

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 Intervenors.

ICDR CASE NO: 01-18-0004-2702

**REQUEST BY NU DOTCO, LLC TO PARTICIPATE AS
AMICUS CURIAE IN INDEPENDENT REVIEW PROCESS**

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Nu Dotco, LLC (“NDC”) hereby submits this Request to Participate as an *Amicus Curiae* in the Independent Review Process (“IRP”) initiated by claimant Afilias Domains No. 3 Limited (“Afilias”) against the Internet Corporation for Assigned Names and Numbers (“ICANN”) on November 14, 2018.

I. INTRODUCTION

1. NDC was the winner of a public auction conducted by ICANN for the right to be the registry operator for the .WEB generic top-level domain (“gTLD”). As the winner of the auction, NDC is entitled to be given the opportunity to enter into a Registry Agreement with ICANN for .WEB. As a result of extensive maneuvering by Afilias and other losers of the auction, including (a) court proceedings in which the .WEB public auction process was upheld, (b) an extensive investigation (likely precipitated by Afilias) in which the Antitrust Division of the U.S. Department of Justice considered the competitive impacts of a potential assignment of NDC’s right to operate .WEB to Verisign and took no action to prohibit the transaction; and (c) multiple and seriatim objections and false accusations regarding NDC’s application, there is still no .WEB Registry Agreement more than two years after the auction. Individuals and entities that desire to use domain names in the .WEB gTLD are still unable to do so.

2. Afilias requests in this IRP an order that, among other things, would require ICANN to disqualify NDC’s application for .WEB and award the .WEB gTLD to Afilias, even though NDC won the auction and Afilias did not. NDC obviously has a strong interest in protecting its rights in this IRP, and it would be severely and unjustly prejudiced if it is unable to defend its interests and its application in this proceeding.

3. The Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) (the “Supplementary Procedures”), expressly entitle NDC to participate in this IRP as an *amicus curiae*. The Supplementary Procedures expressly provide that any member of the “contention set” at issue in an IRP – here, the bidders in the auction for .WEB – “*shall* be permitted to participate as an *amicus* before the IRP Panel.” Supplementary Procedures, § 7 at p. 10 (emphasis added). The

Supplementary Procedures also specify that an entity must be permitted to participate as an *amicus* if the “briefing before the IRP Panel significantly refer to actions taken by” that entity. *Id.* NDC is entitled to participate in Afilias’ IRP under either or both provisions: NDC was a member of the .WEB contention set, and Afilias’ Request for Independent Review (the “Request”) extensively refers to NDC’s alleged actions, including its agreement with VeriSign, Inc. (“Verisign”).

4. NDC is not only entitled to participate in the Afilias IRP proceedings generally, but is also entitled to participate in any proceedings relating to Afilias’ request for “emergency” interim relief relating to .WEB. More specifically, Afilias is seeking interim relief from an Emergency Panelist, requesting an order temporarily enjoining ICANN from entering into the .WEB Registry Agreement with NDC. This relief, if granted, would significantly and adversely affect NDC, as NDC would be prevented from realizing the benefits to which it is currently entitled as a result of winning the public auction for .WEB. NDC therefore should be permitted to participate in the proceedings regarding interim relief to protect its rights and oppose the entry of an order that would cause it substantial injury. The Supplementary Procedures recognize that parties whose rights would be affected automatically have standing to participate in an IRP as an *amicus*, even if they have not lodged a dispute against ICANN. The same logic applies to requests for emergency stays or injunctions in connection with the IRP. It would be incredibly unfair, indeed, a violation of due process, for the Emergency Panelist to enter an order materially injuring NDC’s rights and economic interests without giving NDC a full and fair opportunity to be heard.

5. The Supplementary Procedures instruct that the IRP Panel should allow “broad participation of an *amicus curiae* as needed to further purposes of the IRP.” Supplementary Procedures at p. 10, fn. 4. Assuming NDC is permitted to participate in these proceedings as an *amicus*, as the Supplementary Procedures require, NDC intends and requests the opportunity to submit additional briefing explaining, among other things, (1) that NDC did nothing wrong – its application was not misleading and required no revisions – and there is absolutely no basis for

disqualifying NDC's application or denying NDC's ability to enter into a Registry Agreement for .WEB, and (2) that it is *Afilias*' application for .WEB that should be disqualified by reason of *Afilias*' blatant violations of "blackout rules" imposed by ICANN to prevent contention set members from colluding once the public auction has been scheduled, and thus *Afilias* has no standing to pursue its IRP.

II. NDC SHOULD BE ALLOWED TO PARTICIPATE AS AN *AMICUS* IN THE IRP.

6. The Supplementary Procedures provide that "[a]ny person, group, or entity that has a material interest relevant to the Dispute ... may participate as an *amicus curiae* before an IRP Panel." Supplementary Procedures, § 7 at p. 10. NDC has a clear "material interest" relevant to this IRP, as *Afilias* is asking the IRP Panel to set aside NDC's winning bid for the .WEB gTLD, disqualify NDC's application for .WEB, and award .WEB to *Afilias* instead.

7. The Supplementary Procedures also set forth certain categories of entities that automatically "shall be permitted to participate as an *amicus*" in an IRP. *Id.* NDC falls squarely into two of these categories.

