INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

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

**NU DOTCO, LLC'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS REQUEST TO PARTICIPATE AS *AMICUS CURIAE***

Steven A. Marenberg
Charles E. Elder
IRELL & MANELLA LLP
1800 Ave. of the Stars, Suite 900
Los Angeles, California, 90067
Tel: (310) 277-1010

Counsel to Proposed *Amicus Curiae*
Nu Dotco, LLC

**TABLE OF CONTENTS**

Nu Dotco, LLC ("NDC") hereby submits its Supplemental Brief in support of its 12 November 2018 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").[1]

## I. INTRODUCTION

1. There is no genuine dispute that NDC should be permitted to participate in this IRP. ICANN has repeatedly agreed that NDC should participate in these proceedings as an *amicus*. Afilias, after unreasonably insisting for over a year that NDC should not be permitted to participate in the proceedings at all, recently reversed course by proposing that NDC participate **as a full party**, notwithstanding the fact that NDC has not, to date, enjoyed any of the rights and protections of a party to these proceedings.

2. Thus, a key question for the Panel is the **scope** of NDC's participation as an *amicus*. The Supplementary Procedures clearly answer that question, instructing the Panel to afford *amici* "broad participation" in the proceedings. Afilias' arguments that NDC's participation should be limited to narrow "friend of the court" briefing cannot be squared with the "broad participation" language of the rule.[2]

3. Allowing NDC broad participation as an *amicus* is consistent with the mandate in the ICANN Bylaws that the IRP rules must "ensure fundamental fairness and due process" and "[s]ecure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes." ICANN Bylaws, § 4.3(a)(viii), (n)(iv). Even if, hypothetically, the *amicus* provisions in Section 7 of the Supplementary Procedures had never been adopted, NDC still

[1] Terms not defined herein are used as in NDC's initial Request and its Reply. This Supplemental Brief will not restate in detail the previous briefing and evidence NDC previously submitted to the Procedures Officer, as the Panel has indicated (in Mr. Bienvenu's 9 September 2019 letter) that it would review those materials, which NDC incorporates by reference herein.

[2] No doubt realizing that the rule requires NDC's broad participation, Afilias attacks the rule itself even though it was Afilias' own representative who proposed that the ICANN Board pass the Supplementary Procedures, including the *amici* provisions about which Afilias now complains.

could not be excluded entirely from these proceedings, because NDC's rights are squarely at issue: Afilias seeks to deprive NDC of its rights to the .WEB gTLD. Preventing NDC from fully participating would ***not*** ensure fairness, due process, transparency, efficiency or just resolution.

4. This Panel would benefit from NDC's participation. Afilias' claim that NDC should have been disqualified from the .WEB auction is based on an (untrue) allegation that NDC experienced a change in control prior to the auction. Only NDC can offer competent, first-hand evidence to rebut that point. NDC also has direct knowledge of Afilias' own misconduct prior to the .WEB auction that would disqualify it from operating this gTLD in any event. Specifically, Afilias improperly tried to rig the public auction by offering to pay off NDC during the ICANN-imposed "blackout period" preceding the auction. This is a serious violation of the New gTLD Guidebook that should disqualify Afilias from the right to operate .WEB.

5. For the reasons set forth herein and in the other briefing now before the Panel, NDC respectfully submits that it should participate in all briefing and argument in this IRP, including in connection with Afilias' request for interim relief, and may submit evidence defending its own conduct and illustrating Afilias' own disqualifying misconduct.

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

### A. The Supplementary Procedures Unambiguously Require That NDC Must Be Allowed To Participate As An *Amicus Curiae*.

6. As explained in NDC's initial Request To Participate as *Amicus Curiae*, dated 12 November 2018 ("**NDC Request**"), Section 7 of the Supplementary Procedures confers automatic *amicus curiae* standing on all members of the contention set for the New gTLD at issue in an IRP. NDC was a member – in fact, the winning member – of the .WEB Contention Set, and thus it is entitled to participate as an *amicus*. At no point in the proceedings before the Procedures Officer did Afilias dispute this, and ICANN expressly agreed with NDC's Request.

