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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

AFILIAS' REBUTTAL TO ICANN'S TIME-BAR DEFENSE ON THE RULE 7 CLAIM

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3 December 2019

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1. ICANN's "Response to Afilias' Post-Hearing Arguments Regarding Time-Bar Issues" ("**ICANN's Response**" or the "**Response**") offers arguments that are frivolous and/or based on multiple and serious misrepresentations of the record before this Panel. We address each argument in turn.[1]

2. ***First***, ICANN asserts that Afilias has "attempt[ed] to reformulate its claim" and that the Panel should disregard any "alleged violation" that—according to ICANN—was not "pled" by Afilias prior to its Post-Hearing Brief.[2] At the outset, we observe that ICANN specifically requested leave to submit a Response limited to its time-bar defense—and that this Panel specifically ordered this briefing to be so limited.[3] Nonetheless, several of ICANN's arguments based on Afilias' supposedly "reformulate[d]" claims involve IOT issues rather than time-bar issues. Given that ICANN has made these arguments in its Response, we will address them. They fare no better than ICANN's other flawed and misleading arguments.

3. Thus, as it has done before, ICANN begins its Response by trying to recast Afilias' Rule 7 claim as limited only to the conduct of the IOT—asserting (falsely) that Afilias never alleged that the Rule 7 violations were carried out "with the knowledge and assistance of ICANN personnel" prior to submitting its Post-Hearing Brief.[4] In fact, the language quoted by ICANN—"with the knowledge and assistance of ICANN personnel"—***comes directly from Afilias' Amended IRP Request***. In paragraph 84 of the Amended IRP Request (*i.e.*, the first paragraph of the Section addressing Afilias' Rule 7 claim), Afilias states:

> As described more fully in Afilias' briefing to the Procedures Officer appointed by the ICDR for this IRP, VeriSign exploited its leadership position on the [IOT] committee that drafted the Interim Procedures to ensure that the Interim Procedures contained provisions that gave it (and NDC, which VeriSign controls in all relevant respects), an absolute right to participate in this IRP. ***Moreover, Verisign did so with the knowledge and assistance of ICANN personnel***.[5]

Indeed, as stated in the Amended IRP Request, one of ICANN's many violations of process in adding the *amicus* provisions to Rule 7 is that the IOT "wrongly included ICANN's internal and external counsel in quorum counts" at meetings where decisions on revisions to Rule 7 were made[6]—meaning that ICANN staff members were necessarily involved in the preparation of Rule 7. Furthermore, in its submissions to the Procedures Officer (which, as indicated, Afilias specifically incorporated in its Amended IRP Request), Afilias set forth in detail the extent to

which ICANN staff members—in particular, Ms. Eisner—were involved in the eleventh-hour revisions to Rule 7.[7] Afilias also explained why ICANN's willingness to violate its own internal rules and processes for the specific purpose of benefitting Verisign, the industry monopolist, constituted further violations of the Bylaws:

> ICANN's efforts to protect a privileged insider like VeriSign in manipulating the rulemaking process for its own benefit makes a mockery of the Core Values and Commitments by which ICANN is *required* to act—such as employing 'open, transparent and bottom-up, multistakeholder policy development processes' and making decisions 'by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for special or disparate treatment.'[8]

The assertion that Afilias never alleged involvement by ICANN staff in the facts underlying its Rule 7 claim is simply false. It is also irrelevant to ICANN's time-bar defense.

4. Similarly, ICANN asserts that prior to Afilias' Post-Hearing Brief, Afilias never claimed that "ICANN staff violated the Bylaws by purportedly drafting an incorrect statement regarding the principles applied by the IRP-IOT, which the Board adopted as the preamble to its resolution approving the Interim Supplementary Procedures."[9] That assertion is also false. In Afilias' briefing to the Procedures Officer—under the heading "**ICANN's Board Adopted Rule 7 Based on Misrepresentations and Material Omissions**"—Afilias stated that "[w]hen the draft Interim Procedures were presented to the ICANN Board for adoption, the Board was not fully informed about the process by which Rule 7 had been most recently amended. Specifically, ***ICANN staff prepared a set of Rationales for the Board***…."[10] Afilias then quoted the preamble that appears at the beginning of the Interim Procedures, and explained why the representations contained therein were false.[11] Here, too, ICANN's assertion that Afilias never raised this argument prior to its Post-Hearing Brief is a misrepresentation of the record before this Panel. It is also irrelevant to the time-bar issue.

