

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

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

PROCEDURAL ORDER NO. 5

14 July 2020

Members of the IRP Panel

Catherine Kessedjian
Richard Chernick
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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I. OVERVIEW

1. This Procedural Order No. 5 (**PO 5**) disposes of (1) the Claimant's application dated 10 June 2020 regarding the status of the evidence originating from the *Amici* that was filed with the Respondent's Rejoinder (**10 June Application**); (2) the Claimant's supplemental submission, also dated 10 June 2020, relating to the waiver argument advanced in support of the Claimant's 29 April 2020 application which called into question the sufficiency of the Respondent's document production and the adequacy of its privilege log (**Supplemental Submission**); and (3) a number of key issues arising from the respective submissions of the Parties and *Amici* dated 22 June 2020, concerning the modalities of the merits hearing scheduled, as per the Revised Procedural Timetable for Phase II, on 3 August to 7 August 2020.

II. THE CLAIMANT'S 10 JUNE APPLICATION

A. *Positions of the Parties and Relief Sought*

2. The respective positions of the Parties in relation to this application are set forth in the Claimant's letter of 10 June 2020, the Respondent's response dated 15 June 2020, and the Claimant's reply dated 17 June 2020. These submissions are incorporated herein by reference and have been considered in full by the Panel in reaching its conclusions on the 10 June Application.
3. By way of relief, the Claimant requests that the Respondent be directed to resubmit the evidence filed with its Rejoinder that originated from the *Amici*, with clear indication of the portions thereof with which the Respondent does not agree or which it does not endorse. Should the Respondent fail to do so, the Claimant invites the Panel to hold that all of the evidence submitted by the Respondent should be taken to have been submitted by and on behalf of the Respondent.
4. The Respondent, for its part, invites the Panel to deny the application in full.

5. By letter dated 30 June 2020, the Claimant has contended that the briefs of the *Amici*, filed with the Panel on 26 June 2020, provide further grounds for the relief sought by both the 10 June Application and the Supplemental Submission. By email dated 30 June 2020, the Respondent strongly objected to the filing of the Claimant's 30 June letter, averring that it is an unauthorized submission that should be entirely disregarded by the Panel.

B. Analysis

6. The Panel begins its analysis of the Claimant's 10 June Application by citing in full footnote 6 of the Respondent's Rejoinder [emphasis added]:

6 Pursuant to Paragraph 201 of the Panel's Decision on Phase I dated 12 February 2020, ICANN submits herewith the witness statements of *Amici* NDC and Verisign in order to help ensure that the factual record in this IRP is complete. ICANN does so without endorsing those statements or agreeing with them in full.

7. In its response of 15 June 2020 to the 10 June Application, the Respondent elaborated on its view of the status of the evidence described in this footnote as "the witness statements of *Amici* NDC and Verisign" [emphasis added]. In that response, the Respondent describes this evidence as the "*Amici*'s evidence", evidence submitted by the Respondent "on behalf of *Amici*", and as the "*Amici* expert reports and witness statements" [emphasis added].
8. It is useful to recall the background to the issues raised in the 10 June Application.
9. In its Decision on Phase I, the Panel had to rule on the participation rights that were being sought by the *Amici* in these proceedings, to a large extent with the support of the Respondent. After listing the broad participation rights that were requested by the *Amici* (paras. 186-188), the Panel observed that they were, in reality, "those of a disputing party" (para. 190). The Panel proceeded to compare the *amicus* provisions of the *Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process (Interim Procedures)* with the other provisions of Rule 7

dealing with interventions (paras. 191-194), and drew the following conclusions from this comparison (para. 195):

195. The conclusions the Panel draws from its review of the provisions of Rule 7, read as a whole, are the following:

- *Amici* are not treated as parties, unlike interveners or parties whose cases are consolidated.
- *Amici* do not have a right to access the full record of the IRP, unlike interveners or parties whose cases are consolidated.
- *Amici* are permitted to submit “written briefings on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing”.
- Unlike an intervener, who becomes a Claimant and is bound by the outcome of the IRP, Rule 7 does not provide that an *amicus* will be bound by the outcome of a case in which it participates, and the Applicant *Amici* have made clear that they did not accept to be bound by the result of this IRP.
- The provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to Parties, and the Panel can find no basis in Rules 7 or 8 for the submission that *Afilias* may be subject to motions for exchange of documents by the Applicant *Amici*.
- Nowhere in the Interim Procedures can the Panel find support for the proposition that an *amicus* allowed to participate in an IRP may be afforded the right to assert claims of its own in the IRP.

