

**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

**RESPONSE BY AFILIAS DOMAINS NO. 3 LIMITED TO
ICANN'S REQUEST FOR CORRECTIONS TO THE
DECLARATION OF THE PROCEDURES OFFICER**

28 March 2019

Arif H. Ali
Alexandre de Gramont
Morgan J. Feder
Rose Marie Wong
DECHERT LLP
1900 K Street NW
Washington, DC 20006
Tel. 202-261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
morgan.feder@dechert.com
rose.y.wong@dechert.com

Ethan E. Litwin
CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
Tel. 212-350-2737
elitwin@constantinecannon.com

Counsel for Claimant

1. Afilius Domains No. 3 Limited (“**Afilius**”) hereby requests that the Procedures Officer deny the Internet Corporation for Assigned Names and Numbers’ (“**ICANN**”) application to correct three statements from the Declaration of the Procedures Officer, dated 28 February 2019 (the “**Declaration**”).

2. Article 33 of the International Centre for Dispute Resolution’s Arbitration Rules (“**ICDR Rules**”) governs all corrections to “an award.”¹ ICANN, as a party to this matter, is limited to requesting that the Procedures Officer correct “any clerical, typographical, or computational errors.”² ICANN’s three proposed corrections, however, extend far beyond the scope of permitted “clerical or typographical” corrections. Instead, ICANN seeks to make substantive changes to specific findings made by the Procedures Officer. For this reason alone, the Procedures Officer should deny ICANN’s request. But, moreover, ICANN is wrong on both counts: the Procedures Officer’s findings accord with the evidence as submitted by the parties and as argued at the hearing.

3. Requested Correction Nos. 1 and 2 are substantive in nature. Specifically, the Procedures Officer correctly noted that ICANN is “preparing to award the registry operating rights to Verisign”³ ICANN now seeks to rewrite this statement wholesale. Such a rewrite is inapposite to the evidence. As Afilius argued in its briefings, Nu Dotco LLC (“**NDC**”) was nothing more than a puppet, whose action with regards to .WEB were under the control of VeriSign, Inc. (“**VeriSign**”). Third Party Designated Confidential Information Redacted

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¹ ICDR Arbitration Rules (1 June 2014), Art. 33(1).

² *Id.*

³ Declaration of the Procedures Officer (28 Feb. 2019), ¶ 2.

⁴ Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC
Third Party Designated Confidential Information Redacted

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¹⁴ Given that it was VeriSign who bid through NDC at the .WEB Auction, that it was VeriSign who was participating in ICANN's delegation process for .WEB, and that it was VeriSign who controlled the negotiation of the .WEB registry agreement, the Procedures Officer correctly stated that ICANN is preparing to delegate .WEB to VeriSign.

5 Third Party Designated Confidential Information Redacted

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4. ICANN seeks to substantively change that statement with the fig leaf of ICANN's assignment approval process. By doing so, ICANN implicitly suggests here that it will conduct a rigorous and thorough examination of NDC's forthcoming request to assign all of its rights in .WEB to VeriSign. Nothing could be further from the truth. As ICANN concedes, it chose to limit its evaluation of such requests to "whether the transferee organization [here, VeriSign] has the requisite financial and technical ability to operate a gTLD."¹⁵ ICANN cannot maintain that the oldest, largest, and dominant registry on earth would somehow fail under either prong of that test. The Procedures Officer was therefore correct in noting that delegating .WEB to NDC is functionally equivalent to delegating .WEB to VeriSign.

5. ICANN's Requested Correction No. 3 seeks another substantive correction to the Declaration. Afilias argued in its briefings to the Procedures Officer that the evidence demonstrates that Mr. McAuley must have been aware of Afilias' dispute with ICANN regarding .WEB when he participated in the 11th hour rewrite of Rule 7. Certainly, Mr. McAuley's employer was aware of Afilias' dispute: Mr. Johnston, on VeriSign's behalf, had sent a cease and desist letter to Afilias in August 2018 demanding that Afilias refrain from seeking to delay delegation of .WEB to VeriSign.¹⁶ Afilias' dispute was also widely reported in the industry press. Sam Eisner, with whom Mr. McAuley collaborated on in rewriting Rule 7, specifically noted in IRP-IOT meetings that IRP filings were imminent.¹⁷ And, of course, Mr. McAuley reversed his long-standing positions on Rule 7 in the 11th hour, and only after Afilias had filed for CEP regarding .WEB, in order to rewrite the *amicus* rules to provide his employer with a mandatory right to

¹⁵ Declaration of Christine Willett in Support of ICANN's Opposition to Afilias Domains No. 3 Ltd.'s Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 34.

¹⁶ See Letter from R. Johnston to A. Ali (30 Aug. 2018).

¹⁷ IRP-IOT Meeting #43 Transcript (11 Oct. 2018), p. 15.

participate in this IRP.

6. Having secured what can only be described as truly bespoke language, precisely crafted to reflect VeriSign's position vis-à-vis this IRP, Mr. McAuley denied in his Declaration that he had any knowledge of this dispute in October 2018 when the changes to Rule 7 were made.¹⁸ He denied that he had read any trade press about this dispute. He denied that his employer had told him about this dispute. He denied that Ms. Eisner told him about this dispute. He denied that the revisions to Rule 7 were in any way drafted with this dispute in mind.¹⁹ Overt Afilias' objections, Mr. McAuley did not appear for cross-examination at the 21 February 2019 hearing and, accordingly, his denials are subject to adverse inferences in this regard.

7. ICANN impermissibly seeks to substantively edit the Declaration to erase specific findings by the Procedures Officer. Afilias therefore respectfully requests that the Procedures Officer deny ICANN's application to correct the Declaration.

Respectfully submitted,



Arif H. Ali

DECHERT LLP
1900 K Street NW
Washington, DC 20006
Arif.Ali@dechert.com

Ethan E. Litwin
CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
ELitwin@constantinecannon.com

Counsel for Claimant

¹⁸ Declaration of David McAuley in Support of VeriSign, Inc.'s Request to Participate as *Amicus Curiae* in Independent Review Process (5 Feb. 2019), ¶ 32.

¹⁹ *Id.*