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 REPLY COSTS SUBMISSION

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23 October 2020

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I. INTRODUCTION

1. ICANN's Post-Hearing Brief ("**ICANN's PHB**") underscores the frivolity and abusiveness of ICANN's defense strategy in this IRP—avoid contesting the merits of Afilias' claims and do everything possible to prevent independent review of ICANN's conduct, even though such review is guaranteed by the Bylaws. This has been an IRP in which ICANN, which is required to conduct all of its activities—including the IRP—transparently, consistently, neutrally, objectively, and fairly,[1] has: (1) presented defenses unsupported by the testimony of its own witnesses or the law ICANN relies upon; (2) employed its rule-making power specifically to prejudice Afilias and gain a tactical advantage in the IRP; (3) facilitated the *Amici*'s unnecessary participation by improperly adopting a rule that was proposed and developed by one of the *Amici* (Verisign) specifically to enable it to participate in this IRP; (4) raised defenses designed to narrow the Panel's authority that directly contradict its representations to the United States Government and Federal Courts; (5) purposefully concealed critical facts from Afilias until their disclosure was compelled; (6) misrepresented the actions and inactions of ICANN's Board and Staff; and (7) repeatedly changed its defense theories, introducing key new facts and arguments outside of the procedural framework of the IRP. These and ICANN's other defense strategies and tactics have been frivolous and abusive, with the consequence that ICANN must be required to bear all or a substantial portion of Afilias' fees and costs in the IRP.

2. This Reply Costs Submission addresses ICANN's PHB submissions relevant to the allocation of costs. It does not restate Afilias' Costs Submission, which is hereby incorporated by reference.[2]

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1 ICANN Bylaws (as amended 18 June 2018) ("**Bylaws**"), **[Ex. C-1]**, Sec. 1.2(a)(v), 3.

2 Nor does it address the Amici's four pages of argument on costs in their PHB, as the Amici have no standing to address this issue—unless the Amici have agreed to indemnify ICANN. If they have, transparency requires that ICANN must disclose the existence of any such agreement to the Panel. Afilias respectfully requests that the Panel seek confirmation in this regard. *Cf. Tennant v. Canada*, PCA Case No. 2018-54, Procedural Order No. 4 (27 Feb. 2020), **[Ex. CA-138]**, ¶ 106; *Muhammet Çap and Other v. Turkmenistan*, ICSID Case No. ARB/12/6, Procedural Order No. 3 (12 June 2015), **[Ex. CA-139]**, ¶ 9.

II. THE PANEL IS EMPOWERED TO SHIFT AFILIAS' FEES AND COSTS TO ICANN IF ANY PART OF ICANN'S DEFENSE LACKED MERIT OR WAS OTHERWISE IMPROPER

3. ICANN accepts that it must "bear all administrative costs of maintaining this IRP, including the fees and expenses of the Panelists and the ICDR" pursuant to Section 4.3(r) of the Bylaws.[3] ICANN must also bear the remainder of Afilias' costs, legal fees, and expenses. Section 4.3(r) of ICANN's Bylaws authorizes the Panel to shift fees and costs in the event that ICANN's defenses were either "frivolous or abusive."[4] The interpretation of this standard, of course, must be informed by "international arbitration norms."[5] Even more importantly, it must be interpreted with reference to the Bylaws' requirement that ICANN conduct its activities "consistently, neutrally, objectively, and fairly" and transparently.[6] The cost-shifting standard—properly interpreted—allows ICANN to put up a vigorous defense in an IRP, but only when the elements of that defense are truly in good faith. However, the standard ***cannot*** countenance ICANN putting forth every theory under the sun without regard for whether it is reasonable or sensible. Permitting such behavior—which is contrary to ICANN's own Bylaws—would have a chilling effect on access to the only accountability mechanism available to parties harmed by ICANN's misconduct.

4. Apparently recognizing that its defenses may well have been frivolous or abusive, ICANN argues that the standard for cost shifting must be interpreted based on California law,[7] which is only satisfied if the entirety of its defense was frivolous or abusive. Neither proposition is correct.

