List of Exhibits

to

Opening Submission
of Altanovo Domains Limited
(f/k/a Afilias Domains No. 3 Limited)

submitted to

the Board Accountability Mechanisms Committee

29 July 2022

LIST OF EXHIBITS

Exhibit No.	Description
Altanovo-1	Annex A to Afilias' Response to the *Amicus Curiae* Briefs (24 July 2020)
Altanovo-2	Final Decision (corrected version dated 15 July 2021) ("**Final Decision**")
Altanovo-3	Merits Hearing, Tr. Day 2 (4 Aug. 2020)
Altanovo-4	Merits Hearing, Tr. Day 3 (5 Aug. 2020)
Altanovo-5	Witness Statement of Paul Livesay in Support of ICANN's Rejoinder and AMICI's Briefs (1 June 2020)
Altanovo-6	ICANN, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012) ("**NDC Application**")
Altanovo-7	Merits Hearing, Tr. Day 5 (7 Aug. 2020)
Altanovo-8	Merits Hearing, Tr. Day 7 (11 Aug. 2020)
Altanovo-9	Report of George Sadowsky (20 Mar. 2019)
Altanovo-10	Expert Report of Jonathan Zittrain (26 Sept. 2018)
Altanovo-11	Afilias' Amended Request for Independent Review (21 Mar. 2019)
Altanovo-12	Letter to IRP Panel from S. Smith (Counsel for ICANN) (18 July 2020)
Altanovo-13	*Oxford English Dictionary* (2022): **material**
Altanovo-14	*Urica, Inc. v. Pharmaplast S.A.E.*, Case No. CV 11-02476 (RZx), 2013 WL 12123230 (C.D. Cal. May 6, 2013)
Altanovo-15	*Engalla v. Permanente Medical Grp., Inc.*, 15 Cal. 4th 951 (1997)
Altanovo-16	*Plan. Rsch. Corp. v. United States*, 971 F.2d 736 (Fed. Cir. 1992)
Altanovo-17	*Algese 2 s.c.a.r.l. v. United States*, 125 Fed. Cl. 431 (2016)

EXHIBIT Altanovo-1

Annex A

RELEVANT PROVISIONS OF THE DAA

Redacted - Third Party Designated Confidential Information

EXHIBIT Altanovo-2

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

FINAL DECISION

Corrected version dated 15 July 2021

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20 May 2021

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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GLOSSARY OF DEFINED TERMS

Afilias	Claimant Afilias Domains No. 3 Limited.
Afilias' First DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 February 2018.
Afilias' Response to the *Amici*'s Brief	Afilias' Response to the *Amici Curiae* Briefs dated 24 July 2020.
Amended Request for IRP	Afilias's Amended Request for Independent Review dated 21 March 2019.
Amici	Collectively, Verisign, Inc. and Nu DotCo, LLC.
Amici's PHB	Verisign, Inc. and Nu DotCo, LLC's post-hearing brief dated 12 October 2020.
Articles	*Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the Board on 9 August 2016, and filed on 3 October 2016, Ex. C-2.
Auction Rules	Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
Board	ICANN's board of directors.
Blackout Period	Period associated with an ICANN auction extending from the deposit deadline until full payment has been received from the prevailing bidder, and during which discussions among members of a contention set are prohibited.
Bylaws	Bylaws for Internet Corporation for Assigned Names and Numbers, as amended 18 June 2018, Ex. C-1.
CCWG	The Cross-Community Working Group for Accountability created by ICANN's supporting organizations and advisory committees to review and advise on ICANN's accountability mechanisms.
CEP	ICANN's Cooperative Engagement Process, as described in Article 4, Section 4.3(e) of the Bylaws, intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in the IRP.

CEP Rules	Rules applicable to a Cooperative Engagement Process described in an ICANN document dated 11 April 2013, Ex. C-121.
Claimant	Afilias Domains No. 3 Limited.
Claimant's PHB	Afilias' post-hearing brief dated 12 October 2020.
Claimant's Reply	Afilias' Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 4 May 2020.
Claimant's Reply Submission on Costs	Afilias' reply dated 23 October 2020 to the Respondent's submissions on costs.
Covered Actions	As defined at Section 4.3(b)(ii) of the Bylaws : "any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute".
DAA, or Domain Acquisition Agreement	Domain Acquisition Agreement between Verisign, Inc. and Nu DotCo, LLC dated 25 August 2015, Ex. C-69.
Decision on Phase I	Panel's decision on Phase I dated 12 February 2020.
DIDP	ICANN's Documentary Information Disclosure Policy.
DNS	Domain Name System.
DOJ	United States Department of Justice.
Donuts	Donuts, Inc., the parent company of .WEB applicant Ruby Glen, LLC.
Donuts CEP	Cooperative Engagement Process invoked by Donuts on 2 August 2016 in regard to .WEB.
First Procedural Order	Panel's first procedural order for Phase II, dated 5 March 2020.
gTLD	Generic top-level domain.
Guidebook	ICANN's New gTLD Applicant Guidebook, Ex. C-3.
ICANN, or Respondent	Respondent Internet Corporation for Assigned Names and Numbers.
ICANN's Response to the *Amici*'s Briefs	ICANN's response dated 24 July 2020 to the *amici curiae* briefs.

ICDR	International Centre for Dispute Resolution.
ICDR Rules	International Arbitration Rules of the ICDR.
Interim Procedures	Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process, Ex. C-59.
IOT	Independent Review Process Implementation Oversight Team.
IRP	Independent Review Process provided for under ICANN's Bylaws.
Joint Chronology	Chronology of relevant facts dated 23 October 2020, agreed to by the Parties and the *Amici* pursuant to the Panel's communication dated 16 October 2020.
NDC	*Amicus Curiae* Nu DotCo, LLC.
NDC's Brief	Nu DotCo, LLC's *amicus curiae* brief dated 26 June 2020.
New gTLD Program Rules	Collectively, ICANN's New gTLD Applicant Guidebook, Ex. C-3, and the Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
November 2016 Workshop	Workshop held by the Board on 3 November 2016 during which a briefing was presented by in-house counsel regarding the .WEB contention set.
Ombudsman	ICANN's Ombudsman.
Panel	The Panel appointed to resolve Claimant's IRP in the present case.
Phase I	First phase of this Independent Review Process which concluded with the Panel's Decision on Phase I dated 12 February 2020.
Procedural Order No. 2	Panel's second procedural order for Phase II dated 27 March 2020.
Procedural Order No. 3	Panel's third procedural order for Phase II dated 27 March 2020.
Procedural Order No. 4	Panel's fourth procedural order for Phase II dated 12 June 2020.
Procedural Order No. 5	Panel's fifth procedural order for Phase II dated 14 July 2020.
Procedural Order No. 6	Panel's sixth procedural order for Phase II dated 27 July 2020.

Procedural Timetable	Procedural timetable for Phase II attached to the First Procedural Order dated 5 March 2020.
Questionnaire	Questionnaire issued by ICANN on 16 September 2016.
Radix	Radix FZC.
Reconsideration Request 18-7	Reconsideration request submitted by Afilias challenging ICANN's response to its First Documentary Information Disclosure Policy Request.
Reconsideration Request 18-8	Reconsideration request submitted by Afilias challenging ICANN's response to its Second Documentary Information Disclosure Policy Request.
Request for Emergency Interim Relief	Afilias' Request for Emergency Panelist and Interim Measures of Protection, dated 27 November 2018.
Respondent, or ICANN	Respondent Internet Corporation for Assigned Names and Numbers.
Respondent's Answer	ICANN's Answer to the Amended Request for IRP dated 31 March 2019.
Respondent's PHB	ICANN's post-hearing brief dated 12 October 2020.
Respondent's Rejoinder	ICANN's Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 1 June 2020.
Respondent's Response Submission on Costs	ICANN's response dated 23 October 2020 to the Claimant's submissions on costs.
Revised Procedural Timetable	Revised procedural timetable for Phase II attached to the Procedural Order No. 3 dated 13 March 2020.
Ruby Glen	Ruby Glen, LLC.
Ruby Glen Litigation	Ruby Glen, LLC's complaint against ICANN filed in the US District Court of the Central District of California and application seeking to halt the .WEB auction.
Rule 7 Claim	Afilias' claim that ICANN violated its Bylaws in adopting the *amicus curiae* provisions set out in Rule 7 of the Interim Procedures.

Second DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 April 2018.
Staff	ICANN's Staff.
Supplemental Submission	Afilias' supplemental submission dated 29 April 2020 adding an additional argument in favour of a broader document production by ICANN.
Verisign	*Amicus Curiae* Verisign, Inc.
Verisign's Brief	Verisign, Inc.'s *amicus curiae* brief dated 26 June 2020.
10 June Application	Afilias' application dated 10 June 2020 regarding the status of the evidence originating from the *Amici* which had been filed with the Respondent's Rejoinder.
29 April 2020 Application	Afilias' application seeking assistance from the Panel regarding ICANN's document production and privilege log.

I. INTRODUCTION

A. Overview

1. The Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB generic Top-Level Domain (**gTLD**), pursuant to the rules and procedures set out in the Respondent's New gTLD Applicant Guidebook (**Guidebook**) and the Auction Rules for New gTLDs (**Auction Rules**) (collectively, **New gTLD Program Rules**).

2. gTLDs are one category of top-level domains used in the domain name system (**DNS**) of the Internet, to the right of the final dot, such as ".COM" or ".ORG". Under the Guidebook and Auction Rules, in the event of multiple applicants for the same gTLD, the applicants are placed in a "contention set" for resolution privately or, if this first option fails, through an auction administered by the Respondent.

3. On 27 and 28 July 2016, the Respondent conducted an auction among the seven (7) applicants for the .WEB gTLD. Nu DotCo, LLC (**NDC**) won the auction while the Claimant was the second-highest bidder. Shortly after the .WEB auction, it was revealed that NDC and Verisign, Inc. (**Verisign**) had entered into an agreement (**Domain Acquisition Agreement** or **DAA**) under which Verisign undertook to provide funds for NDC's bid for the .WEB gTLD, while NDC undertook, if its application proved to be successful, to transfer and assign its registry operating rights in respect of .WEB to Verisign upon receipt from the Respondent of its actual or deemed consent to this assignment.[1]

4. The Claimant initiated the present Independent Review Process (**IRP**) on 14 November 2018, seeking, among others, binding declarations that the Respondent must disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel, proceed with contracting the registry agreement for .WEB with the Claimant.

5. At the outset of these proceedings, on 30 August 2019, the Parties agreed that there should

[1] Domain Acquisition Agreement entered into by NDC and Verisign on 25 August 2015, Ex. C-218, as amended and supplemented by the "Confirmation of Understanding" executed by these same parties on 26 July 2016, Ex. H to Mr. Livesay's witness statement. See below, paras. 39, 84 and 101.

be a bifurcated Phase I in this IRP to address two questions. The first was the Claimant's claim that the Respondent violated its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), in adopting the *amicus curiae* provisions set out in Rule 7 of the *Interim Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process*, adopted by the Respondent's board of directors (**Board**) on 25 October 2018 (**Interim Procedures**), and that Verisign and NDC should be prohibited from participating in the IRP on that basis. This question has been referred to in these proceedings as the Claimant's **Rule 7 Claim**. The second question to be addressed in Phase I was the extent to which, in the event the Rule 7 Claim failed, NDC and Verisign should be permitted to participate in the IRP as *amici*.

6. In its Decision on Phase I dated 12 February 2020 (**Decision on Phase I**), which concluded the first phase of the IRP, this IRP Panel (**Panel**) unanimously decided to grant the requests respectively submitted by Verisign and NDC (collectively, the ***Amici***) to participate as *amici curiae* in the present IRP, on the terms and subject to the conditions set out in that decision. On the basis of the Claimant's alternative request for relief in Phase I,[2] the Panel decided to join to the Claimant's other claims in Phase II those aspects of Afilias' Rule 7 Claim over which the Panel determined that it had jurisdiction[3] – to the extent the Claimant were to choose to maintain them.

7. On 4 March 2020, the Panel held a case management conference in relation to Phase II of the IRP. On that occasion, the Claimant informed the Panel that it intended to maintain its Rule 7 Claim in order to illustrate what it described as the "unseemly relationship between the regulator and the monopolist"[4] (*i.e.*, in this case, respectively, the Respondent and Verisign). For reasons set out later in this Final Decision, the Panel has determined that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I. Accordingly, the Panel has concluded that no useful

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2 *See* Decision on Phase I, para. 183.

3 In its decision on Phase I, the Panel found that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws: (a) committed by the Board; or (b) committed by Staff members of ICANN, but not over actions or failures to act committed by the IRP Implementation Oversight Team as such. *See* Decision on Phase I, para. 133.

4 Transcript of the preparatory conference of 4 March 2020, p. 11.

purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as deemed appropriate. In this Final Decision, the Panel disposes of the Claimant's other substantive claims in this IRP, as well as its cost claims in connection with the IRP, including in relation to Phase I.

8. After careful consideration of the facts, the applicable law and the submissions made by the Parties and the *Amici*, the Panel finds that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the Board on 9 August 2016, and filed on 3 October 2016 (**Articles**) and its Bylaws by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold"; and (b) its Board, having deferred consideration of the Claimant's complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program. In the opinion of the Panel, the Respondent in so doing violated its commitment to make decisions by applying documented policies objectively and fairly. The Panel also finds that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure fairness.

9. The Panel is also of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application

should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules. The Panel therefore denies the Claimant's requests for (a) a binding declaration that the Respondent must disqualify NDC's bid for .WEB for violating the Guidebook and Auction Rules, and (b) an order directing the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.

B. The Parties

10. The Claimant in the IRP is Afilias Domains No. 3 Limited (**Afilias** or **Claimant**), a legal entity organised under the laws of the Republic of Ireland with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several generic gTLD registries.

11. The Claimant's parent company, Afilias, Inc., was, until 29 December 2020, a United States corporation that was the world's second-largest Internet domain name registry. As noted below in paragraphs 244 to 249, in post-hearing submissions made in December 2020, the Panel was informed that pursuant to a Merger Agreement signed on 19 November 2020 between Afilias, Inc. and Donuts, Inc. (**Donuts**), these two (2) companies have merged as of 29 December 2020. The Claimant has explained, however, that this transaction does not include the transfer of the Claimant's .WEB application, as both the Claimant as an entity and its .WEB application have been carved out of the transaction.

12. The Claimant is represented in the IRP by Mr. Arif Hyder Ali, Mr. Alexandre de Gramont, Ms. Rose Marie Wong, Mr. David Attanasio, Mr. Michael A. Losco and Ms. Tamar Sarjveladze of Dechert LLP, and by Mr. Ethan Litwin of Constantine Cannon LLP.

13. The Respondent is the Internet Corporation for Assigned Names and Numbers (**ICANN** or **Respondent**), a not-for-profit corporation organised under the laws of the State of California, United States. ICANN oversees the technical coordination of the Internet's DNS on behalf of the Internet community. The essential function of the DNS is to convert

domain names that are easily remembered by humans – such as "icann.org" – into numeric IP addresses understood by computers.

14. ICANN's core mission, as described in its Bylaws, is to ensure the stable and secure operation of the Internet's unique identifier system. To that end, ICANN contracts with, among others, entities that operate gTLDs. The Bylaws provide that in performing its mission, ICANN will act in a manner that complies with and reflects ICANN's commitments and respects ICANN's core values, as described in the Bylaws.

15. ICANN is represented in the IRP by Mr. Jeffrey A. LeVee, Mr. Steven L. Smith, Mr. David L. Wallach, Mr. Eric P. Enson and Ms. Kelly M. Ozurovich, of Jones Day LLP.

C. The IRP Panel

16. On 26 November 2018, the Claimant nominated Professor Catherine Kessedjian as a panelist for the IRP. On 13 December 2018, the International Centre for Dispute Resolution (**ICDR**) appointed Prof. Kessedjian on the IRP Panel and her appointment was reaffirmed by the ICDR on 4 January 2019.

17. On 18 January 2019, the Respondent nominated Mr. Richard Chernick as a panelist for the IRP and he was appointed to that position by the ICDR on 19 February 2019.

18. On 17 July 2019, the Parties nominated Mr. Pierre Bienvenu, Ad. E., to serve as the IRP Panel Chair. Mr. Bienvenu accepted the nomination on 23 July 2019 and he was appointed by the ICDR on 9 August 2019.

19. In September 2019, with the consent of the Parties, Ms. Virginie Blanchette-Séguin was appointed as Administrative Secretary to the IRP Panel.

D. The *Amici*

20. Verisign is a publicly traded company organised under the laws of the State of Delaware. Verisign is a global provider of domain name registry services and Internet infrastructure that operates, among others, the registries for the .COM, .NET and .NAME gTLDs. Verisign is represented in this IRP by Mr. Ronald L. Johnston, Mr. James S. Blackburn,

Ms. Maria Chedid, Mr. Oscar Ramallo and Mr. John Muse-Fisher, of Arnold & Porter Kaye Scholer LLP.

21. NDC is a limited liability company organised under the laws of the State of Delaware. NDC was established as a special purpose vehicle to participate in ICANN's New gTLD Program. NDC was initially represented in this IRP by Mr. Charles Elder and Mr. Steven Marenberg, of Irell & Manella LLP, and from 1 March 2020 onward by Mr. Steven Marenberg, Mr. Josh B. Gordon and Ms. April Hua, of Paul Hastings LLP.

E. Place (Legal Seat) of the IRP

22. The Claimant has proposed that the seat of the IRP be London, England, without prejudice to the location of where hearings are held. In its letter dated 30 August 2019, the Respondent has confirmed its agreement with this proposal.

F. Language of the Proceedings

23. In accordance with Section 4.3(I) of the Bylaws, the language of the proceedings of this IRP is English.

G. Jurisdiction of the Panel

24. The Claimant's Request for IRP is submitted pursuant to Article 4, Section 4.3 of the Bylaws, the International Arbitration Rules of the ICDR (**ICDR Rules**), and the Interim Procedures. Section 4.3 of the Bylaws provides for an independent review process to hear and resolve, among others, claims that actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers or Staff members constituted an action or inaction that violated the Articles or the Bylaws.

25. In its Decision on Phase I, the Panel concluded, in respect of Afilias' Rule 7 Claim, that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws:

(a) committed by the Board; or

(b) committed by Staff members;

but not over actions or failures to act allegedly committed by the IRP Implementation Oversight Team (**IOT**), on the ground that the latter does not fall within the enumeration "Board, individual Directors, Officers or Staff members" in the definition of **Covered Actions** at Section 4.3(b)(ii) of the Bylaws.

26. In relation to Phase II issues, the Parties and *Amici* have characterized a number of issues as "jurisdictional", such as the scope of the dispute described in the Amended Request for IRP, the timeliness of the claims, the applicable standard of review, and the relief that the Panel is empowered to grant. Those issues are addressed in the relevant sections of this Final Decision. However, and subject to the foregoing, the jurisdiction of the Panel to hear the Claimant's core claims against the Respondent in relation to .WEB is not contested.

H. Applicable Law

27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.

28. Section 1.2(a) of the Bylaws provides that "[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law […]". The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.

29. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other "quasi-contractual" documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN's position in this respect.

30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.

I. Burden and Standard of Proof

31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.

32. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, "more likely than not". That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, "[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established."[5]

33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.

J. Rules of Procedure

34. The ICDR is the IRP Provider responsible for administering IRP proceedings.[6] The Interim Procedures, according to their preamble and the contextual note at footnote 1 thereof, are intended to supplement the ICDR Rules in effect at the time the relevant request for independent review is submitted. In the event of an inconsistency between the Interim Procedures and the ICDR Rules, the Interim Procedures govern.[7]

II. HISTORY OF THE PROCEEDINGS

A. Phase I

35. The history of these proceedings up to 12 February 2020, the date of the Panel's Decision on Phase I, is set out at paragraphs 33 to 67 of the Panel's Phase I decision, which are

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[5] See, generally, Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford, Oxford University Press, 2015, para. 6.87.

[6] See Bylaws, Ex. C-1, Section 4.3 (m).

[7] See Interim Procedures, Ex. C-59, Rule 2.

incorporated by reference in this Final Decision.

36. In order to provide context for the present decision, the Panel recalls that on 18 June 2018, Afilias invoked ICANN's Cooperative Engagement Process (**CEP**) after learning that ICANN had removed the .WEB gTLD contention set's "on-hold" status. A CEP is intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in an IRP. The Parties participated in the CEP process until 13 November 2018.

37. On 14 November 2018, Afilias filed its request for IRP with the ICDR. On the same day, ICANN informed Afilias that it would only keep the .WEB gTLD contention set "on-hold" until 27 November 2018, so as to allow Afilias time to file a request for emergency interim relief, barring which ICANN would take the .WEB gTLD contention set off of its "on hold" status. Afilias filed a Request for Emergency Panelist and Interim Measures of Protection with the ICDR on 27 November 2018 (**Request for Emergency Interim Relief**), seeking to stay all ICANN actions that would further the delegation of the .WEB gTLD.

38. From November 2018 to March 2019, the Parties focused on the Claimant's Request for Emergency Interim Relief and, pursuant to Requests to Participate as *Amicus* in the IRP filed by the *Amici* on 11 December 2018, on the possible participation of the *Amici* in the proceedings.

39. The Emergency Panelist presided over a focused document production process during which, on 18 December 2018, ICANN produced the Domain Acquisition Agreement entered into between Verisign and NDC in connection with .WEB. The Claimant then took the position that the documents produced to it by the Respondent warranted the amendment of its Request for IRP. Accordingly, on 29 January 2019, the Parties agreed to postpone the deadline for the submission of the Respondent's Answer until after the Claimant filed its Amended Request for IRP. In the event, the Claimant filed its Amended Request for IRP with the ICDR on 21 March 2019 (**Amended Request for IRP**), and the Respondent submitted its Answer to the Amended Request for IRP on 31 May 2019 (**Respondent's Answer**).

40. In January 2019, the Parties asked the Emergency Panelist to postpone further activity

pending resolution of the *Amici*'s requests to participate in the IRP. After the appointment of this Panel to determine the IRP, the Parties expressed their understanding that it would be for this Panel to resolve the Emergency Interim Relief Request. In the meantime, the Respondent agreed that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP.[8]

41. As for the *Amici*'s requests to participate in the IRP, they were first the subject of proceedings before a Procedures Officer appointed by the ICDR on 21 December 2018. In its final Declaration, dated 28 February 2019, the Procedures Officer found that "the issues raised […] are of such importance to the global Internet community and Claimants [sic] that they should not be decided by a "Procedures Officer", and therefore the issues raised are hereby referred to […] the IRP Panel for determination".[9] The *Amici*'s requests to participate in the IRP were referred to the Panel and, by agreement of the Parties, were resolved in Phase I of this IRP by the Panel's Decision on Phase I dated 12 February 2020.

B. Phase II

42. On 4 March 2020, the Panel presided over a case management conference to discuss the issues to be decided in Phase II and the Parties' respective proposed procedural timetables for the Phase II proceedings. The Parties differed as to the timing of document production and the briefing schedule for Phase II. The Claimant favoured document production taking place after the filing of Afilias' Reply, ICANN's Rejoinder and the *Amici*'s Briefs, such production to be followed by the simultaneous filing of Responses from the Parties. The Respondent, for its part, proposed a document production stage at the outset of Phase II, to be followed by a briefing schedule for the filing of the Parties' additional submissions and the *Amici*'s Briefs.

43. In its First Procedural Order for Phase II, dated of 5 March 2020 (**First Procedural Order**), the Panel decided that the document production phase in relation to Phase II would take place at the outset of Phase II, as proposed by the Respondent, so as to give the Parties

[8] See ICANN's Response to Afilias' Costs Submission, dated 23 October 2020, at para. 23.

[9] Declaration of the Procedures Officer dated 28 February 2019, p. 38.

the benefit of the documents produced during this process in their additional submissions in relation to Phase II. With respect to the other elements of the Procedural Timetable, the Panel adopted the Claimant's proposed briefing sequence, which provided for the filing of the Claimant's Reply, the Respondent's Rejoinder, the *Amici*'s Briefs, and an opportunity for the Claimant and the Respondent subsequently to respond simultaneously to the *Amici*'s Briefs. The Panel attached to the First Procedural Order the following procedural timetable for Phase II, reflecting these decisions (**Procedural Timetable**):

No.	Action	Party	Date
1.	Simultaneous requests to produce (via Redfern Schedules)	Afilias and ICANN	6 March 2020
2.	Simultaneous responses/objections (via Redfern Schedules)	Afilias and ICANN	13 March 2020
3.	List of agreed issues to be decided in Phase II and, as the case may be, list(s) of additional issues to be decided in Phase II	Afilias and ICANN	13 March 2020
4.	Simultaneous replies to responses/objections (via Redfern Schedules)	Afilias and ICANN	20 March 2020
5.	Hyperlinked list of constituent elements (as of that date) of the Phase II record	Afilias and ICANN	20 March 2020
6.	Panel ruling on outstanding objections	N/A	27 March 2020
7.	Production of documents	Afilias and ICANN	17 April 2020
8.	Submissions on questions as to which the *Amici* will be permitted to submit briefings to the Panel, as well as page limits and other modalities	Afilias, ICANN, Verisign and NDC	24 April 2020
9.	Reply (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	1 May 2020
10.	Rejoinder (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	29 May 2020
11.	*Amici*'s Briefs (along with all supporting exhibits, if any, and legal authorities)	Verisign and NDC	26 June 2020
12.	Simultaneous Responses to the *Amici*'s Briefs	Afilias and ICANN	15 July 2020
13.	Parties to identify witnesses called for cross-examination at the hearing	Afilias and ICANN	24 July 2020
14.	Final status and pre-hearing conference	Afilias, ICANN, Verisign and NDC	29 July 2020
15.	Hearing	Afilias, ICANN, Verisign and NDC	3-7 August 2020

No.	Action	Party	Date
16.	Post-hearing submissions	Afilias, ICANN, Verisign and NDC	TBD

44. As reflected in the Procedural Timetable, in its First Procedural Order the Panel also asked the Parties to develop a joint list of issues to be decided in Phase II, and laid out a process for the determination, in consultation with the Parties and as contemplated in the Panel's Decision on Phase I, of the questions as to which the *Amici* would be permitted to submit briefings to the Panel. The Panel also accepted the Parties' proposal that the hearing, scheduled on 3-7 August 2020, be held in Chicago, IL.

45. In accordance with the Procedural Timetable, on or about 6 March 2020, the Parties exchanged document production requests in the form of Redfern Schedules. The Claimant addressed twenty-one (21) requests to produce documents to the Respondent, while the Respondent addressed two (2) requests to produce to the Claimant. Responses or objections to those requests were exchanged on or about 13 March 2020. The Claimant objected to both of the Respondent's requests. The Respondent objected to many, but not all, of the Claimant's requests, having agreed to search for some categories of documents requested by the Claimant.

46. Also on 6 March 2020, the Claimant sought clarification of the First Procedural Order as regards the question of whether the *Amici* would be permitted, in their briefs, to add new documents to the record as exhibits. The Claimant argued that any documents to be submitted by the *Amici* would inevitably be "cherry picked" and supportive of their submissions. The Claimant thus took the position that if the *Amici* were allowed to refer to documents that are not already in the record, the principles of fundamental fairness and due process required that it be granted an opportunity to request documents from the *Amici*. On 11 March 2020, the Respondent submitted in response that pursuant to the Decision on Phase I, the *Amici* are entitled to submit "briefings and supporting exhibits" and that the provisions of the Interim Procedures relating to the exchange of information do not apply to the *Amici*. On the same date, the *Amici* contended, for their part, that the First Procedural Order clearly states that they may submit exhibits, without specifying that such exhibits are limited to those already in the record. The *Amici* stressed that material evidence may

be in their possession and not in possession of the Parties. They further contended that the Panel had already ruled that they may not propound discovery nor be the recipient of information requests. In its reply dated 12 March 2020, the Claimant reiterated its fairness concerns and stated that the First Procedural Order did not address the question of whether the *Amici*'s exhibits were to be limited to those on record.

47. By email dated 13 March 2020, the Parties informed the Panel that they had attempted – for a second time and still without success – to agree on a joint list of issues to be decided in Phase II. While unable to agree on the joint issues list requested by the Panel, the Parties proposed an agreed procedure for the Panel ultimately to determine the questions on which the *Amici* would be invited to submit briefs. In the event, the Panel accepted the Parties' suggestion in Procedural Order No. 3, and issued a revised procedural timetable reflecting the changes proposed by the Parties (**Revised Procedural Timetable**).

48. In Procedural Order No. 2 dated 27 March 2020 (**Procedural Order No. 2**), the Panel ruled on the outstanding objections to the Parties' respective requests to produce, granting twelve (12) of the Claimant's fourteen (14) outstanding requests and one (1) of the two (2) requests presented by the Respondent. In the same order, the Panel directed each of the Parties to provide to the other a privilege log listing each document over which a privilege is asserted, on the ground that such logs might prove useful to the Parties and the Panel in addressing issues arising from refusals to produce based on privilege.

49. In Procedural Order No. 3, also dated 27 March 2020 (**Procedural Order No. 3**), the Panel ruled on the Claimant's clarification request in regard to the possibility for the *Amici*, as part of their briefs, to add to the evidentiary record of the IRP. It is useful to cite in full the Panel's ruling on that question:

> 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.
>
> Should a Party be of the view that documents submitted in support of the *Amici*'s Briefs are incomplete or somehow misleading, it will be open to that Party to advance the argument in response to the *Amici*'s submissions and to seek whatever relief it considers appropriate from the Panel.[10]

50. As regards the Claimant's request to be granted an opportunity to request documents from the *Amici,* the Panel referred to its Decision on Phase I, in which it was noted that the provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to *Parties,* not to persons, groups or entities that are granted permission to participate in an IRP with the status of an *amicus curiae*.[11]

51. On 17 April 2020, the Respondent produced to the Claimant its document production pursuant to the Procedural Order No. 2. On 24 April 2020, the Respondent transmitted to the Claimant a privilege log identifying documents withheld from production based on the attorney-client privilege or the attorney work product doctrine.

52. On 29 April 2020, the Claimant filed an application seeking assistance from the Panel regarding what the Claimant described as the Respondent's "grossly deficient document production and insufficiently detailed Privilege Log" (**29 April 2020 Application**). By way of relief, the Claimant requested in this application that the Panel order the Respondent to "(i) supplement and remedy its production by producing those documents that are subject to the Tribunal's production order or ICANN's production agreement; (ii) produce those

[10] Procedural Order No. 3, pp. 2-3.

[11] See Decision on Phase I, para. 195.

documents listed on ICANN's Privilege Log that are not privileged; (iii) produce those documents that contain privileged and non-privileged information with appropriate redactions covering only the privileged information; and (iii) (*sic*) for the remaining documents, remedy its Privilege Log so that the Panel and Afilias can properly assess the validity of the privilege that ICANN has invoked."[12] The Claimant also reserved "its right to request the Panel to conduct an in camera review of documents that ICANN has asserted are covered by privilege".[13]

53. As directed by the Panel, the Respondent responded to the 29 April 2020 Application on 6 May 2020, rejecting the Claimant's complaints and asserting that the Respondent had in all respects complied with the Procedural Order No. 2. The Respondent argued that it searched and produced all non-privileged documents responsive to the Claimant's requests to which the Respondent agreed or was directed by the Panel to respond, and that it properly withheld only those documents protected by attorney-client privilege or the work product doctrine. The Responded added that it served a privilege log providing, in respect of each withheld document, all of the information necessary to establish privilege.

54. On 11 May 2020, the Panel, as suggested by the Claimant, held a telephonic hearing in connection with the 29 April 2020 Application. On that occasion, both Parties had the opportunity to amplify their written submissions orally and to present arguments in reply. Consistent with the Panel's Decision on Phase I, the *Amici* were permitted to attend this procedural hearing as observers, which they did. In the course of its counsel's reply submissions at the hearing, the Claimant articulated a new waiver argument, namely that by arguing that the Board reasonably decided, in November 2016, not to make any determination regarding NDC's conduct until after the conclusion of the IRP, as alleged in the Respondent's Rejoinder, the Respondent had in effect affirmatively put the reasonableness and good faith of that Board's decision at issue in the case.

55. In accordance with the Revised Procedural Timetable (as modified by the Panel's correspondence of 1 May 2020), on 4 May 2020, the Claimant filed its Reply Memorial in

[12] 29 April 2020 Application, p. 11.

[13] *Ibid*, fn 29.

Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Claimant's Reply**) and, on 1 June 2020, the Respondent filed its Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Respondent's Rejoinder**).

56. On 10 June 2020, while the Claimant's 29 April 2020 Application regarding document production remained under advisement, the Claimant filed a supplemental submission to add an additional argument in favour of a broader document production by the Respondent, which echoed the new argument put forward in the course of its counsel's reply at the hearing of 11 May 2020 (**Supplemental Submission**). In that supplemental submission, the Claimant argued that the Respondent had waived potentially applicable privilege with the filing of its Rejoinder Memorial where it allegedly put certain documents for which it claimed privilege "at issue" in this IRP.

57. By emails dated 11 June 2020 (corrected the following day), the Panel established a briefing schedule in relation to the Claimant's Supplemental Submission. In accordance with this schedule, the Respondent set out its position in relation to the Supplemental Submission in a response dated 17 June 2020 and a sur-reply dated 26 June 2020, inviting the Panel to find that the Respondent did not waive privilege and, therefore, that the relief sought by the Supplemental Submission should be denied. As for the Claimant, its position in relation to the Supplemental Submission was amplified in a reply dated 19 June 2020. The relief sought by the Claimant's Supplemental Submission as set out in the Claimant's 19 June 2020 reply is that the Panel order the Respondent to produce all documents that formed the basis of its Board's alleged determination, in November 2016, to defer any decision on the .WEB contention set, 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.

58. The Claimant filed another application on 10 June 2020, this one regarding the status of the evidence originating from the *Amici* which had been filed with the Respondent's Rejoinder with the caveat that "ICANN did so without endorsing those statements or

agreeing with them in full"[14] (**10 June Application**). The Claimant argued that ICANN was not permitted, pursuant to Procedural Order No. 3, to submit materials from the *Amici* unless it considered them relevant and wished to adduce them in support of its case. By way of relief, the Claimant requested that the Respondent be directed to resubmit the evidence filed with its Rejoinder that originated from the *Amici*, with a clear indication of the portions thereof with which the Respondent did not agree or which it did not endorse. Should the Respondent fail to do so, the Claimant invited 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. On 15 June 2020, the Respondent responded to the 10 June Application, arguing that the submission of evidence on behalf of the *Amici* with the Respondent's Rejoinder complied with Procedural Order No. 3. The Claimant replied on 17 June 2020, contending that the Panel could not allow Respondent to hide the basis for its actions and non-actions by letting the *Amici* defend it in the abstract and without affirming that it agrees with the *Amici*'s evidence.

59. In Procedural Order No. 4 dated 12 June 2020 (**Procedural Order No. 4**), the Panel denied the Claimant's 29 April 2020 Application while reserving the question raised in the Supplemental Submission. The Panel decided that the Respondent had no obligation to ask the *Amici* to search for documents responsive to the Claimant's requests to produce, and consequently rejected the Claimant's claim that the Respondent ought to have produced responsive documents in the possession of the *Amici*. In that same order, a majority of the Panel concluded, applying California law as supplemented by US federal law, that the description used by the Respondent in its privilege log was sufficient to validly assert privilege and, therefore, that the Claimant had failed to justify its request that the Respondent be required to revise its privilege log. One member of the Panel, however, would have required disclosure of more detailed information from the Respondent in order to support the latter's claims of privilege. Finally, the Panel rejected the remaining allegations of the Claimant regarding the alleged insufficiency of the Respondent's production. Specifically, the Panel held that it would violate the attorney-client privilege and work product protection to call upon the Respondent, as requested by the Claimant, to

[14] Respondent's Rejoinder, fn 6.

redact privileged communications or work product documents so as to reveal "facts or information" contained in those protected documents.

60. On 26 June 2020, NDC and Verisign respectively filed the *Amicus Curiae* Brief of Nu DotCo, LLC (**NDC's Brief**) and Verisign, Inc.'s Pre-Hearing Brief (Phase II) (**Verisign's Brief**). In accordance with the Revised Procedural Timetable, the Claimant and the Respondent both responded to the *Amici*'s briefs on 24 July 2020, respectively in Afilias Domains No. 3 Limited's Response to the *Amicus Curiae* Briefs (**Afilias' Response to the *Amici*'s Briefs**) and ICANN's Response to the Briefs of *Amicus Curiae* (**ICANN's Response to the *Amici*'s Briefs***)*.

61. On 14 July 2020, the Panel issued its fifth procedural order (**Procedural Order No. 5**). In relation to the 10 June Application, the Panel found that the Respondent had allowed its Rejoinder to serve as a vehicle for the filing of what the Respondent itself described as the "*Amici*'s evidence", the "*Amici*'s expert reports and witness statements". In the Panel's view, the Respondent had thus sought to do indirectly what the Panel had decided in Phase I could not be done directly under the Interim Procedures. By way of relief, the Panel directed the Respondent to clearly identify, in a communication to be addressed to the Claimant and the *Amici* and filed with the Panel, those aspects (if any) of the *Amici*'s facts and expert evidence which the Respondent formally refused to endorse, or with which it disagrees, and to provide an explanation for this non-endorsement or disagreement.[15] The Respondent complied with the Panel's direction by letters dated 17-18 July 2020.

62. The Panel considers it useful to cite the reasons supporting this ruling as they laid the foundations to the Panel's approach to the issues in dispute in this IRP:

> 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.

[15] Procedural Order No. 5, para. 24.

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 in PO5]).

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 in PO5]:

> 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 Afilias 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.

63. In Procedural Order No. 5, the Panel also ruled on the Claimant's Supplemental Submission by rejecting the Claimant's contention that the Respondent's Rejoinder had itself put in issue in the IRP documents over which the Respondent had claimed privilege, and that the Respondent had thus waived attorney-client privilege. Having quoted the leading case on implied waiver of attorney-client privilege under California law,[16] the Panel wrote:

> **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.
>
> [emphasis in the original]

64. On 26 July 2020, the *Amici* filed a request for "urgent clarification from the Panel regarding the status of the evidence from *Amici* that ICANN has not endorsed in response to Procedural Order No. 5". The *Amici* stressed that, while ICANN endorsed almost all of the statements of the *Amici*'s expert witnesses, ICANN declined to endorse almost all of the *Amici*'s fact witnesses. In its order dated 27 July 2020 (**Procedural Order No. 6**), the Panel ruled that, notwithstanding ICANN's decision not to endorse them, the witness statements of Messrs. Paul Livesay and Jose I. Rasco III remained part of the record of this IRP, and that the Panel would consider the evidence of these witnesses, as well as the rest of the evidence filed in the IRP.

65. On 29 July 2020, the Panel held a telephonic pre-hearing conference, which was attended

[16] *Southern Cal. Gas Co. v. Public Utilities Com.*, 50 Cal. 3d 31 (1990).

by the Parties and *Amici*, to discuss various points of order in advance of the merits hearing.

66. The evidentiary hearing in relation to the merits of the IRP was held from 3 to 11 August 2020 inclusive. Because of the ongoing COVID-19 pandemic and the associated air travel restrictions, the hearing was conducted remotely using a videoconference platform selected by the Parties. Since the participants were located in multiple time zones, hearing days had to be shortened. To compensate, three (3) additional days to the five (5) days initially scheduled for the hearing were held in reserve. In the end, fewer witnesses than had been anticipated were heard and the hearing was completed in seven (7) days. A transcript of the hearing was prepared by Ms. Balinda Dunlap.

67. The Claimant had filed with its original Request for IRP witness statements from three (3) fact witnesses, Messrs. John L. Kane, Cedarampattu "Ram" Mohan and Jonathan M. Robinson, as well as one expert report by Mr. Jonathan Zittrain. Upon the filing of its Amended Request for IRP, on 21 March 2019, the Claimant filed one expert report, by Dr. George Sadowsky, and withdrew the witness statements of its three (3) fact witnesses "[i]n light of ICANN's disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC".[17]

68. For its part, the Respondents filed, on its own behalf, witness statements from five (5) fact witnesses, Ms. J. Beckwith Burr, Mr. Todd Strubbe, Ms. Christine A. Willett, Mr. Christopher Disspain and Ms. Samantha S. Eisner, and one (1) expert report by Dr. Dennis W. Carlton. In addition, the Respondent filed, on behalf of the *Amici*, witness statements from three (3) fact witnesses, Mr. Rasco, of NDC, and Messrs. David McAuley and Paul Livesay, of Verisign, and two (2) expert reports, one (1) by the Hon. John Kneuer, the other by Dr. Kevin M. Murphy. In its letter of 18 July 2020, the Respondent withdrew the witness statement of Mr. Strubbe, a Verisign employee whose evidence had been offered in support of the Respondent's opposition to the Request for Emergency Interim Relief sought by the Claimant at the outset of the proceedings. The Respondent explained that Mr. Strubbe's evidence related to the question of whether Verisign would be irreparably injured by a delay in the delegation of .WEB, an issue that had become moot

[17] See Amended Request for IRP, fn 14, at p. ii.

by the time of the hearing.

69. The seven (7) fact witnesses whose witness statements remained in evidence, as well as the three (3) expert witnesses appointed by the Parties, were all initially called to appear at the hearing for questioning.[18] In the course of the hearing, the Claimant informed the Panel of its decision not to cross-examine the Respondent's expert witness, which prompted the Respondent to decide not to cross-examine the Claimant's experts.

70. The evidentiary hearing was thus devoted to hearing the Parties' and *Amici*'s opening statements, and to the questioning of the remaining seven (7) fact witnesses called by the Respondent, on its behalf or on behalf of the *Amici*, namely Ms. Burr, Ms. Willett, Mr. Disspain, Ms. Eisner, Mr. McAuley, Mr. Rasco and Mr. Livesay.