7. In its Sur-Reply opposing NDC's *amicus* request dated 2 December 2019 ("**Afilias Sur-Reply**"), Afilias concedes that "VeriSign and NDC feature prominently in the matrix of underlying facts." Afilias Sur-Reply at ¶ 5. Based on this concession alone, NDC is entitled to participate as an *amicus* on the independent, alternative ground that Section 7 provides that a party "shall" be permitted to participate as an *amicus* if the IRP briefings "significantly refer to actions taken by" that party. Supplementary Procedures § 7 at p. 10.

8. Given the clear language of the *amicus* rules adopted by ICANN, Afilias chose to attack the validity of those rules. We address that attack below. (*Infra*, subpart C.) But the lack of any dispute about the interpretation of Section 7 is critically important: Absent Afilias' manufactured attack on the Supplementary Procedures, Afilias' opposition to NDC's *amicus* participation collapses, and NDC's Request **must** be granted.

### B. ICANN's Bylaws Require That IRP Procedures Must Ensure Due Process, And Due Process Requires NDC's Participation In These Proceedings.

9. ICANN's Bylaws require that IRP procedures must "ensure fundamental fairness and due process." ICANN Bylaws, § 4.3 (n)(iv). Furthermore, the Bylaws provide that one of the "Purposes of the IRP" is to secure the "efficient, consistent and just resolution of Disputes." *Id.*, § 4.3 (a)(vii). Afilias does not and cannot dispute this.

10. Nor can Afilias dispute that due process requires that "[p]arties whose rights are to be affected are entitled to be heard." *See* NDC's Reply To Afilias' Response to NDC's Request To Participate as *Amicus Curiae*, dated 2 May 2019 ("**NDC Reply**"), at ¶ 16, citing *Baldwin v. Hale*, 68 U.S. 223, 233 (1863); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Schafer v. Multiband Corp.*, No. 12-cv-13152, 2016 WL 1665153 at *6 (E.D. Mich. April 27, 2016) ("If an arbitrator renders a decision without allowing a party the opportunity to present pertinent and material evidence, the arbitration award lacks fundamental fairness. . ."); GARNER, BLACK'S LAW DICTIONARY (10th ed.) ("Due process": "includ[es] notice and the right to a fair hearing before a tribunal with the power to decide the case").

11. NDC's active participation is necessary to assist the Panel in securing the "just resolution" of this dispute, consistent with ICANN's Bylaws. For example, NDC has direct knowledge, and can present evidence, that Afilias violated the "blackout period" preceding the public auction for .WEB. Rasco Declaration, dated 10 December 2018, at ¶ 17 & Ex. C. If Afilias' blackout violation is a disqualifying event, then this IRP would be moot and Afilias lacks standing to pursue it.

12. In addition, if NDC is not permitted to fully participate as the real party in interest, any decision rendered by this Panel would be unenforceable, rendering these proceedings a complete waste of everyone's time. *See* NDC Reply at ¶ 16, citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349-50 (2011). Afilias also ignores this point in the Sur-Reply. In fact, Afilias relegated its responses to NDC's due process argument to a single footnote. *See* Afilias Sur-Reply at 7, n. 20. We address Afilias' responses in turn.

13. Afilias first argues that, under the Supplementary Procedures, NDC "could not" request to "intervene" in the IRP, because an IRP is an accountability mechanism, not a traditional lawsuit or arbitration, and NDC cannot intervene unless it is has "Claimant standing," *i.e.*, unless it claims that ICANN did something wrong. *Id*. But Afilias ignores the fact that, although the Supplementary Procedures limit intervention to the narrow class of "Claimants," those rules also provide for "broad" *amicus* participation by interested entities. The term "Claimant" in the IRP context is narrowly limited only to persons who have a claim **against ICANN**. However, an "*amicus curiae*" in the IRP context calls for broader participation than typically contemplated for *amici* in litigation or arbitration. The two sets of procedures go hand-in-hand and complement each other to ensure that affected rights-holders have a voice in proceedings to determine those rights.

