’s lawyers should not be considered to be members of the Internet community.¹⁴⁴

81. Following ICANN|63, concerned members of the IRP-IOT sought to limit the participation of ICANN’s lawyers in the IRP-IOT, arguing that they should not participate as full members of the IRP-IOT and that their attendance at meetings should not be included in quorum counts.¹⁴⁵ If that procedure had been followed, the IRP-IOT would have failed to reach a quorum

¹⁴² Email from M. Rodenbaugh to M. Huty (Linx) (6 Dec. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-December/000474.html> (last accessed on 27 Jan. 2019), [Ex. 277], p. 1 (emphasis added).

¹⁴³ Email from M. Rodenbaugh to Members of the IRP-IOT (6 Dec. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-December/000478.html> (last accessed on 28 Jan. 2019), [Ex. 223], p. 1.

¹⁴⁴ Email from M. Huty (Linx) to D. McAuley (VeriSign) (6 Dec. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-December/000472.html> (last accessed on 27 Jan. 2019), [Ex. 257], p. 2.

¹⁴⁵ Email from M. Rodenbaugh to M. Huty (Linx) (6 Dec. 2018), *available at* <https://mm.icann.org/pipermail/iot/2018-December/000474.html> (last accessed on 27 Jan. 2019), [Ex. 277], p. 1.

for each of the “intensive” meetings of 9 and 11 October 2018, where ICANN lawyers comprised three out of seven and three out of six participants, respectively.¹⁴⁶

4. VERISIGN AND NDC MAY NOT INTERVENE IN THE EMERGENCY PROCEEDING

82. Despite re-writing the procedural rules governing this IRP to serve its own interests, VeriSign baldly claims a right to participate in the Emergency Arbitrator proceeding on Afiliat’s request for interim measures when, in fact, VeriSign (1) lacks any protectable interest in .WEB, the subject of this IRP and (2) the plain text of Rule 10 restricts participation in emergency proceedings to *parties*.

4.1 VeriSign Lacks Any Material Interest in the Subject of this IRP

83. Contrary to its arguments, VeriSign lacks any “interest relating to the property or transaction that is the subject of the action,” namely the .WEB registry.¹⁴⁷ VeriSign cannot have any interest in a .WEB registry agreement, as no such agreement presently exists. Further, VeriSign has no rights in NDC’s .WEB application, nor can it: the application’s Terms and Conditions specifically prohibit NDC from reselling, assigning, or transferring *any* of NDC’s rights or obligations in connection with its application to any third party.¹⁴⁸

84. Third Party Designated Confidential Information Redacted

¹⁴⁶ See IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202]; IRP-IOT Meeting #43 (11 Oct. 2018), Transcript, [Ex. 205].

¹⁴⁷ See Fed. R. Civ. Pro. 24(a)(2) (2019), available at <https://www.federalrulesofcivilprocedure.org/frcp/title-iv-parties/rule-24-intervention/> (last accessed on 26 Jan. 2019), [Ex. 278]; Request by Verisign, Inc. to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶ 4 (citing U.S. law). Rule 7 of the Interim Procedures is based on U.S. law governing rights of intervention. IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202], p. 16. Under U.S. law, third parties may intervene in a lawsuit where they can establish “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(a)(2) [Ex. 278].

¹⁴⁸ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. [VRSN] 4], p. 6-6.

Third Party Designated Confidential Information Redacted

85. Third Party Designated Confidential Information Redacted

86. Third Party Designated Confidential Information Redacted

¹⁴⁹ Fed. R. Civ. Pro. 24(a)(2) (2019), available at <https://www.federalrulesofcivilprocedure.org/frcp/title-iv-parties/rule-24-intervention/> (last accessed on 26 Jan. 2019), [Ex. 278].

