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VIA E-MAIL

Tom Simotas
International Centre for Dispute Resolution
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**Re: *Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702,
Letter from Jeffrey A. LeVee on behalf of ICANN Requesting the
Appointment of a New Procedures Officer**

Dear Mr. Simotas:

We write on behalf of Afilias Domains No. 3 Limited (“**Afilias**”) in response to the letter from Jeffrey A. LeVee on behalf of the Internet Corporation of Assigned Names and Numbers (“**ICANN**”), dated 8 March 2019.

Mr. LeVee’s request on behalf of his client, and ultimately VeriSign, Inc. (“**VeriSign**”) and Nu Dotco LLC (“**NDC**”), is quite extraordinary and is not supported by either the Interim Supplementary Procedures or the ICDR Arbitration Rules. ICANN demands that the International Centre for Dispute Resolution (“**ICDR**”) “appoint a new Procedures Officer to rule on the *amicus* requests submitted by VeriSign and NDC” because “Mr. Donahey did not perform the responsibilities of a Procedures Officer, and the net effect is that the *amicus* applicants have not received a ruling on their applications.”¹ In short, ICANN demands that the ICDR ignore (1) the Interim Supplementary Procedures, (2) the ICDR Arbitration Rules, (3) ICANN’s own submissions to Mr. Donahey, and (4) Mr. Donahey’s Declaration of 28 February 2019 (the “**Declaration**”)—which considered the applications and ruled that they should be referred to the Independent Review Process (“**IRP**”) Panel, given the importance of the issues “to the global Internet Community and [Afilias].”²

Failing to prevail on their motions to participate before Mr. Donahey, VeriSign and NDC (by way of ICANN) seek a “do-over” before yet another Procedures Officer, who could

¹ Letter from J. LeVee (Counsel for ICANN) to ICDR (8 Mar. 2019), p. 2.

² Declaration of the Procedures Officer (28 Feb. 2019), p. 38.

well reach the same conclusion as Mr. Donahey; presumably prompting a request by ICANN to the ICDR to appoint yet a third Procedures Officer. Granting ICANN's request would undermine the authority of the ICDR and set a disastrous precedent for future arbitrations. Put simply, the ICDR cannot appoint a new Procedures Officer (or, for that matter, a new arbitrator) simply because a party disagrees with the ruling of the one originally appointed by the ICDR.

Mr. Donahey properly performed his duties as a Procedures Officer: hearings were timely held, briefing was requested and reviewed, and a declaration was duly rendered. Mr. Donahey also carefully reviewed all of the materials provided by the parties, and ICANN's suggestion that he somehow went off on a research frolic is inappropriate. It is precisely because Mr. Donahey took his mandate seriously and because he recognized the seriousness of the situation that he reached the decision that he did—one in which he determined that he does not have the jurisdiction to resolve the issues presented to him.

Rule 7 states that, “[e]xcept as otherwise expressly stated herein, requests for ... participation as an *amicus* are committed to the **reasonable discretion** of the PROCEDURES OFFICER.”³ ICANN identifies no express language in Rule 7 that prevented Mr. Donahey from conducting a detailed examination of what he correctly deems to be an issue of “importance to the global Internet community.”⁴ Indeed, where—as here—there is no Standing Panel in place, the Interim Supplementary Procedures defines a Procedures Officer as “the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to the appointment of panelists for consolidation (ICDR Rules Article 8).”⁵ ICDR Arbitration Rule 8, in turn, specifically provides that the consolidation arbitrator “may take into account all relevant circumstances” in making his or her determination.⁶

To summarize the lengthy briefing that was submitted to Mr. Donahey, Afiliis challenged the legitimacy of the specific provisions of Rule 7 of the Interim Supplementary Procedures that were relied upon by VeriSign and NDC in their *amicus curiae* requests, given the circumstances of their drafting and adoption. Specifically, Afiliis demonstrated that the provisions at issue were slipped into the Interim Supplementary Procedures at the 11th hour at the behest of VeriSign and in violation of ICANN's rule-making procedures, Articles of Incorporation, and Bylaws. In response, ICANN argued that Mr. Donahey lacked

³ Interim Supplementary Procedures for ICANN Independent Review Process (adopted 25 Oct. 2018), Rule 7 (at p. 8) (emphasis added).

⁴ Declaration of the Procedures Officer (28 Feb. 2019), p. 38.

⁵ Interim Supplementary Procedures for ICANN Independent Review Process (adopted 25 Oct. 2018), p. 3.

⁶ ICDR International Arbitration Rules, Article 8(3).

jurisdiction to consider this issue and that Afilias would need to invoke an ICANN accountability mechanism to challenge the legitimacy of any of the Interim Supplementary Procedures:

The Procedures Officer is not authorized by Rule 7, or any other provision of the Interim Supplemental Procedures, to consider or decide a claim seeking to invalidate the Interim Supplementary Procedures. ***ICANN has accountability mechanisms that Afilias could use to challenge the validity of the Interim Supplementary Procedures....***⁷

ICANN's counsel argued to similar effect at the 21 February 2019 hearing:

[T]he matter or the challenge to the Interim Supplementary Procedures that Afilias is mounting ***should be properly referred to an IRP Panel***, not the Procedures Officer.⁸