14. Were the Panel to set aside the *amicus* rules in the Supplementary Procedures but leave in place the restrictive rules limiting intervention, as Afilias now urges, that result would foreclose any avenue that an interested party like NDC (or any other member of a gTLD contention set) might have to protect its rights and interests, including, in this case, the ability of

NDC to defend against Afilias' false allegations and protect its rightful status as the winner of the .WEB auction. Such a procedure would violate the fairness and due process requirements in ICANN's Bylaws. Afilias does not, because it cannot, explain how excluding NDC entirely from these proceedings could possibly comply with those requirements.

15. Afilias' position is akin to opposing a patentee's participation in reexamination proceedings before the U.S. Patent Trial and Appeals Board. Such a proceeding is ostensibly an "accountability mechanism" to hold a government agency to its own standards for granting patent rights. But patentees are still afforded notice and an opportunity to be heard regarding their patents. *See, e.g.*, 35 U.S.C. §§ 303-05 (patentee must be notified of decision to reexamine patent and participate in any reexamination); §§ 311-18 (patentee must be notified of petition for *inter partes* review and provided opportunity to participate in such review). Due process requires at least as much. It would certainly work manifest injustice to bar the patentee, whose rights are being adjudicated, from participation. Similarly, the Supplementary Procedures provide for real parties in interest, such the winning member of a contention set, to participate in IRPs. Supplementary Procedures § 7.

16. Afilias' next argument, that the *amicus* role in an IRP should be "restricted to the submission of 'friend of the court' briefs" (*id.*), also runs afoul of the due process requirement in ICANN's Bylaws. Traditionally, a "friend of the court" brief is filed by a non-party that does not have a direct legal or financial interest in the outcome of the proceeding. In an IRP, however, members of a contention set (like NDC here) likely will have such an interest in the outcome. Section 7 *amici* are therefore more analogous to interveners under Federal Rule of Civil Procedure 24 or indispensable parties under Federal Rule of Civil Procedure 19. Despite the nomenclature adopted by ICANN in Section 7, an *amicus curiae* as envisioned by ICANN for purposes of an IRP is simply not the same as a traditional *amicus*. *See* NDC Reply at ¶¶ 28, 47 (citing ICANN's Response to Procedures Officer's Questions Concerning the Drafting History of the Supplementary Procedures, dated 17 January 2019, at 8-21).

17. Recognizing the close analogy to intervention, Afilias argues that "neither NDC nor Verisign would be entitled to intervene as of right" because ICANN itself supposedly is aligned with NDC and/or Verisign and therefore can adequately represent NDC's interests. Afilias Sur-Reply at 7, n. 20. Not so. ICANN may not care one way or another whether NDC, Afilias, or some other entity obtains the rights to .WEB, but NDC has a deep and direct interest in the resolution. NDC should not be forced to stand on the sidelines and hope that ICANN protects its interests going forward. *See 100Reporters LLC v. United States Dep't of Justice*, 307 F.R.D. 269, 278 (D.D.C. 2014) (individual may intervene regardless of participation of an aligned party, as the individual "should have an opportunity to litigate the merits of his [own] interest"); *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 331 F.R.D. 5, 12 (D.D.C. 2019) (tribes and casinos may intervene in litigation regarding legality of government's regulation in part because of the "practical consequences" and difficulty in "reestablishing the status quo" if the government is compelled to act by litigant).

18. Moreover, the suggestion that NDC and ICANN have identical interests and incentives is simply wrong. ICANN has not always acted consistent with NDC's interests in this IRP. For example, ICANN has evidently agreed with Afilias that it would forego entering into a Registry Agreement with NDC. After NDC won the auction and other losing members of the Contention Set had exhausted their efforts to litigate the auction results (on the same grounds asserted by Afilias here), ICANN sent a final Registry Agreement to NDC on 14 June 2018. NDC signed and returned the Registry Agreement to ICANN that same day. However, ICANN still has not counter-signed it, evidently content to implement its own *de facto* stay of the .WEB delegation, which has directly injured NDC by preventing NDC from exploiting its rights.