10. After mention of the decision of the Arbitral Tribunal in *Methanex* on the petitions of non-governmental organizations that had requested certain participation rights in that NAFTA Chapter 11 arbitration (para. 199), the Panel observed (para. 200):

200. In the opinion of the Panel, this reasoning applies to the type of broad participation rights that are being sought by the Applicant *Amici* in this case. To paraphrase the *Methanex* Tribunal, if the Panel cannot add VeriSign and NDC as parties to the IRP, by granting them intervener status or otherwise, the Panel cannot accept the invitation to achieve this result indirectly, by granting them the rights and privileges of parties while they would not, like parties or interveners, be bound by the Panel’s decision.

11. Immediately after this paragraph comes paragraph 201, referred to by the Respondent in footnote 6 of its Rejoinder, which is followed by two paragraphs that it is helpful to cite in full:

202. When all is said and done, it is a striking feature of the Applicant *Amici*’s requests that while they are seeking the broadest participation rights in respect of what would be the core issues of Phase II, they insist that they would not be bound by the Panel’s decision. The Panel can find no basis in Rule 7 to accede to such requests.

203. Having considered all relevant circumstances, the Panel has decided that the Applicant *Amici* shall be allowed to participate in this IRP as *amici*. Except for commercially sensitive or privileged material, the *Amici* shall be given access to all briefings and materials related to the IRP and shall be allowed to attend procedural and merits hearings. The Panel will shortly hold an early preparatory conference to identify, in consultation with the Parties, the issues that fall to be determined in Phase II. Once those issues have been identified, the Panel will decide, in consultation with the Parties and the *Amici*, the questions as to which the *Amici* will be permitted to submit briefings to the Panel, as well as the deadlines, page limits and other modalities of the filing of those briefings and supporting exhibits related to the IRP. The extent to which the *Amici* will be allowed to supplement their written submissions with oral submissions at the merits hearing will be decided, in consultation with the Parties and the *Amici*, during the relevant pre-hearing conference(s). The *Amici* shall bear the full costs of their participation in the IRP.

12. On 6 March 2020, the Claimant filed the Clarification Request on which the Panel ruled in its PO 3. One of the questions as to which the Claimant sought clarification was whether the *Amici* were permitted, in their briefs to be filed pursuant to Rule 7 of the Interim Procedures, to add new documents to the record as exhibits, or were limited to exhibits already on record, or to be added to the record by virtue of the Parties' upcoming submissions.
13. The Respondent and the *Amici* took the position that the Panel's Decision in Phase I entitled the *Amici* to submit "briefings and exhibits", without specifying that the exhibits are limited to those in the record. The *Amici* stressed that material evidence was in their possession and not in the possession of the Parties, and, for that reason, argued that the Panel would be deprived of essential material if the *Amici* were not permitted to file new exhibits.
14. The Panel rejected that position in its PO 3. To quote its directions on that issue [emphasis added]:

In its Decision on Phase I, the Panel made clear that, under the Interim Procedures, the *Amici* are non-disputing parties whose participation in the IRP is through the submission of "written briefings", possibly supplemented by oral submissions at the merits hearing. The Panel also rejected the notion that, under the Interim Procedures, the *Amici* can enjoy the same participation rights as the disputing parties. It follows that it is for the Parties, who bear the burden of proving their case, to build the evidentiary record of the IRP, and it is based on that record that the *Amici* "may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP Panel may request briefing" (see Rule 7 of the Interim Procedures).

The Panel expects the Parties, in accordance with the Procedural Timetable, to file the entirety of the remainder of their case as part of the second round of submissions contemplated by the timetable, that is to say, with the Claimant's Reply and the Respondent's Rejoinder. As evoked in the Panel's Decision on Phase I (see par. 201), if there is evidence in the possession of the *Amici* that the Respondent considers relevant to, and that it wishes to adduce in support of its case, be it witness or documentary evidence, that evidence is required to be filed as part of the Respondent's Rejoinder, and not with the *Amici's* Briefs.

