INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD., Claimant, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent, and VERISIGN, INC. and NU DOTCO, LLC. Proposed *Amicus Curiae*.	ICDR CASE NO: 01-18-0004-2702

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

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Verisign hereby replies to Afilias' response to Verisign's Request to Participate as an *Amicus Curiae* in these IRP proceedings (the "Response").[1]

I. INTRODUCTION

1. Afilias' Response spans nearly 60 pages and purports to describe in exhaustive detail the process by which ICANN's Interim Supplementary Procedures (the "Interim Supplementary Procedures") were adopted. The gist of Afilias' prolix response is this: David McAuley, a Verisign employee and head of the IRP-Implementation Oversight Team ("IRP-IOT") charged with formulating Interim Supplementary Procedures consistent with ICANN's Bylaws, allegedly knew about Afilias' CEP[2] while working on the *amicus* rules and somehow intentionally "manipulated" them to allow Verisign and NDC to participate in this IRP. This is a false narrative fabricated by Afilias for purposes of denying NDC and Verisign the right to defend themselves and their legal interests against Afilias' attack. Furthermore, Afilias' history is irrelevant to the issue of *amicus* participation before the Procedures Officer or the enforceability of the Interim Supplementary Procedures.

2. Contrary to Afilias' Response, Mr. McAuley's knowledge of Afilias' CEP or IRP prior to the ICANN Board unanimously approving the Interim Supplementary Procedures is inapposite and should make no difference to the enforceability of the *amici* rule. First, ICANN's multi-stakeholder process is specifically designed to allow for participation by parties acting in their own interest, so there is nothing improper about Mr. McAuley's involvement in the IRP-IOT. Second, the IRP-IOT drafted Supplementary Procedures allowing for *amici* participation by persons with a material interest in the dispute ***before*** Afilias' CEP was ever filed, so Mr. McAuley's knowledge (or lack of knowledge) could not have prompted that revision. Third,

[1] Verisign uses the same defined and/or abbreviated terms here that it used in its initial Request.
[2] A CEP is a settlement process under ICANN's Bylaws that parties are encouraged to participate in prior to filing IRPs. (Bylaws, Section 4.3(e)).

it was ICANN, not Verisign, that proposed the final *amici* language about which Afilias complains. In sum, Afilias fixates on what Mr. McAuley purportedly knew about its CEP simply to distract from the real facts regarding the *amici* rule in the Interim Supplementary Procedures. In any event, Mr. McAuley had no personal knowledge of the CEP and he could not have acted with an ulterior motive somehow to "manipulate" the rule-making process. (Declaration of David McAuley ("McAuley Decl.")).

3. In **truth**, the only party who knew of the coming IRP when the Interim Supplementary Procedures were adopted by the ICANN Board was Board member **Ram Mohan — of Afilias — who sat on the ICANN Board and, in fact, moved the Board to adopt the Interim Procedures**.[3]

4. In an astonishing omission that could only have been calculated to mislead, Afilias never discloses to the Procedures Officer that the Afilias Board member and Afilias declarant in this IRP moved the Board to adopt the very Interim Supplementary Procedures — which are clear on their face — that Afilias now falsely claims should not be enforced. **This material omission by Afilias is critical not only to the truth of Afilias' narrative on the adoption of the Interim Supplementary Procedures, but also to the truth of Afilias' entire position in this *amicus* proceeding.** In the context of this proceeding, what fact could have been any more important to disclose to the Procedures Officer in Afilias' nearly 60-page history of commentary on the Interim Supplementary Procedures than the fact that Afilias itself, through its Executive Vice President and Chief Technology Officer, who is a declarant in support of Afilias' IRP Request and was liaison to ICANN's Board, was instrumental in inducing the

[3] A transcript of ICANN's Board Meeting on October 25, 2018 is *available* at https://static.ptbl.co/static/attachments/192259/1540518957.pdf?1540518957. Mr. Mohan's seconding the resolution to approve the Interim Supplementary Procedures is at p. 26. A video of the Board meeting is available at https://livestream.com/icannmeeting/events/8416090/videos/182467312.

adoption of the same Interim Supplementary Procedures that Afilias now challenges? Mr. Mohan was a non-voting member of the ICANN Board that unanimously adopted the Interim Supplementary Procedures on October 25, 2018. Mr. Mohan not only failed to raise any objection to the Interim Supplementary Procedures, substantively or procedurally, but he actually *seconded* the motion for a Board vote to adopt the Interim Supplementary Procedures. There can be little doubt that Mr. Mohan knew at the time of the vote that Afilias would soon file an IRP, and tellingly, a number of Afilias' declarations were signed before the Board vote. In purpose and effect, Afilias induced ICANN's Board to vote in favor of a rule that Afilias now asserts is invalid or unlawful. At a minimum, having induced the adoption of the Interim Supplementary Procedures, Afilias is estopped from challenging the validity of those very same Procedures here. (*E.g.*, *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 176–77 (Del. 1991) (affirming the "long recognized" equitable principle that an affirmative vote in favor of a transaction estops a party from "seek[ing] to litigate a contrary position").) And the entirety of Afilias' position here must be viewed with extreme skepticism, as apparently manufactured in an effort to circumvent the involvement in this IRP by Verisign and NDC — the very persons against whom Afilias' preliminary injunction and requested final award are directed.

5. Moreover, beyond the remarkably misleading nature of Afilias' historical account, its Response has little to do with the only question before the Procedures Officer — whether Verisign and NDC have a right under the Interim Supplementary Procedures to participate as *amici* in this IRP to protect their interests. First, while the "legislative history" of the Interim Supplementary Procedures may be helpful to the Procedures Officer in understanding the genesis of his role, almost all of Afilias' nearly 60 pages are entirely irrelevant to the task at hand of deciding *amicus* participation. An arbitrator's powers are limited by the terms of the

relevant arbitration agreement, and an arbitrator has no authority to deviate from the terms of that agreement in fulfilling his or her role. (*See Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831–32 (11th Cir. 1991) (recognizing that "[t]he power and authority of the arbitrators in an arbitration proceeding is dependent on the provisions of the arbitration agreement under which the arbitrators were appointed" and vacating an arbitration award where arbitration agreement required arbitration to be heard by at least three arbitrators, but only two arbitrators participated on the panel that rendered the decision); *PoolRe Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256, 265–66 (5th Cir. 2015) (upholding District Court's vacatur of award where arbitrator exceeded his authority by applying AAA rules instead of ICC rules as selected by the parties).). Under the express terms of the Interim Supplementary Procedures, the Procedures Officer has no discretion to deny Verisign's and NDC's requests to participate as *amici*, and the legislative history of those provisions cannot alter that conclusion. Nor is legislative history relevant to application of the *amici* rules, because they are clear on their face and thus require no "interpretation" based on the legislative history. (*Davis v. Mich. Dept. of Treasury*, 489 U.S. 803, 808 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *see also Middleton v. City of Chicago*, 578 F.3d 655, 660 (7th Cir. 2009) ("[W]here a statute's language is clear, we look to the legislative history only to determine whether Congress expressed a clear intention to the contrary of the literal application of that language."); *Knott v. McDonald's Corp.*, 147 F.3d 1065, 1067 (9th Cir. 1998) ("If a contract is clear and unambiguous, the court must determine the intention of the parties solely from the plain language of the contract and may not consider extrinsic evidence outside the four corners of the document itself." (quotation marks omitted).)