71. At the end of the hearing, it was decided that the Parties and *Amici* would be permitted to file post-hearing briefs on 8 October 2020. The Panel indicated, referring back to a question that had been discussed at the pre-hearing conference, that it would inform the Parties and *Amici* of a date – to be held in reserve – on which the Panel would make itself available to hear oral closing submissions from the Parties and *Amici* should the Panel feel the need to do so after perusing the post-hearing submissions. The date was later set to 20 November 2020.

72. On 23 August 2020, the Panel forwarded to the Parties and *Amici* a list of questions that the Panel invited them to address in their respective post-hearing submissions.

73. Pursuant to a short extension of time granted by the Panel on 6 October 2020, on 12 October 2020, the Parties filed their post-hearing briefs (respectively, **Claimant's PHB** and **Respondent's PHB**), submissions on costs, and updated lists of Phase II issues, along with a factual chronology agreed to by both of them.

74. Also on 12 October 2020, the *Amici* filed a joint post-hearing brief (***Amici*'s PHB**). In their cover email, as well as in footnote 2 to their PHB, the *Amici* noted that the Parties had not consulted with them in the preparation of their respective issues lists, nor in the preparation

[18] The Claimant did not request the presence of the *Amici*'s expert witnesses at the hearing.

of their joint chronology. The *Amici* therefore objected to the Parties' Phase II issues lists "to the extent that they omit or misrepresent the issues before this Panel", and they objected also to the Parties' joint chronology, which they asserted was incomplete.

75. On 16 October 2020, the Panel noted the *Amici*'s conditional objection to the Parties' respective issues lists. As regards the Parties' joint chronology, the *Amici* were given until 23 October 2020 to file, after consultations with the Parties, an amended version of the joint chronology with marked-up additions showing the items that they consider should be added to the joint chronology for it to be complete.

76. Also on 16 October 2020, the Claimant sought leave to respond to a number of "new non-record documents" cited in the *Amici*'s PHB. Having considered the Respondent's and *Amici*'s comments on this request, on 22 October 2020 the Panel granted the Claimant's request and a response to the impugned non-record documents was filed by the Claimant on 26 October 2020.

77. On 23 October 2020, the Parties filed their respective replies to the cost submissions of the other party (respectively, **Claimant's Reply Submission on Costs** and **Respondent's Response Submission on Costs**). On that date, the Claimant also provided the Panel with a joint chronology which had been agreed by the Parties and the *Amici* pursuant to the Panel's communication dated 16 October 2020 (**Joint Chronology**). The 23 October 2020 Joint Chronology is the chronology referred to in this Final Decision, and it is the one that the Panel has used in its deliberations

78. On 3 November 2020, having had the opportunity carefully to review the Parties' and *Amici*'s comprehensive post-hearing submissions, the Panel informed them of its decision not to avail itself of the possibility to hear additional oral closing submissions. The date reserved for that purpose was therefore released.

79. In a series of letters beginning with counsel for Verisign's letter of 9 December 2020, sent on behalf of both *Amici*, the Panel was informed of an impending, and later consummated merger of the Claimant's parent company, Afilias, Inc., and its competitor Donuts, Inc. This was described by Verisign as "new facts arising subsequent to the merits hearing, as

well as related newly discovered evidence, that contradict critical representations made by Afilias Domains No. 3 Limited ("Afilias") in the pre-hearing pleadings and at the merits hearing […]". The *Amici* requested that the Panel consider these new developments in resolving the Claimant's claims in this IRP. The submissions of the Parties and *Amici* concerning these post-hearing developments are summarized in the next section of this Final Decision.

80. On 7 April 2021, the Panel, being satisfied that the record of the IRP was complete and that the Parties and *Amici* had no further submissions to make in relation to the issues in dispute, formally declared the arbitral hearing closed in accordance with Article 27 of the ICDR Rules.

81. The Panel concludes this history of the proceedings by expressing its gratitude to Counsel for the Parties and *Amici* for their assistance in the resolution of this dispute and the exemplary professional courtesy each and everyone of them displayed throughout these proceedings.

III. FACTUAL BACKGROUND

82. The essential facts of this case have been conveniently laid out in the Joint Chronology dated 23 October 2020 agreed to by the Parties and *Amici*. In order to provide some background for the Panel's analysis below, the most salient facts of this case are summarized in this section.

83. The deadline for the submission of applications for new gTLDs under the Respondent's New gTLD Program was 30 May 2012. As mentioned in the overview, the Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB gTLD pursuant to the rules and procedures set out in the Respondent's Guidebook and the Auction Rules for New gTLDs.

84. Because there were multiple applicants for .WEB, the applicants were placed in a "contention set" for resolution either privately or through an auction of last resort administered by the Respondent.

85. Towards the end of 2014, at a time when the .WEB contention set was still on hold, and

had thus not been resolved, Redacted - Third Party Designated Confidential Information

.[19] Apart from filing applications for new gTLDs that were variants of the company's name, for example ".Verisign", or internationalized versions of Verisign's existing TLDs, Verisign had not otherwise sought to acquire rights to new gTLDs as part of ICANN's New gTLD Program. Redacted - Third Party Designated Confidential Information

.[20]

86. Verisign identified .WEB as one business opportunity in the New gTLD Program. Redacted - Third Party Designated Confidential Information

. In May 2015, Mr. Livesay contacted Mr. Rasco, NDC's CFO and manager, and expressed interest in working with NDC to acquire the rights to .WEB.[21]

87. On 25 August 2015, Verisign and NDC executed the DAA under which Verisign undertook to provide, Redacted - Third Party Designated Confidential Information, funds for NDC's bid for the .WEB gTLD while NDC undertook, if it prevailed at the auction and entered into a registry agreement with ICANN, to transfer and assign its .WEB registry agreement to Verisign upon receipt of ICANN's actual or deemed consent to the assignment.

88. On 27 April 2016, ICANN scheduled the .WEB auction of last resort for 27 July 2016.

89. Early in June 2016, it became known among members of the .WEB contention set that NDC did not intend to participate in a private auction in order to privately resolve the contention set. It is common ground that the Respondent, as a rule, favours the private resolution of contention sets. On 7 June 2016, in answer to a request to postpone the

[19] Merits hearing transcript, 11 August 2020, pp. 1125:17-1126:15 (Mr. Livesay).

[20] Mr. Livesay's witness statement, 1 June 2020, para. 4.

[21] Merits hearing transcript, 7 August 2020, p. 806:12-18 (Mr. Rasco).

ICANN auction in order for members of the contention set to "try to work this out cooperatively", Mr. Rasco stated in an email: "I went back to check with the powers that be and there was no change in the response and will not be seeking an extension."[22] The email in question was addressed to Mr. Jon Nevett, of Ruby Glen, LLC (**Ruby Glen**).

90. On 23 June 2016, Ruby Glen informed ICANN that it believed NDC "failed to properly update its application" to account for "changes to the Board of Directors and potential control of [NDC]".[23] On 27 June 2016, ICANN asked NDC to "confirm that there have not been changes to [its] application or [to its] organization that need to be reported to ICANN." On the same day, NDC confirmed that "there have been no changes to [its] organization that would need to be reported to ICANN."[24]

91. On 29 June 2016, Ms. Willett, then Vice-President of ICANN's gTLD Operations, informed Ruby Glen that her team had investigated and that NDC had confirmed that there had been no changes to NDC's ownership or control. As a result, she advised that "ICANN was continuing to proceed with the Auction as scheduled."[25]

92. On 30 June 2016, Ruby Glen formally raised its concern about a possible change in control of NDC with ICANN's ombudsman (**Ombudsman**). On 12 July 2016, the Ombudsman informed Ms. Willett that he had "not seen any evidence which would satisfy [him] that there ha[d] been a material change to the application. So [his] tentative recommendation [was] that there was nothing which would justify a postponement of the auction based on unfairness to the other applicants."[26] The following day, Ms. Willett informed the .WEB contention set accordingly.

93. On 17 July 2016, two other .WEB applicants, Donuts and Radix FZC (**Radix**), filed an emergency Reconsideration Request, alleging that ICANN had failed to perform a "full

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[22] Mr. Rasco's email dated 7 June 2016, Ex. C-35.

[23] Ms. Willett's witness statement, 31 May 2019, Ex. A.

[24] Exchanges between Messrs. Rasco and Jared Erwin, Ex. C-96.

[25] Declaration of Ms. Willett in support of ICANN's opposition to Plaintiff's *ex parte* application for temporary restraining order, Ex. C-40, paras. 15-16.

[26] Ms. Willett's witness statement, 31 May 2019, Ex. G.

and transparent investigation into the material representations made by NDC" and contesting ICANN's decision to proceed with the ICANN auction.[27] Reconsideration is an ICANN accountability mechanism allowing any person or entity materially affected by an action or inaction of the Board or Staff to request reconsideration of that action or inaction.[28] Donuts' and Radix's Reconsideration Request was denied on 21 July 2016.[29]

94. On 22 July 2016, Ruby Glen filed a complaint against ICANN in the US District Court of the Central District of California, and an application for a temporary restraining order seeking to halt the .WEB auction (**Ruby Glen Litigation**). On 26 July 2016, the application for a temporary restraining order was denied.[30]

95. In the meantime, on 20 July 2016, the blackout period associated with the ICANN auction had begun. The blackout period extends from the deposit deadline, in this case 20 July 2016, until full payment has been received from the prevailing bidder (**Blackout Period**). During the Blackout Period, members of a contention set, including the .WEB contention set, "are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction."

96. On 22 July 2016, Mr. Kane, a representative of Afilias, wrote a text message to Mr. Rasco asking whether NDC would consider a private auction if ICANN were to delay the scheduled auction.[31] Mr. Rasco did not respond to this query, as he testified he considered

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[27] Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, p. 2.

[28] See Bylaws, Ex. C-1, Article 4, Section 4.2.

[29] Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, pp. 11-12.

[30] *Ruby Glen, LLC v.* ICANN, Case No. 2:16-cv-05505 (C.D. Cal.), Order on *Ex Parte* Application for Temporary Order (26 July 2016), Ex. R-9.

[31] See the exchange of text messages between Messrs. Kane and Rasco, Attachment E to Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. R-18, p. 73.

it an attempt to engage in a prohibited discussion during the Blackout Period.[32]

97. Redacted - Third Party Designated Confidential Information

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98. On 27 and 28 July 2016, ICANN conducted the auction of last resort among the seven (7) applicants for the .WEB gTLD. As already mentioned, NDC won the auction while the Claimant was the second-highest bidder.

99. On 28 July 2016, Verisign filed a form with the U.S. Security and Exchange Commission stating that "[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to third party consent."[34]

100. On 31 July 2016, Mr. Rasco informed Ms. Willett that Redacted - Designated Confidential Information

."[35] On 1 August 2016, Verisign issued a press release stating that it had "entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co's bid for the .web TLD."[36]

101. The following day, 2 August 2016, Donuts invoked the CEP with ICANN in regard to

[32] Mr. Rasco's witness statement, 10 December 2018, para. 17.

[33] Mr. Livesay's witness statement, 1 June 2020, para. 27, and Ex. H attached thereto.

[34] Verisign's Form 10-Q, Quarterly Report, Ex. C-45, p. 13.

[35] Ms. Willett's email dated 31 July 2016, Ex. C-100, [PDF] pp. 1-2.

[36] Verisign statement regarding .WEB auction results, Ex. C-46.

.WEB (**Donuts CEP**).[37] The CEP is a non-binding process in which parties are encouraged to participate to attempt to resolve or narrow a dispute.[38] While the CEP is voluntary, the Bylaws create an incentive for parties to participate in this process by providing that failure of a Claimant to participate in good faith in a CEP exposes that party, in the event ICANN is the prevailing party in an IRP, to an award condemning it to pay all of ICANN's reasonable fees – including legal fees – and costs incurred by ICANN in the IRP.

102. On 8 August 2016, Ruby Glen filed an Amended Complaint against ICANN in the Ruby Glen Litigation. Also on 8 August 2016, Afilias sent to Mr. Atallah a letter raising concerns about Verisign's involvement with NDC and in the ICANN auction, and, on the same day, submitted a complaint with the Ombudsman.

103. On 19 August 2016, ICANN informed the .WEB applicants that the .WEB contention set had been placed "on-hold" to reflect the pending accountability mechanism initiated by Donuts.

104. Redacted - Third Party Designated Confidential Information

105. On 9 September 2016, Afilias sent ICANN a second letter regarding Afilias' concerns about Verisign's involvement with NDC's application for .WEB, stating that "ICANN's Board and officers are obligated under the Articles, Bylaws and the Guidebook (as well as

[37] Cooperative Engagement and Independent Review Processes Status Update, 8 August 2016, Ex. C-108, [PDF] p. 1.

[38] Bylaws, Ex. C-1, Article 4, Section 4.3 (e).

[39] Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. R-18, [PDF] pp. 1-8.

[40] See Respondent's Rejoinder, para. 35 and Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:9-15.

international law and California law) to disqualify NDC's bid immediately and proceed with contracting of a registry agreement with Afilias, the second highest bidder", and asking ICANN to respond by no later than 16 September 2016.[41]

106. On 16 September 2016, Ms. Willett sent Afilias, Ruby Glen, NDC and Verisign a detailed Questionnaire and invited them to provide information and comments on the allegations raised by Afilias and Ruby Glen.[42] The Respondent avers that the purpose of the Questionnaire "was to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen".[43] It is common ground that at the time, while ICANN, NDC and Verisign had knowledge of the provisions of the Domain Acquisition Agreement, of which each of them had a copy, Afilias and Ruby Glen did not. Responses to the Questionnaire were provided to ICANN on 7 October 2016 by Afilias[44] and Verisign[45], and on 10 October 2016 by NDC.[46]

107. On 19 September 2016, the Ombudsman informed Afilias that he was declining to investigate Afilias' complaint regarding the .WEB auction because Ruby Glen had initiated both a CEP and litigation in respect of the same issue.[47]

108. On 30 September 2016, ICANN acknowledged receipt of Afilias' letters of 8 August 2016 and 9 September 2016, noted that ICANN had placed the .WEB contention set on hold "to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set", and added that Afilias would "be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms." ICANN further stated that it would "continue to take Afilias' comments,

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41 Afilias' Letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

42 ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

43 Respondent's Rejoinder, para. 46.

44 Afilias' letter to Ms. Willett dated 7 October 2016, Ex. C-51.

45 Arnold & Porter's letter to Ms. Willett dated 7 October 2016, Ex. C-109.

46 Mr. Rasco's email to ICANN dated 10 October 2016, Ex. C-110.

47 Mr. Herb Waye's email to Mr. Hemphill dated 19 September 2016, Ex. C-101.

and other inputs that we have sought, into consideration as we consider this matter."[48]

109. On 3 November 2016, the Board of ICANN held a Board workshop during which a briefing was presented by in-house counsel regarding the .WEB contention set (**November 2016 Workshop**).[49] A memorandum prepared by ICANN's outside counsel and containing legal advice in anticipation of litigation regarding the .WEB contention set had been sent to "non-conflicted" ICANN Board members on 2 November 2016, in advance of the workshop.[50] As will be seen in the following section of this Final Decision, the November 2016 Workshop is of particular importance in this case. Suffice it to say for present purposes that, at least according to ICANN, during this workshop the Board "specifically [chose…] not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending".[51] That decision of the ICANN Board was not communicated to Afilias at the time. Indeed, it was first made public and disclosed to Afilias 3 ½ years later, upon the filing of the Respondent's Rejoinder in this IRP, filed on 1 June 2020.[52]

110. On 28 November 2016, the US District Court of the Central District of California dismissed Ruby Glen's claims against ICANN in the Ruby Glen Litigation on the basis that "the covenant not to sue [in Module 6 of the Guidebook] bars Plaintiff's entire action."[53]

111. On 18 January 2017, the Department of Justice (**DOJ**) issued a civil investigative demand to Verisign, ICANN, and others regarding Verisign's "proposed acquisition of [NDC's] contractual rights to the .web generic top-level domain."[54] The DOJ requested that ICANN take no action on .WEB during the pendency of the investigation. Between February

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48 ICANN's letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

49 Joint Fact Chronology, and ICANN's Privilege Log of 24 April 2020, pp. 29-30.

50 Respondent's Rejoinder, para. 40.

51 *Ibid*, para. 3.

52 There are multiple references to the November 2016 Workshop in the Respondent's privilege log of 24 April 2020, but not to any decision made in respect of .WEB.

53 *Ruby Glen, LLC v.* ICANN, Case No. 2:16-cv-05505 (C.D. Cal.), 28 November 2016, Ex. C-106.

54 DOJ Civil Investigative Demand to Thomas Indelicarto of Verisign dated 18 January 2017, Ex. AC-31.

and June 2017, ICANN made several document productions and provided information to DOJ, Redacted - Third Party Designated Confidential Information .[55] On 9 January 2018, a year after the issuance of the DOJ's investigative demand, the DOJ closed its investigation of .WEB without taking any action.

112. On 30 January 2018, the Donuts CEP closed, and ICANN gave Ruby Glen (the entity through which Donuts, Inc. had submitted an application for .WEB) until 14 February 2018 to file an IRP. Ruby Glen did not file an IRP in respect of .WEB.

113. On 15 February 2018, Mr. Rasco requested via email that ICANN move forward with the execution of a .WEB registry agreement with NDC in light of the termination of the DOJ investigation and the absence of any pending accountability mechanisms.[56]

114. On 23 February 2018, counsel for Afilias submitted a Documentary Information Disclosure Policy (**DIDP**) request to ICANN (**Afilias' First DIDP Request**) and asked for an update on ICANN's investigation of the .WEB contention set.[57] ICANN responded to Afilias' First DIDP Request on 24 March 2018.

115. On 28 February 2018, counsel for NDC sent a formal letter to ICANN requesting that it move forward with the execution of a registry agreement for .WEB with NDC.[58]

116. On 16 April 2018, counsel for Afilias wrote to the ICANN Board requesting an update on the status of the .WEB contention set, an update on the status of ICANN's investigation, and prior notification of any action by the Board related to .WEB, adding that Afilias "intend[ed] to initiate a CEP and a subsequent IRP against ICANN, if ICANN proceeds toward delegation of .WEB to NDC."[59]

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[55] Respondent's Rejoinder, para. 49.

[56] Mr. Rasco's email to ICANN dated 15 February 2018, Ex. C-182.

[57] Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

[58] Irell & Manella's letter to Messrs. Jeffrey and Atallah dated 28 February 2018, Ex. R-20.

[59] Dechert's letter to the Board dated 16 April 2018, Ex. C-113.

117. On 23 April 2018, counsel for Afilias wrote to the ICANN Board to object to the non-disclosure of the documents requested in the First DIDP Request by reason of their confidentiality, and to offer to limit their disclosure to outside counsel.[60] This request was treated as a new DIDP request (**Second DIDP Request**)[61]. On the same date, counsel for Afilias submitted a reconsideration request challenging ICANN's response to Afilias' First DIDP Request (**Reconsideration Request 18-7**).[62]

118. On 28 April 2018, ICANN's outside counsel wrote to counsel for Afilias, confirming that the .WEB contention set was on-hold but declining to undertake to send Afilias prior notice of a change to its status on the ground that doing so "would constitute preferential treatment and would contradict Article 2, Section 2.3 of the ICANN Bylaws."[63] Afilias responded to that letter on 1 May 2018, reiterating the arguments it had previously made.[64]

119. On 23 May 2018, ICANN responded to Afilias' Second DIDP Request, and on 5 June 2018, Afilias' Reconsideration Request 18-7 was denied.

120. On 6 June 2018, ICANN took the .WEB contention set off-hold and notified the .WEB applicants by emailing the contacts identified in the applications.[65] In the following days, the normal process leading to the execution of a registry agreement was put in motion within ICANN in relation to the .WEB registry.

121. On 12 June 2018, Ms. Willett and other Staff approved the draft Registry Agreement for .WEB and its transmittal to NDC. On 14 June 2018, ICANN sent the draft .WEB Registry Agreement to NDC, which NDC promptly signed and returned to ICANN. On the same day, Ms. Willett and other Staff approved executing the .WEB Registry Agreement on

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60 Dechert's letter to the Board dated 23 April 2018, Ex. C-79.

61 See Determination of the Board Accountability Mechanisms Committee (BAMC) Reconsideration Request 18-7 dated 5 June 2018, Ex. R-32, p. 5.

62 Afilias Domain No. 3 Limited Reconsideration Request, Ex. R-31 or VRSN-26.

63 Jones Day's letter to Mr. Ali dated 28 April 2018, Ex. C-80.

64 Dechert's letter to Mr. LeVee dated 1 May 2018, Ex. C-114.

65 Exchange of emails between ICANN Staff dated 6 June 2018, Ex. C-166; and Mr. Erwin's email to Ms. Willett and Mr. Christopher Bare dated 6 June 2018, Ex. C-167.

ICANN's behalf.[66]

122. On 18 June 2018, prior to ICANN's execution of the .WEB Registry Agreement, Afilias invoked a CEP with ICANN regarding the .WEB gTLD.[67] Two days later, ICANN placed the .WEB contention set back on hold to reflect Afilias' invocation of a CEP. As a result, the extant .WEB Registry Agreement was voided.[68]

123. On 22 June 2018, Afilias filed a second reconsideration request (**Reconsideration Request 18-8**), seeking reconsideration of ICANN's response to Afilias' 23 April 2018 DIDP Request. On 6 November 2018, the Board, on the recommendation of the Board Accountability Mechanisms Committee, denied that request.[69]

124. A week later, on 13 November 2018, ICANN wrote to counsel for Afilias to confirm that the CEP for this matter was closed as of that date and to advise that ICANN would grant Afilias an extension of time to 27 November 2018 (fourteen (14) days following the close of the CEP) to file an IRP regarding the matters raised in the CEP, if Afilias chooses to do so. As already noted, Afilias filed its Request for IRP on the following day, 14 November 2018.

IV. SUMMARY OF SUBMISSIONS AND RELIEF SOUGHT

125. The submissions made in relation to Phase II are voluminous. The Panel summarizes these submissions below. Where appropriate, the Panel refers in the analysis section of this Final Decision to those parts of the submissions and evidence found by the Panel to be most pertinent to its analysis. In reaching its conclusions, however, the Panel has considered all of the Parties' submissions and evidence.

126. The submissions made and the relief initially sought in relation to the Claimant's Rule 7 Claim are set out in detail in the Panel's Decision on Phase I. The position adopted by the Claimant in relation to its Rule 7 Claim in Phase II is discussed below, in section V.E. of

66 Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

67 Dechert's letter to ICANN dated 18 June 2018, Ex. C-52.

68 Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

69 ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board, 6 November 2018, Ex. C-7, pp. 1-10.

this Final Decision.

A. Claimant's Amended Request for IRP

127. In its Amended Request for IRP dated 21 March 2019, the Claimant claims that the Respondent has breached its Articles and Bylaws as a result of the Board's and Staff's failure to enforce the rules for, and underlying policies of, ICANN's New gTLD Program, including the rules, procedures, and policies set out in the Guidebook and Auction Rules.[70]

128. The Claimant avers that NDC ought to have disclosed the Domain Acquisition Agreement to ICANN and modified its .WEB application to reflect that it had entered into the DAA with Verisign, or to account for the implications of the agreement's terms for its application. The Claimant submits that while it is evident that NDC violated the New gTLD Program Rules, the Respondent has failed to disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB auction.

129. The Claimant contends that the Respondent has breached its obligation, under its Bylaws, to make decisions by applying its documented policies "neutrally, objectively, and fairly," in addition to breaching its obligations under international law and California law to act in good faith. The Claimant also submits that the Respondent, by these breaches, has failed to respect one of the pillars of the New gTLD Program and one of ICANN's founding principles: to introduce and promote competition in the Internet namespace in order to break Verisign's monopoly.[71]

130. More specifically, the Claimant contends that NDC violated the Guidebook's prohibition against the resale, transfer, or assignment of its application, as NDC transferred to Verisign crucial application rights, including the right to reach a settlement or participate in a private auction. The Claimant also asserts that NDC's bids at the .WEB auction were invalid because they were made on Verisign's behalf, reflecting what the latter was willing to pay and implying no financial risk for NDC.

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[70] Amended Request for IRP, para. 2.

[71] *Ibid*, para. 5.

131. By way of relief, the Claimant requested the Panel to issue a binding declaration:

(1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;

(2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;

(3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;

(4) specifying the bid price to be paid by Afilias;

(5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by Verisign and/or NDC;

(6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and

(7) granting such other relief as the Panel may consider appropriate in the circumstances.[72]

B. Respondent's Response

132. In its Response dated 31 May 2019, the Respondent argues that it complied with its Articles, Bylaws, and policies in overseeing the .WEB contention set disputes and resulting accountability mechanisms.

[72] Amended Request for IRP, para. 89.

133. The Respondent contends that it thoroughly investigated claims made prior to the .WEB auction about NDC's alleged change of control, and notes that it was not alleged at the time that NDC had an agreement with Verisign regarding .WEB. Accordingly, what the Respondent investigated was an alleged change in ownership, management or control of NDC, which it found had not occurred.

134. With regard to alleged Guidebook violations resulting from the Domain Acquisition Agreement with Verisign, the Respondent notes that due to the pendency of the DOJ investigation and various accountability mechanisms – including this IRP – its Board has not yet had an opportunity to fully evaluate the Guidebook violations alleged by the Claimant, adding that those are hotly contested and would not in any event call for automatic disqualification of NDC.[73]

135. The Respondent explains that, with the exception of approximately two weeks in June 2018, after Afilias' DIDP-related Reconsideration Requests were resolved and before Afilias initiated its CEP, the .WEB contention set has been on hold from August 2016 through today. The Respondent observes that during the entire period from July 2016 through June 2018, the Claimant took no action that could have placed the .WEB issues before the Board, although it could have.[74]

136. The Respondent adds that the Guidebook breaches alleged by the Claimant "are the subject of good faith dispute by NDC and VeriSign". The Respondent also avers that while the Claimant's IRP "is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and VeriSign to which NDC and VeriSign have responses".[75] The Respondent argues, speaking of its Board, that deferring consideration of the alleged violations of the Guidebook until this Panel renders its final decision is within the realm of reasonable business judgment.[76]

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[73] Respondent's Response, para. 61.

[74] *Ibid*, para. 62. As noted above, the Claimant's second Reconsideration Request was lodged on 22 June 2018, and therefore after the Respondent placed the .WEB contention set back on hold following the Claimant's commencement of a CEP.

[75] Respondent's Response, para. 63.

[76] *Ibid*, para. 66.

137. The Respondent underscores that the Guidebook does not require ICANN to deny an application where an applicant failed to inform ICANN that previously submitted information has become untrue or misleading. Rather, according to ICANN, the Guidebook gives it discretion to determine whether the changed circumstances are material and what consequences, if any, should follow. By disqualifying NDC, this Panel would, in ICANN's submission, usurp the Board's discretion and exceed the Panel's jurisdiction.

138. As for the Claimant's allegation that the Domain Acquisition Agreement between NDC and Verisign is anticompetitive, the Respondent notes that this is denied by Verisign and contradicted by the DOJ's decision not to take action following its investigation into the matter. The Respondent also denies Afilias' assertion that the sole purpose of the New gTLD Program was to create competition for Verisign. The Respondent also contends, relying on the evidence of its expert economist, Dr. Carlton, that there is no evidence that .WEB will be a unique competitive check on .COM, nor that the Claimant would promote .WEB more aggressively than Verisign.

139. As regards the applicable standard of review, the Respondent submits that an IRP panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN's Articles, Bylaws, and internal policies and procedures. However, with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, the Respondent submits that an IRP Panel is not empowered to substitute its judgment for that of ICANN. Rather, its core task is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.[77]

140. The Respondent contends that all of Afilias' claims are time-barred under both the Bylaws in force in 2016 and the current Interim Procedures. The Bylaws in force in 2016 provided that an IRP had to be filed within thirty (30) days of the posting of the Board minutes relating to the challenged ICANN decision or action. The Interim Procedures now provide that an IRP must be filed within 120 days after a claimant becomes aware "of the material effect of the action or inaction" giving rise to the dispute, provided that an IRP may not be filed more than twelve (12) months from the date of such action or inaction.

[77] Respondent's Response, para. 55.

The Respondent contends that Afilias' claims regarding alleged deficiencies in ICANN's pre-auction investigation accrued on 12 September 2016, when it posted minutes regarding the Board's denial of Ruby Glen's Reconsideration Request challenging that investigation. The Respondent takes the position that the facts and claims supporting the Claimant's allegations of Guidebook and Auction Rules violations were set forth in Afilias' letters dated August and September 2016, and were therefore known to the Claimant at that time.[78]

141. As for the Claimant's requested relief, the Respondent contends that it goes far beyond what is permitted by the Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the Board.

C. Claimant's Reply

142. In its Reply dated 4 May 2020 (revised on 6 May 2020), the Claimant rejects ICANN's self-description as a mere not-for-profit corporation, averring that the Respondent serves as the *de facto* international regulator and gatekeeper to the Internet's DNS space, with no government oversight.[79]

143. Regarding the standard of review, the Claimant denies that this case involves the exercise of the Board's fiduciary duties. The Panel is required to conduct an objective, *de novo* examination of the Dispute. Moreover, quite apart from the Board's alleged determination to defer consideration of the Claimant's claims until this Panel has issued its decision, the Claimant notes that this IRP also impugns the flawed analysis of the New gTLD Program Rules by the Staff, ICANN's inadequate investigation of the *Amici*'s conduct, its failure to disqualify NDC's application and auction bids, and its decision to proceed with contracting with NDC in respect of .WEB.[80]

144. The Claimant submits that the Respondent's defences are baseless and self-contradictory:

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[78] *Ibid*, paras. 73-76.

[79] Claimant's Reply, paras. 1-3.

[80] *Ibid*, para. 8.

on the one hand it argues that it appropriately handled Afilias' concerns while on the other it asserts that its Board has deferred consideration of these concerns until the Panel's final decision in this IRP.[81] The Claimant reiterates that ICANN violated its Bylaws and Articles by not disqualifying NDC's application and bids for .WEB, and in proceeding to contract with NDC for the .WEB registry agreement.

145. The Claimant contends that the New gTLD Program Rules are mandatory. In its view, it is not within ICANN's discretion to overlook violations of those rules by some applicants, such as NDC, nor to allow non-applicants like Verisign to circumvent them by "enlisting a shill like NDC".[82] According to the Claimant, the Respondent improperly ignored NDC's clear violation of the prohibition against the resale, transfer or assignment of rights and obligations in connection with its application.

146. In addition, the Claimant contends that the public portions of NDC's application, left unchanged after its agreement with Verisign, deceived the Internet community as to the identity of the true party-in-interest behind NDC's .WEB application.[83] All in all, the Domain Acquisition Agreement constituted, according to the Claimant, a change of circumstances that rendered the information in NDC's application misleading, yet the Respondent did nothing to redress that situation even after it was provided with a copy of the Domain Acquisition Agreement.[84]

147. In reply to the Respondent's argument that the Guidebook does not impose, but merely allows ICANN to disqualify applications containing a material misstatement, misrepresentation, or omission, the Claimant counters that the Respondent must exercise any discretion it may have in this regard consistent with its Articles and Bylaws and in accordance with its obligation towards the Internet community to implement the New gTLD Program openly, transparently and fairly, treating all applicants equally. According to the Claimant, the Respondent's position, were it accepted, would wipe away years of

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81 *Ibid*, para. 20.

82 *Ibid*, para. 27.

83 Claimant's Reply, para. 40.

84 *Ibid*, para. 69.

carefully deliberated policy development work by the ICANN community.[85]

148. The Claimant also submits that NDC's bids in the auction were invalid for failure to comply with the Auction Rules.[86] In that respect, the Claimant stresses that while the Auction Rules provide that bids must be placed by or on behalf of a Qualified Applicant, in the present case the DAA makes it clear that NDC was making bids "Redacted - Third Party Designated Confidential Information [87] Afilias therefore claims that the New gTLD Program Rules required ICANN to declare NDC's bids invalid and award the .WEB gTLD to Afilias, as the next highest bidder.

149. The Claimant avers that ICANN's investigation of its stated concerns was superficial, self-serving, and designed to protect itself, without the transparency, openness, neutrality, objectivity, fairness and good faith required under the Bylaws. In that respect, the Claimant stresses that the Respondent received the Domain Acquisition Agreement on 23 August 2016, and ought to have disqualified NDC's application and bids upon review of its terms.

150. Instead, the Respondent issued its 16 September 2016 Questionnaire to Afilias, Verisign, NDC and Ruby Glen, making no mention of the fact that the Respondent had already sought and received input form Verisign, nor of the fact that at the time, ICANN, Verisign and NDC had knowledge of the contents of the Domain Acquisition Agreement, whereas Afilias had not. According to the Claimant, the Questionnaire was a "pure artifice", designed to elicit answers that would help Verisign's cause if its arrangement with NDC was challenged at a later date and to protect ICANN from the type of criticism and concerns already raised by Afilias.[88]

151. The Claimant notes that there is no indication that the Respondent did anything with the responses it received to the Questionnaire, or what steps were taken to achieve an "informed resolution" of the concerns raised by Afilias. What is known is merely that the

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85 *Ibid*, para. 85.

86 *Ibid*, para. 88.

87 *Ibid*, para. 95.

88 Claimant's Reply, para. 114.

Board decided not to make a determination on the merits on Afilias' contentions against Verisign and NDC until all accountability mechanisms had been concluded, and that on 6 June 2018, the Respondent decided to remove the .WEB contention set from its on-hold status and to proceed with the delegation of .WEB to NDC. This, the Claimant asserts, suggests that the Respondent had in fact made a determination on the merits of Afilias' contentions.[89]

152. According to the Claimant, ICANN must exercise its discretion insofar as the application of the New gTLD Program Rules is concerned consistently with what the Claimant describes as the Respondent's competition mandate, that is, the mandate to promote competition and to constrain the market power of .COM.[90] In the Claimant's view, the DOJ's investigation is irrelevant to deciding this IRP as the DOJ's official policy is that no inference should be drawn from a decision to close a merger investigation without taking further action.

153. In response to the Respondent's contention that its claims are time-barred, the Claimant argues that the lack of merit of this defence is underscored by the Respondent's assertion that the Claimant's claims are in one sense premature and in another sense overdue. The Claimant recalls that (1) between August 2016 and the end of 2016, ICANN represented that it would seek the informed resolution of Afilias' concerns, and keep Afilias informed of the outcome; (2) between January 2017 and January 2018, the DOJ was conducting its antitrust investigation, and had asked ICANN to take no action on .WEB; and (3) between January 2018 and June 2018, Afilias repeatedly asked ICANN for information about the status of .WEB, which ICANN failed to provide until the Claimant was notified that the .WEB contention set had been taken off-hold, whereupon Afilias invoked the Cooperative Engagement Process.[91]

154. The Claimant disputes that the complaints it made in its 2016 letters are the same as those relied upon in its Amended Request for IRP: the former were based on public information

[89] *Ibid*, para. 118.

[90] *Ibid*, paras. 125-128.

[91] Claimant's Reply, paras. 137-139.

only, and requested an investigation; the latter were prompted by the realization that in spite of its requests that NDC's application and bids be disqualified, ICANN had now signaled that it was proceeding to contract with NDC.

155. The Claimant contends that the Respondent misstates the relief that an IRP Panel may order. According to the Claimant, the Panel has the power to issue "affirmative declaratory relief" requiring the Respondent to disqualify NDC's application and bids and to offer the Claimant the rights to .WEB.[92]

D. Respondent's Rejoinder

156. In its Rejoinder Memorial dated 1 June 2020, the Respondent states that a feature that sets this IRP apart is that ICANN has not yet fully addressed the ultimate dispute underlying the Claimant's claims.[93] In that respect, the Respondent stresses that, since the inception of the New gTLD Program, it placed applications and contention sets "on hold" when related accountability mechanisms were initiated.[94] In its view, the Respondent followed its processes by specifically choosing, in November 2016, not to address the issues surrounding .WEB while an accountability mechanism regarding that gTLD was pending.[95] When it received the Domain Acquisition Agreement in August of 2016, ICANN did not disqualify NDC's application because the .WEB contention set was on hold at that time due to a pending accountability mechanism by the parent company of another .WEB applicant.[96] The Respondent argues that it was reasonable for the Board to make this choice because the results of the accountability mechanism, and the subsequent DOJ investigation, could have had an impact on any eventual analysis ICANN might be called upon to make.[97]

157. The Respondent explains that, in the November 2016 Workshop, Board members and

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92 *Ibid*, paras. 147-155.

93 Respondent's Rejoinder, para. 1.

94 *Ibid*, paras. 2 and 89.

95 *Ibid*, paras. 3 and 89.

96 *Ibid*, para. 4.

97 *Ibid*, paras. 41 and 91.

ICANN's in-house counsel discussed the issue of .WEB and chose to not take any action at that time regarding .WEB because an accountability mechanism was pending regarding .WEB. The Respondent states that it did not seem prudent for the Board to interfere with or pre-empt the issues that were the subject of the accountability mechanism. The Respondent underscores that the Claimant does not explain how the Board's determination not to make a decision regarding .WEB during the pendency of an accountability mechanism or other legal proceedings on the same issue represents an inconsistent application of documented policies.[98]

158. Responding to the Claimant's suggestion that ICANN was beholden to Verisign, the Respondent avers that it has an arms-length relationship with Verisign which is no different from ICANN's relationship with other registry operators, including Afilias.[99]

159. Regarding the applicable standard of review, the Respondent argues that the Panel must apply a *de novo* standard in making findings of fact and reviewing the actions or inactions of individual directors, officers or Staff members, but has to review actions or inactions of the Board only to determine whether they were within the realm of reasonable business judgment. In other words, in the Respondent's view, it is not for the Panel to opine on whether the Board could have acted differently than it did.[100]

160. The Respondent maintains that the Claimant's claims regarding actions or inactions of ICANN in August through October 2016 are time-barred under Rule 4 of the Interim Procedures.[101] The Respondent stresses that the Claimant's IRP was filed more than two (2) years after it sent letters complaining about the auction and NDC's relationship with Verisign.[102] According to the Respondent, the Claimant was aware, in 2016, of the actions and inactions that it seeks to challenge, along with the material effect of those

[98] Respondent's Rejoinder, paras. 40-41 and 92.

[99] *Ibid*, paras. 51-53.

[100] *Ibid*, paras. 54-62.

[101] *Ibid*, paras. 9 and 63-64.

[102] *Ibid*, para. 65.

actions, even if it did not have a copy of the Domain Acquisition Agreement.[103] In any event, the Respondent contends that the Claimant ignores the final clause of Rule 4, which states that a statement of dispute may not be filed more than twelve (12) months from the date of the challenged action or inaction.[104] Responding to the equitable estoppel argument advanced by the Claimant, the Respondent argues that there is nothing in its 2016 letters to suggest that it encouraged the Claimant to delay the filing of an IRP, and that the Claimant has not alleged that it relied on those letters in deciding not to file an IRP.[105] The Respondent also notes that the Claimant was represented by experienced counsel throughout the period at issue.[106]

161. Responding to the Claimant's contentions pertaining to its post-auction investigation, the Respondent notes that the Claimant asserted no claim in that regard in its Amended Request for IRP, which focussed on pre-auction rumors.[107] In addition, the Respondent avers that its post-auction investigation was prompt, thorough, fair, and fully consistent with its Bylaws and Articles.[108]

162. The Respondent also observes that the Guidebook and Auction Rules violations alleged by the Claimant do not require the automatic disqualification of NDC and instead that ICANN is vested with significant discretion to determine what the penalty or remedy should be, if any.[109]

163. The Respondent contends that it has, as yet, taken no position on whether NDC violated the Guidebook.[110] The Respondent adds that determining whether NDC violated the Guidebook "is not a simple analysis that is answered on the face of the Guidebook" which,

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[103] *Ibid*, paras. 66-70.

[104] Respondent's Rejoinder, paras. 64-65.

[105] *Ibid*, paras. 72-75.

[106] *Ibid*, paras. 76-78.

[107] *Ibid*, paras. 104-105.

[108] *Ibid*, paras. 8 and 107-113.

[109] *Ibid*, paras. 80-88.

[110] *Ibid*, para. 81.

according to the Respondent, includes no provision that squarely addresses an arrangement like the Domain Acquisition Agreement. The Respondent submits that a "true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA". The Respondent argues that "[t]his analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN."[111]

164. The Respondent notes, referring to the evidence of the *Amici*, that there have been a number of arrangements that appear to be similar to the DAA in the secondary market for new gTLDs.[112] Because it has the ultimate responsibility for the New gTLD Program, the Board has reserved the right to individually consider any application to determine whether approval would be in the best interest of the Internet community.[113]

165. Turning to the Claimant's arguments regarding competition, the Respondent denies that it has exercised its discretion to benefit Verisign, repeating that it has not "fully evaluated" the Domain Acquisition Agreement – and NDC's related conduct – because the .WEB contention set has been on hold due to the invocation of ICANN's accountability mechanisms and the DOJ investigation. Accordingly, the Claimant's assertion that the Respondent has violated its so-called "competition promotion mandate" is not ripe for consideration.[114]

166. The Respondent adds that it is not required or equipped to make judgment about which applicant for a particular gTLD would more efficiently promote competition. Rather, ICANN complies with its core value regarding competition by coordinating and implementing policies that facilitate market-driven competition, and by deferring to the appropriate government regulator, such as the DOJ, the investigation of potential competition issues. The Respondent notes, pointing to the evidence of Drs. Carlton and

[111] *Ibid*, para. 82.

[112] Respondent's Rejoinder, para. 83.

[113] *Ibid*, para. 87.

[114] *Ibid*, para. 95.

