

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

ALTANOVO DOMAINS LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

ICDR Case No. 01-23-0003-2351

**CLAIMANT ALTANOVO DOMAINS LIMITED'S RESPONSE TO
NU DOTCO, LLC AND VERISIGN, INC.'S BRIEF ON THE VALIDITY OF RULE 7**

28 February 2025

AHALI DISPUTE RESOLUTION LLC
1775 Eye Street, NW, Suite 1150
Washington, DC 20006

WOMBLE BOND DICKINSON (US) LLP
2001 K Street, NW, Suite 400 South
Washington, DC 20006

SHINDER CANTOR LERNER LLP
14 Penn Plaza, 19th Floor
New York, NY 10122

Counsel for
Claimant Altanovo Domains Limited

TABLE OF CONTENTS

GLOSSARY OF DEFINED TERMS	ii
1. INTRODUCTION	1
2. THIS PANEL MUST DECIDE WHETHER RULE 7 IS VALID AND EFFECTIVE	4
2.1. The Panel Has Jurisdiction to Determine Rule 7’s Validity	4
2.2. This Issue Is Ripe for Determination and Is Not Time-Barred.....	4
2.3. Prior Rulings Underline the Importance of the Rule 7 Issue	7
3. THE <i>AMICI</i> APPLICANTS’ ACCOUNT OF RULE 7’S DRAFTING HISTORY CONTRADICTS THE PLAIN FACTS.....	9
3.1. The <i>Amicus Curiae</i> Rules Were Intended to be Limited to Appeals of Decisions Made by Underlying “Process Specific Expert Panels”	9
3.2. The <i>Amici</i> Applicants’ (and ICANN’s) Shifting Defense of Rule 7	16
3.3. The <i>Amici</i> Applicants Misstate Sidley’s Role in Drafting the Interim Supplementary Procedures.....	18
3.4. The <i>Amici</i> Applicants’ Reliance on the October 2018 IRP-IOT Meetings Are Misplaced.....	19
3.5. The IRP-IOT Reverses McAuley’s 11th Hour Revisions to Rule 7	21
4. CONCLUSION.....	23

GLOSSARY OF DEFINED TERMS

Abbreviation	Description
Altanovo	Altanovo Domains Limited (Altanovo was previously known as Afilius Domains No.3 Limited.)
Altanovo Brief	Altanovo’s Brief on the Validity of Rule 7 (15 Nov. 2024)
Altanovo Reply Brief	Altanovo Brief, Sec. IV; Altanovo’s Reply Brief on the Validity of Rule 7 (30 Dec. 2024)
<i>Amici</i> Applicants	Nu DotCo, LLC and VeriSign, Inc.
Board or ICANN Board	ICANN’s Board of Directors
Bylaws	Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 2 June 2022) [Exhibit C-14]
CCWG	Cross Community Working Group on Enhancing ICANN Accountability
February 2018 Memorandum	Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN Independent Review Process [Ex. C-126]
First IRP	The proceedings styled <i>Afilius Domains No. 3 Limited v. International Corporation for Assigned Names and Numbers</i> , ICDR Case No. 01-18-0004-2703
gTLD	Generic Top-Level Domain
ICANN	The Internet Corporation for Assigned Names and Numbers
ICANN Legal	ICANN’s internal counsel
Interim Supplementary Procedures	The Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process
IRP	ICANN’s Independent Review Process described in the Bylaws ¹
IRP-IOT	Independent Review Process Implementation Oversight Team
McAuley Suppl. Decl.	Declaration of David McAuley in Support of NDC and Verisign’s Brief on the Validity of Rule 7 (7 Feb. 2025)
NDC	Nu DotCo, LLC
NDC/Verisign Request to Participate	NDC and Verisign’s Request to Participate as <i>Amici Curiae</i> in Independent Review Process (11 Apr. 2024)
NDC/Verisign Rule 7 Brief	NDC and Verisign’s Brief on the Validity of Rule 7 (7 Feb. 2025)
Public Comment Draft	Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, as published for public comment on 28 November 2016 [Exhibit C-109]

¹ Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 2 June 2022) (“Bylaws”), **[Exhibit C-14]**, Sec. 4.3.

Abbreviation	Description
Resolution	Approved Board Resolution, Regular Meeting of the ICANN Board, Board Resolution No. 2023.04.30.12 (unredacted) (30 Apr. 2023) [Exhibit C-17]
Sidley	The law firm Sidley Austin LLP, which assisted the IRP-IOT in its work beginning in January 2016
Verisign	VeriSign, Inc.
.WEB	The .WEB gTLD registry
.WEB Contention Set	The group of applicants for the .WEB gTLD, consisting of Altanovo (as Afiliias); Google (through Charleston Road Registry Inc.); Donuts (through Ruby Glen); Radix (through DotWeb Inc.); InterNetX GmbH (Schlund Technologies GmbH); Web.com Group. Inc.; and NDC

1. INTRODUCTION

1. Nu DotCo, LLC (“NDC”) and VeriSign, Inc. (“Verisign”) (collectively, the “*Amici Applicants*”) assert that Claimant Altanovo Domains Limited (“Altanovo”) seeks to wrongfully exclude them from this proceeding. Not so: Altanovo has repeatedly indicated that it would accept Verisign and NDC in this (and the prior) IRP as *parties who would be bound by the IRP panel’s decision*.² The *Amici Applicants* have consistently rejected Altanovo’s offers,³ claiming that Rule 7 allows them to participate in this IRP as *amici*, essentially with party rights, because NDC was a member of the .WEB Contention Set and Altanovo’s Request for IRP mentions actions taken by Verisign.⁴ The *Amici Applicants* further argue that Rule 7 requires the Panel to provide both Verisign and NDC with “broad participation” rights in this IRP proceeding, which they, along with ICANN, have consistently maintained includes the right to brief all issues, appear and participate at all hearings and conferences with the Panel, and present opening and closing statements at the IRP hearing, as well as introduce evidence and cross examine Altanovo’s witnesses.⁵ Their position effectively gives them the best of both worlds—all the rights of a party, without the risk of having to be bound by any unfavorable decisions rendered by this Panel, and then be in a position to have another bite at the proverbial apple. There is no arbitral regime or set of

² First IRP, Decision on Phase I (12 Feb. 2020), [Exhibit C-43], ¶ 108; Afiliat’s Post-Phase I Brief (15 Nov. 2019), [Exhibit R-51], ¶ 26; Email from A. Ali (Counsel for Altanovo) to J. LeVee (Counsel for ICANN) (12 Apr. 2024), [Exhibit C-149], p. 1; First IRP, Phase I Hearing, Transcript (2 Oct. 2019), [Exhibit C-217], 46:3-49:5.

³ Letter from S. Marenberg (Counsel for NDC) to the First IRP Panel (3 Sep. 2019), [Exhibit C-218], p. 3; see Email from A. Ali (Counsel for Altanovo) to J. LeVee (Counsel for ICANN) (12 Apr. 2024), [Exhibit C-149], p. 1; First IRP, Phase I Hearing, Transcript (2 Oct. 2019), [Exhibit C-217], 46:3-49:5.