6. Second, and in any event, Afilias' Response fails to offer any basis upon which to challenge the Interim Supplementary Procedures as contrary to ICANN's Bylaws and policies or otherwise improper. The joinder rules grew directly out of public comments regarding the necessity to protect the rights of third parties who have material interests in a dispute by allowing those parties to be heard in the proceedings. Such concern was expressed by individual members of the community and ICANN constituencies (such as the IP constituency group) in their public comments. The rules themselves were drafted by ICANN's counsel, Samantha Eisner, together with Sidley Austin, and approved without objection by the entire, 26-member IRP-IOT and ICANN's Board. The specific language about which Afilias now complains — but supported when the rules were adopted at Mr. Mohan's urging — was drafted by Ms. Eisner of ICANN, not Verisign. (ICANN Submission, ¶¶ 4, 9.) Significantly, unlike Mr. Mohan, neither Ms. Eisner nor Mr. McAuley knew that Afilias was on the eve of filing an IRP when these rules were drafted or adopted. (Eisner Decl., ¶ 6; McAuley Decl., ¶ 32.)

7. Further, Afilias identifies no rule that required ICANN to submit the Interim Supplementary Procedures to another round of public comments, or other ICANN process, prior to their submission to the Board. And, as noted in the Board meeting, the Procedures are interim and not final, so there undoubtedly will be further opportunity for the IRP-IOT and the ICANN community to comment, if the ICANN Board deems that appropriate, prior to the adoption of final rules.[4]

8. Third, Afilias' newly invented arguments of conflicts of interest seek to undermine ICANN's **multi-stakeholder** model, as it was established by the U.S. government in 1998. ICANN exists as a bottom-up, consensus-driven policy process that relies on input and

[4] *See* Transcript of ICANN's October 25, 2018 Board Meeting, at pp. 23–24, *available at* https://static.ptbl.co/static/attachments/192259/1540518957.pdf?1540518957.

participation by relevant stakeholders to form ICANN policy. Afilias turns that process on its head, arguing that the Interim Supplementary Procedures are suspect and improper because ICANN — the party that must implement the Interim Supplementary Procedures — and Verisign — a potential interested party in an IRP — were involved in the Procedures' creation. (*See, e.g.*, Bylaws, § 1.2(a)(iv) (describing one of ICANN's Commitments as "[e]mploy[ing] open, transparent and bottom-up, multistakeholder policy development processes" and "ensur[ing] that those entities most affected can assist in the policy development process").) The multi-stakeholder model is designed with the specific intent of allowing interested parties to participate. If any proof of this fact was necessary, Afilias' Mr. Mohan served on ICANN's Board and moved for the adoption of the *amicus* rules on the eve of filing this proceeding.

9. Fourth, Afilias is notably silent regarding the lodestar guiding the creation of the Interim Supplementary Procedures — that they provide for "fundamental fairness and due process" in IRP proceedings, as required by ICANN's Bylaws. (*See* Bylaws, § 4.3(n)(iv) ("The Rules of Procedure are intended to ensure fundamental fairness and due process . . . .").) Fundamental fairness and due process require that all interested parties with a material interest in an IRP dispute have a full and fair opportunity to be heard. Procedural rules that do not provide such an opportunity — as Afilias champions here — would violate due process and expose IRP proceedings to collateral attack by those whose interests are impacted by an IRP yet are prohibited from participating fully. (*See, e.g.*, *Martin v. City of Corning*, 25 Cal. App. 3d 165, 169 (1972) (party to contract that action sought to enjoin was an *indispensable party* to the proceeding as "his interests would inevitably be affected by a judgment rendering the contract void or enjoining further payment to him thereunder"); *Miracle Adhesives Corp. v. Peninsula Tile Contractors' Ass'n*, 157 Cal. App. 2d 591, 593 (1958) ("Persons 'whose interests, rights, or

duties will inevitably be affected by any decree which can be rendered in the action' are indispensable parties, and *the action cannot proceed without them*.") (emphasis added); *Westra Constr., Inc. v. U.S. Fid. & Guar. Co.*, No. 1:03-cv-0833, 2006 WL 1149252, at *2 (M.D. Pa. Apr. 28, 2006) (a nonparty to an arbitration can challenge an arbitration award "when the nonparty is adversely affected by the decision."). *Compare with* Afilias Response, ¶ 100 (where Afilias perversely argues that allowing Verisign and NDC the opportunity for fair participation as interested parties would "raise serious due process issues" for Afilias.)

10. Fifth, Afilias' Response itself demonstrates that Verisign is entitled to *amicus* status. Afilias' Response: (i) falsely asserts that **Verisign "took over" NDC** and corrupted the .web auction, (ii) claims this allegation as the basis for Afilias' requested relief, and (iii) incorrectly posits that **Verisign corrupted the IRP-IOT process** so it could participate in this IRP. Afilias further contends that ICANN has violated or will violate the commitment in its Bylaws to promote competition **if Verisign — not NDC** — is allowed to operate .web. Finally, as relief in this IRP, Afilias seeks (i) a preliminary injunction/stay prohibiting a delegation or assignment of .web to Verisign, and (ii) a final decree awarding .web to Afilias, rather than to NDC or Verisign. At every turn, Afilias' claims come back to Verisign, demonstrating Verisign's material interest in this dispute and entitlement to participate fully and without limitation in these proceedings.

11. Sixth, Afilias' repeated attempts to have the Procedures Officer rule that Verisign and NDC may not participate in Afilias' Request for Emergency Relief are contrary to logic, the Interim Supplementary Procedures, and due process. The emergency relief seeks to enjoin the delegation of .web to NDC or Verisign, or the assignment of the .web registry agreement in Verisign's favor. Afilias' argument that *amici* cannot participate before an Emergency

Panelist — even though they would be entitled to participate in those proceedings before the IRP Panel — merely exposes Afilias' rush to obtain interim relief for what it is: An effort to block any participation by the real parties in interest, Verisign and NDC — the only parties with the full facts and incentive to defend against Afilias' claims.

II. ARGUMENT

A. Having Induced the ICANN Board to Adopt the Interim Supplementary Procedures, Afilias is Estopped From Challenging the Procedures as Invalid

12. Afilias should be estopped from challenging the Interim Supplementary Procedures because its own Executive Vice President and Chief Technology Officer, Ram Mohan, affirmatively moved ICANN's Board of Directors to adopt those Procedures. Indeed, he was the only member of the Board who knew that Afilias would be bringing this IRP after the vote. The Interim Supplementary Procedures were put up for a vote by ICANN's Board on October 25, 2018 at the ICANN 63 meeting in Barcelona. Mr. Mohan was a member of ICANN's Board at that time, as the non-voting liaison of the Security & Stability Advisory Committee ("SSAC") to the ICANN Board.[5] Mr. Mohan was present for the vote on the Interim Supplementary Procedures, and he *seconded* the motion to put the Procedures to a vote. The Interim Supplementary Procedures were unanimously adopted by ICANN's Board.[6] Mr. Mohan voiced no objections, procedural or substantive, to the Board's vote.[7]

[5] https://icannwiki.org/Ram_Mohan.

[6] Mr. Mohan signed a declaration in support of Afilias' IRP just seven days later. (Witness Statement of Ram Mohan, dated Nov. 1, 2018.) Several other Afilias declarants had already signed declarations in support of Afilias' IRP at the time of the Board's vote: (1) Jonathan Zittrain (September 26, 2018); (2) Jonathan Robinson (September 27, 2018); and (3) John Kane (October 15, 2018). (*See* Expert Report of Jonathan Zittrain dated Sept. 26, 2018; Witness Statement of Jonathan M. Robinson dated Sept. 27, 2018; Witness Statement of John L. Kane dated Oct. 15, 2018.) It is clear that Afilias' IRP was well underway when Mr. Mohan participated in the Board's vote approving the Interim Supplementary Procedures.

[7] ICANN's October 25, 2018 Board Meeting, at p. 26, *available at* https://static.ptbl.co/static/attachments/192259/1540518957.pdf?1540518957.

