

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PANEL

AFILIAS DOMAINS NO. 3 LIMITED)	
)	
Claimant,)	
)	
v.)	Case No. 01-18-0004-2702
)	
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS)	
)	
Respondent.)	
)	

EMERGENCY PANELIST’S SCHEDULING ORDER NO. 1

1. Procedural Background

- 1.1. On 14 November 2018, Claimant Afiliias Domains No. 3 Limited (“Afiliias”) filed a “Request for Independent Review” pursuant to Art. 4, Section 4.3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“ICANN”). In the IRP, Afiliias challenges Respondent ICANN’s application and auction processes by which the presumptive rights to a new .WEB Generic Top-Level Domain (“gTLD”) were awarded. Afiliias had been among seven applicants for the right to operate the new .WEB gTLD registry. NU DOT CO LLC (“NDC”) won the .WEB auction. Afiliias was the second-place bidder.
- 1.2. On 27 November 2018, Afiliias filed a “Request for Emergency Panelist and Interim Measures of Protection” (“Interim Request”) seeking appointment of an Emergency Panelist and an order providing Interim Measures of Protection pursuant to Art. 4, Section 4.3 of the Bylaws, Art. 10 of the Interim Supplementary Procedures for ICANN Independent Review Process (adopted 25 October 2018)(“Supplementary Procedures”) and Arts. 6 and 24 of the International Arbitration Rules of the International Centre for Dispute Resolution (1 June 2014) (“ICDR Rules”).
- 1.3. In accordance with Art. 6 of the ICDR Rules governing requests for Emergency Measures of Protection, ICDR on 28 November 2018 -- within one business day of receipt of the Afiliias Interim Request -- appointed Kenneth B. Reisenfeld to serve as the Emergency Panelist. Mr. Reisenfeld then scheduled a telephonic scheduling conference for 29 November 2018. The parties jointly requested that the scheduling conference be delayed to 30 November 2018.
- 1.4. On 30 November 2018, a telephonic scheduling conference was held. The following persons participated:
 - 1.4.1. Emergency Panelist Reisenfeld and Tom Simotas, ICDR Finance Manager

- 1.4.2. On behalf of Afilias: Arif H. Ali, Rose Marie Wong and Alexandre de Gramont, Dechert LLP; and Scott Hemphill, Counsel for Afilias
- 1.4.3. On behalf of ICANN: Jeffrey LeVee, Eric P. Enson, and Steven L. Smith, Jones Day
- 1.5. Each party was given a full opportunity to raise issues with respect to the procedure and schedule for resolution of the Afilias Interim Request. A procedural schedule was preliminarily ordered during the telephone conference.¹ This Procedural Order No. 1 and Attachment A, Procedural Timetable, confirm the schedule and address certain other issues raised during the scheduling conference.

2. Emergency Panelist Appointment

- 2.1. ICDR appointed Emergency Panelist Reisenfeld on 28 November 2018. Mr. Reisenfeld completed his conflict checks and confirmed his availability and ability to serve as an impartial and independent arbitrator on 29 November 2018, providing his notarized Arbitrator's Oath, along with an Addendum to his Notice of Appointment. At the scheduling conference, the Parties confirmed they had reviewed Mr. Reisenfeld's disclosures and did not have objection to his appointment.

3. Applicable Arbitration Rules

- 3.1. The ICDR applies the Supplementary Procedures and ICDR Rules in Independent Review Processes ("IRP") commenced under Art. 4, Section 4.3 of the ICANN Bylaws. Supp. Proc., Art. 2. In the event of any inconsistency between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures govern. *Id.*