19. Afilias' last argument regarding due process is that permitting NDC and Verisign to participate in a role akin to an intervener "would burden the parties with unnecessary costs and delay." Afilias Sur-Reply at 7, n. 20. Frankly, Afilias has done a fine job on its own of burdening ICANN, NDC and Verisign with unnecessary costs and delay. Afilias waited over two years after the .WEB auction to request an IRP. It has been ten months since Afilias filed its

IRP and nine months since NDC and Verisign formally requested *amicus* participation. This matter might have been finally adjudicated already, were it not for Afilias' unreasonable insistence, contrary to the clear rules duly adopted by ICANN, that NDC should not be permitted to appear as an *amicus*. It is only due to Afilias' position that NDC should be denied due process in violation of the Bylaws and Supplementary Procedures that the parties were forced to engage in the lengthy and costly process before the Procedures Officer – who ultimately wasted everyone's time and money by failing to do his one and only job and punting the *amicus* decision to the Panel.

20. In sum, none of Afilias' arguments adequately addresses the due process interests embodied in the ICANN Bylaws. Afilias envisions a process in which this Panel could order ICANN to disqualify NDC's application and set aside the auction results, thereby greatly injuring NDC's legal rights and economic interests, without giving NDC any meaningful ability to defend itself or protect those rights and interests. That cannot be a proper outcome. Due process – and the ICANN Bylaws – require NDC to be fully heard in this IRP.

### C. Afilias' Challenge To The Supplementary Procedures Has No Substantive Merit.

21. NDC had no involvement in the adoption of the Supplementary Procedures.[3] Apart from an interest in making certain that its legal and economic interests are not prejudiced in these proceedings, NDC otherwise has no direct interest in the internal politics of ICANN's rulemaking bodies. NDC has simply attempted to comply with the rules as written. Nonetheless, NDC observes that the record does not support Afilias' challenge to the adoption of the *amicus* rules.

22. In preparing its Reply to Afilias' arguments that the *amicus* rules were supposedly improper and should be disregarded, NDC noticed an important fact that Afilias had not

[3] NDC therefore defers to, and incorporates by reference, the arguments, evidence and authorities submitted by ICANN and Verisign on this point.

disclosed to the Procedures Officer: Afilias' own representative on the ICANN Board – its Chief Technology Officer, Ram Mohan, who also is a declarant in this IRP – seconded the resolution to adopt the Supplementary Procedures. *See* NDC Reply at ¶ 26 & Annex A (ICANN Public Board Meeting transcript 10/25/2018) at 25-26.

23. When a board member induces the board to take action, the board member cannot later complain that the action was improper. *City of Fairmont v. Fairmont General Hospital, Inc.*, 231 W.Va. 264, 269 (2013) ( board member "could not [challenge the board's actions] as he voted in favor of the very actions challenged"); *Suttons Bay Yacht Village Condominium Ass'n v. Board of Representatives Port Sutton Community*, No. 325327, 2016 WL 2942225, at *7 (Mich. Ct. App. May 19, 2016) ("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, 1996 WL 690064, at *5 (4th Cir. Dec. 3, 1996) (table opinion) ("principles of estoppel and acquiescence ordinarily would not permit them to challenge a transaction they supported fully"). Because Afilias' own officer urged the adoption of the Supplementary Procedures, including the *amicus* rules, Afilias cannot now argue that the ICANN Board acted improperly in adopting them.

24. When NDC made these points in the previous briefing, *see* NDC Reply at ¶ 27, Afilias' response (buried in a footnote, and which NDC has not previously had the opportunity to address) was to suggest that Mr. Mohan was "denied the full story" about the impending IRP and the fact that the new *amicus* rules would give Verisign and NDC a voice in those proceedings. Afilias Sur-Reply at 17, n. 49. This is nonsense. No one had better knowledge of Afilias' intent to initiate an IRP than Afilias itself, and Afilias' own executive sponsored the Supplementary Procedures containing the *amicus* provisions to which Afilias now objects. It was Afilias – not NDC or Verisign – that approved these rules with this particular IRP in mind.