¹⁵⁰ See *W. Broad Chiropractic v. Am. Family Ins.*, 122 Ohio St.3d 497, 497-98 (2009), [Ex. 279] (assignment of future rights held to be invalid where those rights have not vested in the transferor and where there is only a possibility that those future rights will arise); see also *UBU/Elements, Inc. v. Elements Pers. Care, Inc.*, No. 16-2559, 2016 U.S. Dist. LEXIS 80946, at *6 (E.D. Pa. June 22, 2016), [Ex. 280] (“[A]n agreement to assign a mark in the future is not a present assignment and does not vest legal title at the time of the agreement.”) (citation omitted).

¹⁵¹ Request by Verisign, Inc. to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶ 25.

4.2 *Amici Curiae* May Not Participate in Emergency Proceedings

87. Separate and apart from the foregoing, the plain text of the Interim Procedures does not provide for *amicus curiae* participation in matters pending before an Emergency Panelist. In the first instance, looking to Rule 7 (“Consolidation, Intervention and Participation as an *Amicus*”) specifically, the text clearly states that *amici*, to the extent they are permitted to participate in an IRP, may do so “before an IRP PANEL.”¹⁵² Rule 7 does not, therefore, expressly provide for *amicus* participation before an Emergency Panelist.

88. Rule 10 (“Interim Measures of Protection”) sets forth the rules specifically governing procedures before an Emergency Panelist. In relevant part, Rule 10 provides:

Interim relief may be granted on an *ex parte* basis in circumstances that the EMERGENCY PANELIST deems exigent, but any ***Party*** whose arguments were not considered prior to the granting of such interim relief ***may submit any opposition*** to such interim relief, ***and the EMERGENCY PANELIST must consider*** such arguments, as soon as reasonably practicable.¹⁵³

89. Only ***parties***, pursuant to the express language of Rule 10, may submit an opposition to a request for interim measures that had been granted *ex parte*. No provision is made for *amicus* participation under such circumstances. VeriSign’s untenable position, therefore, appears to be that while only parties have a right to be heard by an Emergency Panelist where relief has been granted *ex parte*, both parties and *amici* have the right to be heard if relief will not be granted *ex parte*. Such an interpretation is nonsensical.

¹⁵² Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), [Ex. [VRSN] 1], p. 10. The “IRP Panel” is defined at Rule 1 of the Interim Procedures as “the panel of three neutral members appointed to decide the relevant DISPUTE.” *Id.*, p. 3. The “Emergency Panelist” is defined at Rule 1 as “the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief.” *Id.*

¹⁵³ Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), [Ex. [VRSN] 1], Sec. 10 (emphasis added).

90. This interpretation of Rule 10 is consistent with the drafting history of the Interim Procedures. McAuley’s first draft of the joinder language, which he circulated on 3 May 2017, provided:

No interim relief or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.¹⁵⁴

Subsequent drafts of the joinder language repeated this provision in sum and substance.¹⁵⁵ The IRP-IOT, however, never reached agreement on this provision and it was dropped from subsequent drafts and does not appear in the Interim Procedures as adopted on 25 October 2018. VeriSign and NDC, by demanding participation rights on Afiliás’ motion for interim relief, wrongly demand that the Procedures Officer give effect to language that had been deleted from the text.¹⁵⁶

¹⁵⁴ *Presentation: Joinder Recommendations* (12 May 2017), available at <http://mm.icann.org/pipermail/iot/attachments/20170512/bd2af51b/CertainIRPCommentstreamtreatmentforfirstreading-0001.pptx>, [Ex. 281], p. 1 (emphasis added).