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3 ICANN's Post-Hearing Brief (12 Oct. 2020) ("**ICANN's PHB**"), ¶ 234. *See* Bylaws, **[Ex. C-1]**, Sec. 4.3(r); Interim Supplementary Procedures (25 Oct. 2018), **[Ex. C-59]**, Rule 15.

4 Bylaws, **[Ex. C-1]**, Sec. 4.3(r); Interim Supplementary Procedures, **[Ex. C-59]**, Rule 15.

5 Bylaws, **[Ex. C-1]**, Sec. 4.3(viii). *See also id.*, Sec. 4.3(n)(ii); *id.*, Sec. 4.3(x). Pursuant to those norms a defense is frivolous if it is "[l]acking a legal basis or legal merit" and abusive if it is "[c]haracterized by wrongful or improper use." Afilias' Costs Submission (12 Oct. 2020), ¶ 8 (*citing Black's Law Dictionary* (11th ed. 2019): frivolous, **[Ex. CA-128]**; *Black's Law Dictionary* (11th ed. 2019): abusive, **[Ex. CA-129]**). Both definitions are amply confirmed by international arbitration decisions. *See* references collected in Afilias' Costs Submission, n. 5-9. *See also Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Preliminary Objections (31 May 2016), **[Ex. CA-140]**, ¶ 277 (whether a party acted "with such wanton disregard of the facts and the law as to permit this tribunal to consider that its claim was 'frivolous'.").

6 Bylaws, **[Ex. C-1]**, Sec. 1.2(a)(v), 3.

7 ICANN's repeated arguments that this IRP and its conduct must be judged under California law exclusively runs contrary to the express language of the Bylaws. These arguments are, in and of themselves, frivolous and abusive.

- Per ICANN's Bylaws, the standard for cost shifting must be interpreted in terms of international arbitration norms and ICANN's own Bylaws[8]—not the California Code of Civil Procedure (which is not an international arbitration norm). Indeed, the California law standard is inappropriate as a source of guidance. ICANN admits that the Bylaws standard "is more permissive than the 'American Rule'" ensconced in California law.[9]

- The norms of international arbitration and the Bylaws (and indeed California law[10]) confirm that the Panel may shift costs when an individual defense—but not the entirety of the defenses—warrant it.[11] Such a rule is necessary to prevent ICANN from overwhelming an IRP with unmeritorious arguments—which it could otherwise do with impunity. This rule also reflects the multiple instances where the Bylaws recognize that ICANN might raise multiple defenses in an IRP,[12] and the ordinary understanding that a party may raise multiple defenses in an arbitration.

III. ICANN'S PHB UNDERSCORES THAT ITS DEFENSE OF THIS IRP HAS BEEN FRIVOLOUS AND ABUSIVE, BOTH IN GENERAL AND IN ITS PARTICULARS

5. ICANN's PHB underscored that the three main planks of ICANN's substantive defense—the Board workshop session, the Panel's supposed limited remedial jurisdiction, and the time bar—were each frivolous and abusive and should not have been advanced. ICANN has advanced legal theories and supporting factual allegations for each of the three main planks that are tailor made for arbitration but with no basis in reality. ICANN must be required to bear the costs of its litigation strategy.

A. ICANN's Board Workshop Session Defense

6. The first plank of ICANN's defense in its PHB is that the business judgment rule requires the Panel

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8 *See* Bylaws, **[Ex. C-1]**, Sec. 4.3(a)(viii), (n).

9 ICANN's PHB, ¶ 232.

10 *Bach v. McNelis*, 207 Cal.App.3d 852, 875 (1989), **[Ex. CA-141]** (holding that under Section 128.5, sanctions could be awarded for bad-faith actions or tactics "when some but not all of the causes of action alleged in a complaint are frivolous.").

11 *See, e.g.*, *Detroit Int'l Bridge v. Canada*, PCA Case No. 2012-25, Award on Costs (17 Aug. 2015), **[Ex. CA-142]**, ¶ 51; *Chemtura v. Canada*, PCA Case No. 2008-01, Award (2 Aug. 2010), **[Ex. CA-143]**, ¶¶ 272-273; *Int'l Thunderbird Gaming v. Mexico*, UNCITRAL, Arbitral Award (26 Jan. 2006), **[Ex. CA-144]**, ¶ 219-220.