25. From NDC's perspective, ICANN's deliberations and adoption of the Supplementary Procedures does not appear to have been improper in any sense. ICANN's rulemaking committee made a draft set of rules available for public comment. ICANN received

comments urging that parties affected by certain IRPs should be permitted to participate, and one comment expressly suggested "*amicus*" treatment for such parties. The committee considered those comments and revised the proposed rules to address them. Specifically, the committee concluded that persons who have a material interest relevant to the dispute in the IRP should be able to participate in the IRP in some capacity, either as an intervener or *amicus*. The committee necessarily had to implement rules that provided for such participation in order to comply with the mandate in the Bylaws that the IRP rules must ensure due process. The final version of these rules – i.e., the Supplementary Procedures – was then passed along to the ICANN Board, which unanimously adopted it. See NDC Reply at ¶ 28. ICANN's rulemaking process seems to have functioned as intended.

26. In its voluminous papers before the Procedures Officer, **not once did Afilias criticize the substance or wisdom of the *amicus* rules in the Supplementary Procedures, let alone argue that those rules fail to ensure due process as required by ICANN's Bylaws**. To the contrary, Afilias hyper-technically urges the Panel to set aside those rules and deprive NDC and Verisign of any right to participate in this process, which is inconsistent with ICANN's Bylaws requiring due process.

27. Afilias' arguments are transparently outcome-driven, focusing solely on what it thinks might result in its obtaining .WEB. Respectfully, the Panel should focus instead on whether the IRP rules adopted by ICANN are fair and protect due process, not on picking winners and losers as Afilias urges. What Afilias envisions would skew the playing field and result in an IRP process that violates ICANN's Bylaws.

28. Even if the Panel is persuaded that the Supplementary Procedures were improperly adopted for some reason, NDC still should not be prejudiced by such a ruling. NDC is not accused of any wrongdoing in connection with the adoption of the Supplementary Procedures. Afilias argued before the Procedures Officer that NDC should be vicariously estopped – an unprecedented concept invented by Afilias – from participating as an *amicus*.

Afilias Response at 38. As NDC explained in its Reply, that argument was wrong. NDC Reply at ¶¶ 33-40. Afilias did not address those rebuttal arguments in its Sur-Reply.

29. In sum, to exclude NDC from this proceeding would be improper and violate the fairness and due process requirements in the Bylaws. Regardless of how the Panel decides the issue whether the Supplementary Procedures are valid or invalid, NDC should not be excluded from these proceedings.

## III. THE SCOPE OF *AMICUS* PARTICIPATION MUST BE SUFFICIENTLY BROAD TO PROTECT NDC'S AND VERISIGN'S RIGHTS AND GIVE THE PANEL THE BENEFIT OF THEIR PERSPECTIVES AND EVIDENCE.

30. Afilias concedes that the IRP Panel may decide the scope of NDC's and Verisign's participation as an *amicus*. *See* Afilias Response at 56, n. 171 (the scope of *amicus* participation is subject to the "discretion of the IRP Panel").

31. Afilias argues that, because ICANN's Bylaws instruct the rulemaking committee to adopt IRP procedures consistent with "international arbitration norms," and because traditionally *amici* do not participate in hearings or give evidence, Section 7 should be interpreted to permit only limited participation by the *amici*. Afilias Sur-Reply at ¶¶ 32-33. This argument, however, ignores the clear guidance in Section 7 of the Supplementary Procedures that "the IRP Panel shall lean in favor of **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." Supplementary Procedures § 7, at 10, n. 4 (emphasis added). If the words "broad participation" mean anything, they must mean something more than the limited role urged by Afilias. At a minimum, the Panel has discretion to give *amici* broader participation rights than are typically seen in international arbitration. The specific rule set forth in Section 7 governs here, not the precedents cited by Afilias in which *amici* participation was limited in other contexts. ICANN's adoption of Section 7 reflects a policy decision to treat some parties that ordinarily could be interveners as *amici* instead, while still preserving the "broad participation" of such parties notwithstanding their *amici* status.

32. In any event, permitting broad participation by *amici* is not only consistent with ICANN's Bylaws, but international arbitration norms as well. Such norms are trending toward increased participation by interested non-parties in international arbitration. *See, e.g.*, Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules*, 35 J. INT'L ARBITRATION 173 (2018) (analysis of various arbitral institutions reflect a trend in favor of broad participation by interested third-parties at the discretion of arbitral tribunals). This is not surprising, as it is recognized that due process in international arbitrations permits, and may require, substantial participation by interested third parties. *See* S.I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?,* 31 VAND. J. TRANSNAT'L L. 915, 978-996 (1998) (discussing various bases for intervention and joinder as of right by interested parties).