The Panel did not preclude the possibility in its Phase I Decision (and the Procedural Timetable) that the *Amici* might wish to file documents in support of the submissions to be made in their Briefs. By referring to such documents as "exhibits", however, as other arbitral tribunals have in referring to materials to be filed with the submissions of *amicus* participants, the Panel did not mean to suggest that these "exhibits" (which the Panel would expect to be few in number, and to be directed to supporting the *Amici's* submissions, not the Respondent's case) would become part of the record and acquire the same status as the documentary evidence filed by the Parties.

15. In the opinion of the Panel, the Decision in Phase I and PO 3 are clear as to the following:

- The disputing parties in this IRP are the Claimant and the Respondent;
- It is for the Parties, who bear the burden of proving their case, to build the evidentiary record of the IRP;
- The *Amici* are non-disputing parties that were granted the limited participation rights of an *amicus curiae* as provided for in Rule 7; these rights do not include the right to file evidence, whether it be documentary or witness evidence;
- The parties were expected to file the entirety of "their case" (our emphasis) as part of the second round of submissions contemplated by the Revised Procedural Timetable for Phase II;
- The sentence in PO 3 "evidence in the possession of the *Amici* that the Respondent may consider relevant to, and that it wishes to adduce in support of its case, be it witness or documentary evidence" refers — in language that the Panel considers non-ambiguous — to evidence that the Respondent wishes to make its own, and offer "in support of *its* case" even though it may be in the possession of, and therefore originate from, the *Amici*. Because this was

evidence that the Respondent would choose to adduce in support of its case, PO 3 directed that it was “required to be filed as part of the Respondent’s Rejoinder, and not with the *Amici*’s Briefs”;

- Whatever documents the *Amici* may wish to file in support of the submissions to be made in their Briefs (which documents the Panel stated it expected to be “few in number and to be directed to supporting the *Amici*’s submissions, not the Respondent’s case”), these are not ““exhibits” [that] become part of the record and acquire the same status as the documentary evidence filed by the Parties.” In the opinion of the Panel, this language both followed from, and reinforced the notion that the *Amici* as non-disputing parties are not entitled to adduce evidence in this IRP.

16. It is against this background that the Claimant’s 10 June Application must be considered.
17. The Respondent has filed a Rejoinder seeking to draw a distinction between the Respondent’s evidence, filed without reservation in support of the Respondent’s primary case, and the “*Amici*’s evidence”, which the Respondent states it is filing “on behalf of the *Amici*” “to help ensure that the factual record in this IRP is complete”. However, the Respondent files this *Amici* evidence with the caveat that it is neither endorsing it, nor agreeing with it in full, as set out in the above quoted footnote 6 of the Rejoinder.
18. In the Panel’s view, the Respondent is thus seeking to do indirectly what the Panel decided in Phase I could not be done directly under the terms of the Interim Procedures. Instead of the *Amici* filing their own evidence with their Briefs, the Respondent has allowed the Rejoinder to serve as a vehicle for the filing of the “*Amici*’s evidence”, the “*Amici* expert reports and witness statements”. This is indeed how the Respondent describes that evidence in its 15 June 2020 correspondence. The fact that the Rejoinder serves as a vehicle for the filing of what is, in effect, the *Amici*’s evidence is consistent with the Respondent’s proposal, in its submissions of 22 June 2020 relating to the

modalities of the merits hearing (discussed below), that “the *Amici* be permitted to [...] introduced and conduct redirect examination of their own witnesses” (Respondent’s letter of 22 June 2020, p. 2, para. 3 [emphasis added]).

19. The Respondent explains, in its 15 June response, that the purpose of the so-called “*Amici* evidence” is to address the Claimant’s challenge of the *Amici*’s conduct. The Respondent goes on to explain [emphasis added]:

Given that ICANN has not fully evaluated the competing contentions of Afilias and the *Amici*, for reasons ICANN explains at length in its Rejoinder, ICANN is not in a position to identify the portions of the *Amici* witness statements with which it “agrees or disagrees.” But ICANN views it as essential that this evidence be of record, and that the Panel consider it, if the Panel decides to address the competing positions of Afilias and *Amici* regarding the latter’s conduct.