12 *See*, *e.g.*, Bylaws, **[Ex. C-1]**, Sec. 4.3(b)(i)(A) ("ICANN shall not assert any defenses of standing or capacity against the EC in any forum."); *id.*, Sec. 4.3(f) ("ICANN hereby waives any defenses that may be afforded under Section 5141 of the California Corporations Code ('**CCC**') against any Claimant….").

to defer to a "decision" the ICANN Board supposedly made at its November 2016 workshop session.[13] This defense was frivolous in substance and abusive in its presentation:

- **ICANN raised its Board session defense for the first time in its Rejoinder in order to sandbag Afilias.** This was plainly abusive. ICANN then proceeded to criticize Afilias at hearing and in its PHB for not responding to this defense earlier.[14] How is this not frivolous? Indeed, ICANN's PHB argues that Afilias should have anticipated this defense, despite the fact that ICANN had not raised it in its Response to the Amended Request for IRP, during the Cooperative Engagement Process (**"CEP"**) Process, or at any stage of this IRP prior to 1 June 2020.[15] This is simply dishonest advocacy, as well as frivolous and abusive.

- **This factual defense was a pure contrivance that ICANN's counsel invented in order to invoke the business judgment rule—the Board never made a decision on .WEB.** ICANN's witnesses uniformly refused to confirm that the Board made a "decision" during the workshop, instead admitting to passive inaction in response to an update from legal counsel.[16] It is highly unlikely that counsel did not know ICANN's witnesses' views. ICANN's choice to misrepresent what happened[17] at this "privileged" workshop as a "decision" was intentional, since California law requires a Board to take a proactive decision (even a proactive decision not to act) in order to invoke the business judgment rule, the key to ICANN's most recent defense theory. This was both frivolous and abusive.

- **ICANN also made up out of whole cloth ICANN's supposed practice of deferring action on a contention set in view of an ongoing or impending accountability mechanism.** This was a completely frivolous argument. There is no such practice. ICANN's witnesses were unable to identify any documentation of this practice at all—whether in Board transcripts, Board resolutions, or

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13 *See*, *e.g.*, ICANN's PHB, ¶ 159.

14 Merits Hearing, Tr. Day 1 (3 Aug. 2020), 154:23 – 155:1 (ICANN's Opening Presentation) (complaining that Afilias rebutted ICANN's defense only in the "response to the *Amici* briefs, so in their last submission. It wasn't in their reply.").

15 *See* ICANN's PHB, ¶¶ 185-188.

16 Merits Hearing, Tr. Day 2 (4 Aug. 2020), 389:4-10 (emphasis added) ("[BURR]: Well, so it is complicated because ***we are referring to this as a decision, where what I observed was a confirmation to continue to follow the standard practice***…."); Merits Hearing, Tr. Day 5 (7 Aug. 2020), 938:19-22 (emphasis added) ("[DISSPAIN]: … ***I cannot say that the Board proactively decided, proactively agreed, proactively chose to as to put to do -- as to do it as you put it, which is to not pursue Afilias' complaints***.").

17 The Panel will recall that despite the existence of a transcript of the 3 November 2016 workshop, ICANN refused to produce that transcript or indeed any other documents regarding the 3 November 2016 workshop to avoid revealing the truth about its defense prior to the hearing.

elsewhere.[18] Nor were they able to identify any prior example of the Board following this supposed practice of deferring consideration in view of an accountability mechanism.[19] However, ICANN's witnesses did confirm that, contrary to this supposed practice, ICANN continues work on a contention set when accountability mechanisms are pending.[20]

- **Despite clear evidence to the contrary, ICANN continued to argue that ICANN Staff did not make a decision on the .WEB contention set—despite Staff's attempt to delegate .WEB.** This was plainly frivolous. Ms. Willett testified that she was aware of Afilias' complaints, determined them to be "sour grapes", told others about these views, and determined to proceed with executing a Registry Agreement with NDC. And the following is uncontested: (i) ICANN Staff sent a Registry Agreement to NDC/Verisign, which NDC/Verisign executed and returned the same day;[21] (ii) ICANN Staff received all of the internal approvals needed "to proceed to countersign … so that we may act shortly thereafter";[22] and (iii) if ICANN had countersigned, the Registry Agreement would have become binding.[23] It was only because Afilias filed for CEP two business days later[24] that the agreement was not fully executed.