⁴ NDC and Verisign’s Request to Participate as *Amici Curiae* in Independent Review Process (11 Apr. 2024) (“NDC/Verisign Request to Participate”), ¶¶ 6-7.

⁵ First IRP, Decision on Phase I, [Exhibit C-43], ¶¶ 75-76, 83; First IRP, Verisign’s Request to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), [Exhibit C-219], ¶¶ 4-5; First IRP, NDC’s Request to Participate as *Amicus Curiae* in Independent Review Process (11 Dec. 2018), [Exhibit C-220], Sec. 2; NDC/Verisign Request to Participate, ¶¶ 69-71.

international arbitral norms where *amici* participation of the sort urged by the *Amici* Applicants is accepted or even remotely recognized.

2. The record is clear. The provisions that the *Amici* Applicants rely upon for both propositions (mandatory *amicus* participation and broad rights of participation) were added in the 11th hour at the insistence of David McAuley, a senior Verisign executive, following ICANN's disclosure that Altanovo intended to challenge its decision to delegate the .WEB gTLD to NDC. These 11th hour provisions, supported by or at the very least acquiesced to by ICANN Legal, were never discussed by the IRP-Implementation Oversight Team ("**IRP-IOT**") and went far beyond the scope of the public comments received regarding Rule 7, and which ICANN was required to respect.⁶ Contrary to how the rules for this IRP were supposed to be drafted, the 11th hour provisions were drafted, in private, by McAuley and Samantha Eisner of ICANN Legal.⁷ These private negotiations between Verisign and ICANN over the very rules that are at issue here became public only because Altanovo demanded their production.⁸

3. Contrary to the *Amici* Applicants' assertions, these 11th hour provisions do not enjoy widespread support in the Internet community or the current iteration of the IRP-IOT. In fact, the current draft of Rule 7 strips *amici* of the *de facto* party status McAuley insisted upon by, among other things, (1) "clarify[ying]" that no applicant has the right to participate as an *amicus*

⁶ Altanovo's Brief on the Validity of Rule 7 (15 Nov. 2024) ("**Altanovo Brief**"), Sec. II.D.

⁷ Altanovo Brief, Sec. II.D.

⁸ Letter from A. Ali (Counsel for Altanovo) to ICANN (DIDP Request No. 20190401-1) (1 Apr. 2019), [**Exhibit C-221**] (requesting disclosure of IRP-IOT materials); ICANN's Response to DIDP Request No. 20190401-1 (1 May 2019), [**Exhibit C-222**] (noting the publication of IRP-IOT materials in response to Altanovo's request). This is not the only matter that was discovered through the document production process in the First IRP. Document production also led to the disclosure of the secret Domain Acquisition Agreement ("**DAA**") between Verisign and NDC, as well as of the *sub rosa* manner in which ICANN's counsel obtained the agreement and of an undisclosed lengthy written submission Verisign and NDC made to ICANN in support of the DAA. Other communications between NDC and Verisign and ICANN were shielded from production on the basis of legal privilege or because, as *amici*, NDC and Verisign were excluded from document production.

curiae “simply because they have a material interest in the Dispute[,]” (2) changing the standard for *amici* participation to expressly require that the applicant demonstrate that it has “information, expertise, or other input that has a bearing on the issues in Dispute which is likely to assist the IRP Panel[,]” (3) making clear that the only purpose of *amici* participation is “to assist the Panel[,]” and (4) limiting *amici* participation to the submission of written briefings at the request of the Panel.⁹ In essence, the IRP-IOT’s proposed changes to Rule 7 ***completely reverse*** the 11th hour McAuley-Eisner provisions which the *Amici* Applicants rely upon here.

4. If the *Amici* Applicants believe that their “broad participation” in this IRP is essential to protecting their material interest, they should intervene as a party, be subject to document production, and agree to be bound by the Panel’s decision.¹⁰ Otherwise, the *Amici* Applicants should not be permitted to participate in this IRP based on Rule 7. A decision to the contrary would be to reward Verisign’s misconduct and enable ICANN to distract the Panel’s attention (as it did in the First IRP) from the serious breaches of the New gTLD Rules inherent in the Verisign-NDC Domain Acquisition Agreement that is at the heart of this IRP. The question of Rule 7’s validity is thus vital to the conduct of this IRP. The Panel has jurisdiction to resolve the question (**Section 2**). In considering the question of Rule 7’s validity, the Panel should base its analysis on the objective facts underlying the creation and adoption of Rule 7—not unsubstantiated conclusions from the *Amici* Applicants (**Section 3**). And the objective facts indisputably establish the Rule 7 is invalid and cannot be used by the *Amici* Applicants to participate in this IRP as *amici curiae*.

⁹ ICANN, Proposed Changes by the IRP-IOT regarding Rules 3, 4, 5B, and 7 (clean - no red line) (7 Mar. 2024), [Exhibit C-163], p. 16.

¹⁰ As previously noted, the *Amici* Applicants have repeatedly sought to interject a new issue into these proceedings—whether Altanovo violated the blackout period rule for the .WEB Auction. NDC/Verisign Request to Participate, ¶¶ 25-26, 47. If the *Amici* Applicants intend on pursuing that issue, they should do so as a Claimant, not as *amici*.

2. THIS PANEL MUST DECIDE WHETHER RULE 7 IS VALID AND EFFECTIVE

2.1. The Panel Has Jurisdiction to Determine Rule 7's Validity

5. The *Amici* Applicants assert that the Panel lacks jurisdiction to consider whether Rule 7 is valid and effective. They are wrong. ICANN and Altanovo expressly agreed through their Submission Agreement that “the IRP Panel, rather than a Procedures Officer *shall determine*: (i) whether Altanovo has the right to challenge the validity and effectiveness of Rule 7; and, if so, (ii) the merits of Altanovo’s challenge of the validity and effectiveness of Rule 7[.]”¹¹ The parties’ Submission Agreement thus expressly extends the Panel’s jurisdiction to decide whether Altanovo may challenge the validity and effectiveness of Rule 7 and, if so, the merits of that question.¹²

6. The *Amici* Applicants also fundamentally misconstrue the issue before the Panel. As set forth in Altanovo’s prior briefing,¹³ because Rule 7 was not properly adopted by the Board, Rule 7 is ineffective and therefore cannot serve as the basis for the Panel to allow the *Amici* Applicants to participate in this IRP. The sole question before this Panel at this juncture is thus whether Rule 7 may serve as a jurisdictional basis for the *Amici* Applicants to participate in this IRP due to the defects in the rulemaking process by which Rule 7 was adopted and the obvious conflict of interest of the Verisign executive (McAuley) who was relentlessly pushing for these very changes, which a senior lawyer in ICANN Legal (Samantha Eisner) facilitated.

2.2. This Issue Is Ripe for Determination and Is Not Time-Barred

7. Nor is this issue time barred. Altanovo has been consistently pressing the ICANN Board and various IRP Panels to decide the validity of Rule 7 since December 2018. By way of

¹¹ Parties’ Submission Agreement on Amici Participation (18 July 2024), Art. 1(A) (emphasis added).

