

JONES DAY

555 SOUTH FLOWER STREET • FIFTIETH FLOOR • LOS ANGELES, CALIFORNIA 90071.2300

TELEPHONE: +1.213.489.3939 • FACSIMILE: +1.213.243.2539

DIRECT NUMBER: (213) 243-2572
JLEVEE@JONESDAY.COM

March 20, 2019

Via Email

Tom Simotas
Finance Manager
International Center for Dispute Resolution
120 Broadway, 21st Floor
New York, NY 10271

Re: Afilias v. ICANN; ICDR Case No. 01-18-0004-2702

Dear Tom:

I write in response to Afilias Domains No. 3 Limited's ("Afilias") letter dated 14 March 2019 regarding the declaration issued by Mr. Donahey acting as the appointed Procedures Officer under ICANN's Interim Supplementary Procedures.

Afilias does not respond to (much less refute) the stated grounds for ICANN's request that the ICDR appoint another Procedures Officer to rule on NDC's and Verisign's *amicus* requests. Specifically:

1. Rule 7 of the Interim Supplementary Procedures states that "requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER," not to the IRP Panel. Thus, only a Procedures Officer may determine a request to participate as *amicus curiae*. Indeed, Afilias recognized in its letter to the ICDR dated 10 December 2018 that Rule 7 "admits of no ambiguity" in this regard:

The plain language of Section 7 requires a Procedures Panelist to determine whether an entity may participate as an amicus curiae, even if an IRP Panel were already constituted:

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*.

Tom Simotas
March 20, 2019
Page 2

This provision admits of no ambiguity, especially considering the more flexible language earlier in Section 7 relating to applications to intervene as a Party in the IRP.

2. No matter how Afilius attempts to spin Mr. Donahey's declaration, the fact is that Mr. Donahey did not make a determination on NDC's and Verisign's requests to participate as *amicus curiae*. Instead, Mr. Donahey purported to assign responsibility for making that determination "to the Standing Panel, and, until such time as the Standing Panel is formed, to the IRP Panel[.]"
3. The Interim Supplementary Procedures do not give the Procedures Officer the authority to assign his responsibilities to the IRP Panel. The Interim Supplementary Procedures entrust the authority to determine whether a proposed *amicus* satisfies the requirements of Rule 7 solely to the discretion of the Procedures Officer.
4. As a result, NDC's and Verisign's *amicus* requests have not been determined and cannot be determined until the ICDR appoints another Procedures Officer to make that determination.

Afilius erroneously asserts (p. 2) that Mr. Donahey "performed his duties as a Procedures Officer" because he held hearings, received briefing, and issued a declaration. But the Interim Supplementary Procedures impose only one actual duty on the Procedures Officer: to determine a request for consolidation, joinder or participation as *amicus curiae*. Mr. Donahey did not perform that duty. He neither granted nor rejected the *amicus* requests. Instead, he acted outside of his jurisdiction by purporting to refer the *amicus* request to the IRP Panel, which itself has no jurisdiction to decide the *amicus* requests.

Contrary to Afilius' assertion (p. 1), appointing a new Procedures Officer is entirely consistent with the ICDR's International Arbitration Rules ("Rules"). Article 14(4) of the Rules authorizes the ICDR (defined as the "Administrator") to "remove an arbitrator for failing to perform his or her duties." The Procedures Officer was appointed under Article 8 of the Rules governing appointment of a consolidation arbitrator.¹ Surely, the ICDR would appoint a replacement if a consolidation arbitrator failed to render a decision as to consolidation within 15

¹ See December 13, 2018 e-mail from Tom Simotas sent at 4:01 pm ("In regards to the appointment of a Procedures Officer we have determined, in accordance with Article 1 and 7 of the Interim Supplementary Procedures, to appoint a Panelist as outlined in Article 8 of the ICDR's International Arbitration Rules (Consolidation)."); see also Interim Supplementary Procedures, Rule 1 (stating that if the Standing Panel is not in place, then the Procedures Officer shall be "appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8).").

Tom Simotas
March 20, 2019
Page 3

days as required by Article 14(7) of the Rules and instead purported to delegate jurisdiction to decide consolidation to either one or both of the tribunals presiding over the underlying arbitrations. The result should be no different here. Mr. Donahey did not perform his sole duty of deciding the *amicus* requests. Therefore, the ICDR must appoint a new Procedures Officer who will discharge that duty.

Afilias argues that appointing another Procedures Officer may be futile because s/he could reach the same conclusion as Mr. Donahey. But it is exceedingly unlikely that another Procedures Officer would abdicate her/his responsibilities as Mr. Donahey has, particularly knowing that s/he was appointed as a result of Mr. Donahey's failure to discharge the duties of the Procedures Officer.