4. ICANN's Voluntary Agreement to Stay

- 4.1. The Interim Request seeks "a stay of all ICANN actions that further the delegation of the .WEB gTLD during the pendency of the IRP, including, but not limited to, (1) the continued negotiation and execution of a Registry Agreement concerning .WEB, (2) any pre-delegation testing of the .WEB registry, and (3) the delegation of .WEB to the root server." Interim Request, ¶ 4. Afilias contends it would suffer irreparable harm if a stay were not in effect during pendency of the IRP.
- 4.2. The Interim Request alleges that ICANN voluntarily placed the .WEB contention set "on hold" multiple times since 30 September 2016 in response to complaints received about the .WEB auction. Interim Request at ¶¶ 9 – 15. According to Afilias, on 26 November 2018, ICANN threatened to take the contention set "off hold" as of 27 November 2018. *Id.* at ¶ 13. Afilias prepared and filed the Interim Request on 27 November 2018 to preserve the status quo and prevent ICANN from taking the contention set "off hold." While these papers were being prepared, ICANN on 26 November 2018 again postponed the date on which it would take the contention set "off hold." ICANN said that it would keep the .WEB contention set "on hold" until 11 December 2018. *Id.* at ¶ 15.

¹ ICDR Rule, Art. 6(3) requires a procedural schedule for an emergency proceeding to be established within two business days of appointment. A schedule was ordered during the conference call on 30 November 2018.

- 4.3. At the outset of the scheduling conference, counsel for ICANN represented that ICANN voluntarily would agree to keep the .WEB registration process “on hold” pending a decision on the Interim Request by the Emergency Panelist. ICANN’s counsel stated that it would not voluntarily suspend action on the .WEB registry through the date of completion of the underlying IRP process (which, in counsel’s view, might take years to resolve). Thus, the Interim Request must be decided by the Emergency Panelist. But ICANN agreed to keep the registry “on hold” at least until the Emergency Panelist rules on the Interim Request.
- 4.4. ICANN’s counsel agreed to file on or before 3 December 2018 a written undertaking confirming its agreement to stay any further efforts to delegate the .WEB gTLD until the Emergency Panelist rules on Afilias’s Interim Request.

5. Participation by *Amicus Curiae* in the Determination of the Interim Request

- 5.1. ICANN’s counsel raised the prospect of potential participation by *amicus curiae* in this emergency process. ICANN stated that NDC, the winner of the bid for the .WEB gTLD, and/or VeriSign, Inc. (“VeriSign”) may have a “material interest” in the IRP dispute. One or both apparently have informed ICANN of their interest(s) in participating in the Interim Request process. According to ICANN, the Interim Request had not yet been posted by ICDR in the IRP public records, which NDC and/or VeriSign have been monitoring. ICANN requested that the interests of these potential *amicus curiae* be accommodated by setting a schedule giving them a meaningful opportunity to file a response.
- 5.2. Afilias opposed participation by *amicus curiae* in the Interim Request process, arguing that the procedural schedule should not be complicated or delayed to accommodate any third-party interest.
- 5.3. Whether *amicus curiae* may participate in an application for interim measures under the Supplementary Procedures is not addressed in Article 10 and appears to be an issue of first impression. Article 7, which establishes the procedures for participation as *amicus curiae* in an IRP, refers only to participation before an IRP Panel.
- 5.4. Afilias indirectly raised the question whether receipt of additional submissions in this emergency process comports with the adjudicatory principles set forth in Article 5 of the Supplementary Procedures. Article 5 applies to an IRP Panel and Emergency Panelists alike. Article 5 provides that IRPs should be:

resolved expeditiously and at a reasonably low cost, while ensuring fundamental fairness and due process consistent with the Purposes of the IRP. The IRP Panel shall consider accessibility, fairness and efficiency (both as to time and cost) in its conduct of the IRP.

Supp. Proc., Art. 5.

- 5.5. The Emergency Panelist sought guidance from the Parties before it decides whether the interests of potential *amicus curiae* should be considered in resolving Afilias’s Interim Request and if so, how those interests should be accommodated in furtherance of the procedural guidance set forth in Article 5. ICANN may file its observations on or before 3 December 2018. Afilias may respond on or before 5 December 2018.