¹² Parties’ Submission Agreement on Amici Participation (18 July 2024), Art. 1(A).

¹³ Altanovo Brief, Sec. IV; Altanovo’s Reply Brief on the Validity of Rule 7 (30 Dec. 2024) (“**Altanovo Reply Brief**”), Sec. III.

brief summary, the Interim Supplementary Procedures were adopted by the ICANN Board on 25 October 2018, Altanovo filed its Request for IRP for the First IRP on 14 November 2018, and the *Amici* Applicants filed requests to participate in the First IRP on 11 December 2018.¹⁴ Ten days later, on 21 December 2018, Altanovo wrote to the ICANN Board disclosing its preliminary findings that Verisign had wrongfully manipulated the IRP-IOT's rulemaking process to insert language that the *Amici* Applicants had relied on to demand participation in the First IRP.¹⁵ In that letter, Altanovo specifically requested that the ICANN Board suspend operation of the Interim Supplementary Procedures due to these improprieties and declare Rule 7 ineffective pending a second public comment period.¹⁶ The ICANN Board never responded to Altanovo's letter.

8. In response to the application received from Verisign and NDC, the ICDR appointed a Procedures Officer in December 2018. Altanovo challenged Rule 7 in the First IRP before the Procedures Officer¹⁷ and, ultimately, amended its Request to add a new claim that the Board's adoption of Rule 7 violated ICANN's Bylaws.¹⁸ Altanovo's Rule 7 claim was the subject of the Phase I hearing of the First IRP. In its Phase I decision, the First IRP Panel determined to defer consideration of Altanovo's Rule 7 claim to Phase II.¹⁹ In its Phase II decision, the First IRP Panel ultimately determined that Altanovo's Rule 7 claim had been effectively mooted by

¹⁴ ICANN Board Submission No. 2018.10.25.2d, Consideration of Independent Review Process Interim Supplementary Rules of Procedure (25 Oct. 2018), [Exhibit C-183]; First IRP, Request for IRP (14 Nov. 2018), [Exhibit R-26].

¹⁵ Letter from Arif Ali (Counsel for Altanovo) to ICANN Board (21 Dec. 2018), [Exhibit C-164].

¹⁶ Letter from Arif Ali (Counsel for Altanovo) to ICANN Board (21 Dec. 2018), [Exhibit C-164], Ex. 1 (at p. 7).

¹⁷ First IRP, Declaration of the Procedural Officer (28 Feb. 2019), [Exhibit R-2], Sec. III.1 (at p. 10).

¹⁸ First IPR, Amended Request for IRP (21 Mar. 2019), [Exhibit C-223], Sec. 6.

¹⁹ First IRP, Decision on Phase I (12 Feb. 2020), [Exhibit C-43], ¶¶ 182-184.

Verisign's and NDC's participation in the IRP and, along with several issues on the merits, referred the issue back to the ICANN Board for consideration.²⁰

9. The First IRP Panel's Phase II Decision became final on 21 December 2021.²¹ Between December 2021 and January 2022, Altanovo again wrote to the ICANN Board to inquire about how the Board intended to address the First IRP Panel's Phase II decision.²² The Board never responded to Altanovo's letters. And, despite the First IRP Panel's expectation that the ICANN Board would consider the validity of Rule 7 in light of the First IRP Panel's comments, the ICANN Board's resolution on the First IRP Panel's Final Decision (the "**Resolution**") completely ignored the question altogether.

10. The ICANN Board adopted the Resolution on 30 April 2023. In August 2023, Altanovo was informed that Verisign and NDC intended to apply under Rule 7 to participate in this IRP as *amicus curiae*. In response, Altanovo immediately wrote to ICANN's legal counsel on 15 August 2023 requesting that the ICANN Board suspend operation of Rule 7 until such time that its validity can be finally addressed.²³ That request was also ignored. Altanovo has ever since consistently pursued its position in this IRP.

11. The foregoing demonstrates that, far from "sleeping on its rights," Altanovo has consistently objected to the validity of Rule 7 and has consistently sought to have the ICANN Board, and now two IRP Panels, address this issue.

²⁰ First IRP, Final Decision (20 May 2021, as corrected), [Exhibit C-1], ¶¶ 355-357.

²¹ Decision on Article 33 Application (21 Dec. 2021), [Exhibit R-12].

²² Altanovo Reply Brief, ¶ 29.

²³ Altanovo Reply Brief, ¶ 29.

2.3. Prior Rulings Underline the Importance of the Rule 7 Issue

12. Every neutral to examine the question of whether McAuley and Eisner manipulated the rulemaking process to benefit Verisign has found that the issues raised by Altanovo are both serious and troubling, calling the validity of Rule 7 into question. The validity of Rule 7 was first considered by the Procedures Officer in the First IRP who, after receiving and reviewing extensive evidence, referred the matter to the IRP Panel for determination because of its “importance to the global Internet community”²⁴ The First IRP Panel thereupon considered the validity of Rule 7 in Phase I of that proceeding, finding:

The two categories of interested parties added to Rule 7 on 16 October 2018 and deemed to have a material interest in the Dispute are quite specific. In the experience of the Panel, they are couched in language that is not typical of legal texts used to describe parties that may claim intervenor status or request *amicus* participation in legal proceedings. Although it is not inconceivable that it be so, *it would be a surprising coincidence, in light of the documentary evidence* just reviewed, if the articulation of these two categories of potential *amici*, at the time that it occurred, were wholly unrelated to Afilias’ CEP, made public shortly before, and its impending IRP, a draft of which had been shared with ICANN less than a week before these categories came to being. All the more so given that the documentary evidence establishes that Ms. Eisner and Mr. McAuley were in contact while Ms. Eisner was developing language by which these new categories of entities were added to Rule 7.

The questions raised by the specificity of these two additional grounds for *amici* participation are *all the more serious considering the persistence with which Mr. McAuley, in his last exchanges with Ms. Eisner, sought to constrain the discretion of the Procedures Officer* when he or she would be presented with an application by entities meeting those conditions.²⁵

Ultimately, however, the Panel determined:

Before making findings of fact that necessarily imply that the evidence of a witness [McAuley and Eisner] is untruthful, the Panel

²⁴ Altanovo Brief, ¶ 71.

²⁵ First IRP, Decision on Phase I, [Exhibit C-43], ¶¶ 175-176 (emphasis added).

considers it the duty of any adjudicator, save in the clearest of cases, to require that the party urging that these findings be made first put its case and the documents on which it is based to the witnesses in cross-examination. All the more so, if the findings of fact in question relate to alleged misconduct by the witness.²⁶

13. Contrary to the *Amici* Applicants’ assertions that Altanovo lost on its Rule 7 challenge at every stage of the prior proceeding, it is clear that the Procedures Officer found that the evidence presented very serious questions and deferred consideration to the First IRP Panel; then, the First IRP Panel found that the issues raised such serious questions as to the conduct of McAuley and Eisner that it determined to take live testimony on this issue at the final hearing.