As we explained during the 21 February 2019 hearing, Afilias planned to do exactly that. Having discovered evidence of malfeasance in the drafting and adoption of the Interim Supplementary Procedures in preparing our response to VeriSign's and NDC's requests, Afilias promptly wrote to the ICANN Board in late December 2018 to inform the Directors of the evidence it had unearthed. Following the initial 4 January 2019 hearing before Mr. Donahey, on 9 January 2019 Afilias informed counsel for ICANN that it planned to amend its Request for IRP. In response to Mr. LeVee's question about the substance of Afilias' intended amendments, we advised ICANN on 10 January 2019 that, in part, Afilias would be amending its IRP Request "based on matters that arise from the legislative history briefing and Mr. Donahey's decision concerning these matters."⁹ Afilias reiterated its intent to refer this issue to the IRP Panel in its Sur-Reply:

As explained in Afilias' Opposition and herein, the workings of the IRP-IOT were obscured from public view and Afilias was unaware of the chicanery that led to the improper 11th hour amendment of Rule 7's *amicus curiae* provisions until

⁷ ICANN's Reply to Afilias' Response to the Requests of VeriSign and NDC to Participate as *Amicus Curiae* (5 Feb. 2019), ¶ 3 (emphasis added).

⁸ Hearing with Procedures Officer (21 Feb. 2019), Audio Recording, 2:31 – 2:34 (approximate) (emphasis added). Counsel for NDC expressed the same opinion, claiming that Afilias' concerns about the Interim Supplementary Procedures should be "***addressed to an IRP Panel, not to you*** [Mr. Donahey]." *Id.*, 1:59 – 2:00 (approximate) (emphasis added).

⁹ Email from A. de Gramont (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (10 Jan. 2019).

it began work on its opposition to the Requests. This led Afilias to write to the Board on 21 December 2018, roughly one week after the Requests were filed, after the date by which Afilias could formally request Reconsideration under the Bylaws. Accordingly, Afilias will be amending its IRP Request here to add claims that the Board’s adoption of the Interim Procedures breached its Bylaws and, by raising Afilias’ costs associated with this IRP, has damaged Afilias.¹⁰

As ICANN, Afilias, and the proposed *amici* have argued, the IRP Panel is the right forum to adjudicate these issues. The Interim Supplementary Procedures explicitly grant the IRP Panel jurisdiction to resolve any “Disputes,” which include claims that the Interim Supplementary Procedures violate ICANN’s Bylaws,¹¹ and the scope of the participation of any *amicus curiae* in an IRP.¹² To the extent that the Interim Supplementary Procedures are silent as to the precise scope of the IRP Panel’s jurisdiction in this regard, ICDR Rule 19(1) clarifies that the IRP Panel “shall have the power to rule on its own jurisdiction.” ICDR Rule 19(4) further clarifies that “[i]ssues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator from proceeding with administration and *shall be referred to the tribunal for determination once constituted.*”¹³

And yet—having argued that Mr. Donahey lacked jurisdiction to invalidate the contested language in Rule 7—ICANN also maintains that Mr. Donahey was nonetheless required to grant the *amicus* applications under that contested language. In other words, according to ICANN, under the contested language the Procedures Officer only has jurisdiction to grant the applications—not to deny or even to refer them to the IRP Panel. The argument is as self-serving as it is absurd and Mr. Donahey properly rejected it. Especially given the importance and novelty of the issues presented by the *amicus* petitions, Mr. Donahey acted prudently and well within his discretion in referring the applications to the IRP Panel.

¹⁰ Afilias Domains No. 3 Limited’s Sur-Reply to VeriSign, Inc.’s and Nu Dotco LLC’s Requests to Participate as *Amicus Curiae* in Independent Review Process (12 Feb. 2019), ¶ 29, note 52.

¹¹ Interim Supplementary Procedures for ICANN Independent Review Process (adopted 25 Oct. 2018), p. 2 (defining a “Dispute” as a claim that ICANN “violated [its] Articles of Incorporation or Bylaws”).

¹² *Id.*, p. 10 (“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 limits, and other procedural rules as the IRP PANEL may specify in its discretion.*”) (footnote omitted) (emphasis added).

¹³ ICDR International Arbitration Rules, Rule 19 (1 June 2014) (emphasis added).

There is simply no basis on which the ICDR could appoint a new Procedures Officer to re-hear the arguments of ICANN, VeriSign, and NDC, which were thoroughly considered and rejected by Mr. Donahey. In the final analysis, the only basis for ICANN's assertion that Mr. Donahey did "not perform the responsibilities of a Procedures Officer" is that he did not grant the relief that ICANN and the proposed *amici* requested—instead determining that, under the circumstances, the IRP Panel should rule on the applications.

Finally, we note that under the ICDR Arbitration Rules, orders, decisions, and rulings on questions of procedure are always subject to revision by the tribunal.¹⁴ Moreover, Afiliat has no objection if ICANN wants to submit a request for interpretation or correction to Mr. Donahey (as a party may do with respect to an award under ICDR Arbitration Rule 33), subject to Afiliat's right to respond to any such request. But again, there is simply no basis for the ICDR to replace Mr. Donahey with a new Procedures Officer and allow ICANN, VeriSign, and NDC a second bite at the apple—especially where, under Mr. Donahey's ruling, they will have the opportunity to present their arguments to the IRP Panel for resolution.

Afiliat therefore requests that the ICDR deny ICANN's request and allow the IRP Panel to resolve the matter. ICANN cannot be allowed to circumvent both the ICDR Rules and the authority of the IRP Panel.

Sincerely,



Arif Hyder Ali
Counsel for Claimant

cc: Counsel for ICANN

¹⁴ See ICDR International Arbitration Rules, Rule 29 ("Awards, Orders, Decisions and Rulings"). Similarly, an interim or partial award can always be modified in the final award. Mr. Donahey's referral of the applications to the IRP Panel is fully consistent with that principle.