Murphy, that there is no evidence that Verisign's operation of .WEB would restrain competition.[115]

167. Finally, the Respondent argues that the Claimant seeks relief which is beyond the Panel's jurisdiction and not available in these proceedings. While the Panel is empowered to declare whether the Respondent complied with its Articles and Bylaws, it cannot disqualify NDC's application, or bid, and offer Claimant the rights to .WEB.[116]

E. The *Amici*'s Briefs

1. NDC's Brief

168. In its *amicus* brief dated 26 June 2020, NDC alleges that ICANN has approved many post-delegation assignments of registry agreements for new gTLDs pursuant to pre-delegation financing and other similar agreements.[117] NDC notes that Afilias itself has participated extensively in the secondary market for new gTLDs.[118]

169. NDC argues that, having won the auction, it has the right and ICANN has the obligation under the Guidebook to execute the .WEB registry agreement, subject to compliance with the appropriate conditions. Although additional steps remain before the delegation of .WEB, NDC characterizes those as routine and administrative.[119]

170. Turning to the Panel's jurisdiction, NDC stresses that the Panel's remedial powers are significantly circumscribed. Section 4.3(o) of the Bylaws provides a closed list that only authorizes the Panel to take the actions enumerated therein. NDC contends that while the Panel is authorized to determine whether ICANN violated its Bylaws, it cannot decide the Claimant's claims on the merits or grant the affirmative relief sought by Afilias.[120]

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[115] *Ibid*, paras. 94-103.

[116] *Ibid*, paras. 114-124.

[117] NDC's Brief, paras. 32-37.

[118] *Ibid*, paras. 38-39.

[119] *Ibid*, paras. 55-56.

[120] *Ibid*, paras. 64-69.

171. NDC further argues that Section 4.3(o) does not permit the Panel to second-guess the Board's reasonable business judgment. If the Panel finds that there has been a violation of the Bylaws, the proper remedy is to issue a declaration to that effect. It would then be up to the Board to exercise its business judgment and decide what action to take in light of such declaration.[121]

172. According to NDC, the Panel's limited remedial authority is consistent with the terms of the Guidebook providing that ICANN retains the sole decision-making authority with respect to the Claimant's objections and NDC's .WEB application. NDC submits that only ICANN possesses the required expertise and resources to craft DNS policy and to weight the competing interests and policies that would factor into a decision on .WEB.[122]

173. NDC argues that if ICANN were to find that NDC violated the Guidebook or other applicable rules, ICANN's discretion to make determinations regarding gTLD applications would offer it a wide range of possible reliefs, not limited to the relief that the Claimant has asked the Panel to grant.[123]

174. Responding to the Claimant's argument that IRP decisions are intended to be final and enforceable, NDC contends that the binding nature of a dispute resolution procedure and the enforceability of a decision arising out of such procedure cannot expand the scope of the adjudicator's circumscribed remedial jurisdiction.[124] In that regard, the Cross-Community Working Group for Accountability (**CCWG**) did not, contrary to the Claimant's contention, recommend that IRP panels should be authorized to dictate a remedy in cases in which ICANN would be found to have violated its Articles or Bylaws. Rather, the CCWG stated that an IRP would result in a declaration that an action/failure to act complied or did not comply with ICANN's obligations.[125]

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[121] *Ibid*, paras. 70-74.

[122] NDC's Brief, paras. 75-79.

[123] *Ibid*, para. 80.

[124] *Ibid*, paras. 81-84.

[125] *Ibid*, paras. 85-89.

175. Finally, NDC denies making any material misrepresentations to ICANN, as there had been no change to its management, control or ownership since the filing of its .WEB application.[126] NDC also contends that it did not violate any ICANN rules by agreeing with Verisign to a post-auction transfer of .WEB. In arranging for such a post-auction transfer, NDC asserts that it acted consistently with what the industry understood was permissible.[127] In that respect, NDC argues that Afilias' own participation in the secondary market – on both sides of transfers – belies its protestations in this case.[128] In addition, NDC submits that Afilias itself violated the Guidebook by contacting NDC during the Blackout Period.[129]

176. For these reasons, NDC requests that the Panel deny in its entirety the relief requested by the Claimant.[130]

2. Verisign's Brief

177. In its *amicus* brief also dated 26 June 2020, Verisign declares that it joins in the sections of NDC's brief setting forth the background of this IRP and the scope of the Panel's authority, including as to the issues properly presented to the Panel for decision. In the submission of Verisign, the only question properly before the Panel is whether ICANN violated its Bylaws when it decided to defer a decision on the Claimant's objections, and the Panel should decline to determine the merits or lack thereof of these objections, or to award .WEB to the Claimant. According to Verisign, the Domain Acquisition Agreement complies with the Guidebook, is consistent with industry practices under the New gTLD Program, and there is no basis for refusing to delegate .WEB based on ICANN's mandate to promote competition.[131]

178. The Domain Acquisition Agreement, according to its terms, does not constitute a resale,

[126] *Ibid*, paras. 96-99.

[127] *Ibid*, paras. 100-107.

[128] *Ibid*, paras. 108-113.

[129] *Ibid*, paras. 114-119.

[130] *Ibid*, para. 120.

[131] Verisign's Brief, pp. 1-2.

assignment, or transfer of rights or obligations with respect to NDC's .WEB application, nor does it require Verisign's consent for NDC to take any action necessary to comply with the Guidebook or with NDC's obligations under the application. Verisign argues that the only sale, assignment or transfer contemplated in the Domain Acquisition Agreement is the possible future and conditional assignment of the registry agreement for .WEB. Verisign contends that Section 10 of Module 6 of the Guidebook is intended to limit the acquisition of rights over the gTLD *by applicants*, providing that applicants would only acquire rights with respect to the subject gTLD upon execution of a post-delegation registry agreement with ICANN. Verisign contends that Section 10 does not prohibit future transfers of rights. Verisign further argues that restrictions on the assignment or transfer of a contract are to be narrowly construed consistent with the purpose of the contract.[132] Verisign argues that the Domain Acquisition Agreement provides only for a possible future assignment of the registry agreement of .WEB upon ICANN's prior consent.[133]

179. Verisign avers that the Domain Acquisition Agreement is consistent with industry practices under the Guidebook, including assignments of gTLDs approved by ICANN. According to Verisign, there exists a robust secondary marketplace with respect to the New gTLD Program in which Afilias itself has participated. Verisign argues that the Domain Acquisition Agreement contemplates nothing more than what has already often occurred under the Program.[134] Verisign further claims that it would be fundamentally unfair – and a violation of the equal treatment required under the Bylaws – if ICANN or the Panel were to adopt a new interpretation of the anti-assignment provision of the Guidebook.[135]

180. In addition, Verisign argues that the drafting history of the Guidebook contradicts the Claimant's claims. According to Verisign, ICANN purposely declined to include proposed limits on post-delegation assignments of registry agreements, choosing instead to rely on ICANN's right, upon a post-delegation request for assignment of a registry agreement, to

[132] *Ibid*, paras. 2-4, 6 and 11-20.

[133] *Ibid*, paras. 4 and 21-34.

[134] Verisign's Brief, paras. 5, 9-10 and 35-45.

[135] *Ibid*, para. 46.

approve such assignment.[136]

181. Verisign contends that, in an attempt to contrive support for its contention that NDC sold the application to Verisign, the Claimant takes out of context select obligations of NDC under the Domain Acquisition Agreement to protect Verisign's loan of funds to NDC for the auction.[137] Redacted - Third Party Designated Confidential Information .[138] In addition, Verisign underscores that there was no obligation for NDC to disclose Verisign's support in the resolution of the contention set. As Verisign puts it, "confidentiality in such matters is common".[139]

182. Verisign argues that the Guidebook requires an amendment to the application only when previously submitted information becomes untrue or inaccurate, which was not the case here since the Domain Acquisition Agreement did not make Verisign the owner of NDC's application.[140] Furthermore, Verisign asserts that the mission statement in a new gTLD application is irrelevant to its evaluation.[141]

183. Verisign also argues that there is no basis for refusing to delegate .WEB based on ICANN's mandate to promote competition.[142] According to Verisign, ICANN has no regulatory authority – including over matters of competition – and was not intended to supplant existing legal structures by establishing a new system of Internet governance.[143] In Verisign's submission, ICANN has acted upon its commitment to enable competition by helping to create the conditions for a competitive DNS and by referring competition

[136] *Ibid*, paras. 49-51.

[137] *Ibid*, para. 52.

[138] *Ibid*, para. 57.

[139] *Ibid*, para. 62.

[140] *Ibid*, paras. 65-76.

[141] *Ibid*, paras. 77-86.

[142] *Ibid*, paras. 88-93.

[143] Verisign's Brief, paras. 94-101.

issues to the relevant authorities.[144]

184. Verisign claims that there is no threat or injury to competition resulting from its potential operation of the .WEB registry, and that the Claimant has submitted no economic evidence to support the contrary view.[145] Verisign further stresses that it does not have a dominant market position and that it is not a "monopoly", as it has less than 50% of the relevant market.[146] In the view of the expert economists retained by Verisign and the Respondent, there is no evidence that .WEB will be a particularly significant competitive check on .COM.[147]

185. Verisign concludes by reiterating that this Panel should only determine whether ICANN properly exercised its reasonable business judgment when it deferred making a decision on Afilias' claims regarding the .WEB auction. To the extent that the Panel considers the substance of the Claimant's claims, Verisign submits that they are meritless and should be rejected.[148]

F. Parties' Responses to *Amici*'s Briefs

1. Afilias' Response to *Amici*'s Briefs

186. The Claimant begins its 24 July 2020 Response to the *Amici*'s Briefs by addressing what it describes as the omissions and misrepresentations of key facts in the *Amici*'s submissions.[149] The Claimant insists on the fact that Verisign failed to apply for .WEB by the set deadline[150] and provides no explanation for that failure. It observes that had Verisign applied for .WEB in 2012, its status as an applicant would have been known and the public

[144] *Ibid*, paras. 102-107.

[145] *Ibid*, paras. 108-112.

[146] *Ibid*, paras. 112-119.

[147] *Ibid*, paras. 125-134.

[148] *Ibid*, para. 140.

[149] Claimant's Response to *Amici*'s Briefs, paras. 5-66.

[150] While not material to the issues in dispute, there is some confusion in the Claimant's submissions as to what the deadline was. In the Claimant's Response, the deadline is said to be 13 June 2012 (para. 9); in the Claimant's PHB, it is said to be 20 April 2012 (para. 10); while in the Joint Chronology, it is stated that it was 30 May 2012.

portions of its application would have been available for the public and governments to comment upon.[151]

187. Turning to the circumstances of the execution of the Domain Acquisition Agreement, the Claimant notes that as a small company with limited funding, NDC had no chance of obtaining .WEB for itself and was thus the perfect vehicle to allow Verisign to fly "under the radar" of the other .WEB applicants and to blindside them with a high bid that none could have seen coming.[152] The Claimant asks, if the *Amici* believed that their arrangement complied with the New gTLD Program Rules, why go through such lengths to conceal the Domain Acquisition Agreement not only to their competitors, but also to ICANN.[153] The Claimant notes in this regard Verisign's inquiry to ICANN, shortly after the execution of the DAA, about ICANN's practice when approached to approve the assignment of a new registry agreement. On that occasion, Verisign mentioned neither the DAA, nor .WEB.[154] The Claimant vehemently denies that the other transactions identified by the *Amici* as industry practice are analogous to the Domain Acquisition Agreement.[155]

188. According to the Claimant, the *Amici*'s pre-auction conduct, including the execution of the Confirmation of Understandings of 26 July 2016, also exemplifies their concerted attempts to conceal the DAA and Verisign's interest in .WEB. In regard to the post-auction period, the Claimant argues that the *Amici* misrepresent the Claimant's letters of 8 August and 9 September 2016 as asserting the same claims as those made in this IRP, and adds that they have failed to explain how and why ICANN's outside counsel came to contact Verisign's outside counsel, by phone, to request information about the DAA.

189. With respect to the *Amici*'s reliance on ICANN's purported "decision not to decide" of November 2016, the Claimant denies the existence of the "well-known practice" upon which the Board's decision was allegedly based; states that this alleged practice is

[151] Claimant's Response to *Amici*'s Briefs, paras. 8-16.

[152] *Ibid*, para. 20.

[153] *Ibid*, para. 22.

[154] *Ibid*, paras. 24-29.

[155] *Ibid*, para. 23.

inconsistent with ICANN's conduct at the time; that not taking action on a contention set while an accountability mechanism is pending is not among ICANN's documented policies;[156] that ICANN never informed Afilias of such decision until well into this IRP;[157] and that such decision is not even documented.[158]

190. The Claimant also notes that there is no indication that the Staff had undertaken any analysis of the compatibility of the DAA with the New gTLD Program Rules when the Staff moved toward contracting with NDC in June 2018, as soon as the Board rejected Afilias' request to reconsider the denial of its most recent document disclosure request.[159] Nor is it known what assessment of that question had been made by the Board. In this regard, the Claimant claims there is a contradiction between the Respondent's statement in this IRP that it has not yet considered the Claimant's complaints, and the Respondent's submission to the Emergency Arbitrator that ICANN had evaluated these complaints.[160]

191. According to the Claimant, the *Amici* misrepresent the nature of the Domain Acquisition Agreement. The Claimant notes that Redacted - Third Party Designated Confidential Information and were therefore not "executory" in nature.[161] The Claimant also rejects any analogy between the Domain Acquisition Agreement and a financing agreement.[162] In the Claimant's submission, it is self-evident that the DAA was an attempt to circumvent the New gTLD Program Rules, and this should have been patently clear to the Staff and Board upon its review. The Domain Acquisition Agreement makes plain that NDC resold, assigned or transferred to Verisign several rights and obligations in its application for .WEB, including: Redacted - Third Party Designated Confidential Information

156 *Ibid*, paras. 54-55.

157 Claimant's Response to *Amici*'s Briefs, para. 56.

158 *Ibid*, paras. 49-58.

159 *Ibid*, para. 62.

160 *Ibid*, para. 65.

161 *Ibid*, paras. 67-71.

162 *Ibid*, paras. 72-73.

Redacted - Third Party Designated Confidential Information

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192. The Claimant avers that NDC violated the Guidebook by failing to promptly inform ICANN of the terms of the Domain Acquisition Agreement since those terms made the information previously submitted in NDC's .WEB application untrue, inaccurate, false or misleading. The Claimant stresses that the Guidebook does not exempt the section of the application that details the applicant's business plan from the obligation to notify changes to ICANN. In any event, NDC also failed to update its responses regarding the technical aspects of NDC's planned operation of the .WEB registry. The Claimant argues as well that NDC intentionally failed to disclose the Domain Acquisition Agreement prior to the auction, when Mr. Rasco was specifically asked whether there were any changed circumstances needing to be reported to ICANN.[164]

193. The Claimant reiterates its arguments about NDC having violated the Guidebook by submitting invalid bids – made on behalf of a third party – at the .WEB auction. In the Claimant's submission, the *Amici*'s examples of market practice are inapposite for a variety of reasons, and none of them reflects the level of control that the Domain Acquisition Agreement gave Verisign.[165]

194. Responding to the *Amici*'s arguments pertaining to the discretion enjoyed by ICANN in the administration of the New gTLD Program, the Claimant contends that such discretion is circumscribed by the Articles and Bylaws, as well as principles of international law, including the principle of good faith.[166] The Claimant underscores that the Bylaws require ICANN to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Claimant argues that due process and procedural fairness require, among other procedural protections, that decisions be based on evidence and on appropriate inquiry into the facts. According to the Claimant,

[163] *Ibid*, paras. 74-98.

[164] Claimant's Response to *Amici*'s Briefs, paras. 99-114.

[165] *Ibid*, paras. 121-136.

[166] *Ibid*, paras. 140-144.

ICANN repeatedly failed to comply with those principles in regards to Afilias' claims. The Claimant notes again that even in this IRP the Respondent has taken diametrically opposed positions as to whether or not it has evaluated Afilias' concerns.[167]

195. The Claimant also argues that ICANN is required by its Bylaws to afford impartial and non-discriminatory treatment, an obligation that is consistent with the principles of impartiality and non-discrimination under international law. The Claimant submits that, upon receipt of the Domain Acquisition Agreement, and without conducting any investigation on the matter, ICANN accepted the *Amici*'s positions on their agreement at face value, and incorporated them into a questionnaire that was designed to elicit answers to advance the *Amici*'s arguments, and that was based on information that ICANN and the *Amici* had in their possession – but which they knew was unavailable to Afilias.[168]

196. The Claimant avers that the Respondent also failed to act openly and transparently as required by the Articles, Bylaws and international law. The Claimant contends that, far from acting transparently, ICANN allowed NDC to enable Verisign to secretly participate in the .WEB auction in disregard of the New gTLD Program Rules, failed to investigate NDC's conduct and instead proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the auction, all the while keeping Afilias in the dark about the status of its investigation regarding the .WEB gTLD for nearly two years.[169] The Claimant further claims that the Respondent failed to respect its legitimate expectations despite its commitment to make decisions by applying documented policies consistently, neutrally, objectively and fairly. According to the Claimant, had the Respondent followed the New gTLD Program Rules, it would necessarily have disqualified NDC from the application and bidding process.[170]

197. As regards the applicable standard of review, the Claimant denies that the Board's conduct in November 2016 constitutes a decision protected by the business judgment rule. The

[167] *Ibid*, paras. 145-147.

[168] Claimant's Response to *Amici*'s Briefs, paras. 148-149.

[169] *Ibid*, paras. 151-158.

[170] *Ibid*, paras. 159-161.

Claimant also stresses that neither the *Amici* nor the Respondent assert that the business judgment rule applies to the decision taken by ICANN in June 2018 to proceed with delegating .WEB to NDC. The Claimant takes the position that its claims regarding (1) the Respondent's failure to disqualify NDC, (2) its failure to offer Afilias the rights to .WEB and (3) the delegation process for .WEB after a superficial investigation of the Claimant's complaints, do not concern the Board's exercise of its fiduciary duties. The Claimant contends finally that, even assuming *arguendo* that the business judgment rule has any application, the secrecy regarding the Board's November 2016 conduct makes it impossible for this Panel to evaluate the reasonableness of that conduct.[171]

198. Responding to the *Amici*'s claims regarding its own conduct, the Claimant denies having violated the Blackout Period. It contends that the provisions relating to Blackout Period are designed to prevent bid rigging and do not prohibit any and all contact among the members of the contention set.[172]

199. The Claimant states that the *Amici* misrepresent the scope and effect of ICANN's competition mandate. The Claimant argues that ICANN must act to promote competition pursuant to its Bylaws, and that it failed to do so when it permitted Verisign to acquire .WEB in a program designed to challenge .COM's dominance. The Claimant stresses that Dr. Carlton – the economist retained by the Respondent – expressed views on the competitive benefits of introducing new gTLDs in 2009 that differ from those expressed in his report prepared for the purpose of this IRP.[173] According to the Claimant, any decision furthering Verisign's acquisition of .WEB is inconsistent with ICANN's competition mandate. In the Claimant's view, .WEB cannot be considered as "just another gTLD", since it has been uniquely identified by members of the Internet community as the next best competitor for .COM. The Claimant contends that the high price paid by Verisign for .WEB was at least partly driven by the benefits it would derive from keeping that

[171] *Ibid*, paras. 165-178.

[172] *Ibid*, paras. 179-184.

[173] Claimant's Response to *Amici*'s Briefs, paras. 164 and 185-198.

competitive asset out of the hands of its competitors.[174] The Claimant reiterates its submission that the DOJ's decision to close its investigation is irrelevant to the Panel's analysis.[175]

200. Turning to the Panel's remedial authority, the Claimant argues that the *Amici* are wrong in asserting that the Panel's authority is limited to issuing a declaration as to whether ICANN acted in conformity with its Articles and Bylaws when its Board deferred making any decision on .WEB in November 2016. The Claimant urges that meaningful and effective accountability requires review and redress of ICANN's conduct. In that regard, the Claimant invokes the international law principle that any breach of an engagement involves an obligation to make reparation.[176] Finally, the Claimant contends that the Panel must determine the scope of its authority based on the text, context, object and purposes of the IRP, and not only on Section 4.3(o) of the Bylaws, which is not exhaustive and should be read, *inter alia*, with reference to Section 4.3(a).[177]

2. ICANN's Response to the *Amici*'s Briefs

201. In its brief Response dated 24 July 2020 to the *Amici*'s Briefs, the Respondent notes that the position advocated by the *Amici* in their respective briefs is generally consistent with its own position as regards the following three (3) issues: (1) the Panel's jurisdiction and remedial authority, (2) the nature and implications of the Bylaws' provisions in relation to competition, and (3) whether Verisign's potential operation of .WEB would be anticompetitive.[178]

202. The Respondent reiterates that it does not take a position on what it describes as the Claimant's and NDC's "allegations against each other" regarding their respective pre-auction, and auction conduct, or whether NDC violated the Guidebook and Auction

[174] *Ibid*, paras. 199-209.

[175] *Ibid*, paras. 210-213.

[176] *Ibid*, paras. 218-220.

[177] *Ibid*, paras. 223-236.

[178] Respondent's Response to *Amici*'s Briefs, paras. 2-6.

Rules by the execution of the DAA, adding that it will consider those issues after this IRP concludes.[179]

G. Post-Hearing Submissions

203. The Parties and *Amici* have filed comprehensive post-hearing submissions in which they have reiterated their respective positions on all issues in dispute. In the summary below, the Panel focuses on those aspects of the post-hearing submissions that comment on the hearing evidence, or put forward new points.

1. Claimant's Post-Hearing Brief

204. In its Post-Hearing Brief dated 12 October 2020, the Claimant argues that the two fundamental questions before the Panel are whether the Respondent was required to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules and, if so, (ii) offer the .WEB gTLD to the Claimant. The Claimant submits that the hearing evidence leaves no doubt that these questions must be answered in the affirmative.

205. The evidence revealed that the Respondent's failure to act upon the Claimant's complaints was a result of the unjustified position that these were motivated by "sour grapes" for having lost the auction. According to the Claimant, this attitude permeated every aspect of the Respondent's consideration of the Claimant's concerns, including its decision, in the course of 2018, to approve a gTLD registry contract for NDC.[180]

206. The Claimant notes that Ms. Willett acknowledged that the decision of an applicant to participate in an Auction of Last Resort is one of the applicant's rights under a gTLD application. Redacted - Third Party Designated Confidential Information .[181]

207. The Claimant argues that the evidence of Mr. Livesay confirms the competitive significance of .WEB, in that Verisign's CEO was directly involved in the 2014 initiative

[179] *Ibid*, para. 7.

[180] Claimant's PHB, paras. 1-2.

[181] Claimant's PHB, para. 16.

to seek to participate in the gTLD market. Mr. Livesay also confirmed, as did Mr. Rasco, that Redacted - Third Party Designated Confidential Information

According to the Claimant, the evidence of these witnesses demonstrates that they harboured serious doubts as to whether they were acting in compliance with the Program Rules; otherwise, why conceal the DAA's terms from ICANN's scrutiny, and keep Verisign's involvement in NDC's application hidden from the Internet community? In sum, the Claimant submits that the *Amici*'s conduct evidence an attempt to "cheat the system".[182]

208. In the pre-auction period, the Claimant focuses on Mr. Rasco's representation to the Ombudsman that there had been no changes to the NDC application, a statement that cannot be reconciled with the terms of the DAA, according to the Claimant. Also plainly incorrect, in the submission of the Claimant, is Mr. Rasco's assurance to Ms. Willett, as evidenced in the latter's email communication to the Ombudsman, that the decision not to resolve the contention set privately "was in fact his".

209. The Claimant notes that from the moment Verisign's involvement in NDC's application for .WEB was made public, the Respondent treated Verisign as though it was the *de facto* applicant for .WEB, for example, by directly contacting Verisign about questions concerning NDC's application and working with Verisign on the delegation process for .WEB. In regard to Verisign's detailed submission of 23 August 2016, which included a copy of the DAA, the Claimant notes that only the Claimant's outside counsel and Mr. Scott Hemphill have been able to review it and that the Internet community remains unaware of the Agreement's details. The Claimant finds surprising that Ms. Willett, in spite of her leadership position within ICANN in respect of the Program, would have never reviewed – indeed seen – the DAA, or Verisign's 23 August 2016 letter.[183]

210. The Claimant also notes Ms. Willett's inability to address questions concerning the Questionnaire that was sent to some contention set members under cover of her letter

[182] *Ibid*, paras. 21-23.

[183] *Ibid*, paras. 46-56.

dated 16 September 2016, including the fact that some questions were misleading for anyone, such as the Claimant, who had no knowledge of the terms of the DAA. The Claimant also notes that the Respondent presented no evidence explaining what it did with the responses to the Questionnaire, other than Mr. Disspain confirming that the responses were never considered by the Board.

211. Turning to the "load-bearing beam of ICANN's defense in this case", the November 2016 Board decision to defer consideration of Afilias' complains, the Claimant submits that the evidence belies that any such decision was in fact made. Rather, according to the Claimant, both Ms. Burr and Mr. Disspain testified that ICANN simply adhered to its practice to put the process on hold once an accountability mechanism has been initiated, a practice that the Claimant says has not been proven in fact to exist. The Claimant quotes the evidence of Ms. Willett, who testified that work and communications within ICANN would continue while an accountability mechanism was pending, simply that the contention set would not move to the next phase; and points to the fact that the Staff were engaging with NDC and Verisign in December 2017 and January 2018 on the subject of the assignment of .WEB even though Ruby Glen had not yet resolved its CEP, or ICANN considered Afilias' concerns. The Claimant also sees a contradiction between the Respondent's claim that it has not yet taken a position on the merits of Afilias' complaints, and the evidence of Ms. Willett that ICANN would not delegate a gTLD until a pending matter was resolved.[184]

212. The Claimant reviews in its PHB the evidence concerning the genesis of Rule 7 of the Interim Procedures, as it reveals the degree to which, in its submission, the Respondent was willing to go to make things easier for itself and for Verisign to defend against future efforts by the Claimant to challenge ICANN's conduct. The Claimant notes that Ms. Eisner and Mr. McAuley did speak over the phone on 15 October 2018, and that shortly thereafter, Ms. Eisner reversed her positions and expanded the categories of *amicus* participation to cover the circumstances in which the *Amici* found themselves at the time.[185]

[184] Claimant's PHB, paras. 61-76.

[185] *Ibid*, paras. 77-91.

213. Insofar as the DAA is concerned, the Claimant notes that the evidence confirms that NDC and Verisign performed exactly as the language of the DAA provides.[186]

214. The Claimant argues that ICANN violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign. For instance, the Claimant notes that ICANN: failed to provide timely answers to Afilias' letters while Verisign was able to reach ICANN easily to discuss .WEB, even though it was a non-applicant; informally invited Verisign's counsel to comment on Afilias' concerns; discussed the .WEB registry agreement with NDC, all the while stating that ICANN was precluded from acting on Afilias' complaints due to the pendency of an accountability mechanism; and also advocated for the *Amici* and against Afilias throughout this IRP. According to the Claimant, further evidence of disparate treatment can be found in the Staff's decision to make Rule 4 retroactive so as to catch the Claimant's CEP.[187]

215. According to the Claimant, the Staff's decision to take the .WEB contention set off hold and to conclude a registry agreement with NDC also violated the Bylaws and ICANN's obligation to enforce its policies fairly. The Claimant argues that the Board delegated the authority to enforce the New gTLD Program Rules to Staff who authorized the .WEB registry agreement to be sent to NDC and would have countersigned it if the Claimant had not initiated a CEP. The Board did not act to stop the process even though it was aware that the execution of the .WEB registry agreement was imminent.[188]

216. In addition, the Claimant contends that ICANN failed to enable and promote competition in the DNS contrary to its Bylaws. The Claimant submits that the only decision ICANN could have taken regarding .WEB to promote competition would have been to reject NDC's application and delegate .WEB to Afilias. In its view, ICANN cannot satisfy its competition mandate by relying on regulators or the DOJ's decision to close its .WEB investigation.[189]

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[186] *Ibid*, para. 103.

[187] Claimant's PHB, paras. 126-138.

[188] *Ibid*, paras. 139-143.

[189] *Ibid*, paras. 144-154.

217. In relation to its Rule 7 Claim, the Claimant maintains that the Staff improperly coordinated with Verisign the drafting of that rule. In response to a question raised by the Panel, the Claimant explained that its Rule 7 Claim remains relevant at the present stage of the IRP because the Respondent's breach of its Articles and Bylaws in regard to the development of Rule 7 justifies an award of costs in the Claimant's favour.[190]

218. As regards the Respondent's argument based on the business judgment rule, the Claimant points to the evidence of Ms. Burr concerning the nature of Board workshops to advance the position that a workshop is not a forum where the Respondent's Board can take any action at all, still less one that is protected by the business judgment rule. The Claimant also asserts that the evidence of the Respondent's witnesses supports its position that no affirmative decision regarding .WEB had been taken during the November 2016 workshop. Finally, the Claimant reiterates that there is no evidence of an ICANN policy or practice to defer decisions while accountability mechanisms are pending.[191]

219. Turning to the limitations issue, the Claimant avers that the Respondent's position that the Claimant's claims are time-barred is inherently inconsistent with its assertion that ICANN has not yet addressed the fundamental issues underlying those claims. According to the Claimant, its claims are based on conduct of the Staff and Board that culminated in irreversible violations of Afilias' rights when the Staff proceeded with the delegation of .WEB to NDC on 6 June 2018. Consequently, the Claimant argues that its claims are not time-barred pursuant to Rule 4 of the Interim Procedures.

220. Responding to the Respondent's argument that the claims brought in the Amended Request for IRP are time-barred because Afilias raised the same issues in its letters of August and September 2016, the Claimant contends that in the face of ICANN's representations that it was considering the matter, it would have been unreasonable for Afilias to file contentious dispute resolution proceedings in 2016. The Claimant adds that those letters described how *NDC* had violated the New gTLD Program Rules – not how *ICANN* had violated its

[190] *Ibid*, para. 157.

[191] Claimant's PHB, paras. 159-170.

Articles and Bylaws.[192]

221. The Claimant further contends that, because of the circumstances in which Rule 4 of the Interim Procedures was adopted, it cannot be applied to its claims. The Claimant avers that four (4) days after the Claimant commenced its CEP – understanding that its claims had never been subject to any time limitation – ICANN launched a public comment process concerning the addition of timing requirements to the rules governing IRPs. In spite of the fact that the public comment period on proposed Rule 4 remained open, ICANN included Rule 4 in the draft Interim Procedures that were presented to the Board for approval, and adopted by the Board on 25 October 2018. The Respondent further provided that the Interim Procedures would apply as from 1 May 2018, and no carve out was made for pending CEPs or IRPs. According to the Claimant, the decision to make Rule 4 retroactive can only have been made in an attempt to preclude Afilias from arguing that its CEP had been filed prior to the adoption of the new rules. The Claimant avers that ICANN's enactment and invocation of Rule 4 is an abuse of right and is contrary to the international law principle of good faith.[193]

222. In response to the argument that Afilias should have submitted a reconsideration request to the Board, the Claimant argues that, prior to June 2018, there was no action or inaction by the Staff or Board to be reconsidered.[194]

223. The Claimant contends that the Board waived its right to individually consider NDC's application by failing to do so at a time where such review would have been meaningful. The Claimant underscores that the Board failed to do so in November 2016, and again in early June 2018 when it was informed that the Staff was going to conclude a registry agreement for .WEB with NDC. According to the Claimant, there is no evidence to suggest that the Board ever intended to consider whether NDC had violated the New gTLD Program Rules, and it is now for this Panel to decide the Claimant's claims.[195]

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[192] *Ibid*, paras. 177-183.

[193] Claimant's PHB, paras. 184-192.

[194] *Ibid*, paras. 193-195.

[195] *Ibid*, paras. 196-202.

224. Moving to the issue of the Panel's jurisdiction, the Claimant emphasizes that this is the first IRP under both ICANN's revised Bylaws and the Interim Procedures. The Claimant stresses that the IRP is a "final, binding arbitration process" and that the Panel is "charged with hearing and resolving the Dispute". According to the Claimant, this is particularly important in light of the litigation waiver that ICANN required all new gTLD applicants to accept and to avoid an accountability gap that would leave claimants without a means of redress against ICANN's conduct. The Claimant submits that the Panel's jurisdiction extends to granting the remedies that Afilias has requested. In the Claimant's view, the inherent jurisdiction of an arbitral tribunal sets the baseline for the Panel's jurisdiction and any deviation must be justified by the text of the Bylaws. In that respect, the Claimant also invokes the international arbitration principle that a tribunal has an obligation to exercise the full extent of its jurisdiction.[196]

225. The Claimant notes that the CCWG intended to enhance ICANN's accountability with an expansive IRP mechanism to ensure that ICANN remains accountable to the Internet community. In Afilias' view, the CCWG's report "provides binding interpretations for the provisions of ICANN's Bylaws that set forth the jurisdiction and powers of an IRP panel – none of which are inconsistent with the CCWG Report."[197]

226. The Claimant alleges that in the Ruby Glen Litigation before the Ninth Circuit, ICANN represented that the litigation waiver would neither affect the rights of New gTLD Program applicants nor be exculpatory, with the implication that the IRP could do anything that the courts could. In Afilias' view, ICANN's position before the Ninth Circuit contradicts ICANN's position in this IRP when it asserts that the Panel cannot order mandatory or non-interim affirmative relief.[198]

227. In relation to the relief it is requesting from the Panel, the Claimant avers that the CCWG Report states that claimants have a right to "seek redress" against ICANN through an IRP. According to the Claimant, unless the Panel directs ICANN to remedy the alleged

[196] *Ibid*, paras. 203-210.

[197] Claimant's PHB, paras. 211-220.

[198] *Ibid*, paras. 221-228.

violations, there is a serious risk that this dispute will go unresolved. For that reason, the Claimant requests that the Panel issue a decision that is legally binding on the Parties and that fully resolves the Dispute. By way of injunctive relief, the Claimant asks the Panel to: reject NDC's application for the .WEB gTLD; disqualify NDC's bids at the ICANN auction; deem NDC ineligible to execute a registry agreement for the .WEB gTLD; offer the registry rights to the .WEB gTLD to Afilias, as the next highest bidder in the ICANN auction; set the bid price to be paid by Afilias for the .WEB gTLD at USD 71.9 million; pay the Claimant's fees and costs.[199]

2. Respondent's Post-Hearing Brief

228. In its Post-Hearing Brief dated 12 October 2020, the Respondent argues that the Claimant has effectively abandoned its competition claim, which was rooted in the notion that ICANN's founding purpose was to promote competition and that this competition mandate and ICANN's Core Values regarding competition required it to disqualify NDC and block Verisign's potential operation of .WEB. The Respondent contends that without this competition claim, the Claimant's case boils down to whether the Respondent was required to disqualify NDC for a series of alleged violations of the Guidebook and Auction Rules.[200] As to those, the Respondent reiterates that it has not decided whether the DAA violates the Guidebook or Auction Rules, or the appropriate remedy for any violation that may be found. Relying on the evidence of Mr. Disspain, the Respondent contends that the propriety of the DAA is a matter for the ICANN Board.

229. According to the Respondent, the practice of placing contention sets on hold while accountability mechanisms are pending is well known. Accordingly, the Board's decision to defer making a decision on .WEB in November 2016 should have come as no surprise to the Claimant and is entitled to deference from this Panel. As for the transmission of a registry agreement for .WEB to NDC in June 2018, the Respondent claims that it did not reflect a decision that the DAA was compliant with the Guidebook and Auction Rules, but

[199] *Ibid*, paras. 229-246. The Parties' submissions on costs are summarized below, in the section of this Final Decision dealing with the Claimant's cost claim.

[200] Respondent's PHB, paras. 1-6.

was merely a ministerial act triggered by the removal of the set's on hold status.[201]

230. The Respondent recalls that the Panel's jurisdiction is circumscribed by the Bylaws in relation to the types of disputes that may be addressed, the claims that can be raised, the remedies available, the time within which a Dispute may be brought, and the standard of review.[202] The Respondent contends that the Panel can only address alleged violations that are asserted in the Amended Request. In relation to those, the Panel's remedial authority is limited to issuing a declaration as to whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws. According to the Respondent, the relief requested by the Claimant clearly exceeds the Panel's limited remedial authority, which does not include the authority to disqualify NDC's bid, proceed to contracting with Afilias, specify the price to be paid by Afilias, or invalidate Rule 7. The Respondent argues that the Panel is authorized to shift costs only on a finding that the losing party's claim or defence is frivolous or abusive. The Respondent submits that the CCWG's Supplemental Proposal dated 23 February 2016 does not expand the Panel's remedial authority. If there is any inconsistency, the Bylaws clearly control.[203]

231. The Respondent argues that there is no "gap" created by the litigation waiver and avers that it takes the same position in this IRP as it did in the Ruby Glen Litigation, where it sought to enforce the litigation waiver. The Respondent submits that the Claimant's position in this regard is based on the false premise that remedies available in IRPs must be co-extensive with remedies available in litigation.[204]

232. The Respondent also contends that the Panel is required to apply the prescribed standard of review. The first sentence of Section 4.3(i) of the Bylaws establishes a general *de novo* standard, and Subsection (iii) then creates a carve-out, providing that actions of the Board in the exercise of its fiduciary duty are entitled to deference provided that they are within the realm of "reasonable judgment". The Respondent argues that all actions by the Board

[201] Respondent's PHB, paras. 10-12.

[202] *Ibid*, para. 14.

[203] *Ibid*, paras. 15-45.

[204] *Ibid*, paras. 46-48.

on behalf of ICANN are subject to a fiduciary duty to act in good faith in the interests of ICANN.[205]

233. Turning to time limitation, the Respondent notes that the Panel has jurisdiction only over claims brought within the time limits established by Rule 4 of the Interim Procedures, and contends that the limitations and repose periods set out in Rule 4 are jurisdictional in nature.[206] According to the Respondent, the Claimant's claim that ICANN had an unqualified obligation to disqualify NDC is barred by the repose period and the time limitation, which are dispositive.[207] The Respondent contends that the Claimant's claim that the Staff violated the Articles and Bylaws in their investigation of pre-auction rumors or post-auction complaints is also time-barred and therefore outside the jurisdiction of the Panel.[208] The Respondent denies that it is equitably estopped from relying on its time limitation defence, and avers that the repose and limitations periods apply retroactively because of the express terms of the Interim Procedures. According to the Respondent, if the Claimant wished to challenge Rule 4, it could have brought such a claim in this IRP, as it did with Rule 7.[209]

234. Regarding the merits of the Claimant's claims, the Respondent notes the Claimant's decision not to cross-examine Mr. Kneuer, Dr. Carlton, or Dr. Murphy, indicating the abandonment of its competition claim, and reiterates that ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator of the DNS.[210] According to the Respondent, the unrebutted economic evidence establishes that .WEB will not be competitively unique such that Verisign's operation of .WEB would be anticompetitive.[211]

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[205] Respondent's PHB, paras. 49-57.

[206] *Ibid*, paras. 58-61.

[207] *Ibid*, paras. 62-69.

[208] *Ibid*, paras. 70-72.

[209] *Ibid*, paras. 73-85.

[210] *Ibid*, paras. 86-101.

[211] *Ibid*, paras. 102-129.

235. The Respondent further contends that it was not required to disqualify NDC based on alleged violations of the Guidebook and Auction Rules. According to the Respondent, "it is not a foregone conclusion that NDC is or is not in breach".[212] The Respondent argues that the Guidebook and Auction Rules grant it significant discretion to determine whether a breach of their terms has occurred and the appropriate remedy, and that ICANN has not yet made that determination.[213] The Respondent maintains that it, and not the Panel, is in the best position to make a determination as to the propriety of the DAA, and its consistency with the Guidebook or Auction Rules.[214] According to the Respondent, its commitment to transparency and accountability is not relevant to the Claimant's contention regarding NDC's alleged violations.[215]

236. The Respondent reiterates that the Board complied with ICANN's obligations by deciding not to take any action regarding the .WEB contention set while accountability mechanisms were pending, and that the Panel should defer to this reasonable business judgment.[216] The Respondent adds that its obligations to act transparently did not require the Board to inform Afilias of its 3 November 2016 decision. In that respect, the Respondent argues that the Claimant has not put forward a single piece of evidence suggesting that it would have acted differently had it known that the Board decided in November 2016 to take no action while the contention set remained on hold.[217]

237. The Respondent takes the position that the Claimant has not properly challenged ICANN's transmittal of a form registry agreement to NDC in June 2018 and, in any event, that in doing so it acted in accordance with Guidebook procedures and the Articles and Bylaws.[218]

238. According to the Respondent, the Claimant's claims that ICANN's pre- and post- auction

[212] Respondent's PHB, para. 138.

[213] *Ibid*, paras. 136-150.

[214] *Ibid*, paras. 151-156.

[215] *Ibid*, paras. 157-158.

[216] *Ibid*, para. 159.

[217] *Ibid*, paras. 182-189.

[218] *Ibid*, paras. 190-197.

investigations violated the Articles and Bylaws have no merit and in any event are time-barred.[219]

239. As regards the Rule 7 Claim, the Respondent submits that to the extent it is maintained, it must be rejected both as lacking merit and because there is no valid basis for an order shifting costs on the ground of Rule 7's alleged wrongful adoption.[220]

3. *Amici*'s Post-Hearing Brief

240. In their joint Post-Hearing Brief dated 12 October 2020, the *Amici* submit that adverse inferences against the Claimant should be made with respect to every issue in the IRP based on "Afilias purposefully, voluntarily and knowingly withholding" evidence from the Panel. According to the *Amici,* the Claimant's executives whose witness statements were withdrawn had substantial direct personal knowledge and special industry expertise material to virtually every contested issue in the IRP.[221]

241. The *Amici* argue that the Panel's jurisdiction is limited to declaring whether the Respondent violated its Bylaws, and does not extend to making findings of fact in relation to third-party claims or awarding relief contravening third party rights.[222] As a result, the *Amici* submit that the Panel lacks authority to find that the Domain Acquisition Agreement violates the Guidebook or that the *Amici* engaged in misconduct.[223] According to the *Amici,* the Panel should limit its review to ICANN's decision making process and only make non-binding recommendations that relate to that process, as opposed to the decision ICANN should make.[224]

242. The *Amici* contend that a decision granting the Claimant's requested relief, or making findings on the Domain Acquisition Agreement or their conduct, would violate their due

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[219] *Ibid*, paras. 198-217.

[220] Respondent's PHB, paras. 218-231.

[221] *Ibid*, paras. 6 and 13-21.

[222] *Ibid*, paras. 22-49.

[223] *Ibid*, paras. 62-67.