20. The Panel understands the resulting procedural posture to be as follows. The Respondent has adduced evidence in support of its primary case that the ICANN Board, in the exercise of its fiduciary duties, made a decision that is both consistent with ICANN’s Articles and Bylaws and within the realm of reasonable business judgment when, in November 2016, it decided not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending. That, according to the Respondent, should define the proper scope of the present IRP.
21. However, recognizing that the Claimant’s case against the Respondent includes allegations concerning the *Amici*’s conduct (specifically, NDC’s alleged non-compliance with the Guidebook and Auction Rules), the Respondent files the “*Amici* evidence” on the ground that the record should include not only Afilias’ allegations against Verisign and NDC, “but also Verisign’s and NDC’s responses.” The difficulty is that this evidence is propounded not as the Respondent’s defense to Afilias’ claims against it, but rather (on the ground that the Respondent has not fully evaluated the competing contentions of Afilias and the *Amici*) as the *Amici*’s response to Afilias’ allegations that NDC violated the Guidebook and Auction Rules.

22. The Panel recalls that this IRP is an ICANN Accountability Mechanism, the parties to which are the Claimant and the Respondent. As such, it is not the proper forum for the resolution of potential disputes between Afiliac and two non-parties that are participating in these proceedings as *amici curiae*. While it is open to the Respondent to choose how to respond to the Claimant's allegations concerning NDC's conduct, and to evaluate the consequences of its choice in this IRP, the Panel is of the view that the Respondent may not at the same time as it elects not to provide a direct response, adduce responsive evidence on that issue on behalf of the *Amici* and, in relation to that evidence, reserve its position as to which portions thereof the Respondent endorses or agrees with. In the opinion of the Panel, this leaves the Claimant uncertain as to the case it has to meet, which the Panel considers unfair, and it has the potential to disrupt the proceedings if the Respondent were later to take a position, for example in its post-hearing brief, which the Claimant would not have had the opportunity to address prior to, or at the merits hearing.
23. The Panel has taken due note of the Respondent's evidence and associated contentions concerning its Board's decision of November 2016. Nevertheless, the Guidebook and Auction Rules originate from ICANN. That being so, in this ICANN Accountability Mechanism in which the Respondent's conduct in relation to the application of the Guidebook and Auction Rules is being impugned, the Respondent should be able to say whether or not the position being defended by the *Amici* in relation to these ICANN instruments is one that ICANN is prepared to endorse and, if not, to state the reasons why.

C. Conclusion

24. For these reasons, the Panel is of the view that the Claimant is entitled to relief in relation to the reservation in footnote 6 of the Respondent's Rejoinder. Specifically, and for the purpose of this IRP in which the Respondent's action or inaction is being challenged, the Panel directs the Respondent to clearly identify, in a communication to be sent to the Claimant and the *Amici*, and filed with the Panel, by 9 pm Eastern time on

17 July 2020, those aspects (if any) of the *Amici's* facts and expert evidence which the Respondent formally refuses to endorse, or with which it disagrees, and to provide an explanation for this non-endorsement or disagreement.

25. In the opinion of the Panel, the above direction is sufficient to address the difficulty complained of by the Claimant in its 10 June Application. The Claimant's other requests for relief as set out in that application are therefore denied.

III. SUPPLEMENTAL SUBMISSION

A. *Positions of the Parties and Relief Sought*

26. The respective positions of the Parties in relation to the Supplemental Submission are set forth in Afiliias' letter dated 10 June 2020, ICANN's response dated 17 June 2020, Afiliias' reply dated 19 June 2020, and Respondent's sur-reply dated 26 June 2020. These submissions are incorporated herein by reference and have been considered in full by the Panel in reaching its conclusions on the Supplemental Submission.
27. In the wake of the Panel's decision of 23 June 2020 granting the Respondent's request for leave to file a sur-reply, the Claimant filed a 6-page letter on the same date objecting to the Respondent's assertion that the Claimant had improperly raised new issues in its reply papers. By email dated 24 June 2020, the Respondent objected to the filing of that letter, which it described as an unauthorized additional brief, and requested that the Panel disregard it.
28. The relief sought by the Claimant's Supplemental Submission is that the Panel order the Respondent to produce all documents that formed the basis by which its Board allegedly determined to defer any decision on the .WEB contention set in November 2016, as well as all documents reflecting any determination by the Board to continue or terminate such deferral, including all such documents for which the Respondent claimed privilege, on the ground that the Respondent has waived any applicable privilege by putting such documents at issue.