- **ICANN's bottom line position is that, whenever an IRP is pending or impending, ICANN follows an internal practice designed to prevent an IRP Panel from deciding the dispute.** ICANN argues that an IRP Panel may not resolve a dispute so long as the Board has made a decision to defer consideration of any issue.[25] Yet, ICANN also argues that the Board has a practice of "not tak[ing] any action regarding [a] contention set while an Accountability Mechanism … [is] pending."[26]

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18 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 958:7-9, 958:21 – 959:2 ("[Litwin]: can you direct me to any resolution or rationale that discloses this practice? [Disspain]: No. … [Litwin]: [Y]ou could not direct me to any minutes or transcripts of a Board meeting where that practice was disclosed? [Disspain]: It would be fair to say that I cannot direct you there today….").

19 Merits Hearing, Tr. Day 5 (7 Aug. 2020), 958:9 – 959:2 ("[LITWIN]: … Can you give me another example of when the Board has not intervened because of an outstanding accountability mechanism. [DISSPAIN]: Not off the top of my head[.]").

20 Merits Hearing, Tr. Day 4 (6 Aug. 2020), 697:15 – 698:10 (Willett Cross-Examination) ("So there's the -- when we put an application on hold or a contention set on hold, it doesn't mean that all work ceases.").

21 Email from G. Nakata to C. Willett *et al.* (14 June 2018), **[Ex. C-170]**, [PDF] p. 2. *See also* Joint Factual Chronology (12 Oct. 2020), p. 11.

22 Email from G. Nakata to C. Willett *et al.* (14 June 2018), **[Ex. C-170]**, [PDF] p. 2. *See also* Joint Factual Chronology (12 Oct. 2020), p. 11.

23 ICANN, Registry Agreement (as of 31 July 2017), **[Ex. C-26]**, Art. 4.3 (not authorizing termination of Registry Agreement for non-compliance with the New gTLD Program Rules).

24 Letter from A. Ali (Counsel for Afilias) to ICANN (18 June 2018), **[Ex. C-52]**.

25 ICANN's PHB, ¶ 170.

26 ICANN's PHB, ¶¶ 159, 165, 171.

If ICANN's assertions are true (which they are not), ICANN would have abusively implemented a practice designed to prevent an IRP panel from ever resolving a dispute over a contention set. ICANN's position is axiomatically frivolous and abusive.

B. ICANN's Remedial Jurisdiction Defense

7. The second plank of ICANN's defense in its PHB is its position that the Panel does not have the power to grant any remedies for ICANN's violations of the Articles and Bylaws pursuant to Section 4.3(o) of the Bylaws. This too is frivolous and abusive:

- **In another untimely action, ICANN introduced Section 4.3(o) as a merits defense for the first time only with its Rejoinder**. ICANN's Response to the Request for IRP made no mention of the Section 4.3(o) defense, and Afilias' Post-Phase I Hearing Brief fully rebutted ICANN's arguments on Section 4.3(o) in connection with the *Amici* intervention.[27] Incredibly, ICANN's PHB criticizes Afilias because its "Reply Memorial fails even to mention Section 4.3(o), the Bylaws provision governing the Panel's remedial authority."[28] Afilias' Reply fails to mention ICANN's argument on Section 4.3(o) because ***ICANN did not raise this as a merits defense until its Rejoinder***.

- **The supposed inconsistency between Section 4.3(o) of the Bylaws and the Panel's remedial authority in this IRP was purely a made-for-IRP invention of ICANN's counsel.** This notion apparently did not occur ***even to ICANN's own counsel*** until ***after*** ICANN had prepared its Response to the Request for IRP. ICANN's failure to introduce this defense in its Response underscores that Section 4.3(o) contains no such jurisdictional restriction, and certainly not the "express" or "self-evident" restriction that ICANN now alleges.[29]

- **ICANN's position directly contradicts the ICANN community's policy directions regarding the Panel's authority.** The CCWG Report states that "ICANN Board and staff shall be directed to take appropriate action to remedy the breach."[30] The ICANN Board transmitted the Report to the U.S. Department of Commerce as a representation of the reforms it would make to increase ICANN

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27 Afilias' Post-Phase I Hearing Brief, ¶ 19 *et seq*.