[224] *Ibid*, paras. 68-81.

process rights because of their limited participation in the IRP.[225]

243. According to the *Amici*, the Domain Acquisition Agreement complies with the Guidebook. The *Amici* also allege that transactions comparable to the Domain Acquisition Agreement have regularly occurred as part of the gTLD Program, with ICANN's knowledge and approval and consistent with the Guidebook.[226] They further urge that Section 10 of the Guidebook prohibits only the sale and transfer of an entire application, and does not prohibit agreements between an applicant and a third party to request ICANN to approve a future assignment of a registry agreement.[227] The *Amici* aver that ICANN has approved many assignments of registry agreements under such circumstances.[228]

244. The *Amici* state that they did not seek to evade scrutiny by maintaining the Domain Acquisition Agreement confidential during the auction, and argue that the Guidebook did not require disclosure of that agreement prior to the auction. They note that the DAA was always intended to be, and will be subject to the same scrutiny as the numerous other post-delegation assignments of new gTLDs. In addition, the *Amici* deny that the confidentiality of the Domain Acquisition Agreement provided them with any undue advantage.[229]

245. The *Amici* argue that there is no evidence of anticompetitive intent or effect, and submit that Afilias has abandoned its competition claims. In addition, the *Amici* urge that ICANN is not an economic regulator, that competition is not a review criterion under the New gTLD Program, and that ICANN's competition mandate was fulfilled by the DOJ investigation.[230]

246. Finally, the *Amici* note that the Claimant never rebutted the evidence of its own violation of the Guidebook when a representative of the Claimant contacted NDC during

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[225] *Ibid*, paras. 82-86.

[226] *Ibid*, paras. 8 and 87-123.

[227] *Amici*'s PHB, paras. 100-109.

[228] *Ibid*, paras. 124-153.

[229] *Ibid*, paras. 153-180.

[230] *Ibid*, paras. 181-205.

the Blackout Period.[231]

H. Submissions Regarding the Donuts Transaction

247. As noted in the History of the Proceedings' section of this Final Decision, the *Amici* have requested that the Panel take into consideration their submissions concerning the 29 December 2020 merger between Afilias, Inc. and Donuts, Inc. Those submissions, and that of the Parties, are summarized below.

248. In counsel's letter of 9 December 2020, the *Amici* described the contemplated transaction, based on publicly disclosed information, as a sale to Donuts of Afilias, Inc.'s entire existing registry business, with only the .WEB application itself being retained within an Afilias, Inc. shell. This, the *Amici* averred, is information that the Claimant ought to have disclosed to the Panel as it is inconsistent with the Claimant's claims and requested relief in this IRP. Moreover, the *Amici* contended that by withdrawing the witness statements of its party representatives in this IRP, the Claimant sought to prevent the Respondent and the *Amici* from eliciting this information.

249. In its response of 16 December 2020 to the *Amici*'s letter, the Claimant submitted that Afilias, Inc.'s arrangement with Donuts has no bearing on the issues in dispute in the IRP. The Claimant explained that the contemplated transaction concerned the registry business of Afilias, Inc., not its registrar business[232], and that the Claimant as an entity, as well as its .WEB application, had been carved out of the transaction. The Claimant added that after the transaction it will remain part of a group of companies that will control a significant registrar business. Accordingly, the Claimant averred that its new structure will not impact its ability to launch .WEB. Finally, the Claimant noted that it has informed the Respondent of a possible sale of its registry business back in September 2020.

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[231] *Ibid*, paras. 206-214.

[232] Registry operators are parties to Registry Agreements with ICANN that set forth their rights, duties and obligations as operators. Companies known as "registrars" sell domain name registrations to entities and individuals within existing gTLDs. See Respondent's Rejoinder, 31 May 2019, paras. 17 and 23. As explained in the preamble of the Guidebook, Ex. C-3, "[e]ach of the gTLDs has a designated 'registry operator' and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in the TLD. The gTLDs are served by 900 registrars, who interact with registrants to perform domain name registration and other related services." (p. 2 of the PDF).

250. Also on 16 December 2020, the Respondent confirmed that it was aware that Afilias, Inc. and Donuts had entered into an agreement by which the latter would acquire the former's TLD registry business, excluding the Claimant's .WEB application. The Respondent submitted that these developments reinforced the importance for the Panel not to exceed its "limited jurisdiction to determine only whether a Covered Action by ICANN violated the Articles of Bylaws and to issue a declaration to that effect."

251. On 21 December 2020, with leave of the Panel, the *Amici* replied to the Parties' letters of 16 December 2020. According to the *Amici*, the Claimant's response only reinforced the "the inappropriateness and inadvisability of the Panel deciding allegations concerning the transactions at issue." That is because, according to the *Amici*, it is a fundamental principle and tenet of the Respondent's Bylaws and IRP procedures that matters involving multiple parties and interests such as the matters at issue in this case are to be addressed in the first instance by the Respondent. The *Amici* also reiterated their claim that the Claimant has not been transparent about its plans and that of Afilias, Inc. as they affected the Claimant's ability to execute on its proposed deployment of .WEB.

252. On 30 December 2020, the day after the closing of the Donuts transaction, Afilias responded to the *Amici*'s letter of 21 December 2020, stating that it "was yet another attempt to divert the Panel's attention from the relevant issue to be arbitrated in this IRP." The Claimant rejected the notion that the Donuts transaction, much like the other transactions the *Amici* had pointed to in their written submissions, bear any resemblance to the Domain Acquisition Agreement, and it listed what it considers are key differences between the two (2) situations.

V. ANALYSIS

A. Introduction

253. As the Panel observed in its Procedural Order No. 5, this IRP is an ICANN accountability mechanism, the Parties to which are the Claimant and the Respondent. As such, it is not the forum for the resolution of potential disputes between the Claimant and the *Amici*, two (2) non-parties that are participating in this IRP as *amici curiae*, or of divergence and

potential disputes between the *Amici* and the Respondent by reason of the latter's actions or inactions in addressing the question of whether the DAA complies with the New gTLD Program Rules.

254. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules.[233] The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.

255. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.

256. The Claimant's core claims have been articulated with increasing particulars as these proceedings progressed. This, in the opinion of the Panel, is understandable in light of the manner in which the Respondent's defences have themselves evolved, most particularly the defence based on the Board's 3 November 2016 decision to defer consideration of the issues raised in connection with .WEB. This reason alone justifies rejection of the Respondent's contention that the Claimant failed to sufficiently plead a violation of the Respondent's Articles and Bylaws in connection with ICANN's post-auction investigation of Afilias' allegations that NDC violated the Guidebook and Auction Rules. In any event,

[233] See Afilias' PHB, para. 247. See also Claimant's Reply, para. 16, where the Claimant describes its "principal claim".

the Panel considers that the Claimant's core claims are comprised within the broad allegations of breach made in the Amended Request for IRP.[234]

257. The Respondent's main defences are, first, that the Claimant's claims regarding the Respondent's actions or inactions in 2016 are time-barred. While reserving its position about the propriety of the DAA under the New gTLD Program Rules, the Respondent also denies that it was obligated to disqualify NDC, whether it be by reason of its alleged competition mandate or as a necessary consequence of a violation of the Guidebook or Auction Rules. The Respondent also contends that it complied with its Articles and Bylaws when it decided not to take any action regarding the .WEB contention set while accountability mechanisms in relation to .WEB were pending, and that the Panel should defer to the Board's reasonable business judgment in coming to that decision. As noted, the Respondent rejects as unauthorized under the Bylaws, the Claimant's requests that the Respondent be ordered to proceed with contracting the Registry Agreement for .WEB with the Claimant, at a bid price to be specified by the Panel.

258. The Panel begins its analysis by considering the Respondent's time limitations defence. The Panel then addresses the standard by which the Respondent's actions or inactions should be reviewed. Thereafter, the Panel turns to examining the Respondent's conduct against the backdrop of the entire chronology of events, and considers whether it was open to the Respondent, both its Staff and its Board, not to pronounce upon the DAA's alleged non-compliance with the Guidebook and Auction Rules following the Claimant's complaints, an inaction that endures to this day. The Panel then considers, in turn, the Claimant's Rule 7 Claim, and the scope of the Panel's remedial authority in light of its findings that the Respondent, as set out in these reasons, violated its Articles and Bylaws. The Panel concludes its analysis by designating the prevailing party, as required by Section 4.3(r) of the Bylaws, and determining the Claimant's cost claim.

[234] See, e.g., Amended Request for IRP, para. 2.

B. The Respondent's Time Limitations Defence

1. Applicable Time Limitations Rule

259. Three (3) successive limitations regimes have been referred to as potentially relevant to determining the timeliness of the Claimant's claims in this IRP.

260. Prior to 1 October 2016, at a time when only Board actions could be the subject of an IRP, the Bylaws required that a request for independent review be filed within thirty (30) days of the posting of the Board's minutes relating to the challenged Board decision.[235]

261. New ICANN Bylaws came into force as of 1 October 2016. However, these did not contain any provision setting a time limitation for the filing of an IRP. Since the supplementary rules for IRPs in force at the time did not contain a time limitation provision either, it is common ground that, during the period from 1 October 2016 to 25 October 2018, IRPs were subject neither to a limitation period nor to a repose period.

262. The Respondent's time limitations defence is based on Rule 4 of the Interim Procedures which, inclusive of the footnote that forms part of the Rule, reads as follows:

> **4. Time for Filing[3]**
>
> An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.
>
> In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.
>
> [3] The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

[235] See Bylaws (as amended on 11 February 2016), Ex. C-23, Article IV, Section 3.3.

263. This Rule 4 came into being as part the new Interim Procedures adopted by the Board on 25 October 2018. As set out in some detail in the Panel's Decision on Phase I, this was the culmination of a development process within ICANN's IOT that began on 19 July 2016, with the circulation to IOT members of a first draft of proposed Updated Supplementary Procedures, and concluded on 22 October 2018, when draft Interim Supplementary Procedures were sent to the Board for adoption.[236]

264. While the Interim Procedures were adopted on 25 October 2018, the first paragraph of their preamble provides that "[t]hese procedures apply to all independent review process proceedings filed after 1 May 2018." Rule 2 of the Interim Procedures confirms the retroactive application of the Interim Procedures in two (2) ways: first, by providing that they apply to IRPs submitted to the ICDR after the Interim Procedures "go onto effect"; and second, by providing that IRPs commenced prior to the Interim Procedures' "adoption" (on 25 October 2018) shall be governed by the procedures "in effect at the time such IRPs were commenced". For IRPs commenced after 1 May 2018, this would point to the Interim Procedures.

265. Ms. Eisner acknowledged in her evidence that Rule 4 was the subject of considerable debate within the IOT. She also confirmed that by October 2018, "ICANN org"[237] was anxious to get a set of procedures in place. Indeed, Ms. Eisner had noted during the IOT meeting held of 11 October 2018 that "we at ICANN org are getting nervous about being on the precipice of having an IRP filed".[238] It is recalled that on 10 October 2018, the day prior to this meeting, the Claimant had, in the context of its pending CEP, provided the Respondent's in-house counsel with a draft of the Claimant's Request for an IRP in connection with .WEB.[239]

266. Underlying the footnote to Rule 4 is the fact that the Interim Procedures were conceived as a provisional instrument, designed to apply until the Respondent, in accordance with the

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[236] See Decision on Phase I, paras. 139-171.

[237] "ICANN org" is an expression used to refer to ICANN's Staff and organization, as opposed to ICANN's Board or its supporting organizations and committees. See Merits hearing transcript, 4 August 2020, p. 391:6-15 (Ms. Burr).

[238] Merits hearing transcript, 5 August 2020, pp. 495 and 498; see also pp. 479-480 (Ms. Eisner).

[239] See Decision on Phase I, para. 151, and Merits hearing transcript, 5 August 2020, p. 494 (Ms. Eisner).

applicable governance processes, will come to develop and adopt final supplementary procedures for IRPs. Specifically in relation to the introduction of a "Time for Filing" provision in the Interim Procedures, Ms. Eisner explained that the IOT:

> […] agreed at some point and finalized language on a footnote that would confirm that if there was a future change in a deadline for time for filing, that ICANN would work to make sure no one was prejudiced by that. […]
>
> The footnote that was included in the Rule 4 was about the change between the -- we are putting the interim rules into effect. And then if in the future a discussion where people were suggesting that there should be basically no statute of limitations on the ability to challenge an act of ICANN, if that were to be the predominant view, and what the Board put into effect that there would be some sort of stopgap measure put in so that anyone who was not able to file under the interim rules and the timing set out there but could have filed if the other rules, the broader rules had been in effect, that we would put in a stopgap to make sure that no one was prejudiced by that differentiation because we had agreed on a different timing for the final set.[240]

267. In its Post-Hearing Brief dated 12 October 2020, the Respondent advised that as of that date, final Supplementary Procedures had not been completed or adopted.[241]

268. Having identified and placed in context the rule on which the Respondent relies in support of its time limitations defence, the Panel turns to consider the merits of that defence.

2. Merits of the Respondent's Time Limitations Defence

269. It is the Respondent's contention that the Claimant's claim that ICANN had an unqualified obligation to disqualify NDC upon receiving the DAA in August 2016 is barred by the repose period of Rule 4 because the Claimant challenges actions or inactions that occurred in 2016, more than two (2) years before the Claimant filed its IRP in November 2018. The Respondent adds that the limitations period of Rule 4 also bars the Claimant's claims because the Claimant was aware of the material effect of the alleged actions or inactions of ICANN by August and September 2016, as evidenced by its letters of 8 August 2016 and 9 September 2016, demanding that ICANN disqualify NDC.

270. The Claimant's position is that its claims against the Respondent for violating its Articles

[240] Merits hearing transcript, 5 August 2020, pp. 496-498 (Ms. Eisner).

[241] Respondent's PHB, fn 103, p. 38.

and Bylaws, as opposed to its claims that NDC had violated the New gTLD Program Rules, accrued no earlier than on 6 June 2018, when the Respondent proceeded with the delegation process for .WEB with NDC,[242] and that even if the time limitations and repose periods were applicable to its claims against the Respondent, which the Claimant contends they are not, they would have been tolled by its CEP that lasted from 18 June 2018 to 13 November 2018.

271. The Panel has carefully reviewed the Claimant's August and September 2016 correspondence relied upon by the Respondent, and cannot accept the latter's contention that the claims asserted by Afilias in its 2016 letters to ICANN are the same as the claims asserted by the Claimant in this IRP. Whereas the Claimant's 2016 letters sought to demonstrate NDC's alleged violations of the New gTLD Program Rules, the Claimant's IRP, using these violations as a predicate, impugns the conduct of the Respondent itself in response to NDC's conduct. Stated otherwise, the Claimant's claims in this IRP concern not NDC's conduct, but rather the Respondent's actions or inactions in response to NDC's conduct.[243]

272. As amplified later in these reasons, when the Panel considers the Respondent's handling of the Claimant's complaints, the Panel does not accept, as urged by the Respondent, that the Claimant can be faulted for having waited for some form of determination by the Respondent before alleging in an IRP that the Respondent's actions or inaction violated its Articles and Bylaws. The Panel recalls that, in its responses to the Claimant's letters of 8 August 2016 and 9 September 2016, the Staff indicated, on 16 September 2016, that ICANN would pursue "informed resolution" of the questions raised by the Claimant and Ruby Glen,[244] and, in ICANN's letter of 30 September 2016, that it would "continue to take Afilias' comments, and other inputs that [it] ha[d] sought, into consideration as [it] consider[ed] this matter."[245]

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[242] *Ibid*, para. 179.

[243] Claimant's PHB, para. 182.

[244] ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

[245] ICANN's letter to Mr. Hemphill dated 30 September 2016 and attached Questionnaire, Ex. C-61.

273. The first of these letters attached a detailed Questionnaire designed to assist ICANN in evaluating the concerns raised by Afilias and Ruby Glen, and the second represented in no uncertain terms that the Respondent's consideration of this matter was continuing. In such circumstances, there is force to the Claimant's contention that commencing contentious dispute resolution proceedings at that time would have interfered with the "informed resolution" that ICANN had represented it would undertake, and would likely have attracted an objection of prematurity.

274. The Panel also recalls, a fact that is not in dispute, that the Respondent did not communicate to the Claimant any view or determination in respect of the many questions raised in the Questionnaire attached to the Respondent's letter of 16 September 2016. As for the Board's decision in November 2016 to defer consideration of the complaints raised in relation to NDC's conduct, it is common ground that it was never communicated to the Claimant or otherwise made public, and that it was disclosed for the first time upon the filing of the Respondent's Rejoinder in this case, on 1 June 2020.

275. From November 2016 to the beginning of the year 2018, as seen already, the .WEB contention set was on hold by reason of the pendency of an accountability mechanism and the DOJ investigation. The situation evolved with the DOJ's decision to close its investigation on 9 January 2018, the closure of Donuts' CEP on 30 January 2018, and the expiration on 14 February 2018 of the 14-day period given to Ruby Glen to file an IRP. Shortly thereafter, the Claimant, on 23 February 2018, formally requested an update on ICANN's investigation of the .WEB contention set and requested documents by way of its First DIDP Request.[246] The Claimant also requested that the Respondent take no action in regard to .WEB pending conclusion of this DIDP Request.

276. The Claimant was notified on 6 June 2018 that the Respondent had removed the .WEB contention set from its on-hold status.[247] While the Claimant was still ignorant of any determination by the Respondent in respect of the concerns raised in August and

[246] Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

[247] ICANN Global Support's email to Mr. Kane dated 7 June 2018, Ex. C-62, p. 1. Mr. Kane was in Australia at the time, which is why the date on the Afilias' copy is 7 June 2018, although ICANN sent it on 6 June 2018.

September 2016, which were the subject of the Respondent's Questionnaire of 16 September 2016, a necessary implication of the Respondent's decision was that these concerns did not stand – or no longer stood – in the way of the delegation of .WEB to NDC. In the Panel's opinion, this is when the Claimant's complaints about NDC's conduct crystallized into a claim against the Respondent. To quote from Rule 4, but recalling that in June 2018 it had not yet been adopted, this is when the Claimant "[became] aware of the material effect of the action or inaction giving rise to the DISPUTE".

277. The Claimant commenced its CEP on 18 June 2018, twelve days after the removal of the .WEB contention set from its on-hold status. As already explained, potential IRP claimants are "strongly encouraged" to engage in this non-binding process for the purpose of attempting to narrow the Dispute, and an additional incentive to do so resides in their exposure to a cost-shifting decision if they fail to partake in a CEP and ICANN prevails in the IRP.[248]

278. The rules applicable to a CEP are described in an ICANN document dated 11 April 2013 (**CEP Rules**).[249] The CEP Rules provide that, if the parties have failed to agree a resolution of all issues in dispute upon conclusion of the CEP, the potential IRP claimant's time to file a request for independent review shall be extended for each day of the CEP but in no event, absent agreement, for more than fourteen (14) days.

279. The Claimant's CEP was terminated by the Respondent on 13 November 2018. Consistent with the CEP Rules, the Respondent informed the Claimant that "ICANN will grant Afilias an extension of time to 27 November 2018 (14 days following the close of CEP) to file an IRP", adding that "this extension will not alter any deadlines that may have expired before the initiation of the CEP".[250] The Claimant commenced its IRP the next day, on 14 November 2018.

280. The Respondent has not challenged the application of the CEP Rules to the Claimant's

[248] Bylaws, Ex. C-1, Article 4, Section 4.3(e)(i)-(ii).

[249] Cooperative Engagement Process Rules, 11 April 2013, Ex. C-121.

[250] Exchange of emails between ICANN and Dechert, Ex. C-54.

CEP and the time for the filing of its IRP. In response to the Claimant's argument that the retroactive time limitations period set out in Rule 4 was tolled from 18 June 2018 to 13 November 2018, while its CEP was pending, the Respondent argued that the tolling was irrelevant because the limitations period had already long expired based on its submission that the Claimant's claims had accrued in August/September 2016, a submission that this Panel has rejected.

281. In sum, the Panel finds that the Claimant's core claims against the Respondent, as summarized above in paragraph 251 of this Final Decision, only accrued on 6 June 2018. Since the Claimant's CEP had the effect of tolling the time available to the Claimant to file an IRP until 27 November 2018, fourteen (14) days after closure of the CEP, the Claimant's IRP was timely and the Respondent's time limitations defence insofar as the Claimant's core claims are concerned must be rejected.

282. The Claimant has accused the Respondent of having enacted Rule 4 and given it retroactive effect in order to retroactively time bar its claims in this IRP. In support of this contention, the Claimant advances the following factual allegations:

- The Respondent only launched the solicitation of public comments concerning the addition of timing requirements to the draft procedures governing IRPs on 22 June 2018, shortly after Afilias filed its CEP;

- In spite of the fact that the public comment period on proposed Rule 4 remained open, Rule 4 was included in the proposed Interim Procedures presented to the Board for approval on 25 October 2018;

- Having received a draft of the Claimant's IRP in the context of its CEP on 10 October 2018, the Respondent decided to give retroactive effect to the Interim Procedures to 1 May 2018, six (6) weeks prior to the initiation of the Claimant's CEP, with no carve-out for pending CEPs (of which there were several) or IRPs

(of which there was none); and

- Having terminated the Claimant's CEP on 13 November 2018, and received its IRP on 14 November 2018, the Respondent was able to rely on the retroactive application of the Interim Procedures to support its Rule 4 time limitations defence.

283. In light of the Panel's finding as to the accrual date of the Claimant's core claims, it is not necessary further to consider these allegations. However, the Panel does wish to record its view that, from a due process perspective, the retroactive application of a time limitations provision is inherently problematic. A retroactive law changes the legal consequences of acts committed or the legal status of facts and relationships prior to the enactment of the law.[251] The potential for unfairness is apparent and thus, in many legal systems, there are restrictions on, and presumptions against, giving legal rules a retroactive effect.

284. Between 1 October 2016 and 25 October 2018, there was no time limitation for the filing of an IRP in respect of the Respondent's actions or failures to act. Yet an IRP timely filed under the Bylaws, say on 18 June 2018, would, if Rule 4 of the Interim Procedures were given effect to, retroactively be barred and the claims advanced therein defeated with no consideration of their merits because of the retroactive application of the Interim Procedures adopted on 25 October 2018. The fact that only a single case, the Claimant's IRP, was in fact affected by the retroactive application of the Interim Procedures only heightens the due process concern. The Panel recalls that under Section 4.3(n)(i) of the Bylaws, the rules of procedure for the IRP to be developed by the IOT "should apply fairly to all parties".

C. Standard of Review

285. The standard of review applicable to an IRP under the Bylaws is provided in Section 4.3(i) of the Bylaws and Rule 11 of the Interim Procedures, which are in substance identical.

[251] David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, p. 41. See also Black's Law Online Dictionary, 2nd ed., *s.v.* "retroactive statute": https://thelawdictionary.org/retroactive-statute/ (consulted on 7 February 2021): "a law that imposes a new obligation on past things or a law that starts from a date in the past."

Section 4.3(i) of the Bylaws reads in relevant parts as follows:

> (i) Each IRP Panel shall conduct an objective, de novo examination of the Dispute.
>
> (i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.
>
> (ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
>
> (iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

286. It is common ground that, except for claims potentially falling under sub-paragraph (iii) of Section 4.3(i), the Panel must conduct an objective, *de novo* examination of claims that actions or failures to act on the part of the Respondent violate its Articles or Bylaws, and make appropriate findings of fact in light of the evidence. The Parties therefore agree that this is the standard applicable to the Panel's review of actions or failures to act on the part of the Respondent's Staff.

287. There is profound divergence between the Parties as to the import of sub-paragraph (iii) of Section 4.3(i), relating to Claims arising out of the Board's exercise of its fiduciary duties. The Respondent argues that the effect of this rule is to incorporate the "business judgment rule" into the independent review of ICANN's Board action, a doctrine which the Respondent avers is recognized in California[252] and, according to the California Supreme Court, which "exists in one form or another in every American jurisdiction".[253] More specifically, the Parties diverge both as to the scope of the carve-out made in Section 4.3 (i)(iii), and the question of whether the Board actions and inactions that are impugned by the Claimant involve the Board's exercise of its fiduciary duties.

288. These questions are addressed when the Panel comes to consider the merits of the Claimant's claims. For present purposes, it is noted that the Parties agree that, to the extent

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[252] Respondent's PHB, para. 50.

[253] *Landen v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507 n.14 (1986), RLA-13).

the Panel finds that the business judgment rule as it may have been incorporated in Section 4.3(i)(iii) of the Bylaws has any application in the present case, it refers to a "judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions."[254]

D. Merits of the Claimant's Core Claims

289. While the Panel has found that the Claimant's core claims against the Respondent crystallized on 6 June 2018, the Panel's view is that a proper analysis of the Claimant's claims requires an examination of the Respondent's conduct – that of its Board, individual Directors, Officers and Staff – against the backdrop of the entire chronology of events leading to the Respondent's decision of 6 June 2018. Before embarking on this examination, however, the Panel considers it useful to recall the key standards against which the Respondent has determined that its conduct should be assessed.

1. Relevant Provisions of the Articles and Bylaws

290. Article 2, paragraph III of the Respondent's Articles reads, in part, as follows:

> The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets.[...]

291. Under its Bylaws, the Respondent has committed to "act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values".[255]

292. The Respondent's Commitments that are relied upon by the Claimant or appear germane to its claims, are expressed as follows in the Bylaws:

> In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and

[254] *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993).

[255] Bylaws, Ex. C-1, Section 1.2.

> open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):
>
> […]
>
> (v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and
>
> (vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.[256]

293. As for ICANN's Core Values, which are to "guide the decisions and actions" of the Respondent, they include:

> (iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;
>
> (v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;[257]

294. The Bylaws further provide that ICANN's Commitments and Core Values "are intended to apply in the broadest possible range of circumstances".[258]

295. Finally, under Article 3 of the Bylaws, entitled Transparency, the Respondent has committed that it and its constituent bodies:

> […] shall operate to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness, […][259]

296. Bearing the standards set out in those commitments and core values in mind, the Panel turns to consider the Respondent's conduct, beginning with the Claimant's complaints about the Respondent's pre-auction investigation.

2. Pre-Auction Investigation

297. The Claimant has criticized the Respondent's pre-auction investigation of the allegation

[256] Bylaws, Ex. C-1, Section 1.2(a)(v)(vi).

[257] *Ibid*, Section 1.2 (b) (v) and (vi).

[258] *Ibid*, Section 1.2 (b) (c).

[259] *Ibid*, Section 3.1.

by Ruby Glen that NDC had failed properly to update its application following an alleged change of ownership or control of NDC. This allegation was prompted by Mr. Rasco's email of 7 June 2016 to Mr. Nevett, where he stated that the "powers that be" had indicated there was no change in position and that NDC would not be seeking an extension of the auction date. The Claimant strenuously argues that Mr. Rasco's representations, first to an employee of ICANN's New gTLD Operations section, Mr. Jared Erwin,[260] and then to the Ombudsman,[261] were both misleading (in the first case) and erroneous (in the second).

298. As regards the Respondent's pre-auction investigation – on which, in the opinion of the Panel, very little turns insofar as the Claimant's core claims are concerned – the Panel accepts the evidence of Ms. Willett that prior to the auction, the Respondent was unaware of Verisign's involvement in NDC's application. Having considered the witness and documentary evidence on this question, which is preponderant, the Panel finds that the allegation presented to the Respondent was one of change of control within NDC, that it was promptly investigated by Ms. Willett's team and the Respondent's Ombudsman, and that in light of the representations made by Mr. Rasco, it was reasonable for the Respondent to conclude, as Ruby Glen and the other applicants in the contention set were advised in Ms. Willett's letter of 13 July 2016, that the Respondent "found no basis to initiate the application change request process or postpone the auction."[262] The Panel therefore rejects the Claimant's contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.

3. Post-auction Actions or Inactions

(i) Overview

299. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds

[260] Exchanges between Messrs. Erwin and Rasco, Ms. Willett's witness statement, 31 May 2019, Ex. B.

[261] Exchanges between Messrs. LaHatte and Rasco, Mr. Rasco's witness statement, 30 May 2020, Ex. N, [PDF] p. 2.

[262] Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.

300. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.

301. In the paragraphs below, the Panel sets out its reasons for making those findings and reaching this conclusion.

(ii) The Claimant's 8 August and 9 September 2016 Letters

302. In the first of these two (2) letters, Mr. Hemphill, at the time, Afilias' Vice President and General Counsel, makes clear that while he has not been able to review a copy of the agreement(s) between NDC and Verisign, what has been made public about the arrangements between the two (2) companies raises sufficient concerns for Afilias to "request that ICANN promptly undertake an investigation" and "take appropriate action against NDC and its .WEB application for violations of the Guidebook, as we had

requested". Mr. Hemphill concludes his letter by urging the Respondent to stay any further action in relation to .WEB and, in particular, not to act upon any request for NDC or Verisign to enter into a registry agreement for .WEB with the Respondent.[263]

303. The Claimant's 9 September 2016 letter, noting that the Respondent had not responded to its earlier letter of 8 August, reiterated the request that the Respondent take no steps in relation to .WEB until ICANN, its Ombudsman, or its Board had reviewed NDC's conduct and determined whether or not to disqualify NDC's bid and reject its application. The letter then proceeds to explain, in detail, the reasons why, in the opinion of Afilias, the Respondent was obliged to disqualify NDC's application and proceed to contract for .WEB with Afilias. Specifically, Afilias articulated, by reference to the New gTLD Program Rules, the Articles and the Bylaws, why it considered that NDC had violated the Guidebook and Auction Rules and why ICANN was under a duty to contract with the next highest bidder in the auction. The Claimant concluded its letter by requesting a response by no later than 16 September 2016.[264]

304. The Claimant is not the only member of the contention set that raised questions, after the auction, about the propriety of Verisign's involvement in, and support for, the application of NDC. Contemporaneously with the Claimant's letters just reviewed, on 8 August 2016 Ruby Glen filed an Amended Complaint in the proceedings it had commenced in the US District Court prior to the auction. In its Amended Complaint, Ruby Glen questioned the legality of the auction for .WEB and sought an order enjoining the execution of a registry agreement pending resolution of its claims.

305. Before coming to the Questionnaire that the Respondent sent out on 16 September 2016, in part in response to Afilias' two (2) letters, the Panel recalls that in the meantime the Respondent had initiated a dialogue directly with Verisign, when outside counsel for the Respondent communicated by telephone with Verisign's outside counsel. The exact request that was made of Verisign's counsel remains unknown. However, it is undisputed that it was prompted by the Claimant's and Ruby Glen's complaints about the propriety of

[263] Afilias' letter to Mr. Atallah dated 8 August 2016, Ex. C-49, pp. 1 and 3-4.

[264] Afilias' letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

NDC's arrangements with Verisign. Why the Respondent chose to request assistance at that point directly from Verisign, a non-applicant, rather than from NDC, is a question that was largely left unaddressed apart from outside counsel for the Respondent explaining, during the hearing held in connection with Afilias' Application of 29 April 2020, that counsel knew Verisign's lead counsel from prior cases, and therefore decided to contact him.[265]

306. On 23 August 2016, in response to this request, Verisign's and NDC's counsel, unbeknownst to the Claimant and likely to the other members of the contention set (except NDC), filed a submission with the Respondent on behalf of NDC and Verisign in the form of an eight (8) page letter and five (5) attachments, one of which was the DAA. The letter states that it is being submitted in response to the request by ICANN's counsel for information regarding the agreement between NDC and Verisign relating to .WEB. Redacted - Third Party Designated Confidential Information

.[266] The *Amici*'s counsel's letter was marked as "Highly Confidential – Attorneys' Eyes Only", while the attached DAA, as already mentioned, was marked as "Confidential Business Information – Do Not Disclose". The letter of 23 August 2016 sent on behalf of the *Amici* was not posted on ICANN's website or disclosed to the Claimant because of its sender's request that it be kept confidential.[267]

(iii) The 16 September 2016 Questionnaire

307. Turning to the Respondent's Questionnaire of 16 September 2016, the evidence reveals that it resulted from a collaborative effort by and between Ms. Willett, who prepared a first

[265] Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:12-15 (Mr. Enson: "The lawyers … -- ICANN and Verisign had been adverse to one another on a number of occasions. The lawyers know each other well and there is nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this.") See also the response from counsel for the Claimant: Merits hearing transcript, 3 August 2020, p. 53:1-10 (Claimant's Opening).

[266] Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. C-102.

[267] See Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

draft of the questions, and Respondent's counsel. At that time, Ms. Willett held the position of Vice-President, gTLD Operations, Global Division of ICANN, reporting directly to Mr. Atallah.[268] The Questionnaire was sent out to Afilias, Ruby Glen, NDC, and Verisign, under cover of a letter of even date signed by Ms. Willett.[269] Ms. Willett was asked why the Questionnaire was not sent to all members of the contention set, but the question was objected to on the ground of privilege.

308. The Panel has already noted that Ms. Willett's cover letter refers in introduction to questions having been raised in various fora about whether NDC should have participated in the 27-28 July 2016 auction, and whether NDC's application should have been rejected. The letter goes on to note:

> To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information.
>
> Accordingly, ICANN invites Ruby Glen, NDC, Afilias, and Verisign, Inc. (Verisign) to provide information and comment on the topics listed in the attached. Please endeavor to respond to all of the topics/questions for which you have information to do so. To allow ICANN promptly to evaluate these matters, please provide response […] no later than 7 October 2016.[270]

309. Ms. Willett was asked what she meant when she stated that the Respondent was seeking information to facilitate "informed resolution". It was put to her that this "sounds like an investigation at the end of which ICANN would resolve the questions that had been raised". In response, Ms. Willett denied that she was undertaking an investigation, and stated that the responses eventually received to the Questionnaire were simply passed on to counsel.[271]

310. The Questionnaire is six (6) pages long and lists twenty (20) "topics" on which the entities to which it was addressed are invited to comment. The introductory paragraph echoes Ms. Willett's cover letter in stating that "all responses to these questions will be taken into

[268] Merits hearing transcript, 5 August 2020, p. 545 (Ms. Willett). Ms. Willett left the employ of the Respondent in December 2019.

[269] ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

[270] *Ibid*, p. 1 [emphasis added].

[271] Merits hearing transcript, 6 August 2020, pp. 696-697 (Ms. Willett) : "[…] I was not undertaking an investigation. ICANN counsel handled and administered the CEP process. So the responses which I received to these letters I passed along to counsel."

consideration in ICANN's evaluation of the issues raised […]".[272]

311. As already noted, while the Respondent, NDC and Verisign had knowledge of the terms of the DAA at that time, Afilias and Ruby Glen did not. It seems to the Panel evident that this asymmetry of information put Afilias and Ruby Glen at a significant disadvantage in addressing the topics listed in the Questionnaire in the context of "ICANN's evaluation of the issues raised". By way of example, the first topic asked for evidence regarding whether ownership or control of NDC changed after NDC applied for .WEB. The Respondent, NDC and Verisign were able to comment on the alleged change of ownership or control resulting from the contractual arrangements between the *Amici* by reference to the actual terms of the DAA. However, Afilias and Ruby Glen were not.

312. Other topics in the Questionnaire would attract very different answers depending on whether the responding party had knowledge of the terms of the DAA. By way of examples:

> 4. In his 8 August 2016, letter, Scott Hemphill stated: "A change in control can be effected by contract as well as by changes in equity ownership." Do you think that an applicant's making a contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a "change in control" of the applicant? Do you think that compliance with such a contractual promise constitutes such a change in control? Please give reasons.
>
> 5. Do you think that AGB Section 1.2.7 requires an applicant to disclose to ICANN all contractual commitments it makes to conduct its affairs in particular ways? If not, in what circumstances (if any) would disclosure be required? […]
>
> 7. Do you think that changes to an applicant's financial condition that do not negatively reflect on an applicant's qualifications to operate the gTLD should be deemed material? If so, why? Do you think that an applicant's obtaining a funding commitment from a third party to fund bidding at auction negatively affects that applicant's qualifications to operate the gTLD? Please explain why, describing your view of the relevance of (a) the funding commitment the applicant received and (b) the consideration the applicant gave to obtain that commitment (e.g., a promise to repay; a promise to use a particular backend provider; an option to receive some ownership interest in the applicant in the future; some promise about how the gTLD will be operated).[…]
>
> 9. Do you think that requiring applicants to disclose funding commitments (whether through loans, contributions from affiliated companies, or otherwise) they obtain for auction bids would help or harm the auction process? Would a requirement that applicants disclose their funding arrangements create problems for applicants (for example, making funding commitments harder to obtain)? To what extent, if any, do you think scrutinizing such arrangements (beyond determining whether they negatively reflect on an applicant's

[272] ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50, p. 2 [emphasis added].

> qualifications) would be within ICANN's proper mission? Would required disclosure of applicants' funding sources pose any threat to robust competition?

313. Another noteworthy feature of the Questionnaire is that while it contains many references to Mr. Hemphill's letters, it does not refer to the letter of 23 August 2016 from counsel for the *Amici*, nor in terms to the DAA. This was because one and the other had been marked confidential when submitted to the Respondent. Ms. Willett was asked about ICANN's practice when presented with a request to keep correspondence confidential:

> […] our practice was that we respected those requests for confidentiality and we did not post those -- such correspondences, with one exception.
>
> At some point if some other party asked for something to be published or it became desirable and relevant to something else, I recall, again, it's been years, so I don't recall a specific example, but as a general practice, I recall that ICANN might ask the sender if it would be possible to publish a letter, but we respected their requests for confidential correspondence.[273]

314. The Panel is of the view that the Respondent could have, and ought to have requested Verisign and NDC for authorization to disclose the DAA to the other addresses of its Questionnaire, be it on an "external counsel's eyes only" basis. There is no evidence that this possibility was explored. It seems to the Panel that in the context of an information gathering exercise such as that in which the Respondent chose to engage with its Questionnaire, it would have been, to quote Ms. Willett's evidence, both "desirable" and "relevant" to do so. The Panel also believes that ICANN's evaluation of the issues would have been better informed had Afilias and Ruby Glen been given an opportunity to know, and address directly, the arguments advanced on behalf of the *Amici* in response to the concerns they had raised. At the very least, the Respondent could have disclosed that the Questionnaire had been prepared with knowledge of the terms of the DAA, which would have given interested parties an opportunity to seek to obtain a copy of the agreement, either voluntarily by requesting it from the *Amici*, or through compulsion by available legal means.

315. The foregoing leads the Panel to find that the preparation and issuance of the Respondent's Questionnaire in the circumstances just reviewed violated the Respondent's commitment,

[273] Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

under the Bylaws, to operate in an open and transparent manner and consistent with procedures designed to ensure fairness.

316. As noted, Afilias, NDC and Verisign forwarded responses to the Questionnaire, but Ruby Glen did not. Ms. Willett testified that she passed on the responses she received to ICANN's legal team, without undertaking her own analysis. She was not sure what counsel did with them.[274] As for any external follow-up, it is common ground that no feedback whatsoever was given to the Claimant of the Respondent's evaluation of these responses.

(iv) The Respondent's Letter of 30 September 2016

317. In the meantime, on 30 September 2016, Mr. Atallah, on behalf of the Respondent, acknowledged receipt of Afilias' 8 August and 9 September 2016 letters and, as found by the Panel when considering the Respondent's time limitations defence, represented in explicit terms that the Respondent's consideration of this matter was continuing. It bears noting that in 2016, Mr. Atallah was President of the Respondent's Global Domains Division, reporting to the CEO, and was the person responsible for overseeing the administration of the New gTLD Program.[275]

(v) Findings as to the Seriousness of the Issues Raised by the Claimant, and the Respondent's Representation that It Would Evaluate Them

318. In the Panel's opinion, the implication of the Respondent's decision to prepare and send out its 16 September 2016 Questionnaire, and of Mr. Atallah's letter of 30 September 2016 in response to the Claimant's letters of 8 August and 9 September 2016, was that the questions raised by the Claimant and Ruby Glen in connection with NDC's conduct and the latter's arrangements with Verisign were serious and deserving of the Respondent's consideration. This was admitted by the Respondent in its pleadings in this IRP, where the

[274] Merits hearing transcript, 6 August 2020, pp. 719-720 (Ms. Willett).

[275] Merits hearing transcript, 7 August 2020, pp. 917-918 (Mr. Disspain).

Respondent averred:

> […] …determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA. A true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA. This analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.[276]

319. In making its finding as to the seriousness of the questions raised by the Claimant, the Panel is mindful of Ms. Willett's evidence when asked, in cross-examination, whether she considered that the concerns that Afilias had raised were serious. Her answer was that she "considered them to be sour grapes", and she admitted that she may have shared that view with others within ICANN.[277] However, Ms. Willett having testified that she never even read the DAA when these events were unfolding, nor had she read the 23 August 2016 letter sent to the Respondent on behalf of the *Amici*, the Panel must conclude that her stated view was more in the nature of a personal impression than a considered opinion. Moreover, in all appearance her impression was not shared by those who invested time in assisting her preparing the Questionnaire, or by Mr. Atallah who subsequently confirmed that ICANN was continuing to consider the questions raised by the Claimant. In any event, and as just seen, it is not the position formally adopted by the Respondent in this IRP.

320. The questions raised by the Claimant that are, in the opinion of the Panel, serious and deserving of the Respondent's consideration, include the following, which the Panel merely cites as examples:

- Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application".

- Whether the execution of the DAA by NDC constituted a "change in circumstances

[276] Respondent's Rejoinder, para. 82.

[277] Merits hearing transcript, 6 August 2020, p. 746 (Ms. Willett).

that [rendered] any information provided in the application false and misleading".

- Whether by entering into the DAA after the deadline for the submission of applications for new gTLDs, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, Verisign impermissibly circumvented the "roadmap" provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules.

321. The Panel expresses no view on the answers that should be given to those questions and the other questions arising from the execution of the DAA by NDC and Verisign, other than to reiterate, as acknowledged by the Respondent, that they are deserving of careful consideration.

322. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and "others in the contention set" were worthy of the Respondent's consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent's contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent *represented* that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism.[278] Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD

[278] Merits hearing transcript, 6 August 2020, p. 745 (Ms. Willett).