8. First, "[i]f the IRP relates to an application arising out of ICANN's New gTLD Program, ... [an] entity that was part of a contention set for the string at issue in the IRP" "shall be permitted to participate as an *amicus*." *Id.* The use of the word "shall" in this rule indicates that it is mandatory – any such an entity *must* be allowed to participate. Here, *Afilias* admits that the IRP relates to NDC's and *Afilias*' applications for a new gTLD (namely, .WEB) as part of ICANN's New gTLD Program. Request ¶ 21. *Afilias* also admits that NDC was part of the "contention set" – *i.e.*, the applicants permitted by ICANN to bid – for the .WEB gTLD. Request ¶ 22. As a member of the .WEB contention set, NDC is automatically "deemed to have a material interest relevant to the Dispute." Supplementary Procedures, § 7 at p. 10.

9. Second, "[i]f the briefings before the IRP PANEL significantly refer to actions taken by" an entity that is not already a party to the IRP, then that entity "shall be permitted to participate as an *amicus*." *Id.* Here, *Afilias* refers extensively to NDC's actions throughout its request. There can be no dispute that the allegations about NDC are a "significant" part of

Afilias's briefing. Afilias' entire position is predicated on its argument that NDC's application was rendered false and misleading by NDC's subsequent agreement with Verisign.

Request ¶¶ 3, 47-59. On this additional and independent ground, NDC qualifies for participation in the Afilias IRP as an *amicus* party.

10. NDC must, therefore, be provided the opportunity to participate in this IRP. The Supplementary Procedures provide that “the ***IRP Panel shall lean in favor of allowing broad participation of an amicus curiae*** as needed to further the purposes of the IRP set forth in Section 4.3 of the ICANN Bylaws.” Supplementary Procedures § 7 at p. 10, n. 4 (emphasis added).

11. NDC's financial and legal interest in the outcome of this IRP cannot as effectively be vindicated by any other party, including ICANN. NDC can provide direct evidence of the harm it will suffer from further delay in the delegation of .WEB, which is relevant to the balance of the hardships element of Afilias's request for interim relief. NDC is also best situated to defend its application for .WEB, by providing evidence concerning its application for .WEB and explaining why those disclosures were accurate and did not need to be corrected or updated. If and when NDC is permitted to participate as an *amicus*, it plans to submit substantial briefing and evidence demonstrating, among other things, that NDC's disclosures in its application were accurate when they were made and remained accurate throughout the auction process. Declaration of Jose Ignacio Rasco in support of this Request (“Rasco Decl.”) ¶ 5. NDC understands that Verisign is submitting a similar request to participate as an *amicus*, and NDC believes Verisign should participate as an *amicus*, as well.

12. This IRP will benefit from NDC's participation. NDC has direct knowledge of Afilias' violation of ICANN's “blackout rules,” as it was NDC that was offered a material financial inducement by Afilias to forego a public auction within the Blackout Period. Rasco Decl. ¶¶ 9, 13-17 and Exhibits A-C. This violation requires disqualification of Afilias' bid for .WEB and, as such, divests Afilias of standing to bring this IRP.

III. NDC SHOULD BE ALLOWED TO PARTICIPATE AS AN *AMICUS* IN AFILIAS'S REQUEST FOR INTERIM RELIEF.

13. As discussed above, the Supplementary Procedures require that NDC must be given the opportunity to participate in this proceeding as an *amicus*, and that it should be allowed “broad” participation in the IRP, not limited only to certain aspects. Supplementary Procedures § 7 at p. 10 & fn. 4. For these provisions to have any meaning, they must be read to permit NDC’s participation in *all* phases of the IRP proceedings, including Afilias’ request for “emergency” interim relief.

14. In its Request for Emergency Panelist and Interim Measures of Protection (“Interim Request”), Afilias seeks, among other things, “a stay of all ICANN actions that further the delegation of the .WEB gTLD during the pendency of the IRP,” including ICANN’s intended execution of a Registry Agreement with NDC. Tellingly, Afilias only argues that ICANN would “suffer no harm” from a stay, but Afilias ignores the obvious, substantial harm NDC would suffer if the delegation of the .WEB gTLD to NDC is delayed. Just as NDC is a real party in interest to the underlying IRP, it is also a real party in interest to the Interim Request.

15. Given that the Supplementary Procedures confer automatic standing in IRPs to parties whose rights would be directly affected by the adjudication of the IRP, it follows that these rules also confer standing on parties whose rights would be directly affected by interim relief in aid of the IRP. When a party has automatic standing because its rights are threatened by an IRP, that party’s standing should extend not only to the underlying merits, but also to any procedural rulings that could have a material impact on that party’s interests. Accordingly, NDC should be permitted to respond substantively to Afilias’ Interim Request before any decision is made by the Emergency Panelist.

IV. CONCLUSION

16. For the reasons discussed herein, NDC has a material interest in this dispute and should be permitted to participate as *amicus curiae*, including but not limited to: (i) submitting briefs on all substantive issues considered by the Emergency Panelist or the IRP Panel, including Afilias’s Interim Request; (ii) submitting evidence relevant to the IRP and Afilias’s Interim

Request; (iii) access to all filings and evidence submitted in the IRP and Interim Request; and
(iv) full participation in any hearings before the Emergency Panelist or the IRP Panel.

Dated: December 11, 2018

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