29. For its part, the Respondent invites the Panel to find that the Respondent did not waive privilege and, therefore, that the relief sought by the Supplemental Submission should be denied.

B. *Analysis*

30. In Procedural Order No. 4 (**PO 4**), the Panel noted that in the course of the Claimant's counsel's reply submissions at the hearing held in connection with the Claimant's 29 April Application, the Claimant contended that by arguing that the Respondent's Board reasonably decided not to make any determination regarding NDC's conduct until after the conclusion of this IRP, as alleged in the Response, the Respondent has in effect affirmatively put the reasonableness and good faith of that Board's decision at issue in the case. According to the Claimant, the fact that the Board's decision was made on the advice of counsel did not allow the Respondent to shield the basis for, or any discussion of, that decision by claiming privilege over responsive documents that the Respondent has been ordered to produce.

31. The Panel further noted in PO 4 that while the 29 April Application remained under advisement, the Claimant had filed the Supplemental Submission, in which it argued that with the filing of the Respondent's Rejoinder Memorial on 1 June 2020, there was no longer any question that the Respondent has put certain documents for which it claims privilege "at issue" in this arbitration, thereby waiving any potentially applicable privilege and requiring the Respondent to produce them to the Claimant.

32. The Panel stated in PO 4 that to the extent the waiver argument set out in the Supplemental Submission already formed part of the 29 April Application, the Panel was reserving the question for determination in a subsequent procedural order, to be issued after the Parties had filed their respective submissions in relation to the Supplemental Submission.

33. Afiliias argues that the Respondent has clearly put at issue in this IRP its Board's determination to defer resolution of the Claimant's claims until after the conclusion of this IRP. Afiliias adds that the Respondent's refusal to provide any explanation of the basis for the decision other than to assert that it was taken on the advice of legal counsel, puts the advice and communications from counsel squarely at issue in the Respondent's defense.
34. The Respondent counters that it is the Claimant, not the Respondent, that has put the Board's deferral decision at issue; and, in any event, that under California law privilege is only waived where a party puts the *content* of the privilege communication directly at issue. In the present case, argues the Respondent, "ICANN has not relied – and will not rely – on its attorneys' advice or state of mind to demonstrate that it acted reasonably" (Respondent's reply of 17 June, p. 3).
35. The leading authority on implied waiver of attorney-client privilege under the applicable law -- which, in relation to this issue, is California law and U.S. Federal law; see PO 4, paras. 31-33 -- is the California Supreme Court's decision in *Southern Cal. Gas Co. v. Public Utilities Com.*¹ In that case, the Public Utilities Commission had decided that SoCalGas had implicitly waived attorney-client privilege by applying to the Commission to recover the costs incurred in the buy-out of a gas supply contract. In order to succeed on the application, SoCalGas had to prove that its decision to buy-out the contract was reasonable. The Commission determined that SoCalGas' application placed the issue of the reasonableness of its decision to buy-out the contract in issue. The Commission reasoned that SoCalGas could not have made this decision prudently without considering legal advice because legal concerns are an essential consideration when determining a reasonable means of terminating a contract. Hence, SoCalGas had impliedly waived the attorney-client privilege by putting the reasonableness of its lawyers' advice at issue.

¹ *Southern Cal. Gas Co. v. Public Utilities Com.*, 50 Cal. 3^d 31 (1990).

36. In a unanimous decision, the California Supreme Court held that SoCalGas had not waived privilege. The Court held that implied waiver of attorney-client privilege occurs only when the “client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action” (at p. 40, citing *Mitchell v. Superior Court*, 37 Cal. 3d at 609). It is useful to quote at length from the Court’s reasons (at pp. 4-5) [footnotes omitted]:

SoCalGas has done nothing in the present proceedings to place in issue its privileged communications. Nowhere in its CAM application or in the proceedings before the Commission does SoCalGas state that it intends to rely on its attorneys’ advice or state of mind to demonstrate that it acted reasonably when it bought out the Getty contract. It has expressly stated otherwise. Because its attorneys’ advice or state of mind is not in issue, it has not impliedly waived its attorney-client privilege. [...]