5. ICANN also asserts that Afilias never argued that ICANN's continued adherence to the *amicus* provisions in Rule 7 constitutes a violation of the Bylaws prior to its Post-Hearing Brief.[12] Contrary to ICANN's mischaracterization of the claim in its Response, Afilias does not claim merely that the Board failed to take any action in response to Afilias' 21 December 2018 letter.[13] Rather, the claim is that although the Board may have been duped when it originally approved the Interim Procedures, ICANN has continued to adhere to Rule 7 notwithstanding the facts

now available to it. Afilias has clearly and specifically alleged that the actions and inactions by the ICANN Board and ICANN Staff with respect to the *amicus* provisions of Rule 7 constitute a continuing course of conduct (which includes actions and failures to act) that violate the Bylaws in numerous respects. As stated in Afilias' Amended IRP Request with respect to the Rule 7 claim:

> Moreover, ICANN's effectuation of the rule changes in this manner for the benefit of VeriSign is part of a course of conduct dating back to at least August 2016, when ICANN learned of but concealed from the public the terms of the DAA ..., and falsely promised Afilias that it would investigate and consider Afilias' complaints. Since that time, ***ICANN has continually violated its commitments and core values*** of transparency, non-discrimination, promotion of competition, and decision-making through the consistent, neutral, objective, and fair application of document[ed] policies – all for the purpose of assisting Verisign's efforts to obtain the rights in .WEB for itself.[14]

As Afilias' counsel stated at the Phase I hearing before this Panel:

> What we did do, the minute we found out about this information that was produced about what happened during October 2018 is that we wrote to the Board and we detailed what we learned. We sent that letter on December 21, 2018. We asked the Board to investigate, and they have never responded to that letter. They haven't done anything. So the only thing we can do is bring this claim in the IRP.[15]

6. Thus, ICANN's assertions to this Panel that the allegations discussed above were not made by Afilias prior to its Post-Hearing Brief are based entirely on misrepresentations by ICANN to this Panel.

7. ***Second***, having tried to mislead the Panel concerning Afilias' actual Rule 7 claim, ICANN tries to restate the claim to make it more susceptible to ICANN's time-bar defense. According to ICANN, Afilias' claim is that "as a result of alleged misconduct by the IRP-IOT during the drafting process, the Board purportedly violated the Bylaws by approving Rule 7."[16] ICANN further asserts that the "material effect of the Board's adoption of Rule 7 was that Rule 7 would apply to future IRPs…." Therefore, according to ICANN, Afilias was aware of the "material effect" of the violations as soon as the Board approved Rule 7 on 25 October 2018.[17]

8. ICANN's effort to recast Afilias' actual claim is disingenuous at best. Afilias has never claimed that the *amicus* provisions of Rule 7, taken by themselves, violate the Bylaws.[18] Rather, ICANN Staff violated the Bylaws by assisting Verisign to rewrite the *amicus* provisions to provide a tailor-made "mandatory *amicus*" category for the special benefit of Verisign and NDC—at the eleventh hour, in secrecy, and without any of the required protections for