13. Afilias' active participation in the conduct it now claims is improper — the Board enactment of the Procedures — estops Afilias from disputing the validity of the Interim Supplementary Procedures. When a board member induces the board to take action, as here, the board member cannot later complain that the action was improper. (*See City of Fairmont v. Fairmont General Hosp., Inc.*, 231 W.Va. 264, 269 (2013) (holding that where entity was represented on the board, neither the entity nor its board member had standing to challenge the board's actions because the member "could not [challenge the board's actions] as he voted in favor of the very actions challenged."); *see also Suttons Bay Yacht Village Condominium Ass'n v. Board of Representatives Port Sutton Cmty.*, No. 325327, 2016 WL 2942225 at *7 (Ct. App. Mich. May 19, 2016) ("[A] board member who acquiesces or participates in business transactions may not later challenge the validity of the transactions in court."); *Williams v. 5300 Columbia Pike Corp.*, 103 F.3d 122 at *5 (4th Cir. 1996) (assuming as basic principle of law that "principles of estoppel and acquiescence ordinarily would not permit them to challenge a transaction they supported fully, only after it was *fait accompli*."); *Radell v. Towers Perrin*, 172 F.R.D. 317, 320 (N.D. Ill. 1997) (former board member's membership on the board posed an incurable conflict of interest in his prospective class action suit against the company).)

14. Afilias cannot induce ICANN's Board to act and then turn around and claim that act was improper or unenforceable. (*Cf., e.g., Kahn*, 591 A.2d at 176–77 (affirming the "long recognized" equitable principle that an affirmative vote in favor of a transaction estops a party from "seek[ing] to litigate a contrary position").)

B. <u>The Only Issue for the Procedures Officer to Decide is Whether Verisign or NDC Should be Allowed to Participate as *Amici*</u>

15. The ICDR selected a Procedures Officer for one purpose only: To rule on Verisign's and NDC's requests to participate as *amici* in Afilias' IRP. The position of the

Procedures Officer is a creation of the Interim Supplementary Procedures, and exists only by virtue of the operation and validity of those Procedures. (Interim Supplementary Procedures, § 1 ("PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and/or participation as an *amicus*, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8).").). Absent the Interim Supplementary Procedures that Afilias now challenges, the Procedures Officer has no function and no jurisdiction to consider or decide any matter.

16. Verisign's and NDC's requests were made pursuant to Rule 7 of the Interim Supplementary Procedures, which provides, in pertinent part:

> Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the person, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, ***shall* be permitted** to participated as an *amicus* before the IRP Panel:
>
> i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
>
> ii. **If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and**
>
> iii. **If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.**

(Interim Supplementary Procedures, § 7 (emphasis added)).

17. As reflected in the foregoing text, the ICANN Board's duly enacted Interim Supplementary Procedures unambiguously mandate *amicus* participation by Verisign and NDC if the Procedures Officer determines that they are members of the .web contention set (as is NDC) and/or that the briefings in this matter significantly refer to their actions (as is the case for both Verisign and NDC). The Procedures Officer's participation in the *amicus* request begins and ends with that inquiry. In view of the clarity of the Rule 7 *amicus* procedures, an analysis of legislative history has no bearing on their application. *See Davis*, 489 U.S. at n.3 ("Legislative history is irrelevant to the interpretation of an unambiguous statute"); *see also Middleton*, 578 F.3d at 660 ("[W]here a statute's language is clear, we look to the legislative history only to determine whether Congress expressed a clear intention to the contrary of the literal application of that language"); *Knott*, 147 F.3d at 1067 ("If a contract is clear and unambiguous, the court must determine the intention of the parties solely from the plain language of the contract and may not consider extrinsic evidence outside the four corners of the document itself." (quotation marks omitted).) As set forth below, there can be no doubt that Verisign fulfills the requirements of subsection (iii) of the Rule and otherwise has a material interest in the proceedings.

C. Verisign is Entitled to Participate in the IRP Under the Interim Supplementary Procedures

18. Afilias' Response underscores, rather than undermines, why Verisign should be allowed to participate in these proceedings as *amicus curiae*.[8]

[8] For brevity's sake, Verisign will not repeat all of the fact and argument set forth in its December 11, 2018 Request to Participate as *Amicus Curiae*, and refers the Procedures Officer to that pleading for a more complete statement of the basis for its petition.

1. The Response "Significantly Refers" to Verisign — Indeed, Verisign's Alleged Conduct Is the Centerpiece of the Response, the IRP Request, and the Request for Interim Relief.

19. As quoted above, the Interim Supplementary Procedures provide that an entity *shall* be entitled to participate in an IRP as an *amicus curiae* "[i]f the briefings before the IRP PANEL *significantly refer to actions* taken by a person, group, or entity that is external to the DISPUTE, such external person, group or entity." (Emphasis added). Afilias never disputes its the briefing significantly refers to Verisign, and with good reason as Verisign is mentioned 127 times in Afilias' IRP request and 56 times in Afilias' interim relief request. There can be no doubt that Afilias' IRP "significantly refer[s]" to Verisign.

20. Afilias' claims in the IRP rest entirely on its assertions that (i) an agreement between Verisign and NDC with respect to financing of NDC's bid for .web impacted NDC's disclosure obligations under the new gTLD Program and should disqualify NDC's Application and participation in the auction; and (ii) an assignment of the registry agreement for .web would raise competition concerns and thus violate ICANN's Bylaws. (Afilias' Request, ¶ 47 ("NDC's failure to disclose and to seek to amend its application following its agreement with VeriSign constitute breaches of the AGB requiring disqualification of NDC's .WEB application or of its bids in the .WEB Auction."); ¶ 68 ("ICANN's failure to apply its documented policies consistently, neutrally, objectively, and fairly — and its failure to carry out its activities through open and transparent processes — have also resulted in the violation of ICANN's mandate to introduce and promote competition.").) The focus of Afilias' claims is Verisign's alleged conduct.

21. Afilias' Response highlights the importance of Verisign's alleged actions to its claims. The gravamen of the Response is that NDC was acting really as Verisign's "agent" in bidding for .web, and that Verisign "manipulated" the IRP-IOT to adopt the *amicus* rules in the

Interim Supplementary Procedures. (Afilias' Response, ¶ 62 ("Third Party Designated Confidential Information Redacted

"); § 2.1.5 ("After Afilias' invocation of CEP was publicly disclosed, VeriSign manipulated the IRP-IOT process to ensure that it (and NDC) could participate in this IRP.").) Again, alleged conduct by Verisign virtually dominates Afilias' papers.

22. Both the request for emergency relief and a final award are directed against Verisign. Afilias first seeks to enjoin a delegation or assignment to Verisign during the pendency of this proceeding. Afilias secondly seeks a final award that transfers .web to Afilias instead of NDC or Verisign pursuant to their existing contracts with ICANN and each other. (*See* Request for Interim Relief, ¶ 4 (seeking "a stay of all ICANN actions that further the delegation of the .WEB gTLD during the pendency of the IRP"); Afilias' Request for IRP, ¶ 69(3) (seeking "order that ICANN proceed with contracting the registry agreement for .WEB with Afilias").)

23. Afilias' concession that the briefings significantly refer to Verisign should alone end the inquiry on Verisign's Application, as *amicus* participation ***shall*** be permitted as of right in such circumstances. (Interim Supplementary Procedures, § 7.)

2. Verisign Plainly Has a Material Interest in This IRP.

24. Ignoring the centrality of Verisign's alleged conduct to every argument that Afilias makes in this proceeding, Afilias makes the astonishing assertion that Verisign has no material interest in this dispute. Afilias' reasoning is that Verisign lacks any "interest relating to the property or transaction that is the subject of the action" because "Verisign cannot have any interest in a .WEB registry agreement, as no such agreement presently exists," and "Verisign has

no rights in NDC's .WEB application, nor can it: the application's Terms and Conditions specifically prohibit NDC from reselling, assigning, or transferring any of NDC's rights or obligations in connection with its application to any third party." (Response, § 4.1).