Program, but also to disseminate the Respondent's position on those questions within the Internet community and allow market participants to act accordingly.

(vi) The November 2016 Board Workshop

323. The Panel comes to the November 2016 Workshop session at which "the Board chose not to take any action at that time regarding .WEB because an Accountability Mechanism was pending regarding .WEB."[279]

324. The existence of this November 2016 Workshop was revealed for the first time in the Respondent's Rejoinder, filed on 1 June 2020. For example, no mention of it is made in the chronology of events contained in the Respondent's Response,[280] where it was merely pleaded, with no reference to the workshop session, that the Board had not yet had an opportunity to fully address the issues being pursued by Afilias in this IRP and that "[d]eferring such consideration until this Panel renders its final decision is well within the realm of reasonable business judgment".[281]

325. The Panel had the benefit of hearing the evidence of two (2) witnesses who were in attendance at the November 2016 Workshop: Mr. Disspain, a long-standing member of ICANN's Board, and Ms. Burr, who attended the workshop as an observer shortly before being herself appointed to the Board. Both of these witnesses are intimately familiar with the Respondent and its processes, and both testified openly and credibly.

326. This is how Mr. Disspain described the November 2016 Workshop session in his witness statement:

> 10. In November 2016, the Board received a briefing from ICANN counsel on the status of, and issues being raised regarding, .WEB. The communications during that session, in which ICANN's counsel, John Jeffrey (ICANN's General Counsel) and Amy Stathos (ICANN's Deputy General Counsel), were integrally involved, are privileged and, thus, I will not disclose details of those discussions so as to avoid waiving the privilege. I recall that, prior to this session, the Board received Board briefing materials directly from ICANN's counsel that set forth relevant information about the disputes regarding .WEB, the parties' legal and factual contentions and a set of options the Board could consider.

[279] Respondent's Rejoinder, paras. 40-41.

[280] Respondent's Response, paras. 40-54.

[281] Respondent's Response, para. 66.

> During the session, Board members discussed these topics and asked questions of, and received information and advice from, ICANN's counsel.
>
> 11. At the November 2016 session, the Board chose not to take any action at that time regarding the claims arising from the .WEB auction, including the claim that, by virtue of the agreement between Verisign and NDC, NDC had committed violations of the Applicant Guidebook which merited the disqualification of its application for .WEB and the rejection of its winning bid. Given the Accountability Mechanisms that had already been initiated over .WEB, and given the prospect of further Accountability Mechanisms and legal proceedings, the Board decided to await the results of such proceedings before considering and determining what action, if any, to take at that time. […]

327. In the course of his cross-examination, Mr. Disspain had the opportunity to add the following to the evidence set out in his witness statement:

- The workshop session of 3 November 2016 was separate and distinct from the actual Board meeting, which took place on 5 November 2016.[282]

- The session was attended by a significant number of Board members, in his estimation more than 50%.[283] Also in attendance were ICANN's CEO, its in-house lawyers, and likely Mr. Atallah.[284]

- The letters that Afilias had sent Mr. Atallah were known to those in attendance and "would have been part of the briefing";[285] the Questionnaire prepared by ICANN in response to these letters was also known.[286] However, the DAA, the 23 August 2016 letter sent on behalf of the *Amici*, and the Questionnaire were not part of the briefing materials.[287]

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[282] Merits hearing transcript, 7 August 2020, pp. 918-919 (Mr. Disspain).

[283] *Ibid*, p. 923 (Mr. Disspain).

[284] Merits hearing transcript, 7 August 2020, p. 924 (Mr. Disspain).

[285] Merits hearing transcript, 7 August 2020, p. 917 (Mr. Disspain).

[286] Merits hearing transcript, 7 August 2020, p. 928 (Mr. Disspain).

[287] Merits hearing transcript, 7 August 2020, pp. 930-931 (Mr. Disspain).

- There was a full and open discussion, that likely lasted more than fifteen (15) minutes.

- Rather than "proactively decide" or "agree" its course of action, the Board "made a choice" to follow its longstanding practice of not doing anything when there is a pending outstanding accountability mechanism.[288]

- The Board made this choice without the need for a vote, straw poll or show of hands.[289]

328. Ms. Burr explained that Board workshops are informal working sessions. A quorum is not required, attendance is not taken, nor are minutes prepared or resolutions passed.[290]

329. It is common ground that the choice, or decision, made by the Board at its November 2016 Workshop session was not communicated to Afilias or otherwise made public. In response to a question from the Panel, Mr. Disspain indicated that the question of whether the Board's 3 November 2016 decision would or would not be communicated to the members of the .WEB contention set was not discussed at the workshop session.[291] Indeed, Mr. Disspain only became aware through his involvement in this IRP that the November 2016 Board decision to defer consideration of the issues raised in relation to .WEB was only communicated to the Claimant – and made public – when it was revealed in the Respondent's Rejoinder.

330. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC's bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a "pending question, one on which the Board had not pronounced and had decided not to address." [emphasis added]

[288] Merits hearing transcript, 7 August 2020, pp. 938-939 (Mr. Disspain).

[289] Merits hearing transcript, 7 August 2020, p. 935 (Mr. Disspain).

[290] Merits hearing transcript, 4 August 2020, pp. 282-286 (Ms. Burr).

[291] Merits hearing transcript, 7 August 2020, p. 975 (Mr. Disspain).

Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

331. The Respondent urges that it was not a violation of the Respondent's Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC's application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.

332. The Panel does find, however, that it was a violation of the commitment to operate "in an open and transparent manner and consistent with procedures to ensure fairness"[292] for the Respondent to have failed to communicate the Board's decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC's application and auction bids for .WEB. Since the Board's decision to defer consideration of these issues contradicted the Respondent's representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.

(vii) The Respondent's Decision to Proceed with Delegation of .WEB to NDC in June 2018

333. Mr. Disspain confirmed that by early 2018, the situation as described in paragraph 327 above "remained unchanged."[293] That is, the question of whether NDC's bid, post-DAA, was compliant with the New gTLD Program Rules had been raised and remained a pending question on which the Board had yet to pronounce. The extent to which the Respondent's

[292] See Bylaws Ex. C-1, Art. 3.

[293] Merits hearing transcript, 7 August 2020, pp. 976-977 (Mr. Disspain).

Staff had, by early 2018, progressed in their consideration of the questions that had been raised by the Claimant, if at all, is unknown. However, the evidence establishes that no determination of these questions was communicated to the Claimant, and that neither those questions nor any Staff position in relation thereto were brought back to the Board for its consideration. Ms. Willett explained in the course of her cross-examination that the on-hold status of an application or contention set does not mean "that all work ceases", or that the Respondent is prevented from continuing to gather information.[294] Hence, the fact that the contention set was on hold throughout the period from November 2016 to June 2018 would not justify the lack of progress in evaluating the issues that had been raised in connection with .WEB.

334. This brings the Panel to considering the Respondent's decision to put the .WEB contention set "off hold" on 6 June 2018, the day after Afilias' Reconsideration Request 18-7 was denied.[295] As seen, this immediately set back in motion the Respondent's internal process leading to the execution of a registry agreement. On 12 June 2018, Ms. Willett and other ICANN staff approved a draft registry agreement for .WEB; the registry agreement was forwarded for execution to NDC on 14 June 2018; the agreement was promptly signed and returned to ICANN and, on the same day, ICANN's Staff approved executing the .WEB Registry Agreement with NDC on behalf of ICANN.

335. In the opinion of the Panel, the Respondent's decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett's letter of 16 September 2016, the text in the introduction to the attached Questionnaire,[296] and Mr. Atallah's letter of 30 September 2016.[297] The Panel also finds this conduct to be inconsistent with the Board's decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated

[294] Merits hearing transcript, 6 August 2020, pp. 697-698 (Ms. Willett).

[295] See above, para. 117.

[296] ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

[297] ICANN's letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

by the Respondent in this IRP.

336. Mr. Disspain testified about the Respondent's decision to put the contention set off hold in June 2018. While he had made the point in his witness statement that this was a decision made by ICANN's Staff,[298] he confirmed at the hearing that the Board was aware, ahead of time, that the .WEB contention set would be put off hold. He added, however, that he and his fellow Board members fully expected the Claimant to make good on its promise to initiate an IRP, which would result in the contention set being put back on hold.[299]

337. Mr. Disspain was asked by the Panel what would the Board have done had the Claimant, contrary to his and his colleagues' expectation, *not* initiated an IRP. Might that not have resulted in a registry agreement for .WEB being signed by the Staff on behalf of the Respondent without the Board having the opportunity to address the questions it had chosen to defer in November 2016? Mr. Disspain, understandably, did not want to speculate as to what the Board would have done.[300] However, when shown internal correspondence evidencing that signature of the registry agreement for .WEB on behalf of ICANN had in fact been approved by ICANN's Staff after receipt of the executed copy of the agreement by NDC, he did confirm that Board approval is not required for the execution of a registry agreement by ICANN.[301] Thus, clearly, a registry agreement with NDC for .WEB could have been executed by ICANN's Staff and come into force without the Board having pronounced on the propriety of the DAA under the Guidebook and Auction Rules.

338. In the course of her examination, Ms. Willett was asked the following hypothetical question:

> **[PANEL MEMBER]:** […] If […] an applicant had failed to respect the guidebook, but there had been no accountability mechanism to complain about that noncompliance, would you, by reason of the absence of an accountability mechanism, have sent a draft Registry Agreement for execution?

[298] Mr. Disspain's witness statement, 1 June 2020, para. 13.

[299] Merits hearing transcript, 7 August 2020, pp. 978-980 (Mr. Disspain).

[300] *Ibid*, pp. 981-982 (Mr. Disspain).

[301] *Ibid*, pp. 1002-1004 (Mr. Disspain).

> **THE WITNESS:** No, I don't believe we would have. If we determined that an applicant had violated the terms of the guidebook, I don't believe that my team and I would have given our approvals to proceed with contracting.[302]

339. In the Panel's view, Ms. Willett's evidence in answer to this question reflects the kind of ownership of compliance issues with the New gTLD Program Rules that the Respondent did not display in its dealing with the concerns raised in connection with NDC's arrangements with Verisign.

340. The Panel observes that the Respondent's Staff's failure to take a position on the question of whether the DAA complies with the New gTLD Program Rules before moving to delegation stands in contrast with the resolution that was brought to the pre-auction allegation of change of control within NDC, which had also been raised, initially, in correspondence. Ms. Willett confirmed in her evidence that the Respondent's pre-auction investigation was prompted by Ruby Glen's email of 23 June 2016.[303] Once the investigation was completed, Ms. Willett informed Ruby Glen of ICANN's decision[304] and advised Ruby Glen that if dissatisfied with the decision, it could invoke ICANN's accountability mechanisms.[305] No such decision was made by ICANN's Staff in relation to the issues raised by the Claimant that could have formed the basis for a formal accountability mechanism, in the context of which positions would have been adopted, battle lines would have been drawn, and an adversarial process such as an IRP would have resulted in a reasoned decision binding on the parties.

341. What the Panel has described as a failure on the part of the Respondent to take ownership of the issues arising from the concerns raised by the Claimant and Ruby Glen finds expression in the Respondent's submission in this IRP that the dispute arising out of NDC's arrangement with Verisign is in reality a dispute between the Claimant and the *Amici*. For example, the Respondent writes in its Response:

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[302] Merits hearing transcript, 6 August 2020, pp. 749-750 (Ms. Eisner).

[303] Merits hearing transcript, 6 August 2020, p. 617 (Ms. Willett).

[304] See Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

[305] Merits hearing transcript, 6 August 2020, pp. 621-622 (Ms. Willett).

> […] the Guidebook breaches that Afilias alleges are the subject of good faith dispute by NDC and Verisign, both of which are seeking to participate in this IRP pursuant to their *amicus* applications. […] While Afilias' Amended IRP Request is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and Verisign, to which NDC and Verisign have responses. […][306]

342. Another example can be found in the Respondent's post-hearing brief where it is stated:

> The testimony at the hearing established that there is a good-faith and fundamental dispute between *Amici* and Afilias about whether the DAA violated the Guidebook or Auction Rules, meaning that reasonable minds could differ on whether NDC is in breach of either and, if so, whether this qualification is the appropriate remedy. Accordingly, Afilias' additional argument that ICANN can only exercise its discretion reasonably by disqualifying NDC must be rejected.[307]

343. It may be fair to say, as averred in the Respondent's Response, that "ICANN has been caught in the middle of this dispute between powerful and well-funded businesses".[308] However, in the Panel's view, it is not open to the Respondent to add, as it does in the same sentence of its Response, "[and ICANN] has not taken sides", as if the Respondent had no responsibility in bringing about a resolution of the dispute by itself taking a position as to the propriety of NDC's arrangements with Verisign.

344. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on

[306] See Respondent's Response, para. 63.

[307] Respondent's PHB, para. 90 [emphasis added].

[308] Respondent's Response, para. 4.

whether NDC violated the Guidebook".[309]

345. The same can be said of the Respondent taking the position, shortly after Afilias filed its IRP, that it would only keep the .WEB contention set on hold until 27 November 2018, so as to allow the Claimant to file a request for interim relief, barring which the Respondent would take the contention set off hold.[310] It seems to the Panel that the Respondent was once again adopting a position that could have resulted in .WEB being delegated to NDC without the Board having determined whether NDC's arrangements with Verisign complied within the New gTLD Program Rules.

346. The Panel also finds it contradictory for the Respondent to assert in pleadings before this Panel that the Respondent has not yet considered the Claimant's complaints, having represented to the Emergency Panelist earlier in these proceedings that ICANN "ha[d] evaluated these complaints" and that the "time ha[d] therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers".[311]

347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.

348. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent's failure to disqualify NDC's application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the

[309] Respondent's Rejoinder, para. 81.

[310] See Decision on Phase I, para. 40.

[311] ICANN's Opposition to Afilias Domains No. 3 LTD.'s Request for Emergency Panelist and Interim Measures of Protection, para. 3.

unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.

(viii) Other Related Claims

349. In addition to what the Panel has described as the Claimant's core claims, the Claimant has advanced a number of related claims, including that the Respondent violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign, and by failing to enable and promote competition in the DNS.

350. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant's core claims, such as turning to Verisign rather than NDC to obtain information about NDC's arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afilias' letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach. Accordingly, the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims.

351. Turning to the claim that the Respondent failed to enable and promote competition in the DNS, it was summarized in the Claimant's PHB as the contention that "to the extent ICANN has discretion regarding the enforcement of the New gTLD Program Rules, ICANN may not exercise its discretion in a manner that would be inconsistent with its competition mandate (or with its other Articles and Bylaws)."[312] As seen, the Respondent

[312] Claimant's PHB, para. 145.

has not as yet exercised whatever discretion it may have in enforcing the New gTLD Program Rules in relation to .WEB, and therefore this claim, as just summarized, appears to the Panel to be premature.

352. For reasons expressed elsewhere in this Final Decision, the Panel is of the opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook and Auction Rules and, assuming the Respondent determines that it did, what consequences should follow. Likewise, the Respondent is invested with the authority to approve an eventual transfer of a possible registry agreement for .WEB from NDC to Verisign, which it may or may not be called upon to exercise depending on whether NDC's application is rejected and its bids disqualified. That said, and even though it is not strictly necessary to decide the question, the Panel accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct. Compelling evidence to that effect was presented by Ms. Burr and Mr. Kneuer, supported by Mr. Disspain, and it is consistent with a public statement once endorsed by the Claimant, in which it was asserted:

> While ICANN's mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. ***Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators***. Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.[313]

353. As noted in the History of the Proceedings section of this Final Decision,[314] the Parties came to the understanding that it would be for this Panel to determine the Claimant's Request for Emergency Interim Relief upon the Respondent agreeing that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP. For the reasons set out in the section of this Final Decision analysing the Claimant's cost claim,[315] the Panel is of the view that the Claimant's Request for Emergency Interim Relief was well founded, and that it should be granted with effect until such time as the Respondent has considered

[313] Registry Operators' Submission Re: Objections to the Proposed Versign Settlement, Ex. R-21, p. 8 [emphasis added].

[314] See above, para. 40.

[315] See below, paras. 402-407.

the present Final Decision.

354. As regards the Donuts transaction of 29 December 2020, the Panel does not consider it relevant to the issues determined in this Final Decision. It will be for the Respondent to consider, in the first instance, whether this transaction is of relevance to the Claimant's request that following a possible disqualification of NDC's bid for .WEB, the Respondent must, in accordance with the New gTLD Program Rules, contract the Registry Agreement for .WEB with the Claimant.

E. The Rule 7 Claim

355. The Panel recalls that the Rule 7 Claim was first raised as a defence to the *Amici*'s requests, based on Rule 7 of the Interim Procedures, to participate in this IRP as *amici curiae*. In its Decision on Phase I, the Panel granted the *Amici*'s requests – subject to modalities set out in that decision – and, to the extent the Claimant wished to maintain its Rule 7 Claim, joined those aspects of the claim over which the Panel found it has jurisdiction to the claims to be decided in Phase II. The *Amici* have since participated in this IRP to the full extent permitted by the Decision on Phase I, as described in earlier sections of this Final Decision.

356. The Panel included in its list of questions to be addressed in post-hearing briefs a request to the Claimant to clarify what remained to be decided in connection with its Rule 7 Claim given the Decision on Phase I and the conduct of the IRP in accordance with that ruling. The Claimant's response is that the Rule 7 Claim remains relevant to justify an award of costs in its favour.

357. As explained in the sections of this Final Decision dealing, respectively, with the designation of the prevailing party and the Claimant's cost claim, there is, in the opinion of the Panel, no basis on which the Claimant could be awarded costs in relation to Phase I or in relation to the outstanding aspects of the Rule 7 Claim. This being so, it is the Panel's opinion that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision on Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as appropriate. The Panel wishes to make clear that in making this Final Decision, the Panel expresses no view on

the merit of those outstanding aspects of the Rule 7 Claim over which the Panel found that it has jurisdiction, beyond that expressed in paragraph 408 of these reasons.

F. Determining the Proper Relief

358. The remedial authority of IRP Panels is set out in Section 4.3(o) of the Bylaws, which reads as follows:

> (o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:
>
> > (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
> >
> > (ii) Request additional written submissions from the Claimant or from other parties;
> >
> > (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
> >
> > (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
> >
> > (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;
> >
> > (vi) Determine the timing for each IRP proceeding; and
> >
> > (vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).
>
> [emphasis in the original]

359. Of relevance to situating the remedial authority of IRP Panels in their proper context are the provisions of Section 4.3(x), which it is useful to cite in full:

> (x) The IRP is intended as a final, binding arbitration process.
>
> > (i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.
> >
> > (ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

> (iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.
>
> (A)Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.
>
> (B)If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.
>
> (C)If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.
>
> (iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.
>
> [italics in the original]

360. The Panel also notes the provisions of Section 4.3(t) which, among others, require each IRP Panel decision to "specifically designate the prevailing party as to each part of a Claim".

361. In the opinion of the Panel, the Claimant is entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision, and to being designated the prevailing party in respect of the liability portion of its core claims.

362. As foreshadowed earlier in these reasons, the Panel is firmly of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.

363. The Panel also accepts the Respondent's submission that it would be improper for the Panel to dictate what should be the consequence of NDC's violation of the New gTLD Program

Rules, assuming a violation is found. The Panel is mindful of the Claimant's contention that whatever discretion the Respondent may have is necessarily constrained by the Respondent's obligation to enforce the New gTLD Program Rules objectively and fairly. Nevertheless, the Respondent does enjoy some discretion in addressing violations of the Guidebook and Auction Rules and it is best that the Respondent first exercises its discretion before it is subject to review by an IRP Panel.

364. In the opinion of the Panel, the foregoing conclusions are consistent with the authority of IRP Panels under Section 4.3 (o) (iii) of the Bylaws, which grants the Panel authority to "declare" whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.

G. Designating the Prevailing Party

365. Section 4.3(t) of the Bylaws requires the Panel to designate the prevailing party "as to each part of a Claim".[316] This designation has relevance, among others, to the Panel's exercise of its authority under Section 4.3(r) of the Bylaws to shift costs by providing for the "losing party" to pay the administrative costs and/or fees of the "prevailing party" in the event the Panel identifies the losing party's Claim or defence as frivolous or abusive.[317]

366. The Panel has already determined that the Claimant is entitled to be designated as the prevailing party in relation to the liability portion of its core claims. In the opinion of the Panel, the Claimant should also be designated the prevailing party in relation to its Request for Emergency Interim Relief, insofar as the Respondent eventually agreed to keep .WEB on hold until this IRP is concluded, consistent with the rationale of the Board's decision of November 2016 to defer consideration of the issues raised in relation to .WEB and the status of NDC's application, post-DAA, while accountability mechanisms remained

[316] The equivalent provision in the Interim Procedures, Ex. C-59, Rule 13 b., differs slightly in that it requires the IRP Panel Decision to "specifically designate the prevailing party as to each Claim".

[317] See also Section 4.3(e)(ii) of the Bylaws, which requires an IRP Panel to award to ICANN all reasonable fees and costs incurred by ICANN in the IRP in the event it is the prevailing party in a case in which the Claimant failed to participate in good faith in a CEP.

pending.

367. With respect to Phase I of this IRP, the Claimant has argued that the prevailing party remained to be determined depending on the outcome of Phase II.[318] This is correct in regard to those aspects of the Claimant's Rule 7 Claim that were joined to the Claimant's other claims in Phase II, pursuant to the Panel's Decision on Phase I. However, the Respondent prevailed in Phase I on the question of whether the Panel had jurisdiction over actions or failures to act committed by the IOT and, importantly, on the principle of the *Amici*'s requests to participate in the IRP as *amici curiae*. These requests were both granted, albeit with narrower participation rights than those advocated by the Respondent.[319] In light of the foregoing, the Panel does not consider that the Claimant can be designated as the prevailing party in respect of Phase I of the IRP.

368. Turning to the requests for relief sought by the Claimant, the Respondent must be designated as the prevailing party in regard to all aspects of the Claimant's requests for relief other than (a) the request for a declaration that ICANN acted inconsistently with its Articles and Bylaws as described, among others, in paragraph 8 of this Final Decision and the *Dispositif*, and (b) the outstanding aspects of the Rule 7 Claim. With regard to the latter, which the Panel has determined have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I, the Claimant cannot be designated as the prevailing party either, the matter not having been adjudicated upon. For the reasons set out in next section of this Final Decision, however, the fact that those aspects of the Rule 7 Claim have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim because, in the opinion of the Panel, it simply cannot be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive.

[318] See Afilias' Reply Costs Submission, para. 9.

[319] See Decision on Phase I, paras. 96-97.

VI. COSTS

A. Submissions on Costs

369. In its decision on Phase I, the Panel deferred to Phase II the determination of costs in relation to Phase I of this IRP.[320] The Parties' submissions on costs therefore relate to both phases of the IRP.

1. Claimant's Submissions on Costs

370. The Claimant submitted its cost submissions in a brief separate from, but filed simultaneously with its PHB, on 12 October 2020.[321] The Claimant argues that it should be declared the prevailing party on all of its claims in the IRP. Relying on Section 4.3(r) of the Bylaws, the Claimant requests that the Panel shift all of its fees and costs to the Respondent on the ground that the Respondent's defences in the IRP were "frivolous or abusive". In the alternative, the Claimant argues that the Respondent should at least bear all of its costs and fees related to the participation of the *Amici* in the IRP and the Emergency Interim Relief proceedings.

371. The Claimant states that there was no need for this IRP to be as procedurally and substantively complicated as it has been.[322] First, the Claimant avers that the Respondent used the CEP as cover to push through "interim procedures" that would provide the Respondent with a limitations defence. Second, the Claimant argues that the Respondent ought not to have forced the Claimant to seek emergency interim relief to protect against the .WEB contention set being taken off hold. Third, the Claimant blames the Respondent's belated disclosure of the DAA for the need for it to have filed an Amended Request for IRP. Fourth, the Claimant reproaches the Respondent for pressing for the *Amici*'s participation in the IRP, particularly Verisign, which was not even a member of the contention set. Finally, the Claimant contends that the Respondent ought

[320] Decision on Phase I, para. 205(c)).

[321] The Claimant's Submissions on Costs were corrected on 16 October 2020 apparently due to a technical problem with Afilias' exhibit management software.

[322] Claimant's Submissions on Costs, paras. 1-2.

not to have hidden its central defence – the Board's decision of November 2016 – until the filing of its Rejoinder.

372. In the Claimant's submission, the Respondent's central defence in this IRP – articulated for the first time on 1 June 2020 and based on an alleged Board decision taken during the November 2016 Workshop – frivolously and abusively sought to immunize the Respondent from any accountability and to render the present IRP an empty shell.[323] The Claimant argues that it was abusive for the Respondent to center its defence around a decision that had never been made public or disclosed to Afilias prior to the Respondent's Rejoinder.[324]

373. The Claimant also contends that the Respondent's defence frivolously and abusively sought to deprive the Claimant of an effective forum. In that regard, the Claimant avers that ICANN's enactment of the Interim Procedures, weeks before the Claimant filed its IRP, was frivolous and abusive because it allowed the Respondent to advance a time-limitation defence that would otherwise not have been available to it previously and to enable the participation of the *Amici* in the IRP. In the Claimant's view, the circumstances in which ICANN enacted the Interim Procedures made it clear that they were specifically targeted to undermine the Claimant's position in the present IRP.[325]

374. The Claimant submits that ICANN's refusal to put .WEB on hold after the filing of the IRP was also frivolous and abusive and needlessly forced the Claimant to pursue a "costly, distracting, and unwarranted Emergency Interim Relief phase". The Claimant avers that the Respondent's action was frivolous and abusive because the Respondent later abandoned its refusal to put .WEB on hold – but only after the Claimant had incurred extensive fees and costs on the Request for Emergency Interim Relief.[326]

375. The Claimant argues as well that the Respondent must bear its costs and fees associated with the *Amici*'s participation in the IRP. This is so because, in the submission of

[323] Claimant's Submissions on Costs, para. 16.

[324] *Ibid*, paras. 12-17.

[325] *Ibid*, paras. 19-25.

[326] *Ibid*, paras. 26-27.

the Claimant, the Respondent abusively included Rule 7 in the Interim Supplementary Procedures in view of the present IRP and then used the *Amici* as surrogates for its defence.

2. Respondent's Submissions on Costs

376. The Respondent's submissions on costs are set out in its PHB dated 12 October 2020.

377. The Respondent takes the position that the Bylaws and Interim Procedures authorize the Panel to shift costs only in the event of a finding that, when viewed in its entirety, a party's case was frivolous or abusive. The Respondent stresses that while this is an uncommonly high standard for international arbitration, it is more permissive than the "American rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party. The Respondent also recalls that, under the Bylaws, it is the Respondent that bears all the administrative costs of maintaining the IRP mechanism, including the fees and expenses of the panelists and the ICDR.[327]

378. ICANN states that it does not view the Claimant's case as a whole to be frivolous or abusive, even though, in the Respondent's submission, the Claimant has from time to time employed abusive tactics and taken positions that clearly have no merit. The Respondent therefore does not seek an award for costs.

379. The Respondent argues that the Claimant cannot plausibly contend that ICANN's defence triggers the Panel's authority to allocate legal expenses in favour of the Claimant. For these reasons, ICANN contends that the Parties should bear their own legal expenses.[328]

3. Claimant's Reply Submission on Costs

380. In its Reply Costs Submissions dated 23 October 2020, the Claimant argues that the Panel is empowered to shift costs if any part of the Respondent's defence lacked merit or was otherwise improper. In the Claimant's view, the standard for cost shifting must be informed, not by the California Code of Civil Procedure, which is relied upon by

[327] Respondent's PHB, paras. 232-234.

[328] *Ibid*, paras. 235-240.

the Respondent, but by international arbitration norms and ICANN's obligation to conduct its activities "consistently, neutrally, objectively, and fairly" and "transparently."[329]

381. The Claimant avers that the Respondent's PHB underscores that its defence has been frivolous and abusive, both in general and in its particulars.[330] The Claimant argues that the three (3) main planks of ICANN's substantive defence were each frivolous and abusive: the belatedly disclosed Board decision of November 2016,[331] the allegedly limited remedial jurisdiction of the Panel,[332] and the time bar defence, based on Rule 4, which was made applicable to this IRP by distorting the Respondent's rule-making process and violating the "fundamental rule" against retroactivity.[333] The Claimant also asserts that the Respondent's alleged reliance on the *Amici* as a defensive tactic allegedly to deflect attention from its own conduct has been frivolous and abusive, "both in conception and execution" in that it was facilitated by improper collaboration with Verisign in the process of adoption of Rule 7, and by using the *Amici* participation as an excuse to avoid answering the Claimant's claims.[334]

382. In light of the foregoing, the Claimant requests that the Panel order the Respondent to pay the Claimant: USD 11,291,997.13 in compensation for the total fees and costs incurred by the Claimant in this IRP; or, in the alternative: USD 2,383,703.11 for the Claimant's fees and costs incurred in relation to the *Amici* participation; and USD 823,811.88 for the fees and costs incurred in relation to the Emergency Interim Relief phase, along with pre- and post-award interest "at a reasonable rate from the date of this filing".[335]

4. Respondent's Response Submission on Costs

383. In its 23 October 2020 Response to Afilias' Costs Submission, the Respondent contends

[329] Claimant's Reply Submissions on Costs, paras. 3-4.

[330] *Ibid*, para. 5.

[331] *Ibid*, para. 6.

[332] *Ibid*, para. 7.

[333] *Ibid*, para. 8.

[334] *Ibid*, para. 9.

[335] *Ibid*, paras. 10-11.

that the Claimant's request for an order requiring ICANN to pay all its costs and legal fees should be denied because it is legally and factually baseless. In the Respondent's submission, the Claimant applies an incorrect standard for cost shifting, since Section 4.3(r) of the Bylaws allows the Panel to shift legal expenses and costs only when a party's IRP Claim or defence as a whole is found to be frivolous or abusive.[336] The Respondent further argues that the Claimant's cost-shifting arguments are misplaced and baseless since its arguments in defence were nor frivolous or abusive.[337] Finally, the Respondent avers that the Claimant's legal fees and costs are unreasonable as to both their total amount and their allocation as between the subject matters in relation to which separate cost shifting requests are made.[338]

384. For those reasons, the Respondent requests that the Claimant's request for an order requiring the Respondent to reimburse its costs and legal fees should be denied in its entirety.[339]

B. Analysis Regarding Costs

1. Applicable Provisions

385. The Panel begins its analysis by citing the provisions of the Bylaws and Interim Procedures that are relevant to the Claimant's cost claim.

386. Section 4.3(r) of the Bylaws reads as follows:

> (r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

[336] Respondent's Reply Submissions on Costs, paras. 4-8.

[337] *Ibid*, paras. 9-24.

[338] *Ibid*, paras. 25-28.

[339] *Ibid*, para. 29.

387. Rule 15 of the Interim Procedures is to the same effect:

> 15. Costs
>
> The IRP Panel shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.
>
> Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

388. As discussed in the previous section of this Final Decision, it is pursuant to the provisions of Section 4.3(t) that the Panel is required to designate the prevailing party "as to each part of a Claim".[340]

2. Discussion

389. A threshold issue that falls to be determined is whether the Respondent is correct in arguing that costs and legal expenses can only be shifted, pursuant to Section 4.3(r) and Rule 15, if a Claim as a whole, or an IRP defence as a whole, is found by the Panel to be frivolous or abusive. In support of its position, the Respondent relies on the definition of Claim in Section 4.3(d) of the Bylaws, which reads as follows:

> (d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC to commence an IRP ("**Community IRP**"), the EC shall first comply with the procedures set forth in Section 4.2 of Annex D.

390. Based on this definition, the Respondent submits that "costs and legal expenses may be shifted onto the Claimant only if the Request for IRP as a whole is frivolous or abusive".[341] By parity of reasoning, the Respondent argues that the same standard must apply to the Panel's authority to shift legal expenses onto ICANN which, so the argument goes, can only be done if ICANN's defence as a whole is found to be frivolous or abusive.

391. The Panel cannot accept the Respondent's proposed interpretation of the Bylaws

[340] Rule 13 b. of the Interim Procedures, Ex. C-59, requires the Panel to designate the prevailing party "as to each Claim".

[341] ICANN's Response to Afilias' Costs Submission, para. 5.

and Interim Procedures, which the Panel considers to be inconsistent with Section 4.3(t) of the Bylaws and Rule 13 b. of the Interim Procedures, and which would considerably restrict the scope of application of a carve-out that is already very narrow. The Panel's reasons in that respect are as follows.

392. The cost-shifting authority of IRP Panels is contingent upon two (2) findings. First, that the party claiming its costs be the prevailing party; and second, that the IRP Panel identify the losing party's Claim or defence as frivolous or abusive.

393. The Panel's obligation to designate the prevailing party is based on Section 4.3(t), which requires the Panel to make such a designation "as to each part of a Claim". It seems to the Panel that there would be no purpose in designating a prevailing party as to "each part of a Claim" if the Panel were required to consider "a Claim" as an indivisible whole for the purpose of the Panel's cost-shifting authority.

394. The Respondent's argument also fails if consideration is given to the slightly different wording used in Rule 13 b. of the Interim Procedures, which calls for the designation of the prevailing party "as to each Claim".

395. Finally, it would seem that the interpretation of the applicable provisions advocated by the Respondent would be unfair if it mandated that a single, isolated well-founded element of a Claim otherwise manifestly frivolous or abusive would suffice to save a Claimant from a potential cost-shifting order.

396. The better interpretation, one that harmonizes the provisions of Sections 4.3(r) and 4.3(t) of the Bylaws (that are clearly meant to operate in tandem) and reflects the practice of international arbitration, is the interpretation that allows IRP Panels to shift costs in relation to "parts" of the losing party's Claim or defence, which parts are the necessary reflection of the "parts" in respect of which the other party is designated as the prevailing party.

397. Applying the relevant provisions of the Bylaws and Interim Procedures, properly construed, to the facts of this IRP, the only parts of the Claimant's case as to which it has been designated as the prevailing party are the liability portion of its core claims and its Request for Emergency Interim Relief. This being so, those are the only parts of

the Claimant's case as to which the Panel needs to evaluate whether the Respondent's defence was frivolous or abusive.

398. While the Respondent has failed in its defence of the conduct of its Staff and Board in relation to the Claimant's core claims, the Panel cannot accept the Claimant's submission that ICANN's defence of its conduct in relation to these aspects of the case was frivolous or abusive.

399. To state the obvious, not every claim or defence that does not prevail in an IRP will result in an award of costs. The applicable cost shifting rule requires that the claim or defence be found to be frivolous or abusive. This standard binds the Parties as well as the Panel.

400. The Bylaws and Interim Procedures do not define the terms "frivolous" or "abusive". The Respondent has contended that they should be interpreted having regard to their well-established meaning under California law. The Panel agrees with the Claimant that there are good reasons not to seek guidance for the interpretation of those terms in a California statutory standard, which operates in an environment where the default rule is the so-called "American Rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party.

401. In the opinion of the Panel, the terms "frivolous" and "abusive" as used in the Bylaws and Interim Procedures should be given their ordinary meanings. According to the Merriam-Webster Dictionary, "frivolous" means "of little weight or importance", "having no sound basis (as in fact or law)" or "lacking in seriousness".[342] According to Black's Law Dictionary, "[a]n answer or plea is called 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff."[343] For its part, the term "abusive" is defined by the Merriam-Webster Dictionary as "characterized by wrong or improper use or action"[344], while the term "abuse" is defined in Black's Law

[342] Merriam-Webster *s.v.* "frivolous": https://www merriam-webster.com/dictionary/frivolous (consulted on 23 March 2021).

[343] Black's Law Online Dictionary, 2nd ed., *s.v.* "frivolous": https://thelawdictionary.org/frivolous/ (consulted on 23 March 2021).

[344] Merriam-Webster *s.v.* "abusive": https://www merriam-webster.com/dictionary/abusive (consulted on 23 March 2021).

Dictionary as a "misuse of anything".[345]

402. In the case of the Claimant's core claims, the Respondent's defences consisted in the main of the time limitations defence, and the rejection of the Claimant's arguments based on the Respondent's so-called competition mandate and on the asserted manifest incompatibility of the DAA with the provisions of the Guidebook and Auction Rules. The Respondent also raised as a defence the deference owed to its Board's business judgment when it decided to take no action regarding the .WEB contention set while a related accountability mechanism was pending.

403. The time limitations defence was asserted by the Respondent in circumstances where the validity of Rule 4, unlike that of Rule 7, had not been directly challenged by the Claimant. While the Panel has expressed concern as a matter of principle with the retroactive application of a time limitations rule, the Respondent's reliance on a rule, the validity of which had not been challenged and that on its face appeared to provide a defence, was not, in the opinion of the Panel, abusive or frivolous.

404. As regards the Respondent's other defences, the Panel does not accept that it was frivolous or abusive for the Respondent to argue that it was reasonable for its Board to defer consideration of the issues raised with .WEB while accountability mechanisms were pending; that the propriety of the DAA under the New gTLD Program Rules was a debatable issue requiring careful consideration by the Respondent's Board; or that the Respondent did not have the "competition mandate" contended for by the Claimant. These were all defensible positions and there is no evidence that they were advanced for an improper purpose or in bad faith. While the Respondent did fail in its contention that there was nothing for its Staff or Board to pronounce upon in the absence of a formal accountability mechanism challenging their action or inaction in relation to .WEB, the Respondent's position in this respect cannot, in the opinion of the Panel, be said to have been frivolous or abusive. Accordingly, the Claimant's claim for reimbursement of its costs in relation to the liability portion of its core claims must be dismissed.

[345] Black's Law Online Dictionary, 2nd ed., *s.v.* "abuse": https://thelawdictionary.org/abuse/ (consulted on 23 March 2021).

405. The Panel does consider that the Claimant's cost claim in relation to its Request for Emergency Interim Relief is meritorious. The Claimant was forced to introduce this request as a result of the Respondent's refusal to keep the .WEB contention set on hold in spite of the Claimant having commenced an IRP upon the termination of its CEP. When this decision was made, the .WEB contention set had already been on hold for more than two (2) years, precisely because accountability mechanisms were pending. The Board's decision to defer consideration of the questions raised in relation to .WEB in November 2016 was likewise based on the fact that accountability mechanisms were pending. This is how the Claimant describes the sequence of events in its Request for Emergency Interim Relief:

> 13. On 13 November 2018, Afilias and ICANN participated in a final CEP meeting, following which ICANN terminated the CEP. On 14 November 2018, Afilias filed its Request for IRP. Hours later, ICANN responded by informing Afilias that it intended to take the .WEB contention set "off hold" on 27 November 2018 even though Afilias had commenced an ICANN accountability procedure that follows-on from a failed CEP.[30] ICANN provided Afilias with no explanation justifying its decision.
>
> 14. On 20 November 2018, Afilias wrote to ICANN about its decision to proceed with the delegation of .WEB despite Afilias' commencement of the IRP.[31] In its letter, Afilias questioned ICANN's motives for removing the hold on .WEB, given that ICANN had voluntarily delayed the delegation of .WEB for several years and the lack of any apparent harm to ICANN if the .WEB contention set were to remain on hold for the duration of the IRP. Afilias requested an explanation justifying what appeared to be rash and arbitrary conduct by ICANN in proceeding with delegation of .WEB at this time, as well as the production of relevant documents. Afilias wrote to ICANN again on 24 November 2018 requesting a response to its 20 November 2018 letter.
>
> 15. ICANN did not respond to Afilias' letter until after 9:00 pm EDT on 26 November 2018—quite literally the eve of the deadline that ICANN previously set for Afilias to submit this Interim Request to prevent ICANN from taking the .WEB contention set "off hold."[32] ICANN noted in its response that ICANN's practice is to remove the hold on contention sets following CEP, notwithstanding the pendency of an IRP and despite the unanimous criticism of this practice in previous IRPs. ICANN also rejected Afilias' request to produce documents related to its dealings with NDC and VeriSign about .WEB. Instead, ICANN inexplicably offered to keep the .WEB contention set "on hold" for another two weeks, until 11 December 2018, something that Afilias had not requested and that did not remotely address any of the concerns Afilias had raised.[33]
>
> 16. It is because of ICANN's unreasonable conduct and refusal to act in a transparent manner—as required by its Articles and Bylaws—that Afilias has been forced to file, at significant cost and expense, this Interim Request.

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[30] Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afilias) (14 Nov. 2018), **[Ex. C-64]**, p. 1.

[31] Letter from A. Ali (Counsel for Afilias) to Independent Review (ICANN) (20 Nov. 2018), **[Ex. C-65]**.

[32] Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afilias) (26 Nov. 2018), **[Ex. C-66]**.

[33] Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afilias) (26 Nov. 2018), **[Ex. C-66]**, p. 1.

406. Having forced the Claimant to initiate emergency interim relief proceedings, the Respondent eventually changed course and agreed to keep .WEB on hold until the conclusion of this IRP.

407. In the opinion of the Panel, the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was "abusive" within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures, all the more so in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP. In the opinion of the Panel, this conduct on the part of the Respondent was unjustified and obliged the Claimant to incur wasted costs that it would be unfair for the Claimant to have to bear.

408. The Claimant has claimed in relation to its Request for Emergency Interim Relief an amount of USD 823,811.88. This is said to represent 50% of the Claimant legal fees from 14 November 2018 to 10 December 2018; 33% of the Claimant's total fees from 11 December 2018 through 31 March 2019; and 50% of its fees from 1 April 2019 through 14 May 2019.

409. The Respondent has challenged the reasonableness of the fees claimed by the Claimant in relation to its Request for Emergency Interim Relief, pointing out that it entailed the preparation and presentation of the request, one supporting brief, and requests for production of documents which were resolved by 12 December 2018.[346] As noted in the History of the Proceedings' section of this Final Decision, the Parties asked the Emergency Panelist to postpone further activity in January 2019.

[346] See ICANN's Response to Afilias' costs Submission, para. 28.