ICANN rulemaking (such as requiring a public comment period for material rule changes)—and by then misrepresenting to the ICANN Board that no material changes had been made and all necessary procedures had been followed. The ICANN Board further violated the Bylaws later, when it learned of the facts by which the *amicus* provisions were added, and did nothing in response. The "material effect" of the actions and inactions at issue is that through the violation of fundamental Commitments and Core Values stated in its Bylaws, ICANN has rigged this IRP so that Verisign and NDC can claim the status of "mandatory *amici*"—a status that would not even exist but for ICANN's violations of the Bylaws. Afilias had no reason to know that the *amicus* rules were secretly rigged for the benefit of Verisign and NDC—or of the misrepresentations that were made to the ICANN Board and the ICANN community (which intentionally concealed the rigging of the rules)—until Afilias began examining the history underlying the rule changes on 5 December 2018 in response to Verisign's and NDC's requests to appear as *amici*. Moreover, ICANN, at that point, had not completed its production of key documents from the rule-making "process" to the public—a process that ICANN continued into May 2019, ***after Afilias had submitted its Amended IRP Notice***. ICANN's assertion that Afilias knew the "material effect" of the violations at issue on the date that ICANN approved the Interim Procedures again misrepresents Afilias' actual claim and the record facts before this Panel.

9. ***Third,*** ICANN's assertion that Afilias "knew or should have known most of [the] facts" underlying its Rule 7 claim at the time the Board approved the Interim Procedures is equally frivolous.[19] The notion that Afilias should have immediately "examin[ed] the publicly available transcripts of the IRP-IOT meetings and its correspondence"—*i.e.*, that a claimant has the obligation to study the rule-making history of every rule change that ICANN makes to look for potential violations, lest it lose its claim when it later learns it has been materially affected by any such violations—is absurd on its face. Moreover, Afilias has repeatedly demonstrated—and ICANN does not dispute—that ICANN only made key documents concerning the drafting history available beginning in January 2019 and continuing through May 2019. Afilias had no reason to know the basis for or the effect of the rules revision—*i.e.*, that ICANN had violated its rule-making processes and Bylaws to create a bespoke right of "mandatory *amicus*" participation for Verisign and NDC—because ICANN affirmatively concealed the facts through affirmative misrepresentations (which were published

on the face of the Rules and repeated in the Board's Rationales for adopting them) and the failure to provide material documents to the public on a timely basis.[20] For the Panel to adopt ICANN's argument would incentivize ICANN Staff to do exactly what it did here: to act in secrecy, conceal its actions through misrepresentations, and withhold relevant documents in the hope that would-be claimants will not discover the violations, or realize their material effect, until after the 120-day limitations period has elapsed. It would also effectively turn the 120-day limitations period into a statute of repose (which is separately provided for by Rule 4 of the Interim Procedures)—in which the claim is extinguished regardless of when a claimant becomes aware of the material effect of the violation.[21]

10. ***Fourth***, although given the foregoing points, Afilias does not believe that the Panel will need to reach our equitable estoppel argument—as there is no basis for concluding that Afilias had reason to know of the material effect of the violations at issue prior to December 2018—we offer a few brief observations. ICANN does not dispute that on 9 January, 2019, Afilias advised ICANN that ***"[b]ased on information we have learned through ICANN's 18 December [2019] document production, we intend to amend Afilias' IRP Request***…. Our view is that it would make sense to wait until after Mr. Donahey's ruling on whether the proposed *amici* can participate in this case before agreeing to a schedule" by which Afilias would submit its Amended Request and ICANN would respond.[22] Afilias added that "[i]t is also possible that Afilias will amend its IRP Request based on matters that arise from … Mr. Donahey's decision from these matters"[23]—which Afilias in fact did. ICANN agreed.[24] After this correspondence, at the hearing before the Procedures Officer on 21 February 2019, ICANN's counsel specifically argued that the Procedures Officer should not consider the process by which the *amicus* provisions were added to Rule 7—***because Afilias could challenge that process in an IRP***. ICANN's counsel told Mr. Donahey:

> If Afilias wants to challenge the process by which [the] Interim Supplementary Procedures were drafted and adopted, there are ICANN Accountability Mechanisms available for it to do so…. ***Afilias could also pursue an IRP challenging the Interim Supplementary Procedures if it could establish standing as a claimant, and that's exactly what Afilias plans to do***.[25]

Equitable estoppel is a both a general principal of international law and a well-established principle of California law.[26] Even if ICANN had a legitimate time-bar defense (and it does not), ICANN would be estopped from raising it.[27]

11. For all of the foregoing reasons, and those stated in Afilias' prior submissions, the Panel should reject ICANN's time-bar defense to Afilias' Rule 7 claim, and grant the other relief requested in Afilias' Post-Hearing Brief.