Afilias also is wrong in asserting (pp. 2-4) that ICANN's request for the ICDR to appoint a second Procedures Officer is somehow inconsistent with positions that ICANN took in proceedings before Mr. Donahey. Afilias has stated that it intends to amend its IRP Request to add a claim that the Interim Supplementary Procedures were adopted in breach of ICANN's Bylaws and/or Articles of Incorporation. If Afilias pursues such a claim, then that claim must (and will) be determined by an IRP Panel. But such a claim is entirely distinct from the question of whether NDC and Verisign meet the requirements for *amicus* participation under the Interim Supplementary Procedures. The former issue must be determined by an IRP Panel; the latter must be determined by a Procedures Officer. Afilias itself recognizes this obvious distinction, as it intends to challenge the validity of the Interim Supplementary Procedures before the IRP Panel through an amended Request for Independent Review. That planned action, however, does not allow the Procedures Officer to disregard the Interim Supplementary Procedures. As long as the Interim Supplementary Procedures remain in force, they must be applied.

Similarly, Afilias misleadingly suggests (p. 4 & n.12) that, because the IRP Panel has discretion to determine certain issues regarding the scope of *amicus* participation, it has jurisdiction upon referral from the Procedures Officer to determine whether proposed *amicus curiae* meet the requirements of Rule 7. The Interim Supplementary Procedures clearly provide that these are separate issues.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page

Tom Simotas
March 20, 2019
Page 4

limits, and other procedural rules as the IRP PANEL may specify in its discretion.

Thus, the Procedures Officer must determine whether proposed *amicus curiae* satisfy the requirements of Rule 7. If so, the Procedures Officer “shall allow participation by the *amicus curiae*.” The IRP Panel’s discretion regarding deadlines, page limits and other procedural rules governing *amicus* participation is triggered only after a Procedures Officer grants a request to participate as *amicus curiae*.

Citing Article 29 of the ICDR Rules, Afilias states (p. 5 & n.14) that the IRP Panel has authority to revise orders on “questions of procedure.” Afilias apparently means to suggest that the IRP Panel has jurisdiction to overturn a Procedures Officer’s determination of a request to participate as *amicus*, and therefore by inference also should have power to determine such a request in the first instance on referral from the Procedures Officer. That suggestion is wrong. Article 29(3) states that, if the parties so authorize, the “presiding arbitrator” may make decisions on questions of procedure subject to revision by the full tribunal. The “presiding arbitrator” is the chair of the arbitral tribunal (here, the IRP Panel), not the Procedures Officer. As such, Article 29 is inapposite. The Interim Supplementary Procedures state that a request to participate as *amicus curiae* must be determined by the Procedures Officer. They do not give the IRP Panel authority to revise or overturn the Procedures Officer’s ruling, much less to take over the Procedures Officer’s duties and determine the *amicus* request itself.

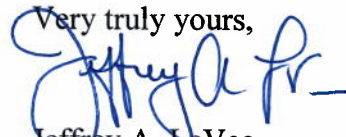
Afilias’ suggestion that ICANN can issue a request that Mr. Donahey clarify his ruling pursuant to Article 33 of the ICDR Rules is similarly inapposite. The problem with Mr. Donahey’s declaration is not a lack of clarity; the problem is that Mr. Donahey declined to decide the sole issue that he was appointed as a Procedures Officer to resolve (and which can be resolved only by a Procedures Officer).

Finally, ICANN objects to Afilias’ implication that ICANN is somehow acting on behalf of Verisign and NDC. ICANN is acting solely on its own behalf. ICANN’s interest is in seeing that its Interim Supplementary Procedures are properly applied. As the approved IRP Provider designated by ICANN’s Board of Directors under Article 4.3(m) of ICANN’s Bylaws, the ICDR has a duty to apply the Interim Supplementary Procedures, including by appointing a Procedures Officer who will carry out the duties assigned to her/him.

In short, *amicus curiae* requests must be determined by a Procedures Officer and may be determined only by a Procedures Officer. Mr. Donahey abdicated his responsibility by choosing not to determine whether NDC’s and Verisign’s *amicus* requests satisfy the requirements of Rule 7. As a result, Verisign’s and NDC’s *amicus* requests have not been decided, and they cannot be

Tom Simotas
March 20, 2019
Page 5

decided by the IRP Panel. Accordingly, another Procedures Officer must be appointed to decide the *amicus* requests.

Very truly yours,

Jeffrey A. LeVee

cc: Counsel for Afilias
Counsel for NDC
Counsel for Verisign