410. The Panel has difficulty accepting that such a significant amount of fees as that claimed by the Claimant in regard to the Request for Emergency Interim Relief can reasonably be attributed to the preparation of this request and the subsequent proceedings before the Emergency Panelist. Exercising its discretion in relation to the fixing of the legal expenses reasonably incurred that may be ordered to be reimbursed pursuant to a cost-shifting decision, the Panel reduces the Claimant's claim on account of the Request for Emergency Interim Relief to USD 450,000, inclusive of pre-award interest.

411. This leaves for consideration the Claimant's cost claim in relation to the outstanding aspects of the Rule 7 Claim which, pursuant to the Panel's Decision on Phase I, were joined to the Claimant's other claims in Phase II, a cost claim that the Panel takes to have been subsumed in the Claimant's global cost claim in relation to the *Amici* participation. In the opinion of the Panel, it suffices to read the Panel's Decision on Phase I to conclude that it cannot seriously be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive. It follows from this assessment of the Respondent's defence that the fact that those aspects of the Rule 7 Claim have been found by the Panel to have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim. In other words, the Panel has sufficient familiarity with the Parties' respective positions on the merits of the outstanding aspects of the Rule 7 Claim to know, and hereby to determine, that regardless of the outcome, the Panel would not have accepted the submission that the Respondent's defence to this claim was frivolous and abusive.

412. The ICDR has informed the Panel that the administrative fees of the ICDR and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer in this IRP total USD 1,198,493.88. The ICDR has further advised that the Claimant has advanced, as part of its share of these non-party costs of the IRP, an amount of USD 479,458.27. In accordance with the general rule set out in Section 4.3(r) of the Bylaws, the Claimant is entitled to be reimbursed by the Respondent the share of the non-party costs of the IRP that it has incurred, in the amount of USD 479,458.27.

VII. *DISPOSITIF*

413. For the reasons set out in this Final Decision, the Panel unanimously decides as follows:

1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu DotCo, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the "Confirmation of Understanding" executed by these same parties on 26 July 2016 (**DAA**), complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold"; and (b) its Board, having deferred consideration of the Claimant's complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program;

2. **Declares** that in so doing, the Respondent violated its commitment to make decisions by applying documented policies objectively and fairly;

3. **Declares** that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure

fairness;

4. **Grants** in part the Claimant's Request for Emergency Interim Relief dated 27 November 2018, and directs the Respondent to stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent has considered the present Final Decision;

5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;

6. **Designates** the Claimant as the prevailing party in relation to the above declarations, decisions, findings, and recommendations, which relate to the liability portion of the Claimant's core claims and the Claimant's Request for Emergency Interim Relief dated 27 November 2018;

7. **Dismisses** the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that that the Respondent be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in sub-paragraph 410 (5);

8. **Designates** the Respondent as the prevailing party in respect of the matters set out in the immediately preceding paragraph;

9. **Determines** that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of

the *Amici* in this IRP in accordance with the Panel's Decision on Phase I and, for that reason, decides that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I;

10. **Fixes** the total costs of this IRP, consisting of the administrative fees of the ICDR, and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer at USD 1,198,493.88, and in accordance with the general rule set out in Section 4.3(r) of the Bylaws, **declares** that the Respondent shall reimburse the Claimant the full amount of the share of these costs that the Claimant has advanced, in the amount of USD 479,458.27;

11. **Finds** that the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was abusive within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP; and, as a consequence of this finding,

12. **Grants** the Claimant's request that the Panel shift liability for the Claimant's legal fees in connection with its Request for Emergency Interim Relief, **fixes** at USD 450,000, inclusive of pre-award interest, the amount of the legal fees to be reimbursed to the Claimant on account of the Emergency Interim Relief proceedings, and **orders** the Respondent to pay this amount to the Claimant within thirty (30) days of the date of notification of this Final Decision, after which 30 day-period this amount shall bear interest at the rate of 10% *per annum*;

13. **Dismisses** the Claimant's other requests for the shifting of its legal fees in connection with this IRP;

14. **Dismisses** all of the Parties' other claims and requests for relief.

414. This Final Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

(s) Catherine Kessedjian

Catherine Kessedjian

(s) Richard Chernick

Richard Chernick

(s) Pierre Bienvenu

Pierre Bienvenu, Ad. E., Chair

Dated: 20 May 2021

EXHIBIT Altanovo-3

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD., Claimant, vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	ICDR Case No. 01-18-0004-2702

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TUESDAY, AUGUST 4, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME II (Pages 249-421)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR 465533

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INDEX OF EXAMINATION
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CALIFORNIA, CALIFORNIA, AUGUST 4, 2020

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ARBITRATOR BIENVENU: Welcome, everyone, to Day 2 of this hearing. Can you hear me?

MR. LITWIN: Yes, Mr. Chairman.

MR. ENSON: Yes.

ARBITRATOR BIENVENU: Welcome, everyone. We parted yesterday with Mr. Ali requesting an opportunity to say a very brief word. I believe it is in response to a comment by Mr. Johnston.

So Mr. Ali.

MR. ALI: Thank you, Mr. Chairman. Good morning to you and to Mr. Chernick and good afternoon to Professor Kessedjian.

Yesterday, Mr. Chairman, Mr. Johnston referred to the fact that I had used the word "bribery" and alluded to or, in fact, said that I accused ICANN or VeriSign of bribery or that our client Afilias had.

I think that he misspoke or misremembered what was on the transcript. I would simply ask that Mr. Johnston be directed to review the transcript carefully to verify that I did not make any such accusations or, in fact, use the word "bribery" or "blackmail" or anything of that

nature.

I ask this because all of this entire transcript is going to be made public, with some appropriate redactions.

However, knowing that it will be made public and that people can get up to all sorts of mischief, I would be grateful if Mr. Johnston could retract his statement or make whatever comment he sees fit, and I'll respond thereafter. Thank you.

ARBITRATOR BIENVENU: My recollection is that Mr. Johnston was looking for the word that you had used. And if my memory serves me right, I think the word he was looking for but couldn't remember was the word "sinister" that Mr. Enson had used during one of our procedural hearings.

But what I propose is that Mr. Johnston take the next break to consider your request and maybe ask to briefly address the Tribunal on this question when we resume after the first break.

But your comments are noted and are now on the record, Mr. Ali.

MR. ALI: Thank you.

MR. JOHNSTON: If I might comment, I have looked at the transcript, and because Mr. Ali raised this yesterday afternoon, and what my

argument related to is what I do regard as a reckless accusation without any support that ICANN is a regulator and specifically Ms. Willett, of course, did not ask and the policy was don't ask, not tell, quote, when you're getting millions of dollars to not say anything.

And that comment by Mr. Ali was at Page 49, Lines 13 through 18 of the rough transcript, Line 13 through Line 18 on Page 49 -- 46 of the final last night, I guess, transcript.

The Panel Chair is also correct that Mr. Ali did accuse and adopt a word used in another context by Mr. Enson to accuse Mr. Enson and I of having a sinister conversation, which I also addressed yesterday.

MR. ALI: Mr. Chairman, if I may respond. This is going on longer than I would have expected. I would have thought that Mr. Johnston would have done the right thing. Obviously I did not use the word "bribery," number one.

Number two, Mr. Johnston might actually want to read the transcript carefully because what I was referring to, don't ask, don't tell, that was money that was being paid to NDC rather than --

ARBITRATOR CHERNICK: Can you speak up,

please, Mr. Ali?

MR. ALI: I was referring to money that was being paid to NDC. With respect to the first point, would you like me to repeat it again whoever said they couldn't hear me?

ARBITRATOR CHERNICK: Not necessary.

MR. ALI: So my second point was, again, to clarify the context in which a 15 million -- when I was referring to the 15 million. So -- and the third point in terms of the inappropriateness of this phone call at a point in time when ICANN didn't know -- apparently didn't know about the DAA but nonetheless felt it was appropriate for counsel, litigation counsel to call VeriSign's litigation counsel to request information as opposed to the actual applicant is something that I stand by. Thank you.

ARBITRATOR BIENVENU: Very well. So we begin, then, with the witness evidence, and the first witness called is Ms. J. Beckwith Burr.

Ms. Burr, are you with us? I don't see you on my screen.

Good morning, Ms. Burr, this is Pierre Bienvenu. I serve as the Chair of the Panel hearing in this case. I am joined by my colleagues

Catherine Kessedjian and Richard Chernick. Now, I cannot see you on my screen.

JD, could you help us out here?

(Discussion off the record.)

ARBITRATOR BIENVENU: So good morning, Ms. Burr, and welcome. Ms. Burr, you have filed in relation to this case a witness statement dated 31st May 2019.

THE WITNESS: That's correct.

ARBITRATOR BIENVENU: At the end of this statement, you swear that the content of the statement is true and correct?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: May I ask you, Ms. Burr, in relation to the evidence that you will give today to this panel, likewise, solemnly to affirm that it will be the truth, the whole truth and nothing but the truth.

THE WITNESS: I do.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Enson, your witness. Please proceed.

MR. ENSON: Thank you very much. Good morning, Ms. Burr.

THE WITNESS: Morning.

MR. ENSON: We are going to try to do this

anyway, is put a copy of your witness statement up on the screen so that you can see it.

THE WITNESS: That looks like the document.

MR. ENSON: Okay. Ms. Burr, do you wish to make any corrections to this witness statement before we proceed?

THE WITNESS: No.

MR. ENSON: I'm sorry?

THE WITNESS: No.

MR. ENSON: Okay. Then, Mr. Chairman, we tender Ms. Burr for cross-examination and reserve time for redirect as it stands necessary.

ARBITRATOR BIENVENU: Thank you, Mr. Enson. I believe the cross-examination will be conducted by Mr. Litwin.

MR. LITWIN: That is correct, Mr. Chairman.

ARBITRATOR BIENVENU: Good morning, Mr. Litwin.

MR. LITWIN: Good morning.

ARBITRATOR BIENVENU: Please proceed.

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CROSS-EXAMINATION

BY MR. LITWIN

Q. Good morning, Ms. Burr. My name is Ethan Litwin. I am from the law firm of Constantine Cannon here in New York City.

How are you today?

A. I am good.

Q. Okay. Can you please confirm that you have received the exhibit bundle in a box or a package or something of that sort?

A. I have received it.

Q. Okay. Can you please open it on camera, please? Thank you.

MR. LITWIN: While you're doing that, I would ask, Mr. Chairman, that the Panel confirm with counsel for ICANN that counsel has also not looked at the bundle for Ms. Burr yet.

MR. ENSON: I have not. I'd like to open it up as the witness opens it up.

MR. LITWIN: Please do so. Thank you, Mr. Enson.

THE WITNESS: I have got it.

ARBITRATOR BIENVENU: I can confirm that we have received the -- "we" being the members of the Tribunal -- have received the cross-examination

bundle.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Ms. Burr, from time to time I will direct your attention to a particular document in that bundle. When I do that, I will refer to the tab number in the binder that you have just opened.

And if you just open it to a random page, you'll see that we have marked each page of each of those documents in the lower right-hand corner with a new, unique page number. So for everyone's reference, I am going to refer to those page numbers in the binder, even if the original page number is different. That way it is clear in the transcript and to everybody here today.

If you have any questions as to what page I'm referring to, please ask and I will clarify.

A. Okay.

Q. So before we begin, Ms. Burr, I just wanted to clarify one small point in your witness statement. I would direct your attention to Page 7 of your witness statement, and at the end of Paragraph 20, at the top of the page, I think you write that, you know, "which had acquired VeriSign." I think what you mean is that VeriSign had acquired NSI.

So that second reference should be NSI; is that correct?

A. Correct, yes.

Q. Okay. Now, Ms. Burr, what documents did you review in preparation for your testimony here today?

A. I reviewed my witness statement. I reviewed a witness statement submitted by George Sadowsky and Jonathan Zittrain. I looked through the various requests and responses for independent review.

Q. Anything --

A. And then a couple of other -- I looked at the bylaws. I looked at the 2008 bylaws and the current bylaws, and I looked at a couple of letters from Afilias to Akram Atallah and I think a couple of other documents that counsel may have shown me during prep.

Q. Do you recall what those couple other documents were?

A. I think there were -- there were two letters from Afilias to Akram. I think I also looked at a letter from the acting Attorney General for Antitrust to the associate administrator of NTIA.

Q. That's the 2008 letter from Ms. Garza? I'm sorry, I didn't get your response.

A. Yes, that's correct.

Q. Okay. Did you review the Domain Acquisition Agreement that was executed between VeriSign and NDC in August of 2005 -- '15, rather?

A. I did not.

Q. Okay. Have you ever reviewed it?

A. No.

Q. Now, Ms. Burr, you're an attorney, correct?

A. I am.

Q. Have you ever represented Afilias or any subsidiary in any capacity?

A. I think in 2007 or something like that Afilias and Neustar and one other participant hired me to discuss some of the vertical integration issues. I don't know if I was ever paid by Afilias, but I was certainly speaking with an Afilias representative.

Q. When did that representation -- I'll just generally call it a representation -- conclude?

A. Honestly, over a decade ago.

Q. Okay. Have you ever represented VeriSign or any of its subsidiaries or any of its affiliates

in any capacity?

A. I have never represented VeriSign. When I was a partner at WilmerHale, I had partners who did represent VeriSign. Again, I have not been at WilmerHale since 2012, and that representation would have been much earlier, in any case.

Q. Have you ever represented NU DOT CO or any of its subsidiaries or affiliates in any capacity?

A. No.

Q. And you were employed by Neustar for several years ending in 2019; is that correct?

A. That's correct.

Q. And Neustar is an Internet registry company much like Afilias and VeriSign; is that right?

A. Well, it was until yesterday. It sold its registry business.

Q. Okay. At the time that you were there, though, it was an Internet registry company?

A. Yes. I started there as chief privacy counsel. So my -- my primary job was deputy job counsel, chief privacy counsel. I started there in June of 2012.

Q. And I guess until yesterday Neustar was one of the larger Internet registry companies; is

that right?

A. Yes.

Q. And, in fact, Neustar was identified as the entity that would be providing back-end registry services in NDC's .WEB application; is that right?

A. I believe that's correct. I was not involved in those contracting documents, but I did come to learn that after.

Q. When you say "after," what do you mean?

A. Well, once I -- once I joined the Board, I looked at all of the back end, all of the registry -- actually it was before that, as I was going on the Board. But there would have been a list after the 2012 -- after everybody tendered their applications, there was a list that came out that said Afilias is the back-end registry for these applications, Neustar is for these, et cetera.

So shortly after the submission, that list would have been available to me.

Q. Sorry. Which submission are you talking about?

A. Submission of new gTLD applications.

Q. I see. This is not your first time

testifying in an IRP, is it?

A. It is not.

Q. Which other IRPs have you testified in?

A. I testified in an IRP in 2010, I believe, between ICANN and ICM Registry with respect to ICM's application to operate .XXX.

Q. Any others?

A. I don't think so. Not that I recall.

Q. Did you review your testimony from the ICM IRP in preparation for your testimony here today?

A. I looked briefly at it.

Q. You also served as an attorney advisor to the United States Federal Trade Commission; is that correct?

A. Correct.

Q. And the United States Federal Trade Commission, or FTC, is one of the two U.S. agencies authorized to enforce U.S. antitrust laws; is that correct?

A. That's correct. I am not -- I have never practiced antitrust law or competition law. I was largely involved in privacy-related issues but also the DNS issues and worked on competition issues from a policy perspective.

Chairman Pitofsky in 2005 and '6 had a

long series of hearings on innovation economy and competition and consumer protection. So I have some familiarity, but I am not an antitrust lawyer.

Q. You are currently a member of the ICANN Board; is that right?

A. That's correct.

Q. And you are also a member of the BAMC, the Board Accountability Mechanisms Committee; is that right?

A. Yes.

Q. That committee reviews all reconsideration requests; is that right?

A. It reviews -- it essentially reviews all reconsideration requests. During the new gTLD Program, there may have been times when, for a variety of reasons, largely to get people who had no relationship to the new gTLD Program, reconsiderations may have come directly to the board as opposed to through the BAMC, but the standard practice is it would come to the BAMC.

Q. And what about IRP decisions, is the standard practice that the BAMC reviews IRP decisions as well?

A. Yes.

Q. And you have been on the board since

November of 2016; is that correct?

A. Yes. I was seated at the end of the annual general meeting in Hyderabad in 2016.

Q. And in November 2016 you were still employed by Neustar; is that right?

A. That's correct.

Q. Did you participate in any Board discussions regarding .WEB?

A. In 2016, no. I observed a Board discussion at a Board workshop before I was on the Board. I did not participate in that discussion.

Q. Is that the November 3rd, 2016, workshop session?

A. Sounds like it.

Q. Okay. Did you receive or review any documents regarding .WEB prior to attending that workshop session?

A. Not that I recall.

Q. Did you receive any documents as a Board member regarding .WEB after the November 3rd, 2016, workshop session?

A. I don't have a specific recollection. It's possible that in connection -- well, it is almost certain that in connection with the DIDP request, the document request, there was some

material that the BAMC received and I would have received.

Q. And those were Afilias's DIDP requests in 2018; is that right?

A. Yeah. I don't remember exactly the documentation what the Board received, but I am certain that we got the information we needed for the reconsideration request.

Q. Okay. At the Board workshop session on November 3rd, 2016 -- and before I ask my questions, I want to instruct you not to reveal the substance of anything that was discussed there pursuant to the Panel's ruling regarding privilege.

But I would like to ask if the Board members who attended that workshop session were shown a copy of the Domain Acquisition Agreement between VeriSign and NDC?

A. I honestly have no idea. I do not believe that I have ever seen it, but I have no idea whether Board members saw it or not. I don't recall any documents being circulated.

Q. Okay. Now, you stated in Paragraph 31 of your witness statement that you are aware of the DOJ's .WEB investigation. How did you learn about it?

A. Neustar received a CID, and I coordinated the response.

Q. Board members have an obligation to be familiar with the governing documents of their organization; is that correct?

A. Correct.

Q. And that would include bylaws or articles of incorporation, right?

A. Absolutely.

Q. And nonprofit Board members in particular have an obligation to understand the organization's mission; is that correct?

A. I am not going to opine on what California law requires. I certainly think that members of a Board should understand what the mission of the organization is.

Q. Thank you. And to be clear, if I -- I am not going to ask you for a legal opinion. I am only asking you about your views as a witness here today.

A. Okay.

Q. Now, in your view, again, nonprofit Board members need to understand the mission because the primary duty of a nonprofit Board member is to protect the organization's mission; is that

correct?

A. Again, "primary duties" sounds like legal terms. Let me just tell you, ICANN is an organization with a specified mission and a limited mission and limited authority. It is absolutely incumbent on members of the Board to understand that and to ensure that ICANN stays within its mission.

Q. And, in fact, the bylaws provide that directors have a duty to act in what they reasonably believe are the best interests of ICANN; is that right?

A. Yes, I believe that's correct.

Q. Now, Section 7 of the bylaws -- and that's, for your reference, Tab 2 in your bundle. Section 7 concerns the Board of Directors specifically; is that correct?

A. Yes.

ARBITRATOR CHERNICK: Do you have a cite to the pages?

MR. LITWIN: It starts on Page 42, Mr. Chernick.

ARBITRATOR CHERNICK: Thank you.

ARBITRATOR BIENVENU: Which tab, Mr. Litwin?

MR. LITWIN: This is Tab 2, and the next series of questions will relate to Article 7 of the bylaws that begin on Page 42 of that exhibit.

Q. Now, the bylaws provide that the directors should be provided with notice for all Board meetings; is that correct?

A. I'm sure that that is correct for all formal Board meetings. You'd have to point me to the specifics.

Q. So if you can look at Article 7.16, which is on Page 51, that's the section on notices.

A. Okay.

Q. Again, I'll ask that the bylaws, particularly Section 7.16, provides that directors shall be provided with notice for all Board meetings; is that correct?

A. Notice of time and place of all meetings.

Q. And that would -- I'm sorry. Is there anything else that you wanted to add?

A. That is in turn referring back to 7.13, 14 and 15, annual meetings, regular meetings and special meetings.

Q. You just obviated the next three questions I had. Thank you.

Now, annual meetings, which are at 7.13,

are held for the purpose of electing officers and for the transaction of any other business that may come before the meeting; is that correct?

A. Yes.

Q. And regular meetings, which is Section 7.14, those are meetings that are held periodically on dates that the Board determines, correct?

A. Yes, formal Board meetings where they are noticed and agendas and resolutions are distributed and the like.

Q. And the bylaws also provide for special meetings at Section 7.15, which may be called at any time at the request of 25 percent of the Board by the Chair or by the president of ICANN; is that correct?

A. Correct. Again, this would be for formal meetings, where people are voting on resolutions and the like.

Q. Okay. Now, turning to Section 7.17. Just wait a minute to get that up on the screen.

7.17, which is the quorum provision, provides that at annual, regular or special meetings, that a quorum is comprised of a majority of the total number of directors then in office and that an act of the majority of the directors

present in any meeting at which there is a quorum shall be the act of the Board; is that correct?

A. Yes. Again, this is referring to formal meetings.

Q. Now, the bylaws also provide that the Board is able to act without a meeting, correct?

A. Yes.

Q. I refer you to Section 7.19.

A. Correct.

Q. But the Board can only act without a meeting if all the directors entitled to vote thereat shall individually or collectively consent in writing to such action; is that right?

A. Correct, at a formal meeting where there's going to be resolution and votes.

Q. Okay. I would now refer you to Section 3 of the bylaws. And I'll wait a minute for that to come up on the screen. We can start at, I believe, Page 8, which is Section 3.1.

MR. ENSON: Ethan, may I ask, is this a complete copy of the ICANN bylaws?

MR. LITWIN: I believe what is in here is excerpts that I am referring to. We do have a complete set of the bylaws electronically if the witness would like to refer to anything I am not

showing her.

MR. ENSON: Thank you.

MR. LITWIN: Sure.

Q. So at 3.1 the bylaws provide that ICANN shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness; is that correct?

A. That's what it says.

Q. And if you look further down in Section 3.1, part of ICANN's obligation to operate open and transparently provides that, "ICANN shall also implement procedures for the documentation and public disclosure of the rationale for decisions made by the Board."

Do you see that?

A. Yes.

Q. Now, ICANN's bylaws don't just say you have to act transparently. They say you have to act transparently to the maximum extent feasible, correct?

A. That's what the words say, yes.

Q. You would agree that "feasible" means, in general, possible, right?

A. Yes.

Q. So what the bylaws provide is that ICANN must act transparently to the maximum extent if it's possible to do so; is that fair?

A. I think that this is a general admonition that goes all the way through the bylaws and all the way through ICANN's operating procedures that basically says you should act in an open and transparent way. It doesn't mean you can't have conversations and discussions that are not public.

Q. Well, it says to the "maximum extent feasible," correct?

A. If you are asking me, does this stand for the proposition that the ICANN should meet in public at all times, the answer to that is no. ICANN Board has to have the opportunity to meet in workshops, for example, to get its work done. From time to time we'll provide information to the community before or after about the general topics that we are looking at during our workshop, but I have never understood the requirement to act in an open and transparent way to mandate that every single interaction of the Board and every Board discussion be public.

Q. Well, let me ask you this, Ms. Burr: As a member of the Board, when you understand -- what do

you understand the bylaw requirement that ICANN should operate in the maximum extent feasible to mean?

A. I think there's a practical -- essentially ICANN should act openly. It should be informed, and it should act openly and transparently.

Q. And that includes the disclosure of rationales for the Board's decisions, correct?

A. That certainly includes an explanation of the rationale for formal decisions for all votes it takes. So that is why ICANN goes to great length to publish significant, detailed documents that explain what information the Board had when it resolved to do one thing or another, yes.

We also, you know, have blogs, conversations with different parts of the community and the community as a whole. That is all part of ensuring that there's as much information exchange with the community as makes sense.

Q. And these bylaws are disclosed publicly, correct?

A. Yes, they are.

Q. And, in fact, they are available on ICANN's website?

A. Yes.

Q. And it's reasonable for members of the global Internet community to expect that ICANN will operate transparently, correct?

A. They not only expect it, they demand it, and they have mechanisms to enforce that as well.

Q. And those are the accountability mechanisms?

A. Accountability mechanisms, DIDP mechanisms.

Q. So turning to Section 3.2, ICANN is required to maintain a website, correct?

A. Correct.

Q. And ICANN is also required to post information about its policy development activities?

ARBITRATOR BIENVENU: Are you referring to a specific provision in 3.2, Mr. Litwin?

MR. LITWIN: Yes, I am, Mr. Chairman, sub --

ARBITRATOR BIENVENU: What is it?

MR. LITWIN: Yes, it is --

THE WITNESS: (b), I believe.

MR. LITWIN: Yes, (b), I believe, correct.

THE WITNESS: Of course, you understand that it is the community, not the Board, that

develops policy at ICANN?

Q. BY MR. LITWIN: And yet -- but just in general, the development of Internet policy, there needs to be disclosure about what's going on on ICANN's website; is that right?

A. Well, policy development matters is a very specific reference to a bylaws-described provision for the process for policy development. That is a bottom-up community process that involves different supporting organizations and sometimes advisory committees. There's a very specific proposal.

I believe this refers to a docket of pending -- what we would call PDP, Policy Development Process, matters.

Q. In fact, part of ICANN's development of policy is to allow for public comment on draft policies, correct?

A. Yes. Again, "policies" meaning policies developed by a community.

Q. And Section 3.2 requires ICANN to post on its website public comments on draft policies?

A. Again, yes, on things that fall within the Policy Development Process mandate for policy to the community.

Q. And the bylaws also require ICANN to post

on its website notice of upcoming Board meetings?

A. Correct, formal Board meetings.

Q. And agendas for upcoming Board meetings; is that correct?

A. Correct. And I presume -- I don't recall, but we probably did have a formal Board meeting in November, and it probably was -- and if we did, it was noticed.

Q. And minutes from those Board meetings, correct?

A. Correct.

Q. Those have to be posted as well?

A. From the formal Board meetings, yes.

Q. And any resolution passed by the Board at a formal Board meeting also has to be produced -- published on the website, correct?

A. Yes. A resolution passed at a Board meeting must be posted, yes.

Q. And the bylaws require these documents to be publicly posted because ICANN is obligated to act transparently, correct?

A. Uh-huh, yes.

Q. And it's fair to say that because it's important for the public to know when the Board is meeting, what the Board will be considering, what

the Board discussed, and what decisions the Board has taken, correct?

A. Correct. And as I said, this very specific -- yes. All of the very specific procedural requirements for transparency and posting and agendas and explanations and all of that, yes, are applied to decisions taken at annual, specific or general meetings of the Board of Directors.

Q. And when you say "general," you're referring to regular Board meetings?

A. Regular Board meetings, yes.

Q. Okay. Now, ICANN holds three public meetings a year; is that correct?

A. Yes. They have been virtual so far this year.

Q. Understood. And I think earlier in your testimony we were referring to the Hyderabad meeting in November 2016. That was one of those public meetings, correct?

A. Correct.

Q. Now, the ICANN Board meets during those public meetings, correct?

A. Yes. So there are several ways in which the Board works. We have a workshop beforehand.

It sometimes happens that there is a Board meeting at the end of the workshop before the annual general meeting itself opens.

We then have a variety of meetings with the community as a whole and with different parts of the community throughout the course of the meeting, and generally we will have -- if this doesn't take place at one of the policy meetings, then at two of the three meetings, and indeed at the end of the general meeting, there is a Board meeting at the end of the workshop. In fact, there are two, because the new Board is seated, and there's a brief meeting of the new Board as well.

Q. Okay. Let me just unpack that a little bit. So these workshops are not regular Board meetings; is that right?

A. Correct.

Q. And they are not special meetings, and they are certainly not an annual meeting, right?

A. No.

Q. There's no bylaw provision that provides for Board workshops; is that right?

A. Not that I'm aware of.

Q. And these workshops don't require a quorum of Board members to be in attendance, do they?

A. No. The workshops are essentially working sessions for the Board. Generally all members of the Board are there, but since no -- you know, we are not passing resolutions and the like, I don't suppose there's a requirement for a quorum, but again, that's -- yeah.

Q. Do you take attendance?

A. I do not take attendance. Certainly we know who is participating, and they are in the room.

Q. Because you can see them; is that right?

A. Yes, or Zoom them.

Q. Okay. It is a brave new world we are all in.

There aren't minutes taken at workshop sessions, are there?

A. I don't believe so. I mean, they are really working sessions. We go through a variety of discussions, you know, about the work that's ongoing in the community, the work that's going to be -- our discussions with the community in the coming week during the meeting. It's preparing to interact with the community and move forward and various things and getting caught up and briefed on other matters.

Q. So is it fair to say that the Board uses these workshops to make its formal Board meetings more efficient?

A. Well, we don't actually spend most of the time at the workshop on the formal Board meetings. We spend much more time on understanding policy development, work that is ongoing in the community, conversations that we will have with the community in the coming week, topics that are important to them.

But it is -- I would say, you know, a -- we get resolution, we get draft resolution in advance of any formal Board meeting. And to the extent that -- I think we probably review them quickly, but that is a tiny percentage of the time, and I don't think it happens all the time.

Q. Okay. I think I wasn't clear. If the Board didn't have those workshop sessions, you'd have to do all of what you described that the Board does in a workshop session at a regular Board meeting, correct?

A. No, that's not true. Right now we basically have Board informational meetings a couple of times a week. We have sort of changed the workshop schedule around so that rather than

packing it into three days with very complex time zones, because the Board of Directors is global, we in the post-COVID era have spread out those informational calls and discussions over the course of the weeks in between the meeting.

It was a convenience to sort of pack them into a three-day workshop, but that's not an inviolate process. Really the question is what's the way for the Board to work together, exchange information, get up to speed on what's going on in the community, take care of various Board housekeeping matters and the like.

Q. Now, the Board doesn't vote during workshop sessions, does it?

A. The Board does -- I think there's one exception, which is we have a straw poll at the September workshop on the elections for the Board officers. It is not -- it is a straw poll.

Q. Other than the straw poll, the Board doesn't actually vote during the workshop session?

A. The Board is not taking formal resolutions, not passing formal resolutions, and we work on consensus.

Q. Right. That's because the bylaws, I think, clearly provide that the Board can only act

at one of the formal meetings we discussed and only if a quorum is present; is that correct?

A. So the Board act is absolute, yes, the Board can only act in a formal sense. It can only adopt a resolution at a formal meeting.

You know, the Board can decide to follow procedures that it typically follows. There's lots of housekeeping issues that the Board can decide. I am uncomfortable with the absoluteness of the term "act."

Q. Okay. Let's look back --

A. The formal Board resolution, that must be taken at a formal Board meeting.

Q. Okay. Let's look back at Section 7.17.

Chuck, if you can put that back up on the screen, please.

This is the quorum section again. What it provides here is that the act of a majority of directors present at any meeting -- and I think we clarified that the term "meeting" there refers to the three types of formal meetings -- at which there is a quorum shall be the act of the Board, right? That's what it says, it uses the term "act."

A. Yes.

Q. And if we look at Section 7.19 -- Chuck, if you could throw that up on the screen again -- what it says here is that the Board can act, this is action without a meeting, but it can only do that if the directors entitled to vote all consent in writing to the Board taking an act outside of one of those formal meetings; is that right?

A. Yes. If the Board wants to take a formal action, it can do it outside of the meeting under these circumstances.

Q. Well, Section 7.19 doesn't say formal action; it says "action," right?

A. Right. And I think that actions here applies to formal actions that the Board takes during its annual regular or special meeting or a formal action without a meeting.

Q. Can you point me to a provision of the bylaws that defines "action" as formal actions limited to resolutions?

A. No. But if you're suggesting that every time the Board decides to follow a practice that it has always followed, it has to take a formal vote, then we would be voting constantly. I mean, it is just not practical to insist that every time the Board makes a decision, including a decision to

follow its standard practice, that it has to have a formal vote. That's -- I don't -- I don't understand that to be typical of any organization, of any Board of Directors.

Q. Do other Boards of Directors have these same provisions in their bylaws regarding transparency and accountability to a broader community?

A. I suspect that there are lots of California corporations that have these, but I have not read all of their bylaws.

Q. Okay. Now, you were a member of the Cross Community Working Group on Accountability, or the CCWG-Accountability, right?

A. I was, indeed.

Q. Now, I am just going to --

MR. ALI: Ethan -- sorry, Ms. Burr.

Mr. Chairman, may I take a 30-second break to speak with Mr. Litwin before he continues since he's moving on to a different topic?

ARBITRATOR BIENVENU: Yes, you may. Is JD available to put you in a separate room, or do you have means to communicate with one another?

MR. ALI: We have means to communicate with one another. We don't need to be put in a

separate room.

ARBITRATOR BIENVENU: We'll just pause for a few seconds to let you do that.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Go ahead and proceed.

Q. BY MR. LITWIN: Ms. Burr, I ask you just to turn, before we move subjects, to Page 10 in Tab 2, which is Section 3.5(c) of ICANN's bylaws. And there you'll see that the bylaws require that ICANN, within seven days of concluding a meeting, must post any action taken by the Board, and that shall be made publicly available in a preliminary report.

So that seems to go far beyond -- any actions goes far beyond just a formal Board resolution; would you agree with that?

A. No.

Q. How do you --

A. It is the same word, "any actions." I am reading "actions" throughout this section to refer to the formal decisions that the Board makes by resolution during Board meetings. And that's the way this has always been interpreted from the beginning of time.

I don't know if this changed, but the Board has always had an obligation to post the results of its Board meeting within this period. I don't know "always," but for many years.

Q. And how did you come to learn that the Board has interpreted the term "any actions" to encompass Board resolution only?

A. I think personally it is plain-text reading of the bylaws. It is consistent with words used throughout the -- when they are talking about formal actions by the Board, and it is consistent with ICANN's practice for many years --

Q. Okay. So --

A. -- at our Board meetings.

Q. So when the Panel is reviewing the bylaws and they see references to actions taken by the Board, they should understand that to mean only action by Board resolution; is that what you're saying?

A. I have not memorized the 250 pages of the bylaws. In this section where they are talking about the operations of the Board, I read this in the same way that I read the provisions related to regular, annual and other meetings, meaning the formal action by the Board in a Board meeting by

resolution.

Q. Well, is there a reference that you are aware of in the bylaws to an action, a Board action that does not refer to a formal resolution?

A. Well, there are inactions in the IRP context, which would not rise to the form of a formal action, I suspect, right, because it wouldn't be by resolution. These provisions of the bylaws that you're talking about are about how the Board operates when it is formal.

If you read this to say anything the Board thinks about, decides to move on with in the way that it, you know, decides to have another meeting to discuss further, all of this has to be contained on the publicly available and the preliminary report seven days later, the Board would spend all of its time approving these preliminary reports.

Q. Actually --

A. It is a very active Board.

Q. Yeah, actually, your reference to the IRP is interesting. There in Section 4.3 the members of the Internet community are given standing to challenge ICANN actions; is that right?

A. And failure to act.

Q. Yes. In particular, ICANN Board actions

and failures to act, correct?

A. Yes, and/or, yes.

Q. Yes. Just focusing in on the Board actions there, does that mean by using the word "actions" there, that it is limited to challenging a resolution of the Board?

A. It's -- I mean, IRPs are specifically -- I want to say, I am not going to make a case that all 256 pages of these bylaws are absolutely consistent, having had a huge role in the creation of the post-transition bylaws and the fact that the bylaws went from 50 pages to 250 pages.

I will say that with respect to the IRP, the question is did the Board do something or fail to do something? Did the Board do something that violated the bylaws or the articles of incorporation? Did the Board fail to take an action that it was bound to take lest it violate the bylaws and the articles of incorporation?

Q. Okay. So in Section 4.3, the word "action," Board action, the phrase "Board action," refers to did the Board do something.

And then looking back at Section 3.5, it says, "Any Board action has to be posted to the website." So --

MR. ENSON: Mr. Litwin, I apologize for interrupting, but if you are going to represent something is in 4.3 of the bylaws, I request that you point it out to Ms. Burr so she can review it.

Q. BY MR. LITWIN: So, for example, Ms. Burr, I would direct your attention to Page 28 of Tab 2, which is Section 4.3(o). And looking at little Roman numeral iii, this provision gives the IRP Panel the authority to declare whether a covered action constituted an action or inaction that violated the articles or bylaws; is that right?

A. Right. I think you have to refer back to the definition of "covered action," which is in 4.3(b), which is -- includes actions or inactions by the Board, individual directors, officers or staff members.

So I do not believe that this is -- that it's limited to -- I mean, the words are in different -- the word "action" has a different context here.

Q. So let me see if I can break this down.

Section 3.1, which we referred to earlier, requires ICANN to operate in an open and transparent manner, correct?

A. Correct.

Q. And open and transparent to the maximum extent feasible, correct?

A. Correct. Which to me does not mean it has to do everything in public.

Q. I understand what your prior testimony was. I am just asking about the plain text of the bylaw.

And Section 4.3(b)(ii), which you just referred us to, maybe it is -- yeah, (b)(ii), says that a covered action is an action or failure to act within ICANN committed by the Board, correct? So that would encompass Board actions, right?

A. No. If you go to (b) in the packet, covered actions include the actions or failure to act by within ICANN committed by the Board, individual directors, officers or staff members that give rise to a dispute.

Q. Right. It says "or." It can refer to simply an action by the Board, correct?

A. Correct. Although I think it is in a different context than the context of the Board voting in the course of a formal Board meeting.

Q. Your testimony, therefore, is that when it says "Board action" in 4.3(b)(ii), that is, you know, did the Board do anything?

A. Well, I can't -- I don't want to speculate. I believe that most of the ways in which the IRP has been invoked with respect to the Board is a formal action of the Board, but I do not rule out the possibility that the Board could do something outside of a formal Board meeting that would violate the bylaws or exceed the mission.

Q. Well, if the Board did something outside of a formal meeting and nothing was posted to the website about it, how would the members of the Internet community know that they had grounds to bring an IRP?

A. Well, I am a little confused about this, because it is my understanding that Afilias received notice in writing about the Board's decision in the November workshop to honor its standard practice, so I don't understand the transparency issue.

Q. Okay. I was talking generally, but I am happy to talk specifically with you.

What is the basis for your statement that Afilias received notice from ICANN that the Board had made a decision during a November 3rd, 2016, workshop session about its complaint?

A. I believe that Afilias received a written

communication from Akram saying that the matter was on hold because one of the accountability mechanisms had been invoked.

The Board in November, as I recall -- as I said, I was not on the Board then, but I was in the room -- continued to follow its usual practice of not intervening once an accountability mechanism has been invoked so as to respect the accountability mechanisms themselves. That is what the Board typically does. That is what org typically does.

Q. So did you review Mr. Akram's letter?

A. I didn't review it in advance of this. I have seen it in the past. I believe it was posted.

Q. Okay. Now, I'll represent to you, Ms. Burr, that Mr. Atallah's letter was dated September 30th, 2016.

Do you recall that?

A. I don't recall the date of the letter.

Q. Okay. This isn't in your binder. I didn't expect to ask you about this.

But I would ask that Chuck put up on the screen Exhibit C-61, please. If you can focus in on just the date, please, so that everybody can see it. Thank you.

You can see here, Ms. Burr, Mr. Atallah -- let me first ask, is this the letter that you are referring to?

MR. ENSON: Mr. Litwin, she needs to be able to see the letter.

Q. BY MR. LITWIN: Can you see the letter?

A. I can.

Q. You are doing better than I can. I can barely see it.

So does this refresh your recollection that Mr. Atallah's letter was sent to Afilias on September 30th, 2016?

A. Yes. That doesn't change the fact that this letter reflects what ICANN org typically does when an accountability mechanism has been invoked, and the Board -- the practice of the Board is to respect and follow that.

Q. So I would --

A. And that would be the Board deciding in November that it was going to continue to follow its practice.

Q. Okay. So stating the obvious here, September 30th is before November 3rd, correct?

A. Correct.

Q. Focusing in on the second-to-last

paragraph -- if you could blow that up, Chuck -- it says, "We will continue to take Afilias' comments, and other inputs that we have sought, into consideration as we consider this matter," correct?

A. That's what it says, yes.

Q. Did you understand that Mr. Atallah was referring, when he says "Afilias' comments," to the two letters from Mr. Hemphill that you reviewed in preparation for your testimony here today?

A. I have no basis for thinking that it's limited to the two letters to Afilias. There was general noise about the auction, and Ruby Glen, for example, had filed an accountability mechanism. I would think that would be wrapped up in this, and it would be in a larger bundle of issues.

Q. Well, I appreciate that, Ms. Burr, but what it says, particularly here in the highlighted language, is that, "We will continue to take Afilias' comments into consideration as we continue to consider this matter."

And what my question is just very simply, really yes or no, do you understand, when he says "Afilias' comments," he's referring to the two letters that Mr. Hemphill had sent to him in August and September of 2018 -- 2016, rather?

A. I would imagine that they were among the things that would be Afilias' comments.

Q. Is there anything else?

A. I don't know. I have seen those two letters.

Q. Okay.

Chuck, can you pull up the first paragraph, please.

So Mr. Atallah begins his letter by saying, "Thank you for your letters of August 8th, 2016, and September 9th, 2016. We note your comments regarding the NU DOT CO application for .WEB in the ICANN auction of July 27, 2016."

Does that help refresh your recollection that when Mr. Atallah is referring to Afilias' comments, he's referring to Mr. Hemphill's two letters?

MR. ENSON: Mr. Chairman, this is Eric Enson. I apologize for the interruption, but I feel I need to make an objection at this point.

Ms. Burr has no way of knowing what Mr. Atallah meant when he wrote this letter. She didn't write it.

ARBITRATOR BIENVENU: Mr. Litwin, do you want to respond to that objection?

MR. LITWIN: I think it is pretty clear what I am asking is just Ms. Burr's understanding based on her earlier testimony that this -- about Mr. Atallah's letter, and I am just trying to understand what Ms. Burr understood about it. I am not asking Ms. Burr to get inside Mr. Atallah's head. I am just asking on -- her understanding based on reading the letter.

ARBITRATOR BIENVENU: I'll allow the question, but I think you have gone as far -- as, in my view, as useful in trying to elicit an interpretation of this letter from this witness, but I'll allow the question.