Respectfully submitted,

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ENDNOTES

[1] ICANN continues to refuse to engage on the merits of the claims raised by Afilias in this IRP. Faced with overwhelming evidence that the IOT violated its own working procedures, violated its representations to the public, and then lied about it to the Board so that a rule allowing a Verisign to participate in this IRP could be passed, ICANN merely shrugs its shoulders at what it calls the IOT's "technical difficulties," disclaims any responsibility for them, and falsely accuses Afilias of not making its objections known sooner. This is a severe distortion of the record and prefigures ICANN's defense to the other claims made by Afilias. Hiding behind rules that ICANN claims that it may interpret to its best advantage, ICANN refuses to take responsibility for the process it created, the decisions it made, and its refusal to enforce the rules to ensure a fair process. This is than antithesis of the "accountability mechanism" that the IRP is supposed to provide.

[2] Response to Afilias' Post-Hearing Arguments Regarding Time-Bar Issues (27 Nov. 2019) ("**ICANN's Response**"), ¶¶ 3-4.

[3] We further note that Afilias requested leave to respond to ICANN's new arguments concerning the IOT in its post-hearing brief; that ICANN opposed our request as being unrelated to the time-bar issue; and that the Panel denied our request on that basis. Email from A. de Gramont to the Panel (21 Nov. 2019); Email from S. Smith to the Panel (21 Nov. 2019); Email from the Panel to Parties (22 Nov. 2019).

[4] ICANN's Response, ¶ 3 (citing Afilias' Post-Phase I Hearing Brief (15 Nov. 2019) ("**Afilias' Post-Hearing Brief**"), ¶ 3). As the Panel no doubt understands at this point, ICANN hopes to mislead the Panel into believing that the Rule 7 claim does not include ICANN Staff or the ICANN Board because ICANN also argues that actions or inactions by the IOT cannot be reviewed in an IRP—an argument that is also incorrect, as demonstrated in our Post-Hearing Brief, ¶¶ 2-9.

[5] Amended Request by Afilias Domains No. 3 Limited for Independent Review (21 Mar. 2019) ("**Afilias' Amended IRP Request**"), ¶ 84 (emphasis added).

[6] *Id*., ¶ 86.

[7] *See* Afilias' Response to Proposed Amici's Requests to Participate (28 Jan. 2019), ¶¶ 39-41, 47, 55; Afilias' Sur-Reply to Verisign's and NDC's Requests to Participate as *Amicus Curiae* in Independent Review Process (12 Feb. 2019) ("**Afilias' Sur-Reply**"), ¶¶ 20, 35.

[8] Afilias' Sur-Reply, ¶ 3 (quoting Bylaws, **C-1**, Art. 4, Sec. 4.3(a)(ii)); *see also* Afilias' Amended IRP Request, ¶ 88.

[9] ICANN's Response, ¶ 3 (citing Afilias' Post-Hearing Brief, ¶¶ 4, 11).

[10] Afilias' Sur-Reply, ¶ 21 (emphasis added).

[11] *Id*., ¶¶ 22-25.

[12] ICANN's Response, ¶ 3 (citing Afilias' Post-Hearing Brief, ¶¶ 4, 7, and 5).

[13] *See id*.

[14] Afilias' Amended IRP Request, ¶ 88 (emphasis added). Moreover, notwithstanding ICANN's assertion to the contrary, ICANN's counsel specifically made this argument before the Panel at the Phase I hearing. Transcript of Phase I Hearing (2 Oct. 2019), 10:18-11:1 (Mr. Steven Smith).

[15] Transcript of Phase I Hearing (2 Oct. 2019), 103:5-10 (Mr. Ethan Litwin).

[16] ICANN's Response, ¶ 5.

[17] *Id*.

[18] To be clear, it is not Afilias' position that the *amicus* provisions by themselves violate the norms of international arbitration. Rather, it is ICANN's interpretation of the provisions to provide for more than written briefings that is inconsistent with the norms of international arbitration, as well as the text of Rule 7 itself. Similarly, the notion of appointing a Procedures Officer who has no discretion but to approve certain types of *amici* applications is strange, to say the least.