14. Following the merits hearing in August 2020, the First IRP Panel held that Altanovo’s Rule 7 claim had been mooted by the participation of Verisign and NDC at the Phase II hearing, finding that no purpose would be served by actually deciding the issue beyond the damning findings of fact set forth in its Phase I decision.²⁷ However, the First IRP Panel noted that the ICANN Board had “no doubt reviewed” the Phase I decision and “can act upon [it], as deemed appropriate.”²⁸ The ICANN Board, however, has not done so. The Board has never substantively responded to any of Altanovo’s requests, never considered any of the evidence amassed by Altanovo regarding the validity of Rule 7, and has steadfastly kept its collective head buried in the sand while the *Amici* Applicants once again seek to profit from Verisign’s outsized influence within and over ICANN.²⁹

²⁶ First IRP, Decision on Phase I, [Exhibit C-43], ¶ 181.

²⁷ First IRP, Final Decision (20 May 2021, as corrected), [Exhibit C-1], ¶ 7.

²⁸ First IRP, Final Decision (20 May 2021, as corrected), [Exhibit C-1], ¶ 7.

²⁹ The *Amici* Applicants’ argument that “Altanovo was aware [in 2012], or should have been aware, that ICANN retained the ability to amend its Bylaws, including, as it did [four years later in 2016] by creating the IRP-IOT to establish the procedural rules for an IRP”, is frankly bizarre. NDC and Verisign’s Brief on the Validity of Rule 7 (7 Feb. 2025) (“NDC/Verisign Rule 7 Brief”), ¶ 39 (citation omitted). This is not the only argument based on Altanovo’s supposed clairvoyance in the *Amici* Applicants’ brief. *E.g., id.*, ¶¶ 26, 30 (arguing that Altanovo knew that Verisign and NDC would seek to participate as *amici* in this IRP). Altanovo cannot predict the future and thus may only react to things that it knows. While the *Amici* Applicants are quick to ascribe omniscience to

3. THE *AMICI* APPLICANTS' ACCOUNT OF RULE 7'S DRAFTING HISTORY CONTRADICTS THE PLAIN FACTS

3.1. The *Amicus Curiae* Rules Were Intended to be Limited to Appeals of Decisions Made by Underlying "Process Specific Expert Panels"

15. The *Amici* Applicants baldly assert that "[t]here is no principled way to read the Bylaws . . . as permitting *amicus* participation by those involved in process-specific expert panel proceedings while prohibiting *amicus* participation by anyone else."³⁰ To the contrary, there is no principled way to reconcile this plainly inaccurate assertion with the factual record. Below we lay out what actually happened in the rulemaking process for Rule 7 and correct the *Amici* Applicants various distortions of the record. The deficiencies in their version of events is in no way ameliorated by McAuley's supplemental witness statement.³¹

16. The IRP-IOT began its work in January 2016 and Sidley Austin LLP ("Sidley") produced a draft set of rules for the IRP-IOT's consideration on 26 July 2016.³² That draft contained provisions for "joinder, intervention and consolidation of Claims," in anticipation of the adoption of ICANN's new Bylaws, but did not provide for participation in IRPs by *amicus curiae* or, indeed, any third party that was not asserting a Claim against ICANN. Accordingly, the considered view of Sidley and the IRP-IOT as of the summer of 2016 was that participation in IRPs was appropriately limited to (a) ICANN, (b) the Claimant, (c) third parties that had brought

Altanovo, they are equally quick to attribute rank ignorance to McAuley. See, e.g., *id.*, ¶¶ 9, 59 (denying that McAuley or Eisner knew about Altanovo's impending IRP).

³⁰ NDC/Verisign Rule 7 Brief, ¶ 44.

³¹ In the exercise of its discretion, of course the Panel is at liberty to accord whatever weight it wishes to McAuley's statement. However, unless Altanovo is given an opportunity to test that statement, we submit that the Panel should give it no weight.

³² Draft as of 26 July 2016 – Updates to ICDR Supplementary Procedures, [Exhibit C-102].

similar Claims against ICANN in parallel IRPs, and (d) third parties that had standing to bring similar Claims against ICANN, but had yet to file an IRP of their own.³³

17. The IRP-IOT discussed the various provisions of this draft and subsequent revisions to the rules were published on 29 July 2016, 4 August 2016, and 22 August 2016.³⁴ These drafts similarly omitted any provisions that would allow for *amicus curiae* participation in IRPs.³⁵

18. In October 2016, ICANN adopted new Bylaws at the insistence of the U.S. government.³⁶ Among the new Bylaws provisions was Section 4.3(b)(iii)(A)(3), which granted IRP Panels jurisdiction to hear “Disputes” that “resulted from the decisions of *process-specific expert panels* that are claimed to be inconsistent with the Articles of Incorporation or Bylaws.”³⁷ The new Bylaws also formally provided for the constitution of the IRP-IOT, which was tasked with developing rules for the IRP “that conform with international arbitration norms”³⁸ The Bylaws further specified that the rules should include, among other things, “[i]ssues relating to joinder, intervention, and consolidation of Claims[.]”³⁹

19. Following the adoption of the new Bylaws, the IRP-IOT continued its work on the new rules. On 29 November 2016, and consistent with the IRP-IOT’s drafting principles, the CCWG approved a set of draft rules for publication for public comment.⁴⁰ The Public Comment

³³ Draft as of 26 July 2016 – Updates to ICDR Supplementary Procedures, [Exhibit C-102], pp. 7-8.

³⁴ Altanovo Brief, ¶ 13.

³⁵ Altanovo Brief, ¶ 13.

³⁶ Altanovo Brief, ¶¶ 5-8.

³⁷ Bylaws, [Exhibit C-14], Sec. 4.3(b)(iii)(A)(3) (emphasis added).

³⁸ Bylaws, [Exhibit C-14], Sec. 4.3(n)(i).

³⁹ Bylaws, [Exhibit C-14], Sec. 4.3(n)(iv)(B).

⁴⁰ ICANN, Updated Supplementary Procedures for Independent Review Process (IRP) (28 Nov. 2016), [Exhibit C-59], p. 2.

Draft's version of Rule 7 was substantively unchanged from Sidley's first draft. It did not provide for any rights of participation in IRPs for any third parties who were not bringing Claims against ICANN.⁴¹ Accordingly, as the November 2016 Public Comment Draft makes clear, it was the considered opinion of the IRP-IOT, its supervisory body, the CCWG, and their counsel at Sidley that the new Bylaws did not mandate that third party participation rights in IRPs unless such third parties were bringing similar Claims against ICANN.

20. In February 2017, the IRP-IOT received three sets of public comments that addressed the proposed Rule 7. Each of these commentators identified the same problem, namely that the party that prevailed before an *underlying process-specific expert panel* would not be able to participate in an IRP where that decision had been appealed by the losing party.⁴² These public comments suggested providing standing for such parties to participate in such IRPs.⁴³ Critically, however, no public comments suggested adopting rules providing for *amicus curiae* standing outside of the very narrow context of IRPs that, pursuant to Bylaw 4.3(b)(iii)(A)(3), concerned decisions of *underlying process-specific expert panels*. Any suggestion to the contrary is false and easily disproven.