25. This argument directly contradicts Afilias' contentions in its Request for IRP. Afilias cannot have it both ways.

26. Contrary to what it says here, Afilias' IRP alleges that "NDC appears to have actually or **effectively sold, assigned, or transferred its rights** or obligations in its .WEB application to Verisign prior to the .WEB Auction." (IRP, ¶ 57). Having based its IRP on this position, Afilias cannot now avoid Verisign's *amicus* participation by arguing the exact opposite — that there has been no assignment of rights and that Verisign's contract does not "exist." (*See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("'The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" (quoting 18 Moore's Federal Practice § 134.30, pp. 134–62 (3d ed. 2000)) (State of New Hampshire estopped from asserting, contrary to prior positions, that Piscataqua River boundary with Maine ran along the Maine shore); *Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir. 1981) (plaintiff estopped from arguing that defendant could not compel arbitration because it was not a party to construction contract that included an arbitration provision, while at the same time arguing that defendant was liable under the construction contract).)

27. Afilias also suggests that the agreement between NDC and Verisign does not provide Verisign a sufficient material interest in this dispute for *amicus* participation. (Response, § 4.1). Again Afilias' view has no merit. Contingent interests that may be impacted by pending litigation, such as those provided to Verisign by its agreement with NDC, are

sufficient to establish a material interest, including for purposes of intervention. (*See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001) ("Contract rights are traditionally protectable interests.") Afilias seeks to nullify Verisign's interests in the .web gTLD with a stay that would delay the execution of the registry agreement between NDC and ICANN and a subsequent assignment of that agreement from NDC to Verisign, and with a subsequent final award that would unwind the results of the public auction and award .web to Afilias rather than NDC or Verisign. It is undeniable that these rights and interests are legally protectable. (*See San Juan County v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (in the context of intervention, "[a]lthough the intervenor cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation") (citation omitted); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861 (8th Cir. 1977) (permitting intervention by homeowners in action involving the constitutionality of a municipal ordinance that placed a temporary moratorium on the operation of abortion clinics because "the market value of the intervenors' homes constituted a sufficient 'interest' under Rule 24(a)(2) even though three events would have had to take place before the homeowners experienced any actual loss: (1) the city had to lose the court fight on the constitutionality of the ordinance, (2) the abortion clinic had to open, and (3) the clinic's operation had to lead to a reduction in the homeowners' property values", as characterized in *San Juan County*, 503 F.3d at 1197–98).)[9]

[9] Further, a close analogue to the current proceedings are challenges to government agency actions, such as licensing decisions, with ICANN serving in place of the agency here. Drawing on this analogy, U.S. administrative law jurisprudence uniformly endorses the availability of standing for competitors to intervene in administrative proceedings where there is a threat of economic injury, *see, e.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Philco Corp. v. FCC*, 257 F.2d 656, 658-59 (D.C. Cir. 1958), as well as to challenge adverse administrative decisions based on alleged competitive harm, *e.g.*, *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

D. A Challenge to the Validity of the *Amicus* Procedures is Not Within the Jurisdictional Scope of this Proceeding; the "Legislative History" of the Procedures is Irrelevant

28. Neither the Procedures Officer nor any other arbitration officer in this proceeding has authority to address the contention that the *amicus* rule should be invalidated based on Afilias' unfounded allegations concerning Verisign's and ICANN's participation in the enactment of the Interim Supplementary Procedures.[10] An arbitrator has no jurisdiction to depart from or rule on the validity of the procedures that define his or her decision-making authority. (*See, e.g.*, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(d) (an arbitral award may be denied enforcement if "the arbitral procedure was not in accordance with the agreement of the parties").) Accordingly, U.S. courts have held that arbitrators who conduct proceedings under rules different than those expressly selected by the parties have "exceeded their authority," a ground for vacatur under the FAA. (*See PoolRe Ins. Corp.*, 783 F.3d at 265–66).[11] This fundamental principle has been expressly affirmed in the context of IRP proceedings:

> There is no question but that ***the authority of an IRP panel*** to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. ***Nor . . . does our authority extend to opining on the nature of the policies or procedures established in the Guidebook.*** "***[O]ur role in this IRP includes assessing whether the applicable rules . . . were followed, <u>not</u> whether such rules are appropriate or advisable***.

(*In the Matter of an Independent Review Process Between Booking.com B.V. and ICANN,* ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 110 (3 March 2015) (emphasis added); *see also In the Matter of an Independent Review Process Between Donuts, Inc. and ICANN*, ICDR Case

[10] Afilias' IRP request contains no challenge to ICANN's rule-making process with respect to the Interim Supplementary Procedures. Afilias' attempt now to inject that issue into this proceeding is beyond the scope of the IRP as defined by Afilias itself.

[11] In *PoolRe*, the parties had agreed to arbitrate under the prevailing ICC rules, yet the arbitrator conducted the arbitration under AAA rules: the Fifth Circuit affirmed a complete vacatur of the award, finding that the use of rules different than those selected by the parties "tainted the entire process." *PoolRe Ins.*, 783 F.3d at 263.

No. 01-14-0001-6263, Final Declaration, ¶ 136 & n.177 (5 May 2016) (quoting with approval the language from *Booking.com* that the panel's "role in this IRP includes assessing whether the applicable rules . . . were followed, not whether such rules are appropriate or advisable."); *In the Matter of an Independent Review Process Between Amazon EU S.A.R.L. and ICANN*, ICDR No. 01-16-0000-7056, Final Declaration, ¶¶ 130–31 (10 July 2017) (Matz, dissenting) (noting that it is not for the Panel "to purport to appraise the policies and procedures established by ICANN.").)

These prior IRP panel rulings should be accorded precedential effect. As observed by the IRP Panel in *Vistaprint*: "The declarations of [previous IRP] panels have precedential value." (*In the Matter of an Independent Review Process Between Vistaprint v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration, ¶ 127 (9 Oct. 2015) (relying on the 2013 version of the Bylaws); *see also In the Matter of an Independent Review Process Between Donuts, Inc. and ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration, ¶ 76 (5 May 2016) (noting the precedential value of prior IRP panels and stating that "[this] Panel takes that to mean that it should take account of the reasoning of other Panels in pursuing its own analysis, and should, to the extent warranted, seek consistency").)[12] Even a cursory review of the IRP decisions rendered to date reveals that IRP panels rely heavily on the findings and analysis of previous panels. (*See, e.g.*, *In the Matter of an Independent Review Process Between Asia Green IT System and ICANN*, ICDR Case No. 01-15-0005-9838, Final Declaration, ¶ 15 (30 Nov. 2017) (quoting prior IRP panel for support); *In the Matter of an Independent Review Process Between Dot Sport Ltd.*

[12] The ICANN Bylaws also specify that "all IRP decisions shall . . . reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP decisions* under the same (or an equivalent prior) version of the Articles of Incorporation and Bylaws[.]" (Bylaws, § 4.3(v).) Nearly identical language is reproduced in the Interim Supplementary Procedures. (*See* Interim Supplementary Procedures, §§ 11(b) (Standard of Review), 13(c) (Form and Effect of an IRP Panel Decision).)

and ICANN, ICDR Case No. 01-15-0002-9483, Final Declaration, ¶ 7.19 (31 Jan. 2017) (relying on prior IRP panel decisions as authority).)