28 ICANN's PHB, ¶ 31.

29 ICANN's PHB, ¶¶ 7, 25.

30 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), **[Ex. C-122]**, ¶ 57.

accountability.[31] ICANN is unable to provide any sensible explanation for why it now takes a position diametrically opposed to what it previously represented to the United States Government. Indeed, its PHB ignores this key language from the CCWG Report.[32] This is especially true where, as here, the provisions of the CCWG Report may be read consistently with the relevant Bylaws provisions.

- **ICANN's position directly contradicts its representations to the Ninth Circuit Court of Appeals in the *Ruby Glen* litigation concerning .WEB.** ICANN's IRP counsel explicitly stated to the Ninth Circuit that the Litigation Waiver was not "***not exculpatory at all***"[33] and that applicants have "***utilized the Independent Review Process in the past to overturn an ICANN Board decision and obtain the rights to operate another new gTLD***…."[34] The Ninth Circuit upheld ICANN's defense of the Litigation Waiver and thereby closed the courthouse door to New gTLD applicants.[35] It is frivolous and abusive for ICANN to take the opposite position in this IRP.

C. ICANN's Time Bar Defense

8. The third plank of ICANN's defense is its Statute of Limitations and Repose ("**SOL/SOR**") defense based on Interim Supplementary Procedures Rule 4. This is also frivolous and abusive:

- **ICANN distorted the rule-making process for the Rules of Procedure to manufacture this defense, months after Afilias had filed for CEP.** ICANN enacted the SOL/SOR on 25 October 2018—shortly after Afilias provided ICANN with its draft Request for IRP during the so-called Cooperative Engagement Process. ICANN rushed the SOL/SOR into place in view of the impending IRP, backdating the new rule of procedure to a month before Afilias filed its CEP, and then invoked it in its Response to the Amended Request for IRP. This is axiomatically abusive conduct.

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31 ICANN, Regular Board Meeting, Resolution (10 Mar. 2016), **[Ex. C-184]**, [PDF] p. 44.

32 ICANN's PHB, ¶ 39 ("The statement that a Claimant should be able to seek redress cannot plausibly be construed to imply that a Claimant is entitled to any form of remedy that it may request, even where that remedy is not authorized by the Bylaws that create the IRP.").

33 *Ruby Glen v. ICANN et al.*, Case No. 16-56890, Appellee's Answering Brief (30 Oct. 2017), **[Ex. C-187]**, [PDF] p. 12 (emphasis added).

34 *Ruby Glen v. ICANN et al.*, Case No. 16-56890, Appellee's Answering Brief (30 Oct. 2017), **[Ex. C-187]**, [PDF] pp. 46-47 (emphasis added).

35 *Ruby Glen v. ICANN*, Case No. 16-56890, Mem. Order, **[Ex. C-107]**, p. 2 (emphasis added) ("Ruby Glen is not without recourse—it can challenge ICANN's actions through the Independent Review Process[.] … Thus, the covenant not to sue does not exempt ICANN from liability, ***but instead is akin to an alternative dispute resolution agreement***….").

- **By invoking Rule 4 as a defense against Afilias' claims, ICANN has violated the fundamental legal rule against retroactivity.** Afilias' claims were never subject to a SOL/SOR at any time prior to the enactment of Rule 4 on 25 October 2018 in the midst of Afilias' CEP. It was obvious to all—and certainly to ICANN—that it would have been impossible for Afilias to comply with the SOL/SOR—as ICANN asserts that both had already expired for Afilias' claims by the time ICANN enacted them. ICANN has provided no explanation as to why the SOL/SOR was made retroactive. This was done purely as an abusive litigation tactic.

- **ICANN's position on the SOL/SOR flatly contradicts its position that Afilias' claims were not present in its Amended Request for IRP.** ICANN argues that Afilias' claims are time barred by the SOL/SOR because "[t]he claims asserted in [its August and September 2016] letters are the same as the claims asserted by Afilias in this IRP…."[36] Yet ICANN repeatedly argues in its PHB that Afilias' claims evolved over the course of this IRP[37]—even while ignoring the belated discovery produced by ICANN and the arguments and evidence introduced by ICANN and the *Amici*. ICANN's too late/too early defense is plainly frivolous.