Please answer the question, Ms. Burr.

THE WITNESS: I am aware that in addition to those two letters, we had litigation that had been filed, a CEP had been filed by Ruby Glen. I take this to reference to the broader matter.

Afilias' comments certainly include those two letters that are noted, but I have no idea if that's all that he's referencing with respect to Afilias' comments or not.

Q. BY MR. LITWIN: Okay. Is there a portion of this letter that, in your mind, refers to the broader dispute with Ruby Glen and other comments,

other than what was specifically referred to in the first paragraph?

A. The .WEB/.WEBS contention set was placed on the 19th of August. That's clearly reflecting the pending ICANN accountability mechanism initiated by another member of the contention set. So yes.

MR. LITWIN: I will move on, Mr. Chairman. I take your point.

Q. So when we left off earlier, we were talking about your role on CCWG-Accountability, and I was about to say that CCWG-Accountability is kind of a mouthful, so I am just going to refer to the CCWG. I am aware that there are other CCWGs, but I'd like you to understand that when I refer to the CCWG, I am referring only to CCWG-Accountability; is that okay?

A. Sure.

Q. Okay. Now, the CCWG was formed in response to the United States government's announced intention in 2014 to transition stewardship of the Internet, that is, the IANA functions, to the global multistakeholder community; is that correct?

A. Yes.

Q. And ICANN would become the new steward of the Internet on behalf of the community; is that right?

A. Well, ICANN has throughout its life been charged with responsibility for coordinating policy development. It would, following the transition, do that without a formal backstop agreement with the United States government.

Q. And when you mean a backstop agreement, just in lay terms, that means that the United States government was no longer going to provide oversight of ICANN; is that right?

A. Not separate from whatever role it participated in in the Government Advisory Committee, correct.

Q. So the CCWG was created to determine how ICANN's then accountability mechanisms could be strengthened to compensate for the absence of U.S. government oversight; is that right?

A. Among other things, yes.

Q. And the CCWG submitted its recommendations to the ICANN Board; is that right?

A. Correct.

Q. And one of those recommendations concerned enhancements to the IRP; is that right?

A. That is correct.

Q. So the CCWG's recommendations for strengthening or enhancing the IRP were contained in its 2016 report; is that correct?

A. Yes. The CCWG was split up into two work streams. One was the accountability mechanisms and the mission, commitment for value statement of the bylaws, and then there were other issues that another work stream took. I was the rapporteur for the accountability work stream.

Q. And the ICANN Board was engaged and had monitored the development of its 2016 report, right?

A. Yes. There were ICANN Board members who were liaisons on the CCWG. I was part of the CCWG. I was not on the Board at that time.

Q. And the Board actually provided comments on two prior drafts of the 2016 report, correct?

A. That seems reasonable. I haven't gone back and reviewed it. So I don't know.

Q. Fair enough. The work stream one report, the one that contained the proposal to enhance the IRP was presented to the Board in 2016, correct?

A. Yes. The final report of CCWG-Accountability was in February of 2016.

Q. And the Board accepted by resolution the CCWG 2016 report, correct?

A. Correct.

Q. And the Board actually approved the transmission of the CCWG report to the NTIA to accompany ICANN's proposal regarding the transition of stewardship responsibilities from the U.S. government to ICANN; is that right?

A. I actually don't know if a report went -- I assume the report did go along with the revised bylaws that were a product of the report.

Q. And that's because improving ICANN's accountability was an important part of the transition, right?

A. That is correct.

Q. And the Board instructed ICANN to implement the CCWG's recommendations that were set forth in its report, correct?

A. I don't have firsthand knowledge of what the Board did. The Board accepted them, and I assume that means it directed the Board to implement. There certainly were implementation efforts. I don't know what the specific wording of the Board's resolution says.

Q. Okay. Now, in the ICANN bylaws -- and I

would refer you, again, in Tab 2, to Section 1.2(a)(v).

Give Chuck a minute to throw that up on the screen.

MR. ENSON: Sorry, Ethan, would you repeat that?

MR. LITWIN: Yes, Section 1.2(a)(v), which is on Page 6 of Tab 2.

MR. ENSON: Got it. Thank you.

MR. LITWIN: You're welcome.

Q. Do you see that, Ms. Burr? It is up on the screen, too.

A. I do.

Q. Okay. Now, that require -- that bylaw requires that -- or in that bylaw, rather, ICANN commits to make decisions by applying documented policies consistently, neutrally, objectively and fairly; is that right?

A. Correct.

Q. That's because -- sorry.

A. No, I just was going to read the rest of it.

Q. And that's because the global Internet community needs to have confidence that ICANN is going to abide by the plain meaning of its rules

and not treat anyone differently; is that right?

A. That particular language has been in the ICANN bylaws, I think, since the original bylaws. So I had -- I was very significantly involved in rewriting Article 1 and Article 4 of the bylaws for the accountability CCWG.

This particular language was in the old bylaws. It was in a separate section. We moved things around, and we split what had been core values into two kinds of things, commitments and core values. And we moved this, which had been in neither of those places, up into the commitments.

So yes, it is a commitment -- continuation of its commitment to apply documented policies consistently, neutrally, objectively and fairly without singling out any particular party for discriminatory treatment.

Q. And I appreciate that answer, but I would ask that you actually answer the question that I asked, which is: ICANN makes this commitment because it's important to the global Internet community to have confidence that ICANN is going to abide by the plain meaning of its rules?

A. Yes. And it has been from the beginning of time, right.

Q. Now, the applicant guidebook for the new gTLD Program is an example of ICANN's documented policies; is that correct?

A. Well, there was a policy that the community developed, the new gTLD policy.

The applicant guidebook, strictly speaking, is implementation of a community-developed policy.

Q. So are you aware that a previous IRP Panel interpreted the guidebook's reference to itself as the implementation of Board-approved consensus policy, as the, quote, crystallization of Board-approved consensus policy concerning the introduction of new gTLDs?

A. I am not aware of that statement. I mean, I believe you that that was the case, but I am not aware of it.

Q. Would you also agree that ICANN must implement the various procedures and rules and policies set forth in the guidebook consistently, neutrally, objectively and fairly?

A. Yes, I believe ICANN is obligated to make decisions by applying documented policies consistently, neutrally, objectively and fairly in accordance with the bylaws.

Q. Now, in general, the basic procedure that's set forth in the guidebook -- and I am going to speak very generally -- is the applicant submits an application. ICANN publishes the nonconfidential parts of that application for public view. ICANN evaluates the application while the community is given an opportunity to comment on or file objections to the application. The application is then rejected or approved.

If it's approved and it is the only one to have applied for the gTLD, then the applicant moves on to execute a registry agreement with ICANN.

But if more than one application is approved for that gTLD, a contention set is created. The applicants are expected to try to resolve the contention set among themselves, and if they cannot, then ICANN will auction the gTLD among them and the winner will proceed to contracting.

Is that just a fair general overview of the process?

A. Yes, at a very high level. There are, of course, many different moving parts in the applicant guidebook and in the application process, but yes.

Q. So you note in your witness statement that

nothing in the guidebook prevents VeriSign for applying for any gTLD that it wanted; is that what you -- is that a fair statement of what you testified to?

A. Yes, the community-developed policy did not impose limitations on who could apply for what.

Q. And, in fact, VeriSign did apply for several gTLDs, correct?

A. I actually don't know the answer to that. I know they were the back end for several of them, but I don't know if they applied for independent -- individual ones as well.

Q. To the extent that VeriSign did, in fact, apply for an applicant for a gTLD, its application or the nonconfidential portions of its application would have been published for public view; is that correct?

A. That's correct, if it did apply to be a registry operator as opposed to a back end.

Q. Understood. So if they apply to be the registry operator, for example, for the Arabic form of .COM, that application would be published on ICANN's website for public view, right?

A. Right.

Q. But VeriSign did not submit an application

for .WEB, did it?

A. That's my understanding.

Q. So there would have been no .WEB application from VeriSign for ICANN to publish, right?

A. Correct.

Q. And because there was no VeriSign .WEB application published, there would have been no reason for anyone to believe at any time prior to the .WEB auction that VeriSign was pursuing the acquisition of .WEB, was there?

A. There was no published application. I have no way of knowing what anybody believed about anything.

Q. Now, one member of the Internet community that comments routinely on new gTLD applications is ICANN's Government Advisory Committee, right?

A. Right.

Q. And I am just going to refer to that as the GAC; is that okay?

A. Yeah.

Q. Now, GAC members have lodged what they call early-warning notices regarding various applications; is that correct?

A. Yes. Those are expressions of individual

governments within the GAC as opposed to a GAC statement of any kind of consensus policy or anything like that. So the members had the ability to raise their hand and say, "We have a problem with that," very early in the process to give applicants a heads-up.

Q. And, in fact, I'll just give you a quote, what the GAC says, that, "An early-warning notice is a notice from members of ICANN's Government Advisory Committee that an application is seen as potentially sensitive or problematic by one or more governments."

Is that a fair statement about what an early notice is?

A. Yes.

Q. I'm sorry --

A. Yes.

Q. So I'd like to direct your attention to Tab 4 in your binder and to the first page of that. It is a copy of the early-warning notice filed by the GAC regarding Google's pursuit of .BLOG through its Charleston Road subsidiary.

Do you see that?

A. Yes.

Q. And in this early-warning notice, the

government of Australia writes -- and, Chuck, if you could bring up the box that's marked, "Reason/ Rationale for the Warning."

"Charleston Road Registry is proposing to exclude other entities, including potential competitors, from using the TLD. Restricting common generic strings for the exclusive use of a single entity could have unintended consequences, including a negative impact on competition."

That's what they wrote, correct?

A. Yes. And I believe this was one among many of the -- objections to closed generic applications.

Q. And those objections remain on competition grounds, right?

A. That's what the government of Australia -- how they described it. It was the exclusive access to a common generic string that generally -- that generally perturbed individual members of the GAC and ultimately -- ultimately resulted in advice from the GAC on closed generics and a temporary prohibition on closed generics in the first round.

Q. So Chuck, if you could bring up the box above that.

I'll repeat my question, Ms. Burr.

The basis for the government of Australia's early-warning notice regarding Google's proposed acquisition of .BLOG was, as it says, "competition," correct?

A. That's how the government of Australia described its concern.

Q. Now, it is true that every member of the .WEB contention set submitted an application for .WEB, correct?

A. Yes, yes.

Q. And the nonconfidential portions of those applications were posted to ICANN's website, correct?

A. Yes.

Q. And each of those applications were evaluated by ICANN, correct?

A. Yes. I assume so, that would be the process.

Q. Well, you couldn't get into a contention set unless you had been evaluated by ICANN and passed that evaluation, right?

A. Right. Which is why I said that's the process.

Q. And the community, including the GAC, would have had an opportunity to comment on each of

those .WEB applications during the evaluation period, correct?

A. Yes. Individual members of the GAC -- so this is not GAC advice, this is an individual member of the GAC expressing a concern -- could have filed an early warning. And the GAC also had the ability to provide consensus advice.

Q. Now, you state in your witness statement --

MR. LITWIN: Before I move on, Mr. Chairman, we have been going for about an hour and a half. I want to check as to when the Panel and the witness want to break.

ARBITRATOR CHERNICK: Mr. Litwin, before we do that, can I ask a question about the document that's on the screen?

MR. LITWIN: Absolutely, Mr. Chernick.

ARBITRATOR CHERNICK: Is there a record reference to this document, an exhibit reference so that we can keep track of these things?

MR. LITWIN: There is. It is not on my copy. I will have someone on my team email you that directly.

ARBITRATOR CHERNICK: All right. Thank you.

Go ahead, Mr. Chairman.

ARBITRATOR BIENVENU: Yes, well, I was saying to Mr. Litwin that he had read my mind. I was about to ask him to advise when would be an appropriate time for our first break, and I take it from your intervention, Mr. Litwin, that it would be.

MR. LITWIN: This would be an opportune time. I am happy that I am able to, even under the small Zoom screen, ascertain when it might be time for a break.

ARBITRATOR BIENVENU: Right. So we will break for 15 minutes.

Ms. Burr, you, of course, are familiar with a process like this one, and you would know that throughout the course of your cross-examination, and that includes any redirect examination, you are not to discuss your testimony or the case with anyone.

THE WITNESS: Yes, sir.

ARBITRATOR BIENVENU: Thank you very much. So we'll take a 15-minute break.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. Litwin, please proceed.

Q. BY MR. LITWIN: Hello, Ms. Burr. Are you ready to proceed?

A. I am.

Q. Okay. So you state in your witness statement that ICANN has various ways in which it holds itself accountable to the global Internet community; is that correct?

A. Yes.

Q. And those are called accountability mechanisms, correct?

A. Correct.

Q. And the IRP, the Independent Review Process, is one of those accountability mechanisms, right?

A. Absolutely.

Q. I would like to direct your attention now to Tab 5 in your binder. This is a copy of Annex 7 to the CCWG report that we were discussing before we went on break.

Annex 7 provides for -- Chuck, if you can turn to Annex 7, please -- the CCWG's proposal for the enhanced IRP?

A. Correct.

Q. So if you could turn to Page 10, and I will direct your attention to Paragraph 34, and

I'll wait a minute for that to come up on the screen here. This is under the heading "Standard of Review."

MR. ENSON: Ethan, I am sorry to interrupt. There's two sets of page numbers on my copy. There's the exhibit page number and the exhibit number of the actual document.

MR. LITWIN: Yes. Hopefully I have it all correct in my notes, but I am referring to the exhibit page numbers only.

MR. ENSON: Okay. Thank you.

MR. LITWIN: You're welcome.

Q. Ms. Burr, under "Standard of Review," the CCWG states that "The IRP Panel shall decide the issues presented to it based on its own independent determination of ICANN's articles of incorporation and bylaws in the context of applicable governing law and prior IRP decisions. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's mission and/or violates ICANN's articles of incorporation and/or bylaws and prior IRP decisions. Decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. The Panel may undertake a de novo

review of the case, make findings of fact, and issue decisions based on those facts."

Do you see that there?

A. I see that paragraph, yes.

Q. Okay. Let's just break that down. The IRP Panel is supposed to decide disputes based on its own independent interpretation of ICANN's articles and bylaws; is that right?

A. I think we need to look -- I mean, this is -- so Annex 7 is sort of an explication of the recommendations that the CCWG-Accountability Group put together with respect to those accountability mechanisms. They were then translated into the ICANN bylaws.

So this is a description where the actual absolute standard of review, I would -- we should refer to the bylaws. I believe it's quite -- I believe it is a -- did an action or inaction violate the -- exceed the mission or violate the bylaws with respect to these.

I am just -- the official source has to be the bylaws, because that's where the rules come from.

Q. So the CCWG report, as we talked about earlier today, was transmitted by ICANN to the NTIA

as part of the transition process; is that right?

A. As I said, I don't know the answer to that. I think that's right, but I have no idea. But bylaws certainly would have been as well. And the bylaws, the language in the bylaws is the final implementation of the CCWG's recommendations, and those were, in fact -- I worked on the writing of the bylaws as the rapporteur for this provision, and those were, again, submitted to that community for comment and the like.

All I'm saying is to the extent there's any discrepancy between this document and the bylaws, the bylaws is the relevant document.

Q. And we are going to look at the bylaws in a minute, but right now I just want to ask you questions about what the CCWG intended. And the CCWG intended that the IRP Panel is supposed to decide disputes based on its own independent interpretation of ICANN's articles and bylaws, correct?

A. That is what this says. I have no idea if that particular sentence is in the bylaws itself, but it is definitely --

Q. I am not asking --

A. -- a de novo review.

Q. I am not asking you about the bylaws. I am only asking you in the context of the next several questions about what the CCWG intended --

A. Okay.

Q. -- as reflected in Annex 7.

And the CCWG intended that the decisions of the Panel should be based on each panelist's individual assessments of the merits of the claim, right?

A. Presented on the Panel's independent interpretation of the bylaws and articles of incorporation and examination, objective examination of whether the complaint of action exceeds the scope of ICANN's missions or violates the bylaws, and it is based on each IRP's assessment of those.

Q. Each IRP panelist's assessment of the merits of the claimant's case, correct?

A. Right. And the case is if this act or failure to act violated the bylaws.

Q. And this standard of review that the CCWG provided for here says that the Panel should undertake a de novo review of the case, correct?

A. Correct. That is in the bylaws, I know.

Q. And by "de novo," that essentially means

that the Panel should start anew, right, that's what "de novo" means?

A. Yes. In other words, it is not acting -- it evaluates the facts.

Q. And you understand that a de novo review is a nondeferential standard of review, correct?

A. I have to say I am not a litigator, but I think this is with respect to the findings of the facts about what happened.

Q. Well, it says here that the Panel may undertake a de novo review of the case. And solely as to that provision, I am saying that where it says "de novo review," that means nondeferential standard of review; it is not an abuse of discretion standard?

A. That's a legal conclusion that -- I mean, it may be true, but I have no idea.

All I'm saying is what this says to me is you get to -- the IRP Panel gets to decide what the facts are.

Q. Wait. So you were on the CCWG, right?

A. Yes. But you're asking me for a sort of legal term-of-art conclusion. I am not a litigator. I can tell you what that means to me. Yes, ICANN doesn't get to say, "Here are the facts.

You must accept them."

So to that extent, they are not deferring to ICANN's -- ICANN's articulation of what the facts are, that's correct.

Q. Right. And the Panel should make its decisions based on the facts as the Panel finds them, right?

A. Yes. That is what this is saying.

Q. Okay. Let's turn back to Page 5 in this exhibit and look at the first bullet point, which starts with "Standing."

A. Yes.

Q. You see that, Ms. Burr? Here what the CCWG is saying is that, "Any person, group or entity that has been materially affected by" -- here's your language -- "an ICANN action or inaction in violation of ICANN's articles of incorporation or bylaws shall have a right to file a complaint under the IRP and seek redress."

Do you see that? Ms. Burr?

A. Yes, I am just looking at this.

Q. Okay.

A. This is Page 5?

ARBITRATOR BIENVENU: It is Page 5 of the exhibit, 3 of the document.

MR. LITWIN: Yes. So there's Exhibit C-1, Page 5.

Thank you, Mr. Chairman.

THE WITNESS: Yes.

Q. BY MR. LITWIN: So what it says here at the second bullet -- and it is up on the screen for your ease of reference, Ms. Burr -- is that if an entity is materially affected by an ICANN action or inaction that violates ICANN's articles of incorporation or bylaws, that that entity shall have a right to file a complaint under the IRP and to seek redress.

That's what it says, right?

A. That's what it says.

Q. So the CCWG is providing for those entities a due-process right to file an IRP; is that right?

A. I mean, it is saying if you have been materially affected, you have a right to file a complaint under the IRP.

Q. And to seek redress?

A. Yes, for the violation of the bylaws.

Q. Right. And "redress" means to remedy, right?

A. The bylaws are clear, and this was always

the intention. I was the rapporteur for this, and I was the person who wrote the -- was fundamentally charged with a relevant bylaws provision.

This means -- and it is very clear in the bylaws, and that is what the CCWG meant -- that they had a right to get a decision about whether an action or an inaction violated the bylaws.

This does not say to me, it was never the intention of the CCWG, in my hearing, that the Panel could prescribe a remedy. And that totally makes sense in the context of ICANN IRPs, because often there are many, many parties who are affected by this. There are a lot of moving parts.

So I do not see that as a statement, and I participated in both the CCWG discussions and the bylaws' drafting, which was not intended to, you know, damages, recovery, remedy, that kind of stuff, but the -- the IRP's authority is limited to finding -- making a determination about whether an action or inaction violated the articles of incorporation and bylaws, and that's what's binding on ICANN.

Q. Ms. Burr, I really must ask that you respond to the question that I'm asking, otherwise we are just never going to get done today.

What I'm asking here is that in Annex 7 on Page 5, at the second bullet point, the CCWG provided that, "Entities shall have standing if they are materially affected by an ICANN action or inaction that violates ICANN's articles of incorporation or bylaws, that they shall have a right to file a complaint and to seek redress."

That's what it says, correct?

A. That's what it says in the annex explicating the recommendation.

Q. That's all I'm asking.

If we could turn to Page 6.

ARBITRATOR BIENVENU: Just for the record, Mr. Litwin, you were referring to the first bullet point, not the second bullet point.

MR. LITWIN: Oh, I'm sorry about that. Yes, first bullet point.

Q. If you could please, Ms. Burr, turn to Page 6, Paragraph 9, please. And here the CCWG states in its explicative Annex 7 that the role of the IRP will be to hear and resolve claims, correct?

A. That ICANN has acted or failed to act in violation of its articles and bylaws.

Q. And that resolution of claims are intended

to be both final and binding, correct?

A. Yes, with respect to binding of a bylaws violation or an action exceeding the mission.

Q. Okay. Now, Ms. Burr, earlier today, you testified about the Ruby Glen litigation concerning .WEB.

Do you recall that testimony?

A. I think I mentioned that litigation had been filed and a CEP was filed.

Q. In that litigation, ICANN defended its conduct by reference to the litigation waiver in the new gTLD guidebook's terms and conditions in Module 6; is that correct?

A. I have not read the pleadings in the Ruby Glen litigation.

Q. Are you aware that the new gTLD guidebook provides for a litigation waiver?

A. My understanding is that the application itself includes a litigation waiver and refers to the accountability mechanisms to resolve disputes.

Q. Okay. In fact, what the guidebook says is that, "The applicant agrees not to challenge in court or in any other judicial forum any final decision made by ICANN with respect to its application, provided that the applicant may

utilize any accountability mechanism set forth in ICANN's bylaws for the purpose of challenging any final decision made by ICANN with respect to the application."

Is that right?

A. I don't have the applicant guidebook in front of me. That sounds right. You read it, so I assume it's correct, but I don't have it.

Q. I'll represent to you that I have read it. In general -- let me just -- now, in terms of that application waiver, is it ICANN's position, therefore, that applicants are not left with any form -- without any form of redress because they can initiate the accountability mechanisms in the bylaws?

A. I don't believe that is a correct statement of ICANN's position. You'd have to ask ICANN itself about that.

Here's what I think: That bylaws provide accountability mechanisms for -- in order to identify instances where ICANN -- either ICANN or the Board has acted in violation of the bylaws, and the Board must -- if there is a finding that ICANN has violated its bylaws, the Board must act to resolve that, to fix that.

Q. So I am not sure of the difference. Would it be a fair statement that applicants in the new gTLD Program are not left without any form of redress because of the litigation waiver because the litigation waiver provides that they may initiate an accountability mechanism, including the Independent Review Process?

A. Right. And the result of the Independent Review Process is if the Independent Review Panel finds that the bylaws have been violated, the Board has to take appropriate action to fix that.

Q. And the IRP is effectively an arbitration that is operated by the ICDR, correct?

A. It is operated by the ICDR, and it very much follows arbitration forms, yes.

Q. And the IRP gives an applicant, therefore, the ability to have independent third parties evaluate its challenges to ICANN's actions or inactions under ICANN's articles and bylaws in addition to claims under the guidebook; is that a fair statement?

A. Its claims under the guidebook that ICANN has violated its bylaws. The IRP is limited to claims that ICANN has -- in this context, there's the IANA and different things, but in this context,

the authority -- the purpose of the IRP is to determine whether or not, in taking some action or inaction or failing to act, ICANN has violated its bylaws, and that would be including in its -- in its application of the rules of the applicant guidebook if it's violated the bylaws somehow.

Q. Would you also agree that, you know, that the applicants have not been left without any form of redress because ICANN has provided for a robust form of review in which these challenges could be addressed, namely the IRP; is that a fair statement?

A. Yes. And the point is that the violations of ICANN's bylaws can be identified through an IRP.

Q. So just to be clear here, where the limits of a court's jurisdiction for review of ICANN's conduct ends because of the litigation waiver, ICANN is essentially saying that the IRP Panel's jurisdiction starts; is that fair?

A. Only if there's a question about whether the way ICANN has administered the applicant guidebook is in violation of the bylaws or articles of incorporation or exceeds ICANN's mission.

Q. Let me try this another way.

So in light of the litigation waiver, an

IRP Panel's jurisdiction must cover all matters that could not be addressed by a court of competition -- competent jurisdiction, otherwise a new gTLD applicant who was required to agree to the waiver would have no effective means of redress; is that fair?

A. So there's a contract here, right, and people are applying for a new gTLD, and the contract, the application, includes a provision that says, "We are not going to sue you in a court. To the extent we have a complaint about violations of the bylaws, we'll use the -- the bylaws-provided remedies."

You're passing this in, like -- sort of in big terms, but I think the issue is there's an agreement here, when you apply for a new gTLD, you are agreeing that disputes related to violation of the bylaws are going to be decided through ICANN's accountability mechanism, and otherwise you don't have a contractual right to sue.

Q. So when Ruby Glen sought to enforce its contractual rights in court, ICANN's position was, "You can't do that. You have waived your right to seek judicial review. And that's okay because we have provided a robust form of independent review

by way of the IRP"; isn't that right?

A. I don't know what the Court in Ruby Glen said. I haven't reviewed that for this. I haven't reviewed it in ages.

MR. ENSON: Mr. Chairman, I would request that we move on. This is an area where Mr. Litwin is seeking legal conclusions on topics that were not in Ms. Burr's witness statement, and I think in light of the time estimates for Ms. Burr's cross, I think our time is best spent on matters that are within her witness statement.

ARBITRATOR BIENVENU: Mr. Litwin.

MR. LITWIN: Well, I was just about to move on, so that's perfectly fine with me.

MR. ALI: Sorry, Mr. Chairman.

Before you do, I'd like to consult with you.

Secondly, Mr. Chairman, I think you made it very clear in your -- in a recent procedure ruling --

ARBITRATOR BIENVENU: Mr. Ali, I am going to cut you off. You don't need to respond to that. I will give you an opportunity to consult with Mr. Litwin. He said he was planning on moving on. So consult about that, and we'll go from there.

MR. ALI: Sure, but, Mr. Chairman, you will understand that we will need to do this fairly often because we are not in the same place. Mr. Litwin is in New York, and I am in Washington, D.C.

ARBITRATOR BIENVENU: That's fine. No one has a problem with that, Mr. Ali.

MR. ALI: All right. Mr. Chairman, thank you.

ARBITRATOR BIENVENU: Thank you.

(Whereupon a recess was taken.)

Q. BY MR. LITWIN: Ms. Burr, I would like to direct your attention to Page 13 of the CCWG report, Paragraph 57.

A. Yes.

Q. Now, here the CCWG provided -- and I will again stipulate that this is in Annex 7, which was an explication on the CCWG report and its recommendations -- that if a Panel determines that an action or inaction by Board staff violates the bylaws or articles, then that decision is binding and the ICANN Board and staff shall be directed to take appropriate action to remedy the breach.

Do you see that?

A. Yes.

Q. Okay. So the CCWG intended that an IRP Panel, if it were to find that ICANN breached its bylaws or articles, should issue a binding declaration that ICANN breached its articles and bylaws and further that the Panel should direct ICANN how to remedy that breach, correct?

A. That is not what the CCWG intended. What the CCWG intended is that the Panel would issue a binding determination regarding a bylaws violation, and in response to that finding, ICANN must take appropriate action to remedy the breach.

Q. Now, I guess I'm confused by this. The CCWG obviously put a lot of work into preparing its report in this Annex 7, correct?

A. Yes. We spent a lot of time doing it.

Q. I know, because I have been through all those materials, and they are quite voluminous.

And here in Annex 7, the CCWG refers to itself, it says, "We intend that the Panel shall issue a binding decision and that ICANN's Board and staff shall be directed to take appropriate action to remedy the breach."

Did the CCWG just not mean what it says here?

A. Well, so, first of all, I can read that

construction, which is passive and which was put up as we were working this out. I do not read it to say that the Panel is going to direct ICANN to take a specific action to remedy the breach.

The Panel, by making a finding that ICANN has violated its articles, ICANN must take -- then take appropriate action to remedy the breach.

That is not the same as saying that the Panel has the authority to say what the appropriate action is to remedy the breach.

And the reason is there are so many moving parts and parties here, imagine if this Panel said "ICANN violated the bylaws, and you must award this to, you know, X, Y or Z." There are going to be two or three other parties who then have a cause of action.

So ICANN must -- ICANN has an obligation to take appropriate action, but the CCWG did not contemplate that the Panel, the IRP Panel would decide what that appropriate action was.

Q. Okay. Why don't we look at the bylaws. So if you could turn back to Tab 2 in your binder, and I would refer you to Page 30 at Section 4.3(x). And there the bylaws provide that the IRP is intended to be a final binding arbitration process;

is that correct?

A. Yes.

Q. And that IRP Panel's decisions are binding final decisions to the extent allowed by law, correct?

A. Yes. And that, of course, is subject to the authority of the IRP Panel in Section (o).

Q. Well, I think we can all agree that arbitral bodies, in fact, any judicial body must act within its jurisdiction, correct?

A. Right. All I am saying is Section (o) specifies what the IRP has authority to do, and within that context its decisions regarding binding -- about a bylaws violation is binding.

Q. Okay. So can we turn to Page 24, Rule 4.3(i), please. Here, much like the CCWG report we just referred to earlier, the bylaws provide that the IRP Panel shall conduct an objective de novo examination of the dispute, correct?

A. Correct.

Q. And under Roman Numeral i, the bylaws provide that the IRP Panel shall make findings of fact to determine whether the covered action constituted an action or inaction that violated the articles of incorporation or the bylaws, correct?

A. Yes.

Q. And it says that the Panel should make those findings pursuant to a de novo examination, correct?

A. Yes. The Panel makes a finding of the facts that determine whether or not the action or inaction violated the bylaws. That's the fact that they are determining, whether the covered action constituted an action or inaction that violates the articles of incorporation or bylaws.

Q. Well, what this says is that the Panel shall make findings of fact to determine --

A. Right.

Q. -- whether or not there was a violation, correct?

A. Correct.

Q. Okay. Now, let's look at Roman Numeral iii that talks about claims arising out of the Board's exercise of its fiduciary duties.

So this provision relates only to those claims that arise out of a Board's exercise of its fiduciary duties, correct?

A. Yes. Although, a Board -- it is very hard for me to see that a Board can act without respect for its fiduciary duties, but yes.

Q. Let's talk about the ICANN Board's fiduciary duties.

Would you agree that each member of ICANN's Board is accountable to the participating community as a whole through his or her fiduciary duties and is required to make decisions that are in the best interest of the corporation and the community at large; is that fair?

A. It is certainly true that the members of the Board are each obligated to act in the interest of the organization, including the organization's commitment to the community. You started this out by saying it has a fiduciary duty to individual members.

I think there's a fiduciary duty to the organization that encompasses staying within its mission and acting in the global public interest and all those other things that individual participants in ICANN have an interest in.

But I am not sure I have a fiduciary duty to an individual member of the community, if that's what you're asking me, and I suspect that's a matter of California law.

Q. Yeah, I think that's right. I think ICANN, in fact, has said that the general legal

duties of an ICANN director are owed to the corporation itself, that is to ICANN itself, and the public at large, not to the individual interests within the ICANN community; is that right?

A. That's my understanding. I certainly do not reflect any individual interest.

Q. So ICANN doesn't act as Afilias' fiduciary, right?

A. I am not comfortable with this construction because it is -- ICANN is acting -- the ICANN Board, when it acts, has an obligation to the organization, including to the global public interest, through the bylaws.

I don't know -- you're asking me to make a legal conclusion about whether ICANN is Afilias' fiduciary, and I just don't quite know what to make of that.

Q. Okay. Well, let me ask you this, then: In terms of your understanding of bylaws, and particularly with respect to the bylaw that's on the screen, little Roman Numeral iii, that says, "For claims arising out of the Board's exercise of its fiduciary duties," can Afilias or any individual member of the ICANN community bring

claims for breach of fiduciary duty against ICANN?

A. Anybody can bring a claim that says that ICANN, either the Board or org, violated the bylaws. So if something that violated the bylaws had something to do with fiduciary duties, you would still be able to bring that.

But the fiduciary issue here doesn't swallow the ultimate fact that the determination about whether something violates the ICANN bylaws or not is left to the IRP Panel.

The question is: In the course of acting there are, at every step of the way, a bunch of potentially reasonable courses of action. And to me this says unless the Panel finds that ICANN violated its -- the bylaws, it's not -- it doesn't have the authority to say, you know, you should have done it a different way if that -- if failing to do it a different way does not amount to a violation of the bylaws.

So this doesn't swallow anything. If there's a violation of the bylaws, there's a violation of the bylaws. This is only sort of in the decision-making and carrying things out that -- activities that -- actions that do not violate the bylaws that the Board should -- substitute its

judgment for the Board's reasonable judgment.

Q. Let me see if I can come across this in a different way.

If the IRP's jurisdiction is limited in the way that you have just described, do matters falling outside of the IRP's jurisdiction fall within the jurisdiction of a court of competent jurisdiction?

A. There are -- in the contracts with contracted parties, there are provisions for how disputes are resolved. I don't -- I mean, I think that calls for a legal conclusion I am not prepared to make.

With respect to the applicant guidebook, the applicant guidebook and the application provided for a waiver of a lawsuit and reversion to a -- these accountability mechanisms for determination about whether the bylaws and articles of incorporation were complied with, and that seems to me it is sort of a contractual resolution.

Q. So I guess what I'm trying to figure out is if there is a gap. Is there a gap between what applicants are prevented from bringing to a court and between -- and what an IRP Panel can decide? Are there claims simply that an applicant can't

bring anywhere because it's waived its right to a court hearing and the IRP Panel can't decide it?

A. Again, that's a legal conclusion that I don't think I can make. I am telling you that with respect to anything that involves an alleged violation of the bylaws, the IRP is the process that's available.

Q. Well, you were a member of the CCWG that developed the process for the enhanced IRP.

What I'm asking is just in general terms, was there an intent by the CCWG to fill the gap for applicants where courts were prevented from hearing a claim due to litigation waiver?

MR. ENSON: Mr. Chairman, if I might interject for a moment. We do object to this continued line of questioning. He's asking for a legal conclusion from Ms. Burr that she's not prepared to give, and she's said three or four times she cannot do it.

I think it is appropriate for us to move on to something else at this point in time.

MR. LITWIN: Mr. Chairman, if I can respond to this. This is a really important line of questioning. Ms. Burr talked about ICANN's accountability mechanisms in her witness statement.

She was a member of the CCWG that drafted the report that we have been referring to today. She was the rapporteur for the translation of those recommendations by the CCWG into the bylaws. Those bylaws were discussed extensively yesterday by ICANN's counsel.

And what I'm simply trying to get an understanding of is not in a legal sense, but in Ms. Burr's sense, as a member of the CCWG and as the rapporteur, as she's testified here today, whether she intended and whether the CCWG intended there to be a gap or whether or not they saw the enhanced IRP as filling that gap. It is that simple.

ARBITRATOR BIENVENU: I'll allow the question directed to Ms. Burr's understanding of the intent of the CCWG insofar as the risk of an existence of a gap between the litigation privilege and the scope of the accountability mechanisms. You can ask her about her understanding.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Ms. Burr, as a member of the CCWG, did you have an understanding as to whether or not the CCWG intended the enhanced IRP to be a gap-filler in light of the litigation waiver provided for in the

applicant guidebook?

A. No, I do not believe there was a discussion about a gap-filler. The CCWG intended that, and I don't recall any specific obligations with the applicant guidebook, although there could have been.

The point here was that if ICANN violated the bylaws, if it exercised -- if it separated out somebody for disparate treatment unfairly without just cause, that the IRP would be there to provide a recourse for the applicant.

In other words, ICANN could not immunize itself from a bylaws violation through a contract. That's -- to the extent that there's any gap-filling, it is that -- and this is, like, so central to what the IRP is about.

It's about saying to ICANN, no, you can't make people agree that you're allowed to violate the bylaws.

But it did not go to other issues that were outside of the bylaws. The IRP is so absolutely specific over and over and over again about what it's intended to address. So to the extent there was a gap-filling, it was, we are not going to allow you to say you get to violate your

bylaws via a contract provision.

ARBITRATOR BIENVENU: Ms. Burr, was there, so far as you can recollect, a discussion of the fact of a gap between the litigation waiver and the scope of the accountability mechanisms, including any possible limitation on the remedies that an IRP Panel could award? Do you recall a discussion of that topic?

THE WITNESS: I don't recall a discussion of that topic. It was several years ago, so I apologize. We were -- completed nearly four -- maybe more than four years ago.

ARBITRATOR BIENVENU: Thank you.

Q. BY MR. LITWIN: Is it possible in your view, given the litigation waiver in the guidebook and the limited role of the IRP Panel that you have just explained, that applicants may, in fact, be left without a form of redress if their claim does not rise to the level that you have discussed that's appropriate for an IRP Panel's determination?

A. All I can tell you is the exercise here in the CCWG -- first of all, it wasn't a specific reference to the applicant guidebook. It was in reference to ICANN's overall accountability.

And second, I can tell you personally that I was motivated by making sure that ICANN could not say that it had the ability to insulate itself from violations of its bylaws. That's what I was thinking about as I was working on this and drafting it. It is what you will recall -- well, you won't recall, but Arif will recall I took objection to in the ICM case.

But here there's no issue here. It is quite clear that if there's a breach of the bylaws, that's -- the IRP Panel is entitled to identify that in a binding way.

So you're asking me a question. I don't think that we ever talked about -- I don't recall talking about it, but it was not intended to be -- it was intended to address violations of the bylaws. That's what the IRP was about.

Q. So if a claimant -- if an IRP doesn't have jurisdiction to decide a claim, then you have to be able to bring it to court, right, because it is not arbitral? If it is not arbitral, you have to be able to bring it to court?

A. This is a matter of equitable law. I don't know the answer to that. I don't know.

Q. Okay. I will move on, subject to any

comments from my team.

Okay. I am going to move on.

MR. ALI: No comments. Thank you.

Q. BY MR. LITWIN: So, Ms. Burr, you state in your witness statement, and I am going to quote from it, that, "ICANN'S core mission is the technical coordination of the Internet's DNS," that is, the Domain Name Space, "on behalf of the Internet community, ensuring the DNS's continued security, stability and integrity."

Is that correct?

MR. ENSON: Ethan, sorry, where are you in the witness statement?

MR. LITWIN: I actually don't have the reference to it, Eric. Let me pull it up real quick.

MR. ENSON: Is it Paragraph 11?

MR. LITWIN: Yes, thank you. Paragraph 11.

MR. ENSON: Thank you.

Q. BY MR. LITWIN: Is that a correct reading of your testimony?

A. It's as originally envisioned by NTIA, ICANN's core mission is the technical coordination, that is correct.

Q. Are you aware that ICANN's Board has stated in one of its rationales that, quote, ICANN's mission statement and one of its founding principles is to promote user choice, consumer trust and competition?

A. Yes. As somebody who was deeply involved in the global international process that led to the creation of ICANN, that has -- the notion that increasing the table for innovation and competition is that ICANN, in carrying out its DNS security mission, should do so in a way that creates opportunities for competition and innovation.

Q. Okay. I'd like to direct your attention to Tab 7 of your binder. This is a copy of ICANN's articles of incorporation. And if you look at Section 2, Roman iii, which I think is on the second page, "ICANN's articles provide that the corporation shall operate in a manner consistent with these articles and its bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with the relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry into Internet-related

markets."

That's what it says, correct?

A. That is what it says, yes.

Q. It is this same open and transparent processes that the bylaws talk about at Section 3.1, correct?

A. Sorry, 3.1 of the bylaws?

Q. Yes, that we referred to earlier today that talks about open and transparent processes.

A. I would have to look at the words side by side to know if they are exact.

Q. I withdraw the question, Ms. Burr.

Now, this paragraph of the articles states that ICANN must carry out its activities in conformity with principles of international law, correct?

A. Yes.

Q. In your view as a lawyer, as a Board member, what are the relevant principles of international law and applicable international conventions that are referenced here?

A. You know, this would be based on relevant treaties, respect for trademark treaties, international conventions on -- I mean, I don't know in particular, but -- because I am also not an

international law expert, nor am I an arbitrator. So I --

Q. Okay.

A. -- I am not able to say all of these, what they all are.

Q. There's a reference to competition here, and the articles clearly say "enable competition," not "comply with U.S. antitrust law," correct?

A. Correct. And enabling competition has always from the white paper -- so just to put this in context, which I think is really important, in 1998 the United States government actually proposed to add new top-level domains to expand the name space to enable competition by expanding the name space by creating five new top-level domains.

The global community came back to us and said, "Forget it. We don't want you to do that, USG." We want the community to develop the policies that will -- for enabling competition through new gTLDs.

So we were asked specifically about antitrust immunity in the green paper, and we said, "No, we are not going to -- we think that's a bad idea because all of this should be -- continue to be subject to applicable law relating to

competition," but ICANN's role is setting a table where competition can take place. ICANN's role, as it says in the -- as the RSEP process with respect to competition, is to refer issues where competition is a concern to relevant authorities.

But ICANN is not a regulator, and ICANN does not have competition law competence, whether it is U.S. or otherwise.

Q. Thank you, Ms. Burr. I will ask again -- and I think I have been quite indulgent in letting you speak your mind here today because we all do want to hear what you have to say, but I would ask you again to not respond to something that's a yes-or-no question with a monologue that does not respond to the question.

Because what I asked is that Article 3 that we are looking at here does not say "comply with U.S. antitrust law," does it?

A. No.

Q. Thank you. Now, I'd like to direct your attention back to Tab 2 in your binder, which is the bylaws, and if you could please turn to Section 1.2 on Page 5.

Again, this is ICANN's commitment and core values section. If you can turn to the next page,

Page 6, that's where the core values begin. And what the bylaws state is that the core values are intended to guide ICANN's decisions and actions, correct?

A. Are we talking about commitments or core values?

Q. Core values on Page 6, under (b), "Core Values."

A. Yes.

Q. Okay. Now, turning to the next page, I am going to direct your attention to Paragraph 4, where the bylaws provide that "One of ICANN's core values is the introduction and promotion of competition into the registration of domain names."

Do you see that?

A. Yes. "Where practical and beneficial to the public interest as identified through the bottom-up multistakeholder Policy Development Process."