E. Contrary to the Response, Verisign Does Not Have "Unclean Hands"

29. Afilias asserts that Verisign's *amicus* request should be denied because it has "unclean hands" with respect to the creation of the Interim Supplementary Procedures. Specifically, Afilias alleges that Verisign's employee David McAuley had an ulterior motive to "manipulate" ICANN's rulemaking process specifically for the purpose of creating a basis for Verisign to participate in this IRP as an *amicus*. (Response, ¶ 2, § 2.1.5, ¶ 60). Afilias' argument makes no sense and is contrary to the facts. First, it is clear that Verisign's interests in this IRP would require it to be permitted to appear as an *amicus* under any standard and, indeed, would *at a minimum* entitle it to such status. *See, supra*, ¶ 9 (listing cases describing fundamental fairness and due process rights). Second, Afilias' speculations are entirely manufactured and without any basis in reality.

30. Afilias' unclean hands argument hinges entirely on Afilias' assertion that Mr. McAuley, Verisign's representative and head of the IRP-IOT, knew about Afilias' CEP and amended the Interim Supplementary Procedures with the express purpose of allowing Verisign to participate in these proceedings. (*See* Response, ¶¶ 50–51, 56). Even if Verisign were to argue for the adoption of rules in its own interests, that would not be "unclean hands." As discussed at Paragraph 8, ICANN is a multi-stakeholder model, in which interested parties act in their own interests to form ICANN policy. What Afilias deems "unclean hands" is ICANN's fundamental organizing principle. Moreover, the timeline for revisions to the Interim Supplementary Procedures shows unequivocally that the *amici* rule granting participation rights to persons with a material interest in the dispute was formulated ***prior*** to the filing of Aiflias' CEP, ***and*** that the

final *amici* language about which Afilias complains came from ICANN. (*See* Section II.F.1, *infra*). Thus, Mr. McAuley's knowledge (or lack thereof) of Afilias' CEP is irrelevant to the enforceability of those rules.

31. Furthermore, as discussed *infra*, Mr. McAuley proposed amendments to the Interim Supplementary Procedures in October 2018 in order to better align the draft Procedures with the Bylaws' requirements that they "ensure fundamental fairness and due process," consistent with public comments regarding the rules. (McAuley Decl., ¶ 15; Bylaws, § 4.3(n)–(o); Section II.F.1, *infra*). There is no evidence to the contrary, and Mr. McAuley's declaration denying personal knowledge of Afilias' CEP or Afilias' IRP leading up to the adoption of the Interim Supplementary Procedures by the ICANN Board is consistent with the testimony of Samantha Eisner, ICANN's counsel who drafted the language in question. (McAuley Decl., ¶ 32; Eisner Decl., ¶ 6).

32. Further, and in any event, Afilias' cited case law provides no support for the application of unclean hands here. (*See Aptix Corp. v. Quickturn Design Sys., Inc.*, 269 F.3d 1369, 1378 (Fed. Cir. 2001) (rejecting use of unclean hands doctrine to declare a patent unenforceable and instead affirming district court's dismissal of patent enforcement action as a *discretionary sanction* grounded in the court's "inherent powers to punish" plaintiff's falsification of evidence); *Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC*, 149 F.3d 85, 90 (2d Cir. 1998) (doctrine of unclean hands did not bar plaintiff from filing complaint against union and union officials; "the unclean hands defense is not an automatic or absolute bar to relief; it is only one of the factors the court must consider when deciding whether to exercise its discretion and grant an injunction" (quotation marks omitted)); *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945) (in patent infringement action, acknowledging that

unclean hands doctrine merely "gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant"); *Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F. Supp. 969, 972 (S.D.N.Y. 1992) (applying unclean hands doctrine to litigant that fabricated testimony before the court); *Gutierrez* Kerry *Gonzalez Freeman Tamez Kerry Alcala Kerry Arredondo De Garcia v. Wiesnet*, 2015 WL 12940215, at *2 (S.D. Tex. Aug. 3, 2015) ("The unclean-hands doctrine . . . does not operate outside [of] equitable proceedings." (quotation marks omitted)); *cf. Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir. 1989) (unclean hands doctrine not available in breach of contract actions).).

F. The Interim Procedures Were Properly Adopted and Consistent with ICANN's Bylaws and Policies; Afilias' Purported "Legislative History" is a False Narrative

1. The True History of the Interim Procedures Entirely Debunks Afilias' Theory of Rule Manipulation.

33. While Afilias falsely claims that Verisign "manipulated" the IRP-IOT process to insert *amicus* provisions into the Interim Supplementary Procedures, Afilias ***never*** contends that those provisions violate the Bylaws or are otherwise unfair or improper. Nor could it. The final version of the *amicus* provisions merely ensure the right of third parties with a material interest in the proceedings to be heard. This is in accordance with, and indeed required by, the Bylaws' mandate that the Procedures "ensure fundamental fairness and due process," (Bylaws, § 4.3(n)(iv)), and general principles of due process applicable to this proceeding. (*See, e.g., Martin*, 25 Cal. App. 3d at 169 (party to contract that action sought to enjoin was an *indispensable party* to the proceeding as "his interests would inevitably be affected by a judgment rendering the contract void or enjoining further payment to him thereunder").)

34. Instead, Afilias' argument, which is premised on Afilias' cherry picking and distortion of the history of the IRP-IOT proceedings, is that interested parties manipulated the process. The Bylaws direct the IRP-IOT to address "issues relating to joinder, intervention, and

consolidation of claims." (Bylaws, § 4.3(n)(iv)(B)). As Afilias itself notes, as early as June 2016, the then committee chair, in discussing intervention, stated "you also do want to make sure that **all of the parties and interest are before the panel** at the right time." (Response, ¶ 20 n.43 (emphasis added).) Another committee member floated the idea of providing for "something short of full intervention, **such as an amicus brief**." (*Id.*, ¶ 20, n.44.)

35. When these specific ideas were not incorporated into the initial draft of the Procedures posted for public comment, the idea of third party participation in IRPs was again raised during the public comment process. The Intellectual Property Constituency (the "IPC") of the Generic Names Supporting Constituency ("GNSO"), for example, submitted a comment that: "**Any third party directly involved in the underlying action** which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or **in opposition to the Claimant(s)"**.[13] (Emphasis added) The IPC stressed that "these rights of intervention and joinder are necessary to serve the due process goals of the enhanced IRP." (*Id.*) The Non-Commercial Stakeholders Group ("NCSG") echoed this same point:

> Currently, the IRP Updated Supplementary Procedures only have the disgruntled party and ICANN as the parties to the proceedings. All others have to apply to accepted — and the first argument the Claimant's Counsel makes is "No!" That's not the procedure in any other litigation forum which **practices due process**. **Everywhere else, all parties to the underlying proceeding have the right to intervene** — the right to be heard in the challenge to their proceeding. Here too, such a Right of Intervention (a material change to Section 7 of these Procedures) must be added. [14]

[13] McAuley Decl., ¶ 12 & Ex. B; https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdft75S74tOev.pdf.
[14] McAuley Decl., ¶ 13 & Ex. C; https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfLoCFUVHjfN.pdf.

(Emphasis added). The NCSG further commented that "[s]hould the winning party not have the time and resources to fully engage in the IRP, they should at least be able to **file proceedings analogous to *Amicus Briefs*** to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession." (Emphasis added)

36. Therefore, contrary to Afilias' mischaracterization, the public comment requests for additional participation rights for third parties were not limited to "underlying 'process-specific expert panel' proceedings conducted pursuant to Bylaws Section 4.3(b)(iii)(A)(3)." (Response, § 2.1.3). It was always recognized that a fair process must ensure that any interested parties are heard.