33. Moreover, the expanding participation of non-parties in international arbitration in recent years serves as a recognition that the rights and interests of non-parties are increasingly at issue in international tribunals, as they are here. *See, e.g.*, J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 685-86 (2007). A blanket rule excluding interested non-parties is inconsistent with international arbitration's universal commitment to fairness and due process. AAA International Dispute Resolution Procedures, Art. 20.1 (parties must be given "a fair opportunity to present its case"); *see also* WIPO Arbitration Rules, Art. 37(b) (same); London Court of International Arbitrations, Art. 14.4 (same); United Nations UNCITRAL Ad Hoc Rules, Art. 15.2 (same); International Chamber of Commerce Arbitration Rules, Art. 22.4 (same). In recognition of the potential importance of non-parties, the following sets of arbitration rules all contain provisions allowing a tribunal to order joinder and/or consolidation even where a party to the existing arbitration has objected: the Singapore International Arbitration Centre Rules, the Hong Kong International Arbitration Centre Rules, the Australian

Centre for International Commercial Arbitration Rules, and the 2010 edition of the UNCITRAL rules. *See, e.g.* Smith, *supra*, at 176.[4]

34. Some arbitral institutions grant full discretion to the arbitral tribunal to order third party participation even where the third party is not bound by the governing arbitration clause. For example, Article 14 of the 2018 Vienna International Arbitral Centre Rules of Arbitration and Mediation permits the joinder of interested third parties to arbitration. The rule provides that "the joinder of a third party in an arbitration, as well as the manner of such joinder, shall be decided by the arbitral tribunal upon the request of a party or a third party after hearing all parties and the third party to be joined as well as after considering all relevant circumstances." Article 14 thus accords the tribunal broad authority to permit third parties to participate in proceedings, as well as to decide the extent and nature of such involvement. This is similar to the *amici* rules adopted by ICANN here.

35. Likewise, Article 4.2 of the Swiss Chambers' Arbitration Institution Rules provides that: "[w]here one or more third persons request to participate in arbitral proceedings already pending under these Rules or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances." One commentator has noted that this provision allows "parties who are not proper parties to the arbitration agreement to participate, ***such as in the form of an* amicus curiae**." Smith, *supra*, at 190 (emphasis added).

[4] International arbitration incorporates the legal traditions of different legal systems and is continually evolving. Indeed, *amicus* or third-party participation in investor-State arbitration is a relatively recent development, but one that tribunals and participants in arbitrations have increasingly embraced. For example, the arbitral tribunal in *Micula v. Romania* permitted the European Commission to participate as *amicus curiae*, not simply to file a written submission, but also to submit exhibits, access the parties' pleadings (subject to safeguards to protect confidential and privileged information), present witnesses, attend the hearing and participate in the argument. *See Ioan Micula v. Romania*, Final Award, ICSID Case No. ARB/05/20 (Dec. 11 2013, Lévy, Alexandrov, Abi-Saab) ¶¶ 36, 80.

36. Still further, Article 3 of Appendix III of the 2017 Arbitration Institute of the Stockholm Chamber of Commerce Rules, which permits third parties to make written submissions to the arbitration, contemplates that such third parties may be permitted to access the submissions and evidence filed in the arbitration. SCC Rules Appendix III, art. 3(6). Third parties may also be required to submit further details regarding their written submissions or to attend a hearing to be examined on such submissions. SCC Rules Appendix III, art. 3(7).

37. One tribunal recognized that participation by non-parties may be crucial to the arbitration itself where the "substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties" and implicate a "public interest in" the dispute. *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," UNCITRAL (15 Jan. 2001), at ¶¶ 49, 52-53. In addition, that tribunal noted the "broader argument" that "the … arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive." *Id*. at 49. In the years since *Methanex*, many scholars and commentators have argued in favor of increased transparency and public participations in international arbitration, and have encouraged increased participation of third parties in order to further those principles. *See, e.g.*, Eugenia Levine, Amicus Curiae *in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L LAW 200, 217-19 (2011); Alexis Mourre, *Are* Amici Curiae *the Proper Response to the Public's Concerns of Transparency in International Arbitration?* 5 LAW & PRAC. INT'L COURTS & TRIBUNALS 257 (2006); Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor-State Arbitration*, 15 ILSA J. INT'L & COMPARATIVE LAW 337 (2009).