SoCalGas has represented that it will demonstrate that its buyout was reasonable based on an examination of the contract itself, the economic analysis it relied on to arrive at its decision, and testimony from appropriate witnesses. [...] After analyzing this information, the commission can determine what SoCalGas should have known regarding the contract’s validity and decide whether SoCalGas’ buyout was reasonable. SoCalGas, therefore, can meet its burden of proof under the commission’s standard without disclosing its actual legal advice. If the commission decides, after considering all the above evidence, that SoCalGas has not adequately demonstrated that its buyout was reasonable, the commission can disallow recovery of the expense. SoCalGas does not, however, impliedly waive its privilege if it simply fails to make an adequate showing that it acted reasonably. [...]

While it is true that the commission, in fundamental fairness to SoCalGas’ ratepayers, must make a careful effort to ascertain whether SoCalGas’ expenses are reasonable, this effort does not have to come at the expense of trampling on SoCalGas’s attorney-client privilege. [...] SoCalGas’s actual legal advice may be relevant information, but it is not essential. “Privileged communications do not become discoverable simply because they are related to issues raised in the litigation.” [...]

37. In the Panel’s opinion, the Supreme Court’s reasoning directly applies, and defeats the Claimant’s claim of implied waiver. While the Respondent has disclosed the fact that its Board received legal advice before deciding to defer acting upon Afilias’ complaints, the Respondent did not disclose the content of counsel’s advice. Nor is the Respondent asserting that the Board’s decision was consistent with counsel’s advice, or that the Board’s decision was reasonable because it followed counsel’s advice. Disclosure of the *fact* that the Board solicited and received legal advice does not entail waiver of privilege as to the *content* of that advice. If that were so, the Respondent’s compliance with the

Panel's directions concerning the contents of the privilege log to be filed in support of its claims of privilege would, in of itself, waive the privilege that the privilege log serves to protect.

38. In support of its claim of implied waiver, Afilius argues that the Respondent identifies in its Rejoinder the items of information received by the Board to inform its decision but does not disclose the substance of that information. Because the information considered includes the advice of counsel, the Claimant reasons that the Board's decision not to take action regarding .WEB while an Accountability Mechanism was pending "must have been one of the options provided by counsel in advance of the meeting and/or otherwise based on advice given to the Board at the meeting" (Afilius' response of 19 June 2020, at p. 2). The Panel cannot accept that submission, which would require the Panel to find an implied waiver of privilege based of an inference as to what might have been the reasons for the Board's decision.
39. The Respondent has cited a number of U.S. cases confirming that disclosure of the *existence* of legal advice – which, for example, may be material to determining whether a board acted with due care – is not the same as disclosing the *substance* of that advice.² In the present case, the Respondent did not disclose, and thus did not put at issue, the substance of the privileged communications between its Board and ICANN's legal counsel. It can therefore not be said that the Respondent has waived attorney-client privilege.
40. The cases relied upon by the Claimant do not support its claim of implied waiver, nor the proposition it is advancing that "a party waives the privilege where information obtained from counsel was used in a decision-making process and the defendant argued that its decision-making process was "reasonable" or made in "good faith."" (Claimant's reply of 19 June 2020, p. 2). In *Roehrs v. Minn. Life Ins. Co.*, 228 F.R.D. 642 (D. Ariz. 2005), the

² *In re Comverge Inc. Shareholders Litig.*, No. 7368-VCP., 2013 WL1455827 (Del. Ch. April 10, 2013), RLA-29); see also *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 369, 379 (2017), RLA-38; *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492 (W.D. Va. 1994), RLA-37.

defendant insurer was found to have waived privilege because it had sought to justify its denial of the plaintiff's claim on the good faith belief of its claims adjusters formed after receiving legal advice from counsel. However, the Respondent has drawn the Panel's attention to subsequent decisions of the same court confirming that there is no implied waiver if the insurer does not assert as a defence that it acted in good faith *based on the advice of its legal counsel*.³

41. The Claimant also relies on *Regents of University of California v. U.S. Department of Homeland Security*, 2017 WL 4642324 (N.D. Cal. 2017) (1 Jan. 2017), a case involving a challenge to the defendant's reversal on immigration policies relating to the legal status of immigrants who came to the United States as children (the so-called DACA policy). According to the Claimant, "the *Regents* court specifically reasoned that the plaintiffs were entitled to challenge whether DHS's decision was reasonable and, "in making that challenge, plaintiffs are entitled to review the [privileged] internal analyses that led up to this change in position"" (Claimant's reply of 19 June 2020, pp. 2-3). However, the court's reasons reveal that, in *Regents*, "DHS specifically relied upon DOJ's assessment that DACA "was effectuated... without proper authority," "was an unconstitutional exercise of authority by the Executive Branch" and "has the same legal and constitutional defects that courts recognized as to DAPA". Thus, it is in the context of the defendant's specific reliance on the advice of legal counsel that the court held that the plaintiffs were entitled to review the internal analyses that had led to this change in position. In the Panel's opinion, this stands in sharp contrast with the present case, in which the Respondent has not put the content of its communications with counsel at issue.