Q. Correct. Now, in other words, putting those two concepts together, the bylaws provide that ICANN should consider how its actions and decisions will help further the objectives of this Paragraph 4, the introduction and promotion of competition, correct?

A. Where practical and beneficial as identified through the bottom-up multistakeholder Policy Development Process, yes.

Q. And the competition concerns identified in Paragraph 4 are those competition concerns or issues or maxims as identified through the Policy Development Process, correct?

A. I'm sorry. Could you repeat that?

Q. Sorry. That was a horrible question. I apologize.

In particular, when ICANN is making its decisions and taking actions and has to consider and be guided by this Paragraph 4, it needs to identify those competition concerns that are specifically identified in ICANN's policies, correct?

A. This is saying in the public interest through the bottom-up multistakeholder Policy Development Process.

The point here is the public interest is the product. The Policy Development Process is the process by which the public interest is identified, and that would be -- so here, introducing and promoting competition in domain name registration where practical and beneficial to the public

interest.

And then it says -- and that public interest, by the way, is identified through the Policy Development Process.

Q. Correct. And there is a public interest in competition, right?

A. Yes, of course there's a public interest in competition. The question is in terms of how that works into the new gTLD process.

Q. Okay.

A. One has to take into mind the consideration of the Policy Development Process and what public interest is identified in the Policy Development Process. It is important because, of course, competition is in the public interest. So are 10,000 other things.

So the question is: In any case when you're deciding what's practical and beneficial, we are looking to the Policy Development Process to identify that.

Q. Okay. I'd like to direct your attention to Section 2.3.

Chuck, if you can put that up.

So here the bylaws provide that, "ICANN shall not apply its standards, policies, procedures

or practices inequitably or single out any particular party for disparate treatment unless justified by a substantial and reasonable cause, such as the promotion of effective competition."

That's what it says, right?

A. Yes.

Q. What do you understand -- strike that.

By "inequitably," do you understand that to mean unjustly or unfairly?

A. Yes.

Q. And what this particular bylaw provides is that although ICANN must in general apply its standards, policies, procedures and practices equitably, it does not have to do so in a particular instance where justified by the promotion of effective competition; is that fair?

A. This is an example where there might be substantial and reasonable cause. I am just a little bit confused because we -- we moved -- so this particular 2.3 was an issue, and we moved it into the commitment statement. I didn't realize we had also left it in Section 2.

But in the commitment statement there's also an obligation to apply "documented policies consistently, neutrally, objectively, and fairly,

without singling out any particular party for discriminatory treatment, making an unjustified prejudicial distinction between or among different parties."

Q. Okay. But what I'm really referring you to, Ms. Burr, is Section 2.3, which says you have got to treat everybody the same, but you can treat one party differently if there's a substantial and reasonable cause to do that, that's what 2.3 provides, right?

A. Yes, if there's a substantial or reasonable cause.

Q. In fact, the only example provided in the bylaws is the promotion of effective competition. The bylaws state that the promotion of effective competition is, in fact, a substantial and reasonable cause to treat somebody differently, right?

A. Yes. I have to say that I thought we had moved this statement out, but apparently it is still there, at least based on this document.

Q. Okay. I'll represent to you that this is a copy of the bylaws that appears on ICANN's website, and again, I would ask you to confirm, yes or no, that the bylaws, Section 2.3, provides that

ICANN must treat everybody the same and can't treat anybody differently unless there's a substantial and reasonable cause to do so. The only example given of that is the promotion of effective competition, correct?

A. Yes, that is what 2.3 says.

Q. Okay. Now, in your witness statement you state that ICANN has historically referred competition concerns to the Department of Justice for analysis and possible government response or action, correct?

A. Correct.

MR. ENSON: Ethan, again, I just ask for a cite in the declaration.

MR. LITWIN: I apologize, Eric.

MR. ENSON: 23, perhaps.

MR. LITWIN: 23, yes. You beat me by a second.

Q. Now, and I'll apologize if I mispronounce his name, but, Ms. Burr, do you know John Kneuer, formerly of the U.S. Commerce Department?

A. Yes.

Q. Did I pronounce his name correctly?

A. Kneuer.

Q. Thank you. Are you aware that Mr. Kneuer

submitted an expert report in this IRP on behalf of Amici?

A. I did see that, yes.

Q. Did you review it?

A. I did not review it in depth. I took a quick look at it.

Q. Okay. Well, in his report Mr. Kneuer opines -- this is Page 3, Paragraph 4(a) of his report.

A. Is that in one of these tabs?

Q. Yes. I can give you the cite. It is a pretty basic point, but if you'd like to refer, it is Tab 9 on Page 3, and there at the bottom of Paragraph (a), and I will read it to you. It says, "ICANN is obligated to refer relevant matters of competitive concern to appropriate government authorities, such as the U.S. Department of Justice."

Do you agree with that?

A. I am not aware of any place where it says it must do that.

ICANN does, for example, in the registry services approval process, reserve the right to refer things to appropriate antitrust competition authority.

Q. Well, if I can just summarize, what I think Mr. Kneuer is saying there is that where ICANN finds a competitive concern, it is obligated to refer those concerns to DOJ or another competition regulator; is that your understanding of what ICANN is obligated to do where it finds competition concerns?

A. That is my personal view about what ICANN can do. I am not aware of a place where it says it must do that.

Q. Okay. Now, where ICANN does do this, I'd just like to get a better sense of how the process works. Perhaps we can just use a recent example, a recent request or referral as an example. When was the last time ICANN asked the DOJ to advise ICANN on a competition issue?

A. I don't know the answer to that question.

Q. Are you aware of any instances where ICANN has asked DOJ to advise it on a competition issue?

A. The place where it is most likely to come up is when somebody seeks -- when a registry operator seeks authority to introduce a new registry service.

In that case, if the registry service that they were proposing raised competition concerns,

they have the right -- ICANN has the ability to refer.

Q. Has ICANN ever done that, do you know?

A. I don't know the answer to that question.

Q. If ICANN was going to refer something to the Department of Justice, would it use the business review letter process?

A. I have no idea how -- I don't know what ICANN would do.

Q. So you don't know if they would send a letter, pick up the phone and call somebody?

A. I don't know.

Q. Okay. If ICANN were to ask the DOJ to opine, would it ask the DOJ to opine on whether something violated its obligation to introduce and promote competition?

A. At least in the RSEP program, the question is whether the service -- and I would have to look at the exact words, but whether it poses -- I don't know, whether it raises competition concerns. So I'd have to look at that RSEP, because that's where I would have to look to find out what they would ask about.

Q. Now, a new registry service would be potentially, and most likely introduced globally,

correct, because the Internet is global, right?

A. It certainly could be.

Q. And in the event that it was global, would ICANN be obligated to take a survey of competition regulators globally to determine whether or not that service raised competition concerns?

A. I don't believe ICANN is obligated to do a global survey.

Q. Well, how would ICANN determine whether an action complied with competition law across multiple jurisdictions?

A. I think in the RSEP context, the referral is whether a proposed service or arrangement raises competition concerns, and that it would be reviewing it -- referring it to the relevant competition authorities, which could be Europe, could be the U.S., could be someplace else.

Q. Well, because competition law varies, right?

A. Correct.

Q. By jurisdiction?

MR. ENSON: Mr. Litwin, the RSEP Policy is attached as Exhibit D to Ms. Burr's witness statement. Our staff referred to it a couple times. If you want to examine her on that, I would

request that you would allow her to look at the document.

MR. LITWIN: I am done with this. If you want to take that up on redirect, you can be my guest.

MR. ENSON: Very well.

Q. BY MR. LITWIN: So would ICANN be obligated to post communications that it's had with a relevant competition regulator on its website?

A. I am quite certain that would depend on the circumstances. So general correspondence ICANN posts on its website. I suspect ICANN does not post CIDs on its website.

Q. Are you aware -- I think you said that you referred, in preparing for your testimony here today, to a 2008 letter that the United States Department of Justice wrote to the U.S. Department of Commerce, correct?

A. Correct.

Q. That's Tab 8 of your binder, and I'd ask you to open that to the first page, please.

Now, is it fair to say that in this letter the Department of Justice is opining on competition concerns raised by ICANN's proposal to launch the new gTLD Program, which, in fact, it did several

years later; is that correct?

A. So this is a letter from Deb Garza, acting assistant Attorney General for Antitrust, to Meredith Baker, who was the acting assistant Secretary for Communications at NTIA, conveying to Meredith Baker the Justice Department's observations regarding the very earliest version of the policy. I don't even know if there was an -- a draft applicant guidebook out at this point.

But yes, this is an input to NTIA, which I believe was forwarded, regarding the Justice Department's recommendations at that point in time.

Q. Okay.

A. This is part of the process.

Q. So essentially NTIA had asked the Department of Justice -- and I am referring to the first paragraph of Ms. Garza's letter. The Department of Commerce was simply asking advice concerning competition issues raised by the draft request for proposal that would govern the issuance of new generic top-level domains, correct?

A. Uh-huh.

Q. I'm sorry, you need to answer "yes" or "no" for the record.

A. Sorry. Yes. Sorry.

Q. No worries. We all fall into that.

This is a request made by the Department of Commerce, not ICANN, right?

A. Apparently, yes.

Q. And I think I heard you testify a moment ago that this letter was subsequently sent by Ms. Baker to ICANN, correct?

A. That's my understanding.

Q. In fact, I will represent to you that Ms. Baker sent this letter on December 18, 2008, to Mr. Peter Dengate-Thrush, who at the time was the chairman of the Board of ICANN?

A. Peter Dengate-Thrush, yes.

Q. Now, I'd like to direct you to a few points in Ms. Garza's letter, just to a few points because I know Mr. Enson and I are very familiar with Ms. Garza.

Ms. Garza was the head of DOJ's Antitrust Division, correct?

A. Yes, she's the acting assistant Attorney General at the end of the second Bush administration.

Q. Okay. So in the world of DOJ, in just general parlance, she was the top dog in the Antitrust Division, right, she was the one that ran

the show?

A. Yes.

Q. Now, Ms. Garza -- I'd like to direct your attention to Page 4 of her letter in the section entitled "Recommendations."

A. Uh-huh.

Q. You'll see there that under "Recommendations," Ms. Garza writes that, "ICANN is obligated to manage gTLDs in the interest of registrants and to protect the public interest in competition," correct?

A. That is what she says.

Q. This conforms to what you said earlier, that there's a public interest in competition, correct?

A. She is citing to the articles of incorporation, and I want to go back to the specific language about enabling competition that's in the articles of incorporation.

Q. Now, turning to Page 6, I would direct your attention to Footnote 10, at the bottom of the page, obviously, and they are in quite small type.

Ms. Garza writes that, "ICANN has consistently told us that its primary concern is with DNS management from a technical perspective,

that it does not have the expertise or inclination to protect or preserve the public interest in competition and low domain costs, preferring instead to allow government competition authorities to take whatever action may be necessary to address issues of competitive abuse."

This is, in fact, what you said in your witness statement was ICANN's historical practice, correct?

A. Correct. ICANN refers out -- it certainly is my consistent view throughout this that ICANN has neither the authority nor expertise to serve as a competition regulator.

Q. And you state at Paragraph 23 of your witness statement that ICANN was not designed to and does not have specific expertise in antitrust for competition law, right?

A. I'd have to look at Paragraph 23, but yes.

Q. Continuing on to Paragraph 24, you write, "ICANN has historically referred competition concerns to DOJ for analysis and possible government response or actions," correct?

A. Uh-huh.

Q. I'm sorry. I need a "yes" or "no" for the record.

A. Yes. I'm so sorry. Yes. I'm so sorry.

Q. No worries.

What you write in your witness statement is consistent with what Ms. Garza writes in Footnote 10, correct? It is the highlighted portion on the screen about what ICANN has consistently told the DOJ.

A. I don't know what ICANN has consistently told the DOJ, but that's consistent with my views on ICANN's expertise.

Q. That was, in fact, the question. Thank you.

Continuing on in Footnote 10 in Ms. Garza's letter, "The problem with ICANN's preferred approach is that antitrust laws," meaning U.S. antitrust laws, "do not prescribe a registry operator's unilateral decisions." "And accordingly," skipping to the end of the paragraph, "ICANN should create rules fostering a competitive environment to the greatest extent possible."

So in other words, the DOJ disagreed with ICANN's preferred approach to handling competition concerns, correct?

A. Well, she is certainly citing what she describes as a problem with ICANN's views, yes,

that's what she's saying. I mean, in creating rules, fostering a competitive environment to the greatest extent possible, for example, in this case, this is largely in 2008, this is largely about trademark concerns and the implication for consumers and trademark holders through the introduction of new top-level domains.

And before the new gTLD Program launched, there were any number of steps taken to address the kinds of issues she is talking about in here, such as the Trademark Clearinghouse and stuff. So it is -- so, you know, this is a letter that ICANN received and fed into the policy and implementation process.

Q. What Ms. Garza's really getting at here is there are certain blind spots in U.S. antitrust law, such as the failure to proscribe a registry operator's unilateral decisions, correct?

A. Well, she is certainly saying that the antitrust laws generally do not proscribe a registry operator's unilateral decisions, yes.

Q. And because of that, ICANN should create rules for fostering a competitive environment to the greatest extent possible, right?

A. That's what she says, yes.

Q. In fact, you note at Footnote 11 of your witness statement, which is on Page 8, you say that, "The pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically," correct?

A. I believe this is a quote -- sorry, I just need to understand where this is coming from.

Yes, this is from the white paper, and this was in response -- this was in response -- I mean, this had very particular genesis because this goes back to the proposal in the green paper that the United States government was going to unilaterally introduce five new top-level domains to add competition.

Q. Ms. Burr, I'm sorry, I am just asking a very basic question.

When you write at paragraph -- at Footnote 11 that, "The pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically," do you agree with that statement?

MR. ENSON: Mr. Litwin, I have to object. Ms. Burr was in the middle of a response to your question.

ARBITRATOR BIENVENU: The objection is

sustained. Mr. Litwin, she does not write this. She quotes from a response, as you can see. So if you want to reformulate your question, you're at liberty to do so, but she doesn't say that.

MR. LITWIN: I will reformulate. Thank you, Mr. Chairman.

Q. Ms. Burr, you quote from the white paper at Footnote 11 that, "The pressure of competition is likely to be the most effective means of discouraging registries from acting monopolistically."

Do you agree with that statement in the white paper?

A. As a general matter, the white paper was saying that competition is -- more competition is better, but it also goes on to say, "But we are deferring to the community, who said we should not be making that decision."

I mean, that's what this is about. It is really, really, really -- yes, it was the United States government's position in 1998 that the pressure of competition is likely to be the most effective way of discouraging registries from acting monopolistically.

Q. Okay. Now, do you understand, as someone

who has some familiarity with competition laws as a result of your work at the FTC, that acting monopolistically is the same thing that Ms. Garza writes in Footnote 10 of her letter about a registry operator making unilateral decisions?

MR. ENSON: Mr. Chairman, again, I apologize for interrupting, but I feel that I have to object. We have established what Ms. Garza said in the letter in 2008. We established what is said in the white paper. Ms. Burr has answered these questions. There's nothing more to examine her on. Mr. Litwin is unfortunately seeking a legal conclusion on these issues.

MR. LITWIN: If she doesn't have an understanding, I am happy to move on.

ARBITRATOR BIENVENU: I think it goes to weight. You can ask the question.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Again --

A. Let me be very clear, I am not an antitrust expert. She's talking about unilateral decisions made under processes established by ICANN. Those might or might not be monopolistic behaviors. I have to know the circumstances. I don't read those two sentences as saying the same

thing.

Q. Okay. When Ms. Garza writes that, "ICANN should create rules for fostering a competitive environment to the greatest extent possible," what do you understand "to the greatest extent possible" to mean?

A. I would go back and look at ICANN's bylaws and articles of interpretation to parse that, which is that where practical and feasible, consistent with the global public interest as identified through policy development processes.

Q. Is it possible that what Ms. Garza's saying here is that where ICANN is faced with a decision where one outcome may promote competition and an alternative may harm competition, that ICANN should err on the side of promoting competition because antitrust laws have certain blind spots when dealing with dominant entities?

MR. ENSON: Mr. Chairman, Ms. Burr cannot answer or speculate about what Ms. Garza meant in 2008 with the use of that phrase. Ms. Garza wrote it, not Ms. Burr.

ARBITRATOR BIENVENU: I'll allow the question. I believe it goes to the weight of the resulting evidence, but I'll allow the question.

Ms. Burr is a very sophisticated witness with intimate knowledge of ICANN and its provenance. I'll allow the question.

MR. ENSON: Thank you, your Honor.

Q. BY MR. LITWIN: Ms. Burr --

A. If you would, just give me a moment here.

Q. Sure.

A. To me this letter is really about pressures on trademark owners who will feel compelled to register in new gTLDs and that ICANN should analyze that issue, the trademark issue, and proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD.

To me what this letter is about is -- it's possible that new top-level domain operators will be able to impose costs on trademark owners who feel compelled to protect their marks, and you need to do this analysis before you proceed with new gTLDs.

Beyond -- this is in a very particular context, and I have to respond to it in the context in which it was written.

Q. Okay. Let's look at this from another angle. So if you could turn to Tab 6 in your

binder, and this is a document called the "Rationale for Board Decisions on Economic Studies Associated with the new gTLD Program."

Do you see that?

A. Yes.

Q. And these are the explanatives of Board resolution that the Board issues from time to time to explain why it took certain actions; is that a fair statement?

A. I actually don't know what this document is. Could you give me a little bit more?

Q. Sure.

A. Could somebody tell me in what context or what this was attached to?

Q. I can tell you that -- I'll represent to you, Ms. Burr, that we downloaded it from ICANN's website, and I'll also represent to you that even though it is undated, it was issued in 2011, which we know from the web address from it.

And you'll see, if you look at Page 3, that refers to events that took place in 2009 and 2010 and was issued -- well, I won't testify to why it was issued, but I would direct your attention to Page 8, which is entitled "Board Determinations."

And there -- and the Board states that,

"ICANN's default position should be to foster competition."

Do you see that?

A. "As opposed to having rules that restrict the ability of gTLDs to innovate."

Q. Correct. I just want to ask this question again. Because ICANN's default position, according to the Board, should be to foster competition, that where ICANN is faced with a choice, one of which may promote competition, the other which may harm competition, ICANN should act in conformity with its default position to foster competition; is that a fair statement?

A. So this is talking about a default position to allow the introduction of new gTLDs, set a table where competition can thrive through -- and innovation through the addition of new gTLDs.

I would read this also in the context of other provisions of ICANN's bylaws that require to rely on market mechanisms in the same -- you just can't take this out of -- I mean, yes, foster competition. Does that mean that ICANN should act like a regulator? No. But it should make a choice to allow competitive forces to go out and battle it out and introduce innovation.

Q. But what I'm asking is that where ICANN faces a choice, and we have already established that you are not aware of any instance where ICANN, in fact, has asked the advice of a competition regulator and ICANN has to make a choice, isn't it fair to say, based on what we have seen, that its default position should be to make the choice that promotes competition?

A. ICANN has -- ICANN must operate consistent with the community-developed policies. I had not seen this before. I don't know everything that it goes through. I feel like I am speculating based on one position. But basically this is consistent with my view that in all cases, the point is to allow an environment in which competition can take place.

Q. Okay. Turning back to Page 6 of Ms. Garza's letter.

ARBITRATOR BIENVENU: Mr. Litwin, I am sorry to interrupt. We are beyond the point at which the agenda provided you with a break for our second break. And for planning purposes, I should mention that, according to the administrative secretary, you have reached and are a little bit beyond your estimate of three hours for the cross.

So I don't want to break your flow, but please bear this in mind as you proceed.

MR. LITWIN: Thank you, Mr. Chairman. I am almost done here.

Q. So, Ms. Burr, are you back on Page 6 of Ms. Garza's letter?

A. I am now, yes.

Q. I think I recall that you said that DOJ said that -- you know, opined that ICANN should consider competition as part of its evaluation of each new gTLD application; is that fair?

I'll just turn your attention to right above the Number 2 point heading on Page 6. It refers to the evaluation of each new gTLD application.

A. Yes. What they are saying there is you should consider the impact of new gTLDs on trademark owners and others who have marks that they need to -- that they feel the need to protect.

Q. Okay. Now, the next section of Ms. Garza's letter is captioned, "ICANN should revise its RFP process and the proposed registry agreement to protect consumers from the exercise of market power."

Do you see that?

A. I do.

Q. And in that section, in fact, in the first paragraph under that, Ms. Garza writes, "The RFP process should require ICANN to consider and allow objections for and retain authority to address any adverse consumer welfare effects that may arise during the new gTLD process."

Do you see that?

A. I do.

Q. So the view of the United States Department of Justice was that ICANN had and should retain the authority to address adverse consumer welfare effects that may arise during its administration of the new gTLD Program; isn't that right?

A. That is what the Department of Justice said in 2008, at the very beginning of the new gTLD process, based on the very first applicant guidebook.

Q. And that's consistent with what we looked at earlier in Section 2.3 of the bylaws that allows ICANN, in specific instances, to treat a party differently to promote effective competition, right?

A. That is what Section 2.3 says.

Q. Now, I'll direct your attention to the last page of Ms. Garza's letter under the three asterisks. She writes, "ICANN's approach to TLD management demonstrates that it has adopted an ineffective approach with respect to its obligation to promote competition," right?

A. Yes, in December of 2008.

Q. Okay. Now, when we began discussing Ms. Garza's letter, I represented to you, and I think, as you recall, that the Commerce Department had sent Ms. Garza's letter to ICANN.

Are you aware that the Commerce Department also advised ICANN back in 2008 to revise, among other things, its applicant guidebook, this first iteration of the guidebook so that ICANN could, as Ms. Garza says in her letter, "consider, allow objections for, and retain authority to address any adverse competitive welfare effects that may arise during the approval of new gTLDs"?

A. I don't have the transmittal letter from NTIA here, so I don't know if NTIA said that or simply transmitted Deb Garza's letter. I'm sorry. I don't have it in front of me.

Q. I'd like to direct your attention to Tab 3 of your binder, which is an excerpt from the

applicant guidebook, and if you could turn to page -- I apologize. The page numbers here are incredibly small -- to Pages 6 and 7, which are in the upper right-hand corner. May be easier to refer to the guidebook. It is A-11 and A-12 in the guidebook.

Do you see that?

A. Yes, I am looking at the same chart, A-11 and -12.

Q. I will represent to you this is a section from the guidebook that provides instructions on how to complete the new gTLD application, and this excerpt is taken out of Section 18, the Mission/Purpose.

Do you see that?

A. Yes.

Q. And if you turn to the next page, A-12, which is Exhibit Page 7, the guidebook states that the answers to Section 18(b) should address the following points, one of which is, "What do you anticipate your proposed gTLD will add to the current space, in terms of competition, differentiation or innovation," correct?

A. I see that, yes.

Q. And that's exactly what DOJ asked for,

that ICANN should consider in each application how it would affect competition, differentiation and innovation, correct?

A. I think Deb Garza's admonition was slightly different.

Q. Well, I will agree with you it is slightly different, but it is the same concept, right, that ICANN should consider competition concerns in connection with its approval of new gTLD applications, correct?

A. What it says, I think this is what you're referring to, is that the letter says ICANN should explicitly analyze the imposition of the possible impetus -- imposition of costs on registrants who feel compelled to register their names in the new gTLD.

Q. Well, actually, what I was referring to -- and this is on Page 2 of Ms. Garza's letter. It says, "The division makes two specific recommendations. First, ICANN's general approach to new gTLDs should be revised to give greater consideration to consumer interests. ICANN should more carefully weigh potential consumer harms against potential consumer benefits before adding new gTLDs and renewing new gTLD registry

agreements."

A. Yes.

Q. And all I am asking is that is consistent with what ICANN eventually put in its guidebook to require applicants to describe how their proposed gTLD will add to the current space in terms of competition, differentiation and innovation?

A. Yes. ICANN did ask for information in the applicant guidebook about how it would contribute to competition, differentiation or innovation, and yes, in 2008, after the first of, you know, nine versions of an applicant guidebook, the Justice Department suggested that ICANN should look harder at consumer interests and cost-benefit analysis about adding new gTLDs.

It is really about a cost-benefit analysis about new gTLDs all together. ICANN went through eight more versions of the applicant guidebook, a lot of policy development and practice around protecting consumers and trademark holders and, you know, the economic analysis that you referred me to earlier.

So yes, that's what the Department of Justice said in 2008, four years before the final applicant guidebook.

Q. And if we could just turn briefly, again, to that paragraph on Page 6 that I referred you to earlier. Ms. Garza writes, "ICANN should explicitly include this type of analysis as part of its evaluation of each new gTLD application and should proceed cautiously in authorizing new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD."

So it is not just in the general, it is in the specific, too, right?

A. And the community process calls for a different approach. The community Policy Development Process essentially said applicants should resolve contention sets among themselves, as opposed to a beauty contest.

Q. So in -- is your testimony here today that the United States Department of Justice opined on competition issues raised by the new gTLD Program and then ICANN went a different route?

A. After four more years of community development addressing a whole bunch of competition issues that are raised in this letter, did ICANN follow this letter to the -- did ICANN do everything that Deb Garza wanted them to do? I mean, I read this letter as Deb Garza essentially

saying, you know, you don't have the -- you have to work through the cost-benefits of what this is going to do to trademark holders, and then that was the motivation, and ICANN spent four more years working on that.

Q. Okay. After which they introduced the language of the guidebook that instructed applicants on how to complete 18(b), correct?

A. Yes. I saw that language as well.

Q. Right. And that section, Section 18, and 18(b) in particular is part of the nonconfidential portion of the application that ICANN posted on its website, correct?

A. Correct.

Q. So --

A. I don't know the answer to that, but I assume that.

ARBITRATOR BIENVENU: Mr. Litwin, I hate to do it, but I think there are many participants looking at their watch and wondering when we are going to take our break. I didn't want to break your flow, but I feel indebted to others.

MR. LITWIN: Mr. Chairman, if I could just indulge your time for two more minutes, I am virtually at the end.

ARBITRATOR BIENVENU: Very well.

Q. BY MR. LITWIN: So during the evaluation process, Ms. Burr, members of the global Internet community would be able to see what the applicant believed the applied-for gTLD would contribute competitively to the DNS, right?

A. Yes, if that provision was part of the public application.

Q. And that's the entire point of ICANN's obligation to act transparently, right, to post this stuff for public view?

A. It is certainly a point of ICANN's transparency commitment.

Q. Because the global Internet community needed to understand who was applying for which gTLDs and why, correct?

A. The program -- I mean -- I think the applicant guidebook speaks for itself in terms of what you're required to produce and what will be made public, and all of that was part of being as transparent as possible in this process.

MR. LITWIN: Thank you, Ms. Burr. I have no further questions. Thank you, members of the Panel, for indulging me. And to everybody else on the phone, I apologize that I went over the break

time.

ARBITRATOR BIENVENU: Thank you, Mr. Litwin.

So we will take our 15-minute break, but just before we do so, Mr. Enson, any redirect?

MR. ENSON: Yes, Mr. Chairman, not much, but we will probably need 20 minutes or so.

ARBITRATOR BIENVENU: And to my co-panelists, do you have questions for the witness before the redirect?

ARBITRATOR CHERNICK: I do not.

ARBITRATOR KESSEDJIAN: I do not. Thank you.

ARBITRATOR BIENVENU: I have a few questions. I'll ask them before your redirect, Mr. Enson, and then we'll proceed with Ms. Burr.

MR. ENSON: Very well. Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Thank you. Ms. Burr, I have two questions, very brief questions for you.

In Paragraph 23 of your witness statement, you describe ICANN in relation to competition, I believe, as a coordinator rather than a regulator.

Could I ask you to expand upon this?

THE WITNESS: Yes. So ICANN has very specific authority in the bylaws, and with respect to names, its job is to coordinate the development of policy with respect to the introduction of new gTLDs and other areas where stability and security needs of the DNS and the Internet require coordinated policy development.

So the ICANN Board, for example, and org don't make policy. The community makes policy. ICANN -- the ICANN Board gets that, accepts that policy recommendation and will adopt it, but it doesn't have policy authority itself.

And specifically in the context of the new bylaws that were adopted in 2016 in anticipation of the transition, there's a specific reference that says ICANN -- ICANN's mission is enumerated, not exemplary. So if ICANN doesn't have authority, it is not articulated in here, ICANN doesn't have the authority to do it.

And ICANN shall not regulate in certain circumstances, and it specifically says that for the avoidance of doubt, ICANN does not hold any governmentally-authorized regulatory authority.

ICANN's role is policy -- coordination of policy development and implementation.

ARBITRATOR BIENVENU: My second question relates to evidence early in your testimony, when you discussed participating as an observer in the November 2016 Board workshop.

Do you remember being asked questions about this?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And you said in looking at Page 44 of the transcript, you said that your understanding was that Afilias had received notice of the Board's decision made during this November workshop, the Board's decision not to act upon the claims regarding the various claims regarding .WEB.

Do you remember that?

THE WITNESS: Yes, and I probably misspoke a bit.

ARBITRATOR BIENVENU: Right. So my question is this: Was it your belief that Afilias had, indeed, received a notice of the decision of the Board in the course of that workshop in November 2016?

THE WITNESS: So my reference -- what I meant to say was that Afilias had received notice that because of the pendency of the accountability

mechanism -- and I think at a certain point the litigation became a CEP filed by Ruby Glen -- that a contention set had been put on hold, consistent with what ICANN always does.

The Board didn't change that. The Board just in the -- again, I didn't participate. I happened to have been in the room, but I wasn't on the Board yet. And the Board did not change, did not deviate from the standard practice, which was once there is an accountability mechanism litigation, the process goes on hold, pending resolution.

ARBITRATOR BIENVENU: Ms. Burr, are you aware as a Board member and perhaps because of your participation in this case as a witness, are you aware of the fact that it is the contention of Afilias that it was made aware of this Board decision for the first time when ICANN filed its rejoinder in this IRP, were you aware of that?

THE WITNESS: I am not aware of that. Again, the Board was simply -- agreed to continue to abide by the standard practice.

ARBITRATOR BIENVENU: So if I were to ask you, Ms. Burr, as a Board member, does it come as a surprise to you, having been a witness of the

workshop back in November 2016, does it come as a surprise to you that Afilias was never formally advised of that decision?

THE WITNESS: Well, so it is complicated because we are referring to this as a decision, where what I observed was a confirmation to continue to follow the standard practice, which was that the contention set was on hold, and I believe that Afilias was well-aware of the fact that the contention set was on hold.

Now, I don't -- if you're asking me whether Afilias was surprised to learn that the Board had been updated on the situation in the November workshop, I mean, I don't know. I don't know when they may or may not have been aware of that. But they certainly were aware -- my understanding is that they were aware throughout this process that -- that the contention set was on hold.

ARBITRATOR BIENVENU: Thank you. Forgive me. I have another question.

You have stated when you were questioned about the CCWG final report that the bylaws have precedence over the recommendations of the CCWG.

Do you remember that?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Now, what is your understanding -- and can you help us by pointing, if one exists, to a statement of the status of the CCWG report, insofar as the bylaws or their interpretation are concerned?

THE WITNESS: So the bylaws' effort took the recommendation -- and the process was over several days -- the entire recommendation, all of the aspects of the recommendation were reflected back into the bylaws, and then those bylaws, the draft bylaws were published for comment, that is my recollection of those, to make sure that they faithfully represented the input of the CCWG.

ARBITRATOR BIENVENU: Thank you. Thank you, Ms. Burr.

So, Mr. Enson, you ready for your redirect?

MR. ENSON: I am, Chairman.

ARBITRATOR BIENVENU: Please proceed.

MR. ENSON: Thank you very much.

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REDIRECT EXAMINATION

BY MR. ENSON

Q. Ms. Burr, thank you for the time you have given us this morning and --

(Discussion off the record.)

Q. BY MR. ENSON: Ms. Burr, several times in your testimony, you referred to ICANN org. What is ICANN org?

A. So we kind of think of this community at large as having a bit of a three-legged stool. So one leg is the Board. One leg is the community in the form of the supporting organizations and advisory committees, and one is ICANN the organization. When I refer to ICANN org, I mean the CEO, staff, the ICANN organization.

Q. Ms. Burr, what's your view of whether or not Board members exercise their fiduciary duties to ICANN outside of annual, regular, or special meetings?

MR. ALI: Mr. Chairman, this is Arif Ali here raising an objection.

This is redirect, and as I understand, the questions cannot be open-ended in a way which Mr. Enson is presenting.

ARBITRATOR BIENVENU: Mr. Enson, I think

Mr. Ali has a point. Perhaps you can direct the witness to the part of her cross-examination about which you wish to ask a clarifying question.

MR. ENSON: Sure.

Q. Mr. Litwin, Ms. Burr, asked you questions about ICANN Board member fiduciary duties, correct?

A. Yes, he did.

Q. Okay. And he also asked you about certain Board meetings, correct?

A. Correct.

Q. And he asked whether the Board is able to take actions and make decisions in and out of certain types of Board meetings, correct?

A. Yes.

Q. So what's your view of whether a Board member must be within an annual, regular, or special meeting in order to exercise his or her fiduciary duties?

MR. ALI: Objection. Sorry, Eric, but you have just done the same thing. This goes beyond the customary practice for how redirect should be conducted, Mr. Chairman.

ARBITRATOR BIENVENU: I'll allow the question.

THE WITNESS: I believe I have an

obligation to exercise my fiduciary -- respect my fiduciary obligations to ICANN in everything that I do related to ICANN.

Q. BY MR. ENSON: Thank you, Ms. Burr.

I want to talk a little bit about the redrafting, or the revising, I should say, of ICANN's bylaws. Was the revising of the ICANN bylaws in 2016 that you were involved in, was that in connection with the new gTLD Program?

A. No, it was several years after the new gTLD Program had launched.

Q. And would you --

Kelly, would you put up Exhibit C-11, and in particular Page 28.

ARBITRATOR BIENVENU: Is that a document in the document -- in the witness bundle, Mr. Enson?

MR. ENSON: It is. It is. It is the bylaws. I just have different page numbers than Mr. Litwin does.

ARBITRATOR BIENVENU: It is in Tab 2.

MR. ENSON: It is 4.3(o), which is Page 28 of the exhibit. I believe it's --

ARBITRATOR BIENVENU: We are familiar with the provision.

Q. BY MR. ENSON: Ms. Burr, were you involved in the drafting of this particular provision?

A. Yes, I was.

Q. Sorry, go ahead.

A. I was involved in Section 4, Article 4.

Q. Would you describe for us what is set forth here in Section 4.3(o)?

A. 4.3(o) is a statement of the authority of the IRP Panel, and it includes the three provisions that had been in the bylaws for some time, which is to dismiss -- actually, that may have been a new one, declare whether covered actions constituted an action or inaction that violated the articles.

There was also an existing authority to stay actions or decisions, and we then added a few additional provisions relating to, for example, the PTI, determining the shift of IRP costs and expenses was actually moved from a different part of the section.

So this was an attempt to gather the authority of the Panel and articulate the full authority of the Panel.

Q. Is Section 4.3(o) an exhaustive listing of the IRP Panel's authority?

A. Of the authority which is binding on

ICANN, yes.

Q. Mr. Litwin spent a fair amount of time with you with respect to Ms. Garza's 2008 letter.

Do you recall that?

A. Yes, I do.

Q. Do you have any idea the level of familiarity Ms. Garza had of ICANN in 2008?

A. I really don't have any idea of her familiarity with it.

Q. Do you know whether ICANN commissioned any economic studies to evaluate some of the issues set forth in Ms. Garza's letter?

A. Yes. ICANN did evaluate a study, I think along the lines that was discussed in Ms. Garza's letter. Over time that study evolved a bit, but that paper that Mr. Litwin showed before that discusses the -- was the basis for ICANN's decision -- I can't remember which tab it is, Tab 8 or 6, sorry -- lists a bunch of the work that was done there.

Q. Is it Tab 6, Ms. Burr?

A. Yeah, and there are -- the economic studies are outlined in that on Page 4.

Q. Ms. Burr, in your testimony you referred to the white paper several times.

Would you just explain for the Panel what the white paper is?

A. Sure. In 1997 -- '6, really, when the cooperative agreement between Network Solutions and the National Science Foundation and a contract between the University of Southern California Information Sciences Institute and DARPA, the Defense Advanced Research Project Agency, which had provided initially the funding, but subsequently the oversight for the work that was being done on the Internet, those contracts were coming to the end of their terms, but the National Science Foundation and DARPA had indicated these -- the project was no longer a research project and that they did not intend to renew the contracts.

At that time the Clinton administration, like governments around the world, was working on a sort of policy statement on global electronic commerce. One of the things that we heard quite a lot about was the Domain Name System, the need to internationalize but maintain private-sector management of the system.

There was a proposal on the table that those of us who were working in the administration heard a number of concerns about. So we issued

essentially what we called the green paper. Here's how we propose to handle this, how we propose to transition this system into the private sector management, tell us what you think.

And we got thousands of comments from around the world, and we took those comments, and we turned the green paper into a white paper, which was the Clinton administration's policy statement with respect to the process to transition coordination management of the Domain Name System out of the government into the global private sector.

Q. And a copy of the white paper's attached as an exhibit to your witness statement, correct?

A. I believe so.

Q. Final question, Ms. Burr. Are you aware of ICANN ever taking affirmative action to block potentially anticompetitive activity or transactions?

A. No. As I said, I really believe that, you know, ICANN's obligation with respect to competition is to create a table in which -- and to coordinate the development of policy under which competition can emerge. But I am not aware of ICANN blocking something.

I am just trying to think, and in truth, I mean, as I have said, ICANN -- you know, competition law, as we have talked about, is highly -- requires a high degree of expertise. There's a lot we don't know about these markets, and the view always was that competition law and competition authorities would provide a check on the behavior of the organization and the players that were valuable.

MR. ENSON: Thank you very much for your time, Ms. Burr, for your time today.

Mr. Chairman, those are my questions. I thank you for the opportunity.

ARBITRATOR BIENVENU: Thank you, Mr. Enson.

Ms. Burr, there is a sequestration order applicable to fact witnesses that extends to a prohibition to communicate with other witnesses in this case whose testimony has not yet been heard.

So in accordance with that order, I am instructing you not to discuss your testimony or this case with other fact witnesses who have not yet testified before us.

THE WITNESS: Absolutely.

ARBITRATOR BIENVENU: Having said that, I

know that my co-panelists join me, Ms. Burr, in thanking you for your evidence and for accepting to participate in this IRP. We are very grateful.

THE WITNESS: Thank you, and thank you for your service. So I'll just leave?

MR. ENSON: Yes, I think so.

MR. LITWIN: Thank you very much, Ms. Burr.

ARBITRATOR BIENVENU: Very well. Can we bring in the next witness, Ms. Samantha Eisner?

(Discussion off the record.)

ARBITRATOR BIENVENU: May I ask counsel for the parties who will be introducing Ms. Eisner and who will be conducting her cross-examination?

MR. WALLACH: This is David Wallach for Jones Day for ICANN. I will be introducing Ms. Eisner.

MR. LITWIN: Mr. Chairman, this is Ethan Litwin again from Constantine Cannon. I will be doing the cross-examination of Ms. Eisner.

ARBITRATOR BIENVENU: Welcome to you, Mr. Wallach.

Ms. Eisner, my name is Pierre Bienvenu. I serve as Chair of the Panel in this case. My co-panelists are Catherine Kessedjian,

participating from Paris, and Mr. Richard Chernick in Los Angeles.

First of all, welcome.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: You have contributed a witness statement to this Independent Review Process dated January 16, 2019, correct?

THE WITNESS: Yeah.

ARBITRATOR BIENVENU: In that statement at the end you affirm that the content of your statement is true and correct to the best of your knowledge and belief.

Do you see that?

THE WITNESS: It is not on the screen. May I open the packet of documents? I do confirm that I submitted that in the declaration.

ARBITRATOR BIENVENU: Very well. May I ask you, Ms. Eisner, in relation to the evidence that you will give today to likewise solidly affirm that it will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Wallach, your witness.

MR. WALLACH: Hello, Ms. Eisner, and good

afternoon. I have only a couple of very brief questions to ask before I will turn the floor over.

First, is the information in the witness statement, which hopefully you have on the screen in front of you, true and correct to the best of your knowledge?

THE WITNESS: Yes.

MR. WALLACH: Okay. Could we turn to the final page of the witness statement on the screen, please.

Is that your signature that appears on that page?

THE WITNESS: Yes, it is.

MR. WALLACH: Is there anything in your witness statement that you would like to correct or amend in any way?

THE WITNESS: No, there's not.

MR. WALLACH: I have no further questions.

ARBITRATOR BIENVENU: Thank you, Mr. Wallach.

Mr. Litwin, your witness.

MR. LITWIN: Thank you, Mr. Chairman.

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BY MR. LITWIN

Q. Ms. Eisner, can you please confirm that you have not looked at any of the documents in the exhibit bundle that was provided to you?

A. Yes, I can confirm. It is still sealed.

Q. Can you please open the bundle on camera now, please?

MR. LITWIN: Again, Mr. Wallach, do you want to open yours on camera as Mr. Enson did?

MR. WALLACH: Yeah.

Q. BY MR. LITWIN: Ms. Eisner, from time to time during our discussion today, I will direct your attention to a document. When I do that, I will refer to the tab that's reflected in your binder for that document and the binder that you have in front of you right now, and you will see that, generally on the bottom right-hand corner of the page, we have given each page in the exhibit a unique page number. So when I direct you to a particular page, I will be referring to that particular page number that we have provided, okay?

A. Yeah.

Q. Thank you. Ms. Eisner, you are a deputy general counsel of ICANN; is that right?

A. Yes.

Q. Do you have particular areas of responsibility as deputy general counsel for litigation or something like that?

A. It is not appended to my title, but I am responsible for a couple of different areas within ICANN. I lead the support to our multistakeholder strategic initiative team as well as our global stakeholder engagement team and our governmental engagement team.

As part of that work to the multistakeholder strategic initiative team