38. Accordingly, there exists no daylight between the norms of international arbitration and the priorities of ICANN's Bylaws and Rules for IRP proceedings. In both instances, transparency, public accountability and principles of fundamental fairness and due process are driving priorities. These goals should guide the Panel's exercise of its discretion to allow broad participation by Verisign and NDC here.

## IV. NDC'S "BROAD PARTICIPATON" IN THIS IRP AS AN *AMICUS* SHOULD INCLUDE OPPOSING AFILIAS' PETITION FOR EMERGENCY RELIEF.

39. Section 7 of the Supplementary Procedures permits *amici* to participate in proceedings "before the IRP PANEL." There is no carve-out for proceedings involving the Panel's consideration of Afilias' Request for Interim Relief.[5] Despite this rule, and despite the fact that the Supplementary Procedures require that *amici* should be allowed "broad participation" in an IRP, Afilias argues that NDC and Verisign, if allowed to participate as *amici*, should not be permitted to brief, argue or present evidence in connection with Afilias' request for "emergency" interim relief. Not only is such a result impermissible under the language of Section 7 granting "broad participation" rights to *amici*, but excluding NDC from any proceedings, interim or otherwise, that may impact NDC's rights or implicate NDC's alleged conduct, including in connection with Afilias' request for emergency relief, is not only anomalous but impermissible.

40. In its Request for Emergency Panelist and Interim Measures of Protection ("Interim Request"), Afilias sought, 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. As a practical matter, ICANN has effectively granted Afilias this relief already, as it has either agreed or unilaterally decided not to execute the Registry Agreement that it sent to NDC (and NDC executed) over a year ago. This has harmed NDC by depriving it of the rights and benefits as the winner of the .WEB auction, and has also harmed the Internet community, as .WEB is still not available for use as a gTLD as a result of this self-imposed stay by ICANN.

41. In its Interim Request, Afilias asserts that ICANN would "suffer no harm" from a stay, which may or may not be true. But Afilias ignores the harm to NDC as a result of the delay

[5] Afilias had previously argued that, had its Request for Interim Relief been decided by a separate "EMERGENCY PANELIST" as defined in Section 1 of the Supplementary Procedures, that request would not be covered as part of the proceedings before the Panel. That argument was not only incorrect, for the reasons set forth in the prior briefing, it is now irrelevant insofar as this Panel will resolve Afilias' request for Interim Relief.

in the delegation of the .WEB gTLD. 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.

42. Afilias argues that Section 10 of the Supplementary Procedures only permits a "Party" to oppose a request for interim relief. *See* Afilias Sur-Reply at ¶ 38. Not so – this is an unwarranted construction of the rule. Specifically, the fact that the rule *permits* a Party to file an opposition to an interim request, does not mean that it excludes other briefing, particularly from *amici* affected by any requested interim order. Simply, nothing in that rule limits the discretion of the Panel to consider arguments of *amici*. Instead, the better view is that the rule must also be read along with the undisputed language of Section 7, which (1) requires the Panel to permit NDC to participate as an *amicus*, (2) instructs the Panel to permit "broad participation," and (3) gives the Panel the discretion to decide the scope of *amici* participation. Reading those two provisions together, the only reasonable interpretation is that the Panel may, and should, permit NDC to participate in the Interim Relief proceedings as well as the IRP generally.

## V. CONCLUSION

43. For the reasons discussed herein, NDC's application to participate in all phases of the IRP should be granted. Specifically, NDC should be permitted to participate in all briefing and argument in this IRP, including in connection with Afilias' request for interim relief, and may submit evidence defending its own conduct and proving Afilias' own disqualifying misconduct.

Dated: 27 September 2019

IRELL & MANELLA LLP
Steven A. Marenberg

By: */s/ Steven A. Marenberg*
Steven A. Marenberg
Attorneys for Proposed *Amicus Curiae*
Nu Dotco, LLC