- **ICANN abused its obligation to act transparently in an effort to keep key facts secret from Afilias until after it had initiated its IRP.** ICANN did not disclose even the existence of the DAA to Afilias until 18 December 2018,[38] over two years after ICANN first received it. As a result, Afilias was forced to significantly amend its Request for IRP to account for the DAA.[39]

- **Indeed, ICANN refused to disclose other key documents until after Afilias had amended its Request for IRP and filed its Reply.** It was only then that ICANN revealed key documents regarding the actions Ms. Willett and her Staff took in June 2018 to execute a Registry Agreement with NDC. It was not until 1 June 2020 that ICANN revealed that the Board had allegedly discussed the .WEB contention set at the 3 November 2016 workshop session and that the workshop session would form

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36 ICANN's PHB, ¶ 63.

37 ICANN's PHB, ¶¶ 15-22.

38 Joint Factual Chronology (12 Oct. 2020), p. 14.

39 Afilias withdrew the witness statements of its employees because they were no longer necessary. Those statements were used to substitute for the lack of direct evidence of the Verisign/NDC agreement. There is nothing that such witnesses could have added on the negotiation and effect of the DAA, which they were prohibited from reviewing due to the Confidentiality Order that ICANN and the *Amici* insisted upon. Moreover, former witness Ram Mohan would not have been able to address matters pertaining to his role as a Board member. Indeed, ICANN demanded that Afilias withdraw his statement.

a key plank of its defense.[40] It was not until that same date that ICANN set out its merits defense based on the supposed limitation on remedial jurisdiction in Section 4.3(o) of the Bylaws.[41] And it was not until 5 August 2020—in the midst of the hearing—that Ms. Willett revealed that she had determined Afilias' complaints to be "sour grapes" and determined to proceed with executing a Registry Agreement with NDC.[42] Based on these facts it is simply unacceptable, and can only be viewed as frivolous and abusive, for ICANN to have persisted with its SOL/SOR defense.

IV. ICANN'S RELIANCE ON THE *AMICI* AS A DEFENSIVE TACTIC HAS BEEN FRIVOLOUS AND ABUSIVE

9. ICANN's PHB also serves to confirm that ICANN's tactic of deflecting attention from itself through the intervention and participation of the *Amici* in the IRP was frivolous and abusive, both in conception and execution. There was never any need for the *Amici*'s participation in the IRP, as ICANN could have obtained any relevant information and witnesses from the *Amici* and submitted it itself—just as it was able to obtain the DAA and a letter brief in 2016 and to submit documentary evidence and witness statements from the *Amici* in 2020. ICANN's frivolous and abusive actions must have consequences for the allocation of costs.

- **ICANN improperly collaborated with Verisign to include Rule 7 in the Interim Supplementary Procedures to gain a tactical advantage in this IRP.** ICANN Legal collaborated with Verisign to redraft Rule 7 at the 11th hour, and then presented it to the Board for enactment in the midst of Afilias' CEP and just weeks before it commenced IRP.[43] In fact, Rule 7 was custom tailored for Verisign and NDC to intervene as the *Amici* in this very IRP, at a time when both ICANN Legal and Verisign knew that Afilias "was on the precipice" of filing this IRP. Despite this, ICANN hypocritically accuses Afilias of unfairly having sought "to preclude NDC and Verisign from being heard…."[44]

- **ICANN's reliance on the *Amici* participation, which it facilitated, as an excuse to avoid answering Afilias' claims is frivolous and abusive.** ICANN makes the incredible assertion that

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40 ICANN's Rejoinder Memorial (1 June 2020), ¶ 89 *et seq.*

41 ICANN's Rejoinder Memorial (1 June 2020), ¶ 114 *et seq*.

42 Merits Hearing, Tr. Day 4 (6 Aug. 2020), 746:1-3 (Willett Cross-Examination) (emphasis added) ("Q: Did you consider the concerns that Afilias had raised to be serious concerns? A: ***I considered them to be sour grapes***.").