21. The IRP-IOT clearly understood this very limited issue that had been identified in the public comments and sought to amend Rule 7 accordingly. Indeed, IRP-IOT participants, McAuley prominently among them, repeatedly noted over the course of 2017 that any amendments to Rule 7 would be narrowly tailored to those IRPs that concerned the new Bylaws provision providing IRP Panels with jurisdiction to hear what were essentially appeals of decisions taken by

⁴¹ Draft as of 31 October 2016 – Updates to ICDR Supplementary Procedures, [Exhibit C-109], p. 8.

⁴² Altanovo Brief, ¶¶ 20-27.

⁴³ Altanovo Brief, ¶¶ 20-27.

underlying process-specific expert panels. McAuley repeatedly affirmed this position to the IRP-IOT in both meetings and correspondence:

- **IRP-IOT Meeting #18 (6 April 2017):** “The suggestions that I made are that we come up with rules that allow *everybody that was a party at the underlying proceeding – the Expert Panel* basically such as a string confusion objection. Those kind of panels . . . all parties have a right to intervene or file an amicus brief, and that if they become parties, they have the rights of a party under this kind of conflict[.]”⁴⁴
- Email to the IRP-IOT (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.”⁴⁵
- IRP-IOT Meeting #27 (27 July 2017): “*My suggestion was intended to allow all parties at the underlying proceeding to have a right of intervention* but that the IRP panel through the procedures officer could limit such intervention to being that of an amicus. Not . . . to allow nonparties from below or others to join under these provisions. Noting that these provisions deal with parties below. *Basically an expert panel hearings*. We’re not displacing rule number 7 [on] consolidation, intervention joinder from the draft supplementary rules [that] were up for comment.”⁴⁶
- IRP-IOT Meeting #28 (7 September 2017): “*[O]nly those persons or entity participating in the [underlying] proceedings . . . have a right to intervene in the IRP*. ... The manner 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.”⁴⁷

⁴⁴ IRP-IOT Meeting #18, Transcript (6 Apr. 2017), [Exhibit C-157], p. 22 (emphasis added).

⁴⁵ Email from D. McAuley to Members of the IRP-IOT (21 July 2017), [Exhibit C-118], p. 2 (emphasis added).

⁴⁶ IRP-IOT Meeting #26, Transcript (27 July 2017), [Exhibit C-158], p. 21 (emphasis added).

⁴⁷ IRP-IOT Meeting #28, Transcript (7 Sep. 2017), [Exhibit C-119], p. 3 (emphasis added).

The Panel should credit McAuley’s contemporaneous understanding of the scope of the public comments, rather than either counsel’s fanciful interpretations to the contrary nearly a decade later or McAuley’s gap-filled recollections.⁴⁸

22. To avoid the clear implications of the above, the *Amici* Applicants claim that the IRP-IOT’s February 2018 Memorandum “instructed Sidley to draft an *amicus* rule allowing participation by persons with a ‘material interest’ in the dispute at issue in the IRP—regardless of whether or not those parties had been involved in process-specific expert proceedings prior to the IRP.”⁴⁹ The *Amici* Applicants, once again, misstate the record. The February 2018 Memorandum was not a set of instructions to Sidley, but rather a report on the public comments that was later provided to Sidley as background information.⁵⁰ And, as McAuley had made abundantly clear over the course of 2017, the IRP-IOT had consistently viewed the public comments as requesting a modification of Rule 7 solely to provide participation rights in IRPs that concerned decisions taken by underlying process-specific expert panels.

23. The *Amici* Applicants’ self-serving interpretation of the proposed modification to the specific proposed joinder rules set forth in the February 2018 Memorandum is also contrary to the factual record. The record shows that this language was originally drafted by Liz Le of ICANN

⁴⁸ While McAuley claims to recollect new details regarding his work on the IRP-IOT, he still claims ignorance as to the substance of two critical phone calls he had with Eisner and Sidley. First, McAuley was repeatedly questioned by counsel and by the First Panel about his 15 October 2018 call with Eisner, after which Eisner completely reversed her position that McAuley’s Rule 7 proposals went far beyond the public comments received on Rule 7 and would therefore require a new public comment period. First IRP, Merits Hearing Tr. (Day 6) (10 Aug. 2020), [Exhibit C-89], 1074:12-16 (McAuley Cross-Examination). Having attempted to shift responsibility for the last-minute changes to Rule 7 to legal counsel, McAuley claims he cannot recall any details about his discussions and correspondence with Sidley in June-July 2018. Declaration of David McAuley in Support of NDC and Verisign’s Brief on the Validity of Rule 7 (7 Feb. 2025) (“McAuley Suppl. Decl.”), ¶ 12. McAuley’s selective memory is simply not credible.

⁴⁹ NDC/Verisign Rule 7 Brief, ¶ 51.

⁵⁰ Email from D. McAuley (Verisign) to IRP-IOT Members (20 Feb. 2018), [Exhibit C-224] (transmitting Draft Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN Independent Review Process (Feb. 2018), [Exhibit C-126]).

Legal and distributed to the IRP-IOT on 1 December 2017.⁵¹ Le's proposal sought to clarify the then-current proposal for Rule 7's joinder language, which had been circulated to the IRP-IOT by McAuley on 25 August 2017. McAuley's language provided:

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 *all such parties* have a right to intervene in the IRP. 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. 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. . . .⁵²

24. ICANN Legal, as it had throughout the IRP-IOT's discussion of Rule 7, expressed concerns about the use of the term "party," since that term was not used in the Bylaws or in the rules (both of which use the very specific term "Claimant" instead). Le thus suggested revising the above language to avoid any ambiguity resulting from the use of the undefined term "party."⁵³ Le's proposal, circulated the IRP-IOT on 1 December 2017, provides:

1. If the person or entity participated in *the underlying proceeding*, (s)he/it/they receive notice.
 - 1.A. If the person or entity satisfies (1.), above, then (s)he/it/they have a right to intervene in the IRP.
 - 1.A.i. BUT, (s)he/it/they may only intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

⁵¹ See Email from D. McAuley (Verisign) to IRP-IOT Members (1 Dec. 2017), [Exhibit C-225], pp. 1-2.

⁵² Emails between S. Eisner (ICANN) to D. McAuley (Verisign) (*various dates*), [Exhibit C-121], p. 1-2.

⁵³ Email from E. Lee (ICANN) to D. McAuley (Verisign) (30 Nov. 2017), [Exhibit C-226].