³ *Labertew v. Chartis Property Casualty Co.*, No. CV-13-1785-PHX-DGC, 2018 WL 1876901 (D. Ariz., April 19, 2018) RLA-39; *Safety Dynamics v. General Star Indem. Co.*, No. CV-09-00695-TUC- CKJ (DTF), 2014 WL 268653 (D. Ariz. Jan. 24, 2014), RLA-40

C. Conclusion

42. The Panel concludes that the Respondent did not put an otherwise privileged communication in issue in this IRP. The Respondent has not relied, and has stated categorically that it will not rely, on its counsel's advice or state of mind to seek to demonstrate that it or its Board acted reasonably. The Respondent did not disclose the content of the advice received by the Board, nor did it assert that in making the decision that it did, in November 2016, the Board was acting in accordance with the legal advice received. Disclosure of the fact that a party received legal advice to inform a decision does not waive privilege. The Panel must therefore reject the Claimant's contention that the Respondent's Rejoinder has put documents over which the Respondent had claimed privilege in issue, and thus waived attorney-client privilege. The relief requested by the Claimant in its Supplemental Submission is therefore denied.

IV. MODALITIES OF THE MERITS HEARING

A. Positions of the Parties and Amici

43. By email dated 11 June 2020, the Panel invited the Parties to discuss, consult with the *Amici*, and report back to the Panel on their joint or respective proposals for the conduct of the merits hearing, including consideration of holding a virtual hearing in light of the current pandemic and the restrictions on international travelling.

44. The respective positions of the Parties and *Amici* on this question are set forth in the Claimant, Respondent and VeriSign's⁴ respective letters of 22 June 2020. By letter dated 24 June 2020, the Claimant has objected to the *Amici* using their response to the Panel's 11 June 2020 invitation to advance arguments on a range of procedural and substantive issues going beyond the participation rights of the *Amici* as delineated in the Panel's prior rulings.

⁴ Counsel for VeriSign submitted a letter regarding the modalities of the merits hearing on behalf of both VeriSign and NDC.

45. The Parties' submissions on the modalities of the merits hearing as set out in their 22 June 2020 letters are incorporated herein by reference and have been considered in full by the Panel in reaching the decisions, conclusions and directions set out in the following paragraphs of this order. The Panel also took into account the submissions of the *Amici* as set out in VeriSign's letter of 22 June 2020, bearing in mind, however, the observations made in the Claimant's letter of 24 June 2020.

B. *Dates and Type of Hearing*

46. Afilias submits that it is critical that this hearing proceed in person, at least with respect to the examination of fact witnesses, since the credibility and truthfulness of certain witnesses are plainly at issue. While recognizing that by reason of the COVID-19 crisis an in-person hearing in Chicago in early August will not be possible, the Claimant invites the Panel to postpone the in-person hearing "by a few weeks" and to look for available dates early in the Fall. The Respondent and the *Amici* submit that the current hearing dates should be preserved, and that the hearing should be conducted virtually.

47. In an email communication dated 11 July 2020, the Panel informed the Parties and the *Amici* that the Panel has decided to proceed with the merits hearing on the dates provided for in the Revised Procedural Timetable for Phase II, and to conduct the hearing remotely, using a videoconference platform to be agreed between the Parties or selected by the Panel. In the same email, the Panel stated that in view of the fact that proceeding remotely with participants in different time zones would result in shorter hearing days, the Panel had decided to schedule three additional hearing days, to be held in reserve until the agenda for the hearing has been established. The Panel noted that its members were available on 10-12 August 2020 for that purpose, and asked that the Parties and *Amici* hold these days in reserve in case they are needed to complete the hearing.