¹⁵⁵ Email from D. McAuley (VeriSign) to Members of the IRP-IOT (12 May 2017), available at <https://mm.icann.org/pipermail/iot/2017-May/000224.html> (last accessed on 27 Jan. 2019), [Ex. 282] (attaching revised joinder language in the “Certain IRP Comments Treatment for First Reading”); *Presentation: Joinder Recommendations* (12 May 2017), available at <http://mm.icann.org/pipermail/iot/attachments/20170512/bd2af51b/CertainIRPCommentstreamtreatmentforfirstreading-0001.pptx>, [Ex. 281]; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (19 May 2017), available at <https://mm.icann.org/pipermail/iot/2017-May/000241.html> (last accessed on 27 Jan. 2019), [Ex. 283] (attaching revised joinder language as “IRP-IOT Joinder Issue First Reading Complete”); *Presentation: Joinder – First Reading Complete* (19 May 2017), available at <http://mm.icann.org/pipermail/iot/attachments/20170519/b0b0ad76/IRPIOTJoinderissueFirstReadingcomplete-0001.pptx> (last accessed on 27 Jan. 2019), [Ex. 284]; Email from D. McAuley to Members of the IRP-IOT (21 July 2017), available at <https://mm.icann.org/pipermail/iot/2017-July/000279.html> (last accessed on 26 Jan. 2019), [Ex. 207]; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (25 Aug. 2017), available at <https://mm.icann.org/pipermail/iot/2017-August/000298.html> (last accessed on 27 Jan. 2019), [Ex. 285]; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (3 Oct. 2017), available at <https://mm.icann.org/pipermail/iot/2017-October/000315.html> (last accessed on 27 Jan. 2019), [Ex. 244]; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (10 Oct. 2017), available at <https://mm.icann.org/pipermail/iot/2017-October/000321.html> (last accessed on 26 Jan. 2019), [Ex. 246]; Email from D. McAuley (VeriSign) to Members of the IRP-IOT (23 Oct. 2017), available at <https://mm.icann.org/pipermail/iot/2017-October/000325.html> (last accessed on 26 Jan. 2019), [Ex. 247].

¹⁵⁶ The removal of the provision indicates that the IRP-IOT did not intend to impose such limitations on interim relief or settlement proceedings in the Interim Procedures. See, e.g., *Stevens v. Nat’l Life Assur. Co. of Canada*, 20 Wash. App. 20, 25, 29-30, 32 (1978), [Ex. 286] (holding that deletion of words “in advance” from insurance policy previously requiring “semi-annual payments in advance” changes policy to only require “semi-annual premium payments”); *In re City of Cent. Falls, R.I.*, 468 B.R. 36, 77-78 (2012), [Ex. 287] (holding that deletion

91. Accordingly, VeriSign and NDC, which have requested to participate only as *amicus curiae*, may not participate in hearings before the Emergency Panelist concerning Afilias' request for interim relief.

5. VERISIGN'S AND NDC'S PARTICIPATION IN THIS IRP, IF ALLOWED, SHOULD BE LIMITED

92. The Interim Procedures do not define the scope of participation by an *amicus curiae* in an IRP. In their Requests, VeriSign and NDC demand the right to (i) submit briefs on all substantive issues, (ii) submit case-specific evidence, (iii) access all filings and evidence submitted in this IRP, and (iv) participate fully in all hearings. Although VeriSign's and NDC's Requests are styled as applications to participate in this IRP as an *amicus curiae*, the substance of their arguments makes clear that what they want is the right to participate on equal footing with Afilias and ICANN, repeatedly referring to themselves as "a real party in interest" or the "indispensable party" to this IRP.¹⁵⁷ The Interim Rules, however, are clear: VeriSign and NDC may not intervene as parties because they lack Claimant standing under the Bylaws.

93. VeriSign's and NDC's Requests are inconsistent with the limited role of *amicus curiae* as set forth in Rule 7 of the Interim Procedures and must, except as set forth below, should be denied.

5.1 The Traditional Role of *Amicus Curiae*

94. The Bylaws required the IRP-IOT to draft rules of procedure (*i.e.*, these Interim

of the words "school committee" from city charter "disestablished the school committee" because "there [was] nothing ambiguous about the deletion").

¹⁵⁷ Request by Verisign, Inc. to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶¶ 1, 4; Request by Nu Dotco, LLC to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), ¶ 14.

Procedures) that “conform with international arbitration norms....”¹⁵⁸ Where procedures provide for *amicus curiae* participation in international arbitration, the norm is that such participation is limited.