[19] *See* ICANN's Response, ¶ 8.

[20] ICANN's other assertions on this point are also frivolous. As stated above, the *amicus* provisions as written do not necessarily fall outside the norms of international arbitration. Rather, ICANN's position that they provide for participation beyond written briefing does so. *See* ICANN's Response, ¶ 8(b). Similarly, ICANN asserts that it was "public knowledge that the IRP-IOT did not hold a second public comment period." *Id*., ¶ 8(c). But a second public comment period was only required because the *amicus* provisions had been materially changed—a fact that ICANN Staff concealed through their affirmative misrepresentations on that point. Similarly, even assuming *arguendo* that it was "public knowledge that the IRP-IOT had been counting an ICANN liaison toward its quorum requirement since at least June 2017" (*id*., ¶ 8(a)), Afilias had no reason to know that—absent the ICANN liaison—the IOT did not make its quorum requirements for the meetings at issue. More fundamentally, it is not the quorum violations *per se* that make the *amicus* obligations problematic. Again, the problem is that ICANN and its staff were willing to violate their rulemaking procedures—and ultimately the Commitments and Core Principles of the Bylaws—to change the rules, secretly and at the eleventh hour, to benefit Verisign and NDC in this IRP.

[21] In addition to the 120-day limitations period, Rule 4 effectively provides a one-year statute of repose: "A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the dispute; provided, however, that a statement of DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction." Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (adopted October 25, 2018), **[Ex. VRSN-1]**, Sec. 4 (at p. 5).

[22] Email from A. de Gramont to J. LeVee et al. (9 Jan. 2019), **[Ex. C-86]**.

[23] Email from A. de Gramont to J. LeVee et al. (10 Jan. 2019), **[Ex. C-87]**.

[24] *See* Email from J. LeVee to A. de Gramont (10 Jan. 2019), **[Ex. C-88]**.

[25] Unofficial Transcript of Hearing with Procedures Officer (21 Feb. 2019), 6:24-7:2, 7:11-14 (emphasis added).

[26] "[E]stoppel is a recognized general principle of law that has been applied by many international tribunals. Of essence to the principal of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party." *Canfor Corp. et al. v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal (7 Sep. 2005), **[Ex. CA-12]**, ¶ 168. In *Feldman v. Mexico*, the tribunal specifically recognized that "formal and authorized" behavior could "estop the Respondent[ ] from presenting a regular limitation defense." *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 Dec. 2002), **[Ex. CA-13]**, ¶ 354. Similarly, the California Supreme Court has recognized that the doctrine of equitable estoppel can prevent a defendant from asserting a time-bar defense: "Equitable estoppel … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action ***because his conduct has induced another into forbearing suit within the applicable limitations period***." *Lantzy v. Centex Homes*, 73 P.3d 517, 532-33 (Cal. 2003), *as modified* (Aug. 27, 2003), **[Ex. CA-14]** (emphasis added). Thus, even assuming *arguendo* that the 180-day limitations period could somehow be deemed to have commenced on

the date that the ICANN Board approved the Interim Procedures (even though the violations through which the *amicus* provisions were added were concealed from the Board at that time), ICANN is equitably estopped from raising the time-bar defense by its conduct—including *agreeing* that Afilias could add the claim to its Amended IRP Request after the Procedures Officer issued his Declaration, and arguing to the Procedures Officer that he should not rule on Afilias' process-related claims because Afilias could assert them in an IRP.

27 Finally, we note that ICANN has asserted that Afilias failed to provide a detailed response to ICANN's time-bar defense in its Phase I Supplemental Brief. In fact, ICANN—while generally asserting in its Response to Amended Request for Independent Review Process that "all" of Afilias' claims are time-barred—did not mention the Rule 7 claim therein (*see id*., ¶¶ 73-76), and only articulated the purported "basis" for its time-bar argument with respect to the Rule 7 claim in its Phase I Supplemental Brief and its recent Response.