37. Another public comment to the October 31, 2016 draft of the Updated Supplementary Procedures from the Fletcher law firm did, as Afilias notes, focus on rights of participation by parties to "process-specific expert panel" proceedings conducted pursuant to Bylaws Section 4.3(b)(iii)(A)(3). Several of the drafts of the Procedures, including the final Interim Supplementary Procedures submitted by the IRP-IOT, included participation rights for parties to such proceedings. However, it is not true that the IRP-IOT was only concerned with protection for that limited set of third parties. On the contrary, beginning in 2017, the IRP-IOT began to discuss and then include language in the draft Updated Supplementary Procedures intended to provide a right of participation in IRPs for persons with a material interest in the dispute.

38. As noted in both ICANN's and Afilias' briefs, the IRP-IOT began to address these and other comments following the closure of the public comment period in early 2017. However, a substantial portion of the IRP-IOT's time was devoted not to third-party participation in IRPs, but to the issue of limitations periods for Claimants to bring IRPs. Thirteen of the

nineteen public comments addressed the time for filing, and expressed diametrically opposed positions with respect to this proposed requirement.[15] All other issues effectively took a back burner to the time for filing issue. (McAuley Decl., ¶ 17.)

39. In February 2018, the IRP-IOT prepared a draft memorandum directing the IRP-IOT's counsel, Sidley Austin, to implement certain revisions to the Interim Supplementary Procedures following public comments. With regard to Rule 7, the IRP-IOT instructed Sidley Austin 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.[16] The version of Rule 7 proposed in that February 2018 memorandum states that "any person, group, or entity" that "did not participate in the underlying proceeding"[17] and does not satisfy the standing requirements of the Bylaws "**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." Thus, nearly **five months** before Afilias filed its CEP in June 2018, the IRP-IOT proposed that persons **not involved** in an underlying process-specific panel be allowed to participate as *amici* if they had a material interest in the IRP dispute. (McAuley Decl, ¶¶ 19–20).

40. The recommendations in the February memorandum ultimately were incorporated into a May 1, 2018 draft of the Interim Supplementary Procedures by Sidley Austin. The proposed Procedures, which were presented in redline against the October 31, 2016 Updated

[15] https://www.icann.org/en/system/files/files/report-comments-irp-supp-procedures-02aug17-en.pdf.
[16] McAuley Decl., ¶ 19 & Ex. E (Draft Report of the IRP-IOT Following Public Comments on the Updated Supplementary Procedures for the ICANN IRP, at pp. 4-5, *available at* https://community.icann.org/download/attachments/59643726/IRP.IOT.ReportonPubComments.Rules%28V2%29.pdf?version=1&modificationDate=1519322649000&api=v2).
[17] "Underlying Proceeding" is described as "a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)))."

Supplementary Procedures, included participation rights for both parties that ***were*** participants in process-specific expert panels **and** those that ***were not***. With respect to "Intervention and Joinder," the Interim Supplementary Procedures provided as follows:

> If a person, group, or entity participated in an underlying proceeding (a process-specific expert panel as per Bylaw Section 4.3(b)(iii)(A)(3)), (s)he/it/they shall receive notice that the INDEPENDENT REVIEW has commenced. Such a person, group, or entity shall have a right to intervene in the IRP as a CLAIMANT or as an amicus, as per the following:
>
> i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws.
>
> ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an amicus.
>
> Any person, group, or entity that **did not participate in the underlying proceeding** may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. **If the standing requirement is not satisfied, such persons may intervene as an amicus if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed amicus has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE**.

(McAuley Decl., ¶ 20 (emphasis added).) Again, the right to participate as *amicus* **was not limited**, as Afilias asserts (Response, ¶ 14), to participants in process-specific expert panel proceedings. On the contrary, by May 1, 2018 — **six weeks before Afilias filed its IRP** — the then-current draft of the Interim Supplementary Procedures expressly provided for *amicus* participation by anyone determined to have a material interest in the dispute. This *amicus* rule could not have been prompted by knowledge regarding Afilias' CEP -- by Mr. McAuley or anyone else -- because that CEP had not yet been filed.

41. On October 5, 2018, Bernard Turcotte, an ICANN contractor responsible for supporting the IRP-IOT, circulated an updated draft of the Interim Supplementary Procedures, dated September 25, 2018, to the IRP-IOT that reflected further revisions to the draft Procedures

by Sidley Austin, the IRP-IOT's counsel. The September 25 draft expanded upon but was consistent with the May 1, 2018 draft and public comments regarding participation by third parties with a material interest in the dispute. Among other things, the new draft clearly separated the concepts of intervention and participation as *amicus curiae*, reserving intervention for those parties qualified to be a Claimant and *amicus* participation for those that did not. With regard to *amicus* participation, the September 25, 2018 draft states:

> **Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL**, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

(McAuley Decl., ¶ 23 (emphasis added).)

42. On October 11, 2018, Mr. McAuley suggested revising the **intervention** portion of Rule 7 to broaden the mandatory IRP participation rights of persons with a significant interest relating to the subject matter of the IRP, and subsequently proposed revised language to the intervention portion of the rule to implement his suggestion. Mr. McAuley's proposal was based on his concern that the rules still did not sufficiently provide mandatory rights of intervention or participation by parties whose interests would be affected by the IRP. (McAuley Decl., ¶¶ 24–25).

43. ICANN objected to including Mr. McAuley's proposed language in the intervention portion of Rule 7 and **ICANN proposed** that, instead, additional participation protections for persons with material interests in an IRP be added to the *amicus* portion of Rule 7. In addition, **ICANN, not Verisign**, proposed adding language, which ultimately became part of Rule 7 of the enacted Interim Supplementary Procedures, providing mandatory *amicus*

participation rights for, (a) in an IRP arising out of an application for a new gTLD, persons who were part of a contention set for the new gTLD; and (b) persons whose actions were significantly referred to in the briefings before the IRP Panel. **Verisign never suggested to ICANN** that it should add these two categories of persons who would be deemed to have a material interest for purposes of *amicus* participation. (*Id.*, ¶ 26.) Instead, ICANN thought the additions it proposed would add to the clarity of the *amicus* rule. (*See id.*)

44. In summary, Afilias' alternate history of the IRP-IOT is a sham. *Amicus* participation by persons with a material interest in the dispute was proposed in public comments in 2016 and, by the IRP-IOT in 2018, *months* before Afilias filed its CEP. ICANN, not Verisign, proposed the changes to the rule and language providing for mandatory *amicus* participation by entities in circumstances like those faced by Verisign and NDC. Afilias' fantasy that Verisign manipulated the rule-making process to interfere with this IRP is manufactured out of whole cloth.

2. The IRP-IOT Did Not Need to Report to the CCWG-Accountability.

45. Afilias contends that the Interim Supplementary Procedures are invalid because the IRP-IOT was required to report back to the Cross-Community Working Group on Enhancing Accountability ("CCWG-Accountability") before presenting the Interim Supplementary Procedures to ICANN's Board. (Response, ¶ 68 (citing the IRP-IOT's Mission Statement).) Afilias neglects to inform the Procedures Officer, however, that the CCWG-Accountability effectively disbanded by October 2018 and thus there was no CCWG-Accountability to which to report. (McAuley Decl., ¶ 30.) Afilias' effort to block *amicus* participation in this proceeding on the basis of a purported, technical reporting obligation — to a no longer functioning ICANN group — must be rejected.

3. The Interim Supplementary Procedures Did Not Require Further Public Comment.

46. Afilias asserts that ICANN may not rely on the Interim Supplementary Procedures because the IRP-IOT purportedly was obligated to seek an additional round of public comment on Rule 7 of those procedures. Afilias acknowledges that, consistent with the Bylaws, § 4.3(n)(ii), the IRP-IOT *did* publish the draft Interim Supplementary Procedures for public comment in November 2016. (Response, ¶ 73.) Afilias' complaint is that, following receipt and implementation of those comments, the IRP-IOT did not again seek public comment on changes to the rules that were made pursuant to the public comments, that were "interim" in nature, and as to which there was no opposition within the IRP-IOT. Afilias' position runs counter to the determinations of the IRP-IOT and ICANN, both of whom determined that no such repeat procedure was required. (Eisner Decl., ¶ 7; McAuley Decl., ¶ 31.)