95. Traditionally, *amici curiae* in international arbitrations are considered to be “a volunteer, a friend of the court, not a party.”¹⁵⁹ *Amici* are not permitted to “consider themselves as simply in the same position as either party’s lawyers” or suggest “how issues of fact or law as presented by the parties ought to be determined (which is the sole mandate of the Arbitral Tribunal itself).”¹⁶⁰ Therefore, while *amici* can provide written submissions to the tribunal, they are not allowed to participate in hearings.¹⁶¹ Nor are *amici* permitted to introduce evidence as part of their submission.¹⁶² Tribunals are also cautious in allowing *amici* to obtain materials from the proceedings in order to draft their written submissions because *amicus curiae* participation “is not intended to be a mechanism for enabling [*amici*] to obtain information from the Parties.”¹⁶³

¹⁵⁸ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018), [Ex. **VRSN** 2], Art. 4, Sec. 4.3(n)(i).

¹⁵⁹ *Aguas Argetinas, S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (19 May 2005), [Ex. **288**], ¶ 13.

¹⁶⁰ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), [Ex. **289**], ¶ 64.

¹⁶¹ *Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as “*Amici Curiae*” (15 Jan. 2001), [Ex. **290**], ¶ 47 (“The Tribunal also concluded that it has no power to accept the [*Amici*’s] requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration.”); *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from Eloïse M. Obadiah (Secretary of the Tribunal) to Parties (5 Oct. 2009), [Ex. **291**], p. 2 (“The Tribunal does not at this stage envisage that the [*amici*] will be permitted to attend or to make oral submissions at the hearing.”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), [Ex. **289**], ¶ 71.

¹⁶² *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), [Ex. **289**], ¶ 60 (“[*Amici*’s] submission should not attach any evidence or documentation, but may identify any such material that the [*Amici*] may wish to introduce at a later stage. If the Arbitral Tribunal considers that it needs to be provided with such documentation, it will request it from the [*Amici*] on its own initiative.”).

¹⁶³ *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from Eloïse M. Obadiah (Secretary of the Tribunal) to Parties (5 Oct. 2009), [Ex. **291**], p. 1; *Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as

96. *Amici curiae* have a similarly limited role in litigation, where *amicus* participation is routinely confined to the submission of legal briefs on discrete issues.¹⁶⁴ *Amici* have “never been recognized, elevated to, or accorded the full litigating status of a named party or a real party in interest.”¹⁶⁵ As non-parties, *amici* are denied any degree of control over a litigation and are barred from participating in a “totally adversarial fashion.”¹⁶⁶ To this end, “[a]n *amicus curiae* is not a party and may not assume the functions of a party ... he must accept the case before the court with the issues made by the parties.”¹⁶⁷

97. Courts therefore routinely strike *amicus* briefs that advance new issues beyond those raised by the parties or¹⁶⁸ that present new case-specific evidence.¹⁶⁹ In sum, the role of an *amicus curiae* is to help the court decide the issues and interpret the evidence already before it, not to raise new issues beyond those made by the parties or otherwise use their briefs as a vehicle to present additional or new case-specific evidence, *i.e.*, evidence about what the parties and other witnesses did, when and how.¹⁷⁰

“Amici Curiae” (15 Jan. 2001), [Ex. 290], ¶ 47 (“The Tribunal also concluded that it has no power to accept the [Amici’s] requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration.”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), [Ex. 289], ¶¶ 66-68 (“[F]or the time being only, and pending a further ruling after the ... hearing, the Arbitral Tribunal denies the [Amici’s] application for access to the documents filed by the parties in the arbitration.”).

¹⁶⁴ IRP-IOT Meeting #42 (9 Oct. 2018), Transcript, [Ex. 202], p. 16.

¹⁶⁵ *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991), [Ex. 292] (citing *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982), [Ex. 293]).

¹⁶⁶ *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991), [Ex. 292].