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

2. For any person or entity that did not participate in the underlying proceeding, (s)he/it/they may intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

2.A. If the standing requirement is not satisfied, the persons described in (2.), above, may intervene as an amicus if the Procedures Officer determines, in her/his discretion, that the entity 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.⁵⁴

25. Le's proposed language did not propose to expand the scope of IRPs affected by Rule 7: Both Paragraphs 1 and 2 are clearly limited to IRPs that are hearing appeals from "the underlying proceeding."⁵⁵ To read them otherwise is nonsensical. For example, Paragraph 2 provides that even if a third party had not participated in the underlying proceeding, that third party could still intervene in any appeal of that underlying decision if they had Claimant standing. If Paragraph 2 is read to refer to any IRP, Paragraph 2 is needlessly repetitive of the intervention provisions of Rule 7, which provide that third parties may intervene in any IRP where they have Claimant standing. Correctly limited to appeals from "the underlying proceeding," Paragraph 2.A provides that third parties that had not participated below may still intervene as an *amicus* if the Procedures Officer determines that such third party has a material interest that directly relates to the Claim.⁵⁶

⁵⁴ Email from D. McAuley (Verisign) to IRP-IOT Members (1 Dec. 2017), [Exhibit C-225], pp. 1-2 (emphasis added).

⁵⁵ Email from D. McAuley (Verisign) to IRP-IOT Members (1 Dec. 2017), [Exhibit C-225], pp. 1-2 (emphasis added).

⁵⁶ Email from D. McAuley (Verisign) to IRP-IOT Members (1 Dec. 2017), [Exhibit C-225], pp. 1-2 (emphasis added).

26. There is thus no basis, and certainly no contemporary discussion within the IRP-IOT, that would suggest that the committee intended what the *Amici* Applicants now suggest—a significant expansion of the joinder language beyond the consistent position of that committee for nearly a year. To the contrary, at the 7 December 2017 IRP-IOT meeting, Le admitted that her proposed Paragraph 2 was added to address a concern expressed by Malcom Hutty about entities that wanted to intervene on behalf of ICANN.⁵⁷ Hutty made clear that his concern was limited to the very narrow context that the IRP-IOT had been discussing for the last year—appeals of decisions rendered by underlying process-specific expert panels. Hutty, who had found Le’s proposal to be unclear, proposed an alternative clarification:

2. A person or entity that does not have the right to intervene under paragraph 1 may nonetheless intervene as an amicus, but not as a party, if they participated *in the underlying procedure* that gave rise to the decision or action under review.⁵⁸

27. Notably, no one in the IRP-IOT, including Le, disagreed with Hutty’s interpretation of Paragraph 2.⁵⁹

3.2. The *Amici* Applicants’ (and ICANN’s) Shifting Defense of Rule 7

28. ICANN and the *Amici* Applicants have consistently changed their arguments in support of Rule 7 when confronted with facts.⁶⁰ When Altanovo first complained to the ICANN

⁵⁷ IRP-IOT Meeting #31, Transcript (7 Dec. 2017), <https://tinyurl.com/5dy7skx2> (last visited 27 Feb. 2025), [Exhibit C-227], pp. 12-13.

⁵⁸ IRP-IOT Meeting #31 (7 Dec. 2017), Email dated 3 Dec. 2017 from Malcom Hutty, [Exhibit C-161], p. 3; IRP-IOT Meeting #31, Transcript (7 Dec. 2017), <https://tinyurl.com/5dy7skx2> (last visited 27 Feb. 2025), [Exhibit C-227], pp. 10-13 (discussing the language proposed by Hutty on 3 December 2017).

⁵⁹ McAuley asserts that “the IRP-IOT did not meet but did occasionally discuss the [Rules]” between May 2018 and September 2018. McAuley Suppl. Decl., ¶ 13. That is not true—the IRP-IOT did meet on 7 June 2018. More troubling, however, is that ICANN has not disclosed these “discussions” that occurred between that June 2018 IRP-IOT meeting and September 2018. If there are additional “off-list” correspondences between IRP-IOT members during this period that discuss Rule 7, they should be produced immediately.

⁶⁰ That effort continues with McAuley’s “Supplemental” Declaration, where he professes to recall additional and material details left out of both his prior Declaration and his testimony from over four years ago. *Compare*

Board about how Rule 7 had been amended in the 11th hour, the only evidence that Altanovo had to support its position were the transcripts for the IRP-IOT's inquorate meetings of 9-11 October 2018 and the final text of Rule 7 that retained various redlined edits, attesting to the last-minute changes that had been pushed through by Verisign's McAuley.⁶¹ Faced with these facts, the *Amici* Applicants sought to downplay McAuley's role by claiming that the complained-of text had actually been drafted by Samantha Eisner of ICANN Legal.⁶²

29. But following production of the private correspondence between McAuley and Eisner between 12-19 October 2018, it became clear that Eisner had at first opposed McAuley's proposal to expand Rule 7⁶³ but then agreed to accept his changes to the rule following a phone call with McAuley on 15 October 2018 about which she could remember nothing; McAuley's memory also failed him insofar as the substance of the call was concerned.⁶⁴ Nonetheless, as the First IRP Panel noted in its Phase I findings of fact, email correspondence revealed that McAuley had pushed Eisner to revise Rule 7 to provide for (a) mandatory *amici* participation rights and (b) for any such *amici*, the right to broadly participate in IRPs.⁶⁵ Eisner accepted his position, but

McAuley Suppl. Decl., ¶¶ 4, 6-13 with First IRP, Declaration of David McAuley in Support of Verisign's Request to Participate as *Amicus Curiae* (5 Feb. 2019), [Exhibit C-88], ¶¶ 10, 19-21.

⁶¹ Letter from Arif Ali (Counsel for Altanovo) to ICANN Board (21 Dec. 2018), [Exhibit C-164], Ex. 1.

⁶² First IRP, Verisign's Reply in Support of Request to Participate as *Amicus Curiae* (5 Feb. 2019), [Exhibit C-228], ¶ 6; First IRP, Verisign's Supplemental Brief in Support of Request to Participate as *Amicus Curiae* (27 Sep. 2019), [Exhibit C-229], ¶ 18; First IRP, NDC's Supplemental Brief in Support of Request to Participate as *Amicus Curiae* (27 Sep. 2019), [Exhibit C-230], ¶ 21, n.3 (incorporating Verisign's arguments).

⁶³ Email from S. Eisner (ICANN) to D. McAuley (Verisign) (12 Oct. 2018), [Exhibit C-231].

⁶⁴ First IRP, Merits Hearing Tr. (Day 3) (5 Aug. 2020), [Exhibit C-91], 464:18-21 (Eisner Cross-Examination) ("Q. Do you recall having a telephone call with Mr. McAuley on October 15th, 2018? A. I don't recall specifically having that call."); First IRP, Merits Hearing Tr. (Day 6) (10 Aug. 2020), [Exhibit C-89], 1074:12-16 (McAuley Cross-Examination) ("[Q.] Did you, in fact, have a call with Ms. Eisner to discuss her concerns as she set them out here in her email of October 12th? A. I don't recall it, but -- I don't recall it, but I would not be surprised.").