6. Production of ICANN Documents

- 6.1. In Paragraph 34 of its Interim Request, Afilias seeks production of broad categories of documents it claims are relevant and material to the issues in dispute in this emergency proceeding and in the IRP. During the scheduling conference, Afilias requested production of these documents within a week to provide Claimant a reasonable opportunity to present its case in the emergency proceeding.
- 6.2. While acknowledging that it expected an exchange of documents in the IRP, ICANN initially objected to any document production during the emergency proceeding. After discussion, ICANN agreed to produce by 14 December 2018 documents responsive to a narrower list of documents that may be necessary for Afilias's presentation of its case in this emergency proceeding. Afilias agreed to submit a narrowly tailored list of document requests on 3 December 2018.

7. Procedural Timetable

- 7.1. The Interim Request did not propose a schedule for this proceeding. The urgency of its request was based upon ICANN's repeated threats to take the .WEB contention set "off hold," at the latest by 11 December 2018. Interim Request at ¶ 15. During the scheduling conference, Afilias proposed a highly compressed schedule designed to obtain a decision before 21 December 2018.
- 7.2. ICANN's voluntary proffer at the scheduling conference to keep the .WEB contention set "on hold" until the completion of this emergency process decreased the necessity to adopt an overly truncated schedule to consider the Interim Request. ICANN agreed to stay its actions until the Interim Request could be appropriately briefed, argued and decided. Afilias did not identify any basis for harm or prejudice if the Emergency Panelist adopted a procedural schedule resulting in a decision on the Interim Request before the end of January 2019. In fact, both parties expressed an interest in avoiding filing deadlines during the Holiday period at the end of December 2018.
- 7.3. Following input by both parties, the Procedural Timetable set forth in Appendix A to this Procedural Order No. 1 has been settled and must be complied with. Subject to the ICDR Rules, the Emergency Panelist may extend any deadline upon the request of a party, but such extensions will only be granted in exceptional or unexpected circumstances. All deadlines shall be midnight Eastern Standard Time on the date indicated.
- 7.4. The parties stipulated and agreed that the Tribunal would issue a reasoned order or interim award.

8. Hearing

- 8.1. Subject to any further decision by the Emergency Panelist, the following rules will apply to the hearing of the Interim Request.
- 8.2. The hearing will be conducted by video conference. The parties will coordinate with the technical operator at the law firm of the Emergency Panelist to arrange for the video conference. As set forth in Art. 5A of the Supplementary Procedures, an in-person hearing will not be held.

- 8.3. The hearing on the Interim Request will take place starting at 11:00 AM Eastern Standard Time on Monday, 14 January 2018. The hearing is expected to take no more than three (3) hours, with a forty-five (45) minute break half-way through. The parties will be given equal time to present their arguments in favor and against the Interim Request and any other issues that have been raised. The record will be closed following the hearing.
- 8.4. The hearing shall be limited to argument only, unless a party seeking to present witness testimony has demonstrated that such testimony is necessary and appropriate pursuant to the standards set forth in Art. 5A of the Supplementary Procedures.
- 8.5. A verbatim transcript of the hearing shall be made. The parties shall coordinate to order an expedited hearing transcript. The parties shall agree on any corrections to the transcript within two (2) days of receipt of the transcript. The agreed corrections may be entered by the court reporter in the transcripts (“Revised Transcript”). The Emergency Panelist shall decide upon any disagreement between the parties and any correction adopted by the Emergency Panelist shall be entered by the court reporter in the Revised Transcript.
- 8.6. All evidence, including witness statements, if any, must be submitted along with the Response and Reply submissions set forth in the Procedural Timetable.
- 8.7. Without prejudice to the Emergency Arbitrator’s and IRP Panel’s final allocation of costs, the costs of transcription and any costs associated with the hearing shall be borne by both parties in equal shares.