43 Afilias' Post-Hearing Brief (12 Oct. 2020) ("**Afilias' PHB**"), ¶¶ 77-91, 157; Afilias' Costs Submission, ¶¶ 19-20, 24-25.

44 ICANN's PHB, ¶ 237.

the disagreement between Afilias and NDC/Verisign proves that both positions are reasonable and therefore that ICANN cannot be expected to advance any view of the matter, regardless of what decisions and actions Ms. Willett and her team took.[45] Indeed, ICANN refuses to even address Ms. Willett's determination that Afilias' claims were mere "sour grapes." This IRP is intended to hold ICANN accountable for its Staff's misconduct—and ICANN cannot invoke contrivances to avoid responding to the merits of Afilias' claims.

- **ICANN's refusal to even take a view on the merits of its dispute with Afilias is all the more abusive because the *Amici's* participation was supposed to help resolve those very merits.** Indeed, the *Amici* hypocritically argued in their PHB that the Panel lacks jurisdiction to make findings regarding their conduct[46] even though they justified their very intervention in this IRP on the grounds that they would provide evidence regarding that conduct.[47] The *Amici* ultimately added nothing to these proceedings in terms of substance that ICANN could not have presented itself.

- **Even though the Rule 7 issue remains open for decision, ICANN falsely lays claim to victory on this issue in Phase I of the IRP.**[48] The Panel held in Phase I that it could not decide the factual issues until ICANN's witnesses had been subject to cross-examination and therefore declined to resolve the Rule 7 issue at that time.[49] As a result, the Panel "decided to grant Afilias' alternative request for relief, and to join those aspects of the Rule 7 claim over which the Panel has jurisdiction … to the other claims to be decided in Phase II."[50] The victor on the Rule 7 claim remains to be determined—and the hearing testimony underscored that Afilias should be found to have prevailed.

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45 ICANN's PHB, ¶ 90, ¶ 148.

46 *Amici* PHB, Post-Hearing Brief of *Amicus Curiae* Nu Dotco, LLC and Verisign, Inc. (12 Oct. 2020) ("***Amici* PHB**"), ¶ 64.

47 Verisign's Request to Participate as *Amicus Curiae* (11 Dec. 2018), ¶ 10, ¶ 68; Verisign's Supplemental Brief (27 Sep. 2019), ¶ 31.

48 ICANN's PHB, ¶ 239.

49 Decision on Phase I (12 Feb. 2020), ¶ 181.

50 Decision on Phase I (12 Feb. 2020), ¶ 184.

V. REQUEST FOR RELIEF

10. For the above reasons, Afilias respectfully requests that the Panel order ICANN to pay USD 11,291,997.13 in compensation for the total fees and costs that Afilias incurred in this IRP. In the alternative, Afilias respectfully requests that the Panel order ICANN to pay USD 473,708.27 for the costs of the Panelists and the ICDR, to pay USD 2,383,703.11 for the fees and costs incurred in relation to the *Amici* participation, and to pay USD 828,811.88 for the fees and costs incurred in relation to the Emergency Interim Measures phase.[51] Afilias further requests that the Panel order ICANN to pay pre- and post-award interest at a reasonable rate commencing from the date of this filing.[52]

11. We hereby certify that the fees and costs presented in the updated Schedule of Costs, **Annex A**, are true and accurate, in accordance with the updated cost calculation methodology, **Annex B**. Afilias reserves its right to amend the fees and costs to reflect any further work performed in the future in relation to this IRP.

Respectfully submitted,

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51 The figures from the *Amici's* participation and the Emergency Interim Measures phase exclude costs of Panelists and the ICDR on the assumption that they will be separately awarded pursuant to ICANN's concession. If they are not, the figures increase to USD 2,504,873.06 for the *Amici's* participation and USD 858,262.70 for the Emergency Interim Measures phase.

52 California law, for example, provides for pre-judgment interest at 10% per annum for breach of contract and at the same rate post-judgment. Ca. Civ. Code § 3289(a), **[Ex. CA-145]**; Ca. Code Civ. P. § 685.010, **[Ex. CA-146]**.