¹⁶⁷ *Commonwealth v. Cotto*, 708 A.2d 806, 808 n. 2 (Pa. Super. Ct. 1998), *aff’d*, 562 Pa. 32, 753 A.2d 217 (2000), [Ex. 294].

¹⁶⁸ *Wiggins Bros., Inc. v. Dep’t of Energy*, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981), [Ex. 295] (citing *Nat’l Comm’n On Egg Nutrition v. F.T.C.*, 570 F.2d 157, 160 n. 3 (7th Cir. 1977), [Ex. 296]).

¹⁶⁹ *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So.2d 522, 523 (Fla. Dist. Ct. App. 1996), [Ex. 297].

¹⁷⁰ *See, e.g., Ciba-Geigy*, 683 So. 2d at 523 [Ex. 297] (rejecting an *amicus* brief that “appear[ed] to be nothing more than an attempt to present a fact specific argument of the same type as is contained in the appellants’ 50 page brief”).

98. These limitations on *amici*, as recognized in both the international arbitration and U.S. federal court context, are necessary to ensure that the conduct of a legal proceeding is not disrupted by *amicus*-driven tangents.

5.2 *Amicus Curiae* Participation Under the Interim Procedures

99. Even accepting, *arguendo*, that the Interim Procedures should apply here, *amicus curiae* participation in IRPs should be limited in accordance with “norms of international arbitration.” Pursuant to Rule 7, prospective *amici* are granted the right to submit a request to participate and, if granted, may not participate further in the IRP unless or until invited to do so, at the Panel’s discretion.¹⁷¹ Pursuant to norms of international arbitration, as discussed above, such participation should be limited to the submission of legal briefs, which may not include evidence outside the record developed by the parties to the IRP, as only entities that intervene in an IRP as a claimant enjoy such rights.¹⁷²

100. The bar on *amici* presentation of evidence is logical. Due process demands that evidence introduced against a party be susceptible to testing and verification, both through discovery and cross-examination of witnesses.¹⁷³ Yet only parties to an IRP are subject to discovery pursuant to Rule 8 and only party witnesses are subject to cross-examination at hearings

¹⁷¹ Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), [Ex. [VRSN] 1], Sec. 7 (at p. 10) (“Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, *in the discretion of the IRP Panel...*”) (emphasis added). A footnote in the Interim Procedures counsels that the Panel should favor “*broad participation of an amicus curiae.*” *Id.*, note 4 (at p. 10). This footnote 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.

¹⁷² Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted Oct. 25, 2018), [Ex. [VRSN] 1], Sec. 6 (at p. 7) (“All necessary and available evidence in support of the CLAIMANT’S claim(s) should be part of the initial written submission.”).

¹⁷³ *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), [Ex. 298] (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”).

before the Panel pursuant to Rule 5A. VeriSign's demands therefore raise serious due process concerns and should be denied on that basis alone.

5.3 A Clear Order Is Needed, As VeriSign and NDC Are Already Impermissibly Acting as Parties

101. Afilias' concerns are not hypothetical as VeriSign's and NDC's Requests themselves violate all the foregoing precepts that govern *amicus curiae* participation, raising serious due process issues. As noted above, an IRP is an ICANN accountability mechanism in which the *only* issue to be determined is whether ICANN has breached its Bylaws. Afilias has raised several claims to that end. Yet VeriSign and NDC raise several novel issues, based solely on evidence that they alone have submitted and which serve only to distract from the issue of ICANN's accountability under its Bylaws to the Internet community.¹⁷⁴

102. *First*, VeriSign and NDC baldly allege that Afilias "colluded" with other members of the .WEB contention set to coerce NDC into a private auction. This naked allegation is simply false: VeriSign and NDC have not cited nor can they cite any evidence of any such agreement between Afilias and any other member of the .WEB contention set. To the contrary, Afilias has always acted unilaterally in this matter, consistent with its own interests. VeriSign's and NDC's inferences of collusion are wrongfully drawn from evidence of parallel unilateral conduct.¹⁷⁵