9. Submissions

- 9.1. Afiliás commenced this emergency proceeding by filing its Interim Request on 27 November 2018. The parties have sought an opportunity to respond and reply. As set forth in the attached Procedural Timetable, ICANN may file a Response to the Interim Request on or before 17 December 2018. Afiliás may file a Reply on or before 7 January 2019.
- 9.2. To the extent that Afiliás’s Reply presents documents or witness statements beyond what it had referred to in its Interim Request, ICANN may file a Sur-Reply addressing the new documents or statements on or before 9 January 2018.
- 9.3. Each written submission shall cite and attach all evidence supporting the assertions made therein, including, but not limited to, written witness statements, expert reports and documentary exhibits.
- 9.4. Written submissions and related documents shall be submitted as follows:
 - 9.4.1. By the relevant filing date, the parties shall submit by email to the Emergency Arbitrator and the opposing party, with a copy to the ICDR Case Administrator, an electronic version (in PDF searchable format) of the written submission with witness statements, expert reports, and a list of exhibits. All exhibits should be numbered in consecutive order for this emergency proceeding (CE-1, CE-2, RE-1, RE-2, etc.). To the extent that an exhibit has already been filed in the main IRP, its correlating number should be identified in the party’s List of Exhibits to avoid any confusion.

9.4.2. Each party shall delivery by overnight courier to the Emergency Arbitrator and the opposing party a USB drive with full copies of the entire written submission, including the witness statements, expert reports, exhibits, and legal authorities. The USB drive shall also contain a list of exhibits hyperlinked to the electronic versions of the exhibits.

9.4.3. Within two business days following the electronic filing, each party shall courier to both the Tribunal and the opposing party hard copies of the written submission and exhibits.

10. Advance Payments and Allocation of Costs

10.1. The parties shall cover the direct costs of the proceeding in equal parts, without prejudice to the decision of the Emergency Arbitrator and the IRP as to the allocation of costs. As provided in ICDR Art. 6(8):

[t]he costs associated with applications for emergency relief shall be addressed by the emergency arbitrator, subject to the power of the [IRP] arbitral tribunal to determine finally the allocation of such costs.

10.2. The Emergency Arbitrator understands that ICDR has collected an initial amount for this Emergency Proceeding. The Emergency Arbitrator shall request further advances as needed.

Dated: 3 December 2018



Kenneth B. Reisenfeld
Emergency Panelist

APPENDIX A: PROCEDURAL TIMETABLE

Date	Procedural Step
14 November 2018	Afilias Request for Independent Review Process
27 November 2018	Afilias Request for Emergency Panelist and Interim Measures of Protection
28 November 2018	ICDR Appointment of Emergency Panelist Kenneth B. Reisenfeld
30 November 2018	Scheduling Conference and Establishment of Schedule for Emergency Proceeding
3 December 2018	Emergency Panelist's Scheduling Order No. 1
3 December 2018	ICANN Written Confirmation of Voluntary Undertaking to Stay Further Registry Activities Relating to .WEB Contention Set Pending Decision By Emergency Panelist
3 December 2018	ICANN Observations on Participation by <i>Amicus Curiae</i> in Emergency Proceeding
3 December 2018	Afilias Limited Document Production Request for Emergency Proceeding
5 December 2018	Afilias's Observations on Participation by <i>Amicus Curiae</i> in Emergency Proceeding
17 December 2018	ICANN Response to Afilias Request for Interim Measures of Protection
7 January 2019	Afilias Reply on Its Request for Interim Measures of Protection
9 January 2019	ICANN Sur-Reply (if any)
14 January 2019	Video Hearing on Afilias Interim Request
28 January 2019	Emergency Panelist Decision on Interim Request

EMERGENCY PANELIST'S SCHEDULING ORDER NO. 1 (3 DECEMBER 2018)
Errata Sheet Pursuant to Emergency Panelist Emails (3-4 December 2018)

Paragraph	Change From	Change To	Reason for Change
¶ 1.4.2		Add: Ethan Litwin (Dechert LLP)	Typographical error
¶ 1.4.3		Remove: Eric Enson	Typographical error
¶ 4.2, line 3	26 November 2018	14 November 2018	Typographical error
¶ 8.3, line 2	14 January 2018	14 January 2019	Typographical error
¶ 9.2, line 3	9 January 2018	9 January 2019	Typographical error