47. Afilias' assertion is also contrary to standard administrative rule-making procedures. Under the U.S. Administrative Procedures Act, for example, courts have found that if a final rule is not a "logical outgrowth" of its proposed version, it may require another round of comment under principles of due process. Putting aside that no such requirement exists for the IRP-IOT, the final Rule 7 would easily satisfy such a test: the expansion of amicus rights in the final rule, in response to the public comments seeking such expansion, clearly had its "germ" in the proposed rule (*see NRDC, Inc. v. Thomas*, 838 F.2d 1224, 1242 (D.C. Cir. 1988)), and falls far short of the kind of "bolt from the blue" that violates the level of notice demanded by due process. (*Cf. Shell Oil Co. v. EPA*, 950 F.2d 741, 750 (D.C. Cir. 1991).)[18]

[18] Afilias also asserts that the Interim Supplementary Rules are not enforceable because a lone member of that committee — subsequent to the committee's deliberations regarding the rules — complained about ICANN's participation in the IRP-IOT. An untested complaint by a single IRP-IOT member is hardly a sufficient basis for the Procedures Officer to disregard binding rules of procedure.

G. The Proper Scope of *Amicus* Participation in This Proceeding

48. Under the Interim Supplemental Procedures, the scope of *amicus* participation is an issue for the panel and not the Procedures Officer. Under any circumstances, in light of the claims made and relief sought in this IRP, due process requires the full and complete participation by NDC and Verisign in this IRP.

1. The IRP Panel, Not the Procedures Officer, Determines the Scope of *Amicus* Participation.

49. The Interim Supplementary Procedures are clear: The Procedures Officer may consider *requests* for participation as an *amicus,* but the IRP PANEL determines the *scope* of *amici* participation once a request has been granted. (Interim Supplementary Procedures, § 7.) Specifically, the Interim Supplementary Procedures provide that "[a]ny person participating as an *amicus curiae* may submit to the IRP PANEL written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, ***in the discretion of the IRP PANEL*** and subject to the deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. (*Id.* (emphasis added).) The Procedures further provide that, "in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of participation from *amicus curiae*, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* . . . ." (*Id.*) Thus, the IRP PANEL, *not* the Procedures Officer, is to determine the scope of *amicus* participation, in its discretion. Afilias' apparent request for the Procedures Officer to undertake this task violates the express language of the Interim Supplementary Procedures and interferes with the duties assigned to the IRP PANEL. (*See* ¶¶ 5, 28, *supra* (citing cases establishing that arbitrators must follow agreed-upon procedures in contexts of prior IRPs, international arbitration, and domestic arbitration).)

2. Afilias' Position That *Amici* May Not Participate in Interim Relief Proceedings Violates Fundamental Fairness and Due Process.

50. The Procedures Officer should reject Afilias' arguments that *amici* should not participate in proceedings before the Emergency Panelist. Afilias' position is based on the statement, in Rule 7 of the Interim Supplementary Procedures, that an *amicus* may make submissions to the "IRP Panel." Because the "Emergency Panelist" is not the "IRP Panel," according to Afilias, Verisign and NDC may not participate in the interim relief proceedings.[19] Not only is Afilias' argument severely strained and hyper-technical, it is contrary to the Bylaws' mandate that the Interim Supplementary Procedures ensure "fundamental fairness and due process." It is also contrary to the Interim Supplementary Procedures' admonition that *amici* should be allowed "broad participation" in the proceedings. (Interim Supplementary Procedures, § 7, n.4; *see also* Bylaws, § 4.3(n)(iv).)

51. "A Claimant may request interim relief from the IRP PANEL." (Interim Supplementary Procedures, § 10.) However, if an IRP PANEL is not yet in place at the time an interim relief request is made, then an Emergency Panelist will be appointed, in lieu of the IRP PANEL,[20] to consider the request. (*Id.*) Interim relief requests are not, as Afilias implies,

[19] Afilias also cites to the statement in Section 10 (Interim Measures of Protection) of the Interim Supplementary Procedures that parties not present when interim relief is granted on an *ex parte* basis may later present their arguments to the Emergency Panelist. This provision does not, as Afilias claims, provide that only "parties" may participate in interim relief proceedings. Rather, it stands for the mundane proposition that parties not present for *ex parte* relief — *i.e.*, relief granted *without* all of the parties being present — may later present their arguments to the Emergency Panelist. Afilias' strained reading of this provision as shedding light on *amicus* participation is ludicrous.

[20] The Emergency Panelist, in effect, stands in the shoes of the IRP PANEL until it is constituted. Rule 5 of the Interim Supplementary Procedures states:

> "In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate."

Thus, the Emergency Panelist's power to grant participation by *amici* is the same as that held by an IRP PANEL. There is no principled reason to limit the Emergency Panelist's discretion regarding *amicus* participation when no such limit would apply to the IRP PANEL hearing the same matter.

exclusively the province of Emergency Panelists rather than an IRP PANEL. Rather, the presiding officer(s) for such a request is determined **solely** based on the **timing** of the request.

52. Afilias does not dispute that, if its request for interim relief had been made *after* formation of the IRP PANEL, then *amici* could participate in those proceedings in the IRP PANEL's discretion. Had Afilias waited until the IRP PANEL was in place to file its interim relief request, it would have *no basis* — technical or otherwise — to argue that *amici* could not participate in interim relief proceedings. Thus, Afilias' position is not based on principal, but solely on its unilateral decision of when to file for early interim relief.

53. If true, Afilias' interpretation of the Interim Supplementary Procedures would encourage Claimants to "forum shop" their interim relief requests: File early before an Emergency Panelist — even in the face of an offer not to take action for some period (as ICANN apparently offered here, but Afilias rejected) — and avoid participation by interested parties (including potentially any true adversary) on the interim relief request. But nothing in the Procedures remotely suggests that they were intended to encourage such gamesmanship, arbitrary processes, and interference with the due process rights of interested parties.

54. At bottom, the interpretation Afilias urges would violate the Bylaws' requirement that the Interim Supplementary Procedures ensure fundamental fairness and due process. There is nothing fair, and it would be a clear violation of due process, to allow Afilias' interim relief request to proceed without Verisign's and NDC's full participation. Verisign and NDC are the real parties in interest in Afilias' request, which seeks to delay execution of the .web registry agreement, delegation of the .web gTLD, and, ultimately, any assignment of that registry agreement from NDC to Verisign. (IRP, ¶ 69; Interim Relief Request, ¶ 4.) It would violate due process to have NDC's and Verisign's rights and interests affected so drastically without their

full participation in those proceedings.[21] (*See, e.g.*, *Ass'n of Contracting Plumbers of City of New York, Inc. v. Local Union No. 2 United Ass'n of Journeymen*, 841 F.2d 461, 467 (2d Cir.1988) (holding that nonparties to arbitration may attack the award where the award "affects the [nonparties] in a sufficiently substantial and concrete manner"); *Martin*, 25 Cal. App. 3d at 169 (party to contract that action sought to enjoin was an indispensable party to the proceeding as "his interests would inevitably be affected by a judgment rendering the contract void or enjoining further payment to him thereunder."); *Miracle Adhesives Corp.*, 157 Cal. App. 2d at 593 (1958) ("Persons 'whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action' are *indispensable parties*, and the action *cannot proceed without them*." (emphasis added)).)