¹⁷⁴ To support their Requests, VeriSign and NDC rely on copious case-specific evidence not submitted by the parties. For example, VeriSign and NDC rely on the Declaration of Jose Ignacio Rasco III of NDC in which Mr. Rasco testifies as to what action Afilias took and when, as well as to authenticate documents for the record. Rasco, himself a key witness, testifies as to what actions he took, when he took them and why he took them. The Rasco Declaration is therefore replete with case-specific evidence and, as it has not been submitted by a party, it should be stricken in its entirety. As Mr. Rasco's evidence was not submitted by ICANN, Afilias lacks the ability to test the veracity of his statements through discovery and Mr. Rasco will not be available to cross-examine at any hearing. Further, VeriSign also improperly submits a nearly 1,000-page Appendix of "evidence", much of which exceeds the evidence submitted by the parties. This Appendix and Mr. Rasco's Declaration should be stricken in their entirety. To the extent VeriSign and NDC seek to reference evidence, they may refer to materials included within party submissions.

¹⁷⁵ *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 564-65 (2007), [Ex. 299]; *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 322-23 (3d Cir. 2010), [Ex. 300]; *In re Musical Instruments and Equipment Antitrust Litigation*, 798 F.3d 1186, 1193-94 (9th Cir. 2015), [Ex. 301].

Afilias has the right to demand the production of all relevant evidence concerning this unwarranted and false allegation.

103. *Second*, VeriSign and NDC falsely allege that Afilias attempted to rig the auction by offering a bribe to NDC. This allegation is based solely on Mr. Rasco's deliberate misreading of texts sent to him by an Afilias employee. Afilias has the right to cross-examine Mr. Rasco under oath on this topic, following a production of all of his relevant documents.

104. *Third*, VeriSign and NDC falsely allege that Afilias violated the Blackout Period associated with the .WEB Auction. As VeriSign and NDC concede, contention set members are not prohibited from speaking with each other during the Blackout Period. The Auction Rules only forbid contention set members from discussing (1) the substance of a bid, (2) bidding strategies, or (3) negotiating settlement agreements during the Blackout Period. Afilias' simple question to NDC ("If ICANN delays the auction next week would you again consider a private auction? Y/N") is not such a violation of the Blackout Period. Afilias' communication did not discuss or disclose any information about a bid or a bidding strategy. Nor was it an attempt to negotiate a settlement. The sole intent of Afilias' communication was to assess whether, if ICANN delayed the .WEB auction (a request that Afilias did not request or support), NDC would consider participating in an alternative auction. No terms for that auction were discussed and no bidding strategies were communicated. Any statement to the contrary lacks all basis in fact. Afilias has the right to cross-examine Mr. Rasco, and others, under oath, following a production of their relevant documents.

105. VeriSign's and NDC's Requests reveal their true intent in this IRP. Rather than assist the Panel in its assessment of ICANN's conduct, VeriSign and NDC seek to muddy the waters by defaming Afilias, casting baseless aspersions that are intended to draw attention from ICANN's failure to appropriately sanction NDC for its plain violations of the New gTLD Program

Rules. VeriSign's and NDC's efforts to complicate this IRP by, in effect, presenting counterclaims against Afilias run contrary to the purpose of the IRP—an ICANN accountability mechanism—and should not be tolerated.

106. For the foregoing reasons, to the extent that VeriSign's and NDC's Requests are granted, the Procedures Officer should limit their further participation in this IRP as *amici curiae* to the discretion of the Panel, in accordance with Rule 7 of the Interim Procedures. The Procedures Officer should further order that VeriSign and NDC refrain, at all times, from introducing and relying on new case-specific evidence in presenting any arguments ordered by the Panel, and strike those portions of the Requests that do so.¹⁷⁶

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¹⁷⁶ Paragraphs 21-62 of VeriSign's Request and paragraphs 11-2 of NDC's Request should be stricken for improperly introducing and relying on new case-specific evidence.