48. The Panel's reasons for this decision are the following. The pandemic has required national and international courts and tribunals to find ways to keep the wheels of justice turning in spite of the health crisis confronting the world. The Panel would have considered a postponement if, as submitted by the Claimant, there was a reasonable prospect of being able to hold an in-person hearing early in the Fall. Regrettably, it appears most unlikely that the health risks associated with the pandemic will be sufficiently reduced in the coming weeks or even months to envisage holding an in-person hearing without imperilling the health and safety of the many participants involved, nearly all of whom would need to travel to attend the hearing, to say nothing of travel bans and quarantine requirements that may remain in place for many months. In such circumstances, the Panel is of the view that the interests of the Parties will be better served by proceeding on the days long-scheduled for the merits hearing in this case.
49. Panel members are based in three different time zones, and the same appears to be the case for the group of counsel involved in the representation of the Parties and *Amici*. In such circumstances, the Panel has decided that it will sit for five hours only, from 8 am to 1 pm (PT), 11 am to 4 pm (ET) and 5 pm to 10 pm (CET).
50. As called for in the Panel's email communication of 11 July 2020, the Parties are directed to consult on the choice of an appropriate video platform for the hearing. The Panel strongly suggests retainer of a provider, such as ICDR or Arbitration Place, that employs a familiar video platform, such as Zoom, but also provides technical and hearing management assistance during the hearing. The Parties are directed to report back to the Panel as to their decision in this respect by noontime Eastern on 17 July 2020.

C. Allocation of Time at the Hearing

51. The Panel considers it premature at the present time to rule on the Parties' competing positions as to the basis for the allocation of time at the hearing. Under the Revised Procedural Timetable, the Parties are to identify by 24 July 2020 the witnesses that they wish to call for cross-examination at the hearing. The Panel hereby directs each of the Parties also to provide, on the same date, an estimate of the time required for the cross-examination of each of the witnesses it is calling. Upon receipt of the number of witnesses called to appear at the hearing, and the estimated time for their cross-examination, the Panel will prepare an agenda for the hearing with an allocation of time that ensures fairness as between the Parties.

D. Amici's Requests

52. The *Amici* have requested that the fact and expert witnesses "who are affiliated with the *Amici*" and whose evidence was put forward by the Respondent be entitled to representation "by their own counsel" (that is, by counsel representing the *Amici* in the IRP) while being questioned, and to conduct any redirect examination. The *Amici* are also seeking (a) a total of two hours for oral statements by their counsel after the Parties' opening presentations, and (b) permission and time to cross-examine "any testimony by Afilias' witnesses to the extent that the Panel permits testimony on Afilias' claims directed at *Amici*'s conduct (as opposed to ICANN's)".
53. The Panel recalls that the *Amici* are participating in this IRP as *amici curiae*, not as parties, for reasons set out in the Panel's Decision on Phase I, PO 3 and above in this order. The *Amici*'s contribution to the resolution of the issues in dispute in this IRP is to take the form of written submissions, possibly supplemented by oral submissions at the hearing. The Panel defers determining whether the *Amici* will be permitted to supplement their written submissions with oral submissions at the hearing, and, if so, the time to be afforded to them for that purpose, until the preparation of the hearing agenda and determination of the time afforded to the Parties for their opening statements.

54. The witness statements and expert reports of the witnesses “affiliated with the *Amici*” were filed by the Respondent with its Rejoinder. Subject to the Respondent clarifying its position in relation to this evidence as directed to do so in accordance with paragraph 24 above, this evidence is taken to have been submitted in support of the Respondent’s case. It follows that these witnesses are to be introduced, and, as the case may be, their redirect examination is to be conducted, by counsel for the Respondent, not counsel for the *Amici*. In the event fact witnesses affiliated with the *Amici* -- and therefore not affiliated with a Party to these proceedings -- are called upon to appear at the merits hearing, they will be entitled to be assisted by counsel of their choice while they are examined or cross-examined by counsel for the Parties.
55. For the reasons set out in the Panel’s Decision on Phase I, PO 3 and this order, the *Amici*’s participation rights in this IRP do not include the right to cross-examine witnesses, and the *Amici*’s request for permission to do so is therefore denied.

56. The Panel has unanimously agreed the terms of this Procedural Order No. 5, which is signed by the Chair on behalf of the Panel at the request of his co-panelists.

Place of the IRP: London, England

Dated: 14 July 2020



Pierre Bienvenu, Ad. E.
Chair
On behalf of the Panel