3. Verisign's and NDC's Roles Should Not Be Limited to That of "Traditional" *Amici*, as Afilias Argues.

55. To muster support for its argument that Verisign's and NDC's participation in the IRP, if allowed, should be limited, Afilias purports to survey the role of *amicus curiae* in international arbitration, concluding that "the norm is that such participation is limited." (Afilias Response, ¶ 94.) However, the comparison Afilias seeks to draw between the role of *amici* in the specialized field of international investment arbitration and the envisioned role of *amici* in the proceedings at issue here is not valid. International investment arbitration involves conflicts between foreign investors and sovereign host States and has its own particular dispute resolution procedures and mechanisms.[22] Yet, despite the unique characteristics of both investment

[21] The same holds true for Afilias' argument regarding the omission of the language cited in Paragraph 90 of its Response from the final version of the Interim Supplementary Procedures. Failure to expressly claim *amicus* participation rights cannot be used to interpret the rules in a way that violates fundamental fairness and due process. In any event, the omitted language was not deleted due to opposition by the IRP-IOT but rather due to the vagaries of the drafting process leading up to the final version of the Interim Supplementary Procedures. (*See* McAuley Decl., ¶¶ 15, 17).

[22] *See generally* Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, Chapter 8 (Oxford University Press, 2015).

arbitration and IRP proceedings, Afilias attempts to import the standards applied to *amici* participation in disputes between governments and foreign investors to the dispute here. In so doing, Afilias ignores that the parties seeking to participate as *amici*, the nature of their respective stakes in the dispute, and the particular institutional rules governing their participation, are vastly different in each context.

56. For example, in each of the cases cited by Afilias on this point, the *amici* seeking to take part in the proceedings were non-governmental organizations ("NGOs"), non-profits, or some combination of the two.[23] None of these groups actually possessed the substantive right being asserted. In contrast, Verisign and NDC are real parties in interest, and each has a significant and material financial interest at stake in the present dispute. The distinction is vital. Whereas NGOs and non-profits may be able to contribute to the proceedings in a way that aids a tribunal, they do not have a personal stake in the outcome. In other words, it makes sense that the role of *amici* in international investment arbitration would be more limited, because the third parties seeking to be heard are not at risk of having their rights severely impaired and lack Constitutional standing. (*See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).) Here, the opposite is true. Verisign's and NDC's interests will be

[23] *See, e.g.*, *Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (15 Jan. 2001), ¶ 1 (listing the International Institute for Sustainable Development, Communities for a Better Environment, and the Earth Island Institute as parties seeking participation); *Aguas Argentinas, S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005), ¶ 1 (noting the "five non-governmental organizations" that filed the petition to participate as *amici*); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (2 Feb. 2007), ¶ 1 (listing the *amici* petitioners as the Lawyers' Environmental Action Team, the Legal and Human Rights Centre, the Tanzania Gender Networking Programme, the Center for International Environmental Law, and the International Institute for Sustainable Development); *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Petition for Limited Participation as non-Disputing Parties (17 July 2009), ¶ 3.3 (describing *amici* as "two of the leading human rights advocacy organisations in South Africa").

directly and very seriously impacted by the decisions made in the course of the IRP, which is why the Interim Supplementary Procedures *require* the Procedures Officer to admit *amicus curiae* participation of entities that have a material interest relevant to the dispute.

57. The rules governing *amici* participation in international investment arbitration, by their express terms, differ in crucial respects from the rules applicable here. For example, ICSID Rule 37(2)[24] gives a tribunal a wide margin of discretion to accept or reject submissions by *amici* in investment arbitration:

> *After consulting both parties*, the Tribunal ***may*** allow a person or entity that is not a party to the dispute . . . to file a written submission with the Tribunal regarding a matter within the scope of the dispute . . . . The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

(ICSID, Arbitration Rule 37(2), 10 April 2006 (emphasis added).) Unlike the ICSID Rules, which require a tribunal to consult with both parties before accepting *amici* submissions and state only that a tribunal *may* allow *amici* participation,[25] Rule 7 of the Interim Supplementary Procedures mandates broad support for *amici* involvement in IRP disputes. As discussed above, upon a finding that the proposed *amicus curiae* has a material interest relevant to the dispute, the procedures officer "***shall*** allow participation by the *amicus curiae*." (Interim Supplementary Procedures, § 7 (emphasis added).) Further, Rule 7 expressly provides for broad participation by *amici*:

> During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of participation from *amicus curiae*, ***the IRP PANEL shall lean in***

[24] Three of the four international arbitration cases Afilias points to were governed by the International Centre for Settlement of Investment Disputes ("ICSID"). (*See* Afilias Response, ¶ 95, nn.159–64.)

[25] Before determining whether to allow an *amicus curiae* filing, the ICSID Rules also require that a tribunal consider the extent to which: "(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding . . . ; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding." (ICSID, Arbitration Rule 37(2), 10 April 2006.)

> ***favor of allowing broad participation*** of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

(*Id.* at n.4.) (emphasis added). Accordingly, it is disingenuous for Afilias to attempt to draw parallels to international investment arbitration where the rules governing *amici* participation, and the purposes of such participation, differ so sharply.

58. Many of Afilias' claims are, in any event, inaccurate as Afilias seeks to portray *amici* participation in arbitration as being considerably more restrictive than it actually is. For example, Afilias alleges that investment arbitration *amici* are not "permitted to introduce evidence as part of their submission." (Response, ¶ 95.) This is incorrect. ICSID Rule 37(2) does not place any explicit limits on an *amicus curiae*'s submission; instead, the tribunal is given discretion to prescribe the contours of the submission. (ICSID, Arbitration Rule 37(2).) That Afilias points to a single arbitration order in which a tribunal chose to delay its decision (*see* Response, ¶ 95 n.162) on whether to accept evidence as part of an *amicus curiae*'s submission falls far short of establishing the proposition that *amici* are not permitted to submit evidence, particularly given that one arbitral tribunal's decision is not binding on another.[26]

59. Afilias seeks support in the U.S. domestic litigation context as well, noting that "*[a]mici* have 'never been recognized, elevated to, or accorded the full litigating status of a named party or a real party in interest.'" (Response, ¶ 96 (citing *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991)).) Yet this comparison too is inapposite: the limited role of *amici*

[26] Afilias' own cases cited on this point express support for the value of *amici* participation generally. For example, the Tribunal in *Aguas Argentinas* noted that *amicus curiae* can "help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide." (*Aguas Argetinas, S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19 May 2005), ¶ 13.) The *Methanex* Tribunal observed that "[t]he acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of [the proceedings]." (*Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (15 Jan. 2001), ¶ 24.) This latter point is particularly relevant given the emphasis ICANN places on transparency in its bylaws: "ICANN . . . shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness . . . ." (Bylaws, § 3.1.)

in domestic litigation must be viewed in the context of Rule 24 of the Federal Rules of Civil Procedure, which provides for **intervention as of right for any party that "claims an interest relating to the property or transaction that is the subject of the action**," (Fed. R. Civ. P. 24(a)(2)), as well as permissive intervention in other contexts, (*see* Fed. R. Civ. P. 24(b)) (emphasis added). The right to intervene in civil litigation accorded to parties with a material interest, then, obviates the need for expansive rights of participation for *amici* while satisfying due process requirements. Indeed, Afilias notes that Interim Supplementary Procedures Rule 7 was modeled on FRCP Rule 24 (*see* Response, n.147), yet nonetheless later seeks to limit the scope of *amicus* participation under Rule 7 while ignoring FRCP Rule 24 altogether. Afilias cannot have it both ways. The Bylaws' requirement of "fundamental fairness and due process" necessitate that parties with a material interest have a meaningful right to be heard, and neither the international investment arbitration nor domestic litigation norms cited by Afilias' counsel state otherwise.

III. CONCLUSION

60. For the reasons set forth above and as set forth in Verisign's and NDC's original requests, Verisign should be allowed to participate as *amici* in this IRP.

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