⁶⁵ First IRP, Decision on Phase I, [Exhibit C-43], ¶¶ 152-164; *id.*, ¶ 176 (describing "the persistence with which Mr. McAuley, in his last exchanges with Ms. Eisner, sought to constrain the discretion of the Procedures Officer when he or she would be presented with an application by entities meeting those conditions."); Email from D. McAuley (Verisign) to S. Eisner (ICANN) (17 Oct. 2018), [Exhibit C-141]; Email from D. McAuley (Verisign)

then failed to advise the Board of the extent to which the language of the rule that was being presented to them was not in line with the drafting rules and procedures. Whether this was intentional or an oversight does not matter. What matters is that the Board adopted the rule based on incomplete and indeed inaccurate information.⁶⁶

3.3. The *Amici* Applicants Misstate Sidley’s Role in Drafting the Interim Supplementary Procedures

30. Sidley acted as counsel to the CCWG.⁶⁷ As such, Sidley’s instructions were to act as legal advisor to the IRP-IOT and to draft rules in response to instructions from the IRP-IOT. Sidley, as counsel, would have had no authority to go beyond its client’s instructions. That said, the *Amici* Applicants argue that the 11 July 2018 draft prepared by Sidley contains significantly broader *amicus curiae* provisions than anything that had been discussed and agreed within the IRP-IOT previously.⁶⁸ Indeed, these provisions go beyond either the 8 May Draft that had been sent to Sidley on 14 June 2018 or anything in the accompanying background materials that were sent at the same time.⁶⁹

31. The record is silent as to when and who instructed Sidley to do otherwise. On 19 June 2018, McAuley wrote to Sidley, noting that the IRP-IOT had identified “areas that still need development with respect to the procedures for a right to joinder and intervention[.]”⁷⁰ McAuley, Eisner, and Le spoke with Sidley later that day by phone. McAuley, however, apparently cannot

to S. Eisner (ICANN) (18 Oct. 2018), [Exhibit C-232]; Email from D. McAuley (Verisign) to S. Eisner (ICANN) (19 Oct. 2018), [Exhibit C-233].

⁶⁶ See Altanovo Brief, Sec. II.E.

⁶⁷ ICANN, Draft CCWG Accountability Proposal, Appendix F – Legal Counsel (30 Nov. 2015), [Exhibit C-234], p. 1.

⁶⁸ NDC/Verisign Rule 7 Brief, ¶ 55.

⁶⁹ Altanovo Reply Brief, ¶ 13.

⁷⁰ Email and Enclosures from D. McAuley (Verisign) to H. Gregory (Sidley Austin) (19 June 2018), [Exhibit C-184], p. 1.

recall what was discussed on that call.⁷¹ The record is also silent as to whether there were any subsequent communications, either by phone or by email, among McAuley, ICANN Legal, and Sidley after 19 June 2018 but before Sidley returned the draft rules to McAuley on 11 July 2018.

32. Notwithstanding this significant gap in the record, the *Amici* Applicants assert that there is “irrefutable documentary evidence” that Sidley drafted the new *amicus curiae* language of Rule 7 that appears in the 11 July 2018 draft. There is no such evidence. As noted, the record is silent as to who instructed Sidley to draft this language and when those instructions were given. At a minimum, Sidley’s internal communications and internal drafts that concern Rule 7 should be produced. ICANN and the *Amici* Applicants have squarely placed Sidley’s drafting at issue here and the questions of what specific instructions were given to Sidley on 19 June 2018, how Sidley went about its work pursuant to those instructions, and whether there were further instructions subsequently given to Sidley regarding the drafting of Rule 7, should be answered. Otherwise, the *Amici* Applicants’ submissions can only be viewed as hollow drums.

3.4. The *Amici* Applicants’ Reliance on the October 2018 IRP-IOT Meetings Are Misplaced

33. Regardless of who drafted the revised version of Rule 7 that first appears in the 11 July 2018 draft, the fact remains that this version of the rule was never discussed, let alone approved, at a quorate meeting of the IRP-IOT.⁷² Indeed, the *Amici* Applicants (and ICANN) put much stock in the two *inquorate* meetings of the IRP-IOT held in October 2018. The *Amici* Applicants assert that during its 9 October 2018 and 11 October 2018 meetings, the IRP-IOT

⁷¹ McAuley Suppl. Decl., ¶ 12.

⁷² As discussed in the Altanovo Opening Brief, contrary to the custom and practice of the IRP-IOT, these new expansive *amicus curiae* provisions never received a first or second reading at a quorate IRP-IOT meeting. Altanovo Reply Brief, Sec. IV.A. That the *Amici* Applicants cannot point to a single vote or discussion by a quorate IRP-IOT on these provisions is underscored by their repeated assertions that a *single IRP-IOT member* voiced support for them. Clearly, a single member cannot constitute a quorum of the committee.

approved (a) the concept that *amicus* standing would not be limited to IRPs regarding appeals of process-specific expert proceedings, and (b) that *amici* would be afforded broad participation rights.⁷³ However, because the IRP-IOT failed to achieve a quorum at either the 9 or 11 October 2018 meetings, it was unable to conduct business and thus could not approve anything.⁷⁴

34. The *Amici* Applicants attempt to dismiss the IRP-IOT’s quorum requirements as immaterial, claiming that these requirements were derived solely from “offhand comments from an IRP-IOT member, Bernard Turcotte, during one IRP-IOT meeting.”⁷⁵ In fact, Turcotte was not a member of the IRP-IOT; rather, he was an ICANN contractor assigned to assist the IRP-IOT, and the person McAuley repeatedly turned to for advice as to the group’s working process and procedures.⁷⁶ Moreover, as noted in Altanovo’s Reply Brief, the IRP-IOT’s practice was to cancel meetings where it failed to reach a quorum.⁷⁷ When participation in the IRP-IOT fell in 2018, the IRP-IOT would occasionally hold an informal meeting, but it was clear that the IRP-IOT could not take any decisions during such meetings.⁷⁸

35. Ignoring this, the *Amici* Applicants claim that the Board was informed that the version of the rules provided to the Board was “the subject of intensive focus by the IOT in two

⁷³ NDC/Verisign Rule 7 Brief, ¶¶ 60-61.

⁷⁴ Altanovo Reply Brief, ¶¶ 38-39.

⁷⁵ NDC/Verisign Rule 7 Brief, ¶ 46.

⁷⁶ See, e.g., IRP-IOT Meeting #34, Transcript (22 Feb. 2018), [Exhibit C-155], p. 4; IRP-IOT Meeting #31, Transcript (7 Dec. 2017), <https://tinyurl.com/5dy7skx2> (last visited 27 Feb. 2025), [Exhibit C-227], pp. 4, 8; IRP-IOT Meeting #32, Transcript (11 Jan. 2018), <https://tinyurl.com/5c2zpx86> (last visited 27 Feb. 2025), [Exhibit C-235], p. 3; IRP-IOT Meeting [#36], Transcript (10 May 2018), <https://tinyurl.com/u5wr8vaz> (last visited 27 Feb. 2025), [Exhibit C-236], pp. 6, 13; IRP-IOT Meeting #41, Transcript (11 Oct. 2018), [Exhibit C-137], p. 12; IRP-IOT Meeting #37, Transcript (24 May 2018), [Exhibit C-180], p. 8; Email from B. Turcotte to D. McAuley (Verisign) and S. Eisner (ICANN) (7 Oct. 2018), [Exhibit C-237].

⁷⁷ Altanovo Reply Brief, n.63 (citing several examples of meetings cancelled for failing to reach a quorum).

⁷⁸ Altanovo Reply Brief, n.63 (citing IRP-IOT Meeting [#36], Raw Transcript (10 May 2018), [Exhibit C-171], p. 1 (where McAuley states that “we have not reached a quorum to make decisions . . . [but] Bernie [Turcotte] explained that we can continue without taking decisions.”)).

meetings on 9 and 11 October 2018”⁷⁹ and, thus, was well-aware of the 11th hour nature of the amendments to Rule 7. Not so. The Board was never informed that these “intensive” meetings had been inquorate and largely attended by ICANN lawyers and Verisign’s McAuley. The Board was never told that the IRP-IOT ended its meeting on 11 October 2018 with no consensus on the *amicus* provisions of Rule 7.⁸⁰ The Board was never told that the actual language that appeared in draft rules submitted to the Board were developed outside of the IRP-IOT by McAuley and Eisner and never even discussed at a single IRP-IOT meeting, quorate or not. The Board was never told that the first opportunity that members of the IRP-IOT had to review the new Rule 7 language was at midnight on Friday 19 October 2018. The Board was never told that McAuley unilaterally deemed that this extensive amendment to Rule 7 had been approved by the IRP-IOT because no comments were received by midnight on Sunday 21 October 2018. And, of course, the Board was not told that two categories of *mandatory amici* that were added to Rule 7 at the 11th hour perfectly described Verisign, McAuley’s employer, and NDC, Verisign’s .WEB partner.

3.5. The IRP-IOT Reverses McAuley’s 11th Hour Revisions to Rule 7

36. At the 9-11 October 2018 inquorate meetings, McAuley—“wearing [his] participant (not leader) hat” —insisted that any entity with a material interest in an IRP should have a right to participate in that IRP, and that such participation be as broad as the Claimant’s.⁸¹ As discussed extensively in Altanovo’s Opening Brief, Eisner disagreed, both during these meetings and in her 12 October 2018 email to McAuley in which she opined that the changes that

⁷⁹ NDC/Verisign Rule 7 Brief, ¶ 36 (citation omitted).

⁸⁰ To the contrary, the Resolutions drafted by ICANN Legal strongly implied, if not outright stated, that the draft Rules reflected “modifications” that had been agreed upon during the 9 and 11 October 2018 meetings. NDC/Verisign Rule 7 Brief, ¶ 36 (quoting Adopted Board Resolutions, Regular Meeting of the ICANN Board (25 Oct. 2018), [Exhibit C-58], ¶¶ 29-31).

⁸¹ Email from B. Turcotte to IRP-IOT Members (19 Oct. 2018), [Exhibit C-238], p. 1.

McAuley was seeking would go far beyond the comments that the IRP-IOT had received on Rule 7 and would require a second public comment period.⁸² McAuley, however, persisted, resulting in the language that was first disclosed to the IRP-IOT after working hours on Friday 19 October 2018 and that McAuley unilaterally deemed approved 48-hours later on Sunday 21 October.

37. The 11th hour provisions added to Rule 7, *which still appear in redline in the final version of the Rule*, were never discussed at a quorate IRP-IOT meeting, let alone given a first or second reading, which had been the IRP-IOT's standard working procedures.⁸³ Any assertion that this language was approved by the IRP-IOT at the time is simply false. Simply stated, the only two entities that knew about and had approved this language were Verisign and ICANN Legal.

38. Subsequent events demonstrate that the Internet community disagrees with most of the key facets of McAuley's 11th hour provisions. On 3 July 2024, the IRP-IOT published a second public consultation on certain new draft Rules, including a new draft of what was Rule 7. The following relevant and significant changes reversed the key elements of McAuley's 11th hour maneuverings:

- The standard for assessing an application to participate as an *amicus curiae* was revised. Not only must the Panel find that the applicant "has a material interest relevant to the Dispute," *but also* that the applicant has "information, expertise or other input that has a bearing on the issues in the Dispute which is likely to assist the IRP Panel."⁸⁴
- The new Rule further makes clear that the purpose of allowing an *amicus curiae* to participate in an IRP is "to assist the IRP Panel by offering information, expertise, or other input that has a bearing on the issues in the Dispute" and not to introduce new issues or claims into the proceeding.⁸⁵

⁸² Altanovo Brief, ¶¶ 49-58.

⁸³ Altanovo Reply Brief, Secs. IV.A.-B.

⁸⁴ ICANN, Proposed Changes by the IRP-IOT regarding Rules 3, 4, 5B, and 7 (clean - no red line) (7 Mar. 2024), [Exhibit C-163], p. 16.

⁸⁵ ICANN, Proposed Changes by the IRP-IOT regarding Rules 3, 4, 5B, and 7 (clean - no red line) (7 Mar. 2024), [Exhibit C-163], p. 15.

- The IRP-IOT clarified that no third party has the right to participate as an *amicus curiae* simply because they have a material interest in the Dispute.⁸⁶
- The proposed new Rule provides for **limited** participation by *amicus curiae*, expressly providing that *amici* may **only** submit written briefings **solely at the request and at the discretion** of the IRP Panel.⁸⁷

39. The *Amici* Applicants’ assertions that “the IRP-IOT continued to favor broad *amicus* participation in IRPs”⁸⁸ is therefore false and directly contradicted by the factual record.

4. CONCLUSION

40. For the reasons stated above, and as further supported by Altanovo’s Brief and Reply Brief on the Validity of Rule 7, Altanovo respectfully requests the Panel to determine that it does not have jurisdiction to permit the *Amici* Applicants to participate in this IRP pursuant to Rule 7 of the Interim Supplementary Procedures.

⁸⁶ ICANN, Proposed Changes by the IRP-IOT regarding Rules 3, 4, 5B, and 7 (clean - no red line) (7 Mar. 2024), [Exhibit C-163], pp. 15-16.

⁸⁷ ICANN, Proposed Changes by the IRP-IOT regarding Rules 3, 4, 5B, and 7 (clean - no red line) (7 Mar. 2024), [Exhibit C-163], pp. 15-16.

⁸⁸ NDC/Verisign Rule 7 Brief, ¶ 67.

Respectfully submitted,



Arif H. Ali
Rose Marie Wong
AHALI DISPUTE RESOLUTION LLC
1775 Eye Street, NW, Suite 1150
Washington, DC 20006
Tel. 202-538-9133
arif.ali@ahalidisputes.com
rosey.wong@ahalidisputes.com

Alexandre de Gramont
WOMBLE BOND DICKINSON (US) LLP
2001 K Street, NW, Suite 400 South
Washington, DC 20006
Tel. 202-857-4541
Alex.deGramont@wbd-us.com

Ethan E. Litwin
SHINDER CANTOR LERNER LLP
14 Penn Plaza, 19th Floor
New York, NY 10122
Tel. 646-960-8610
Ethan@scl-llp.com

Counsel for
Claimant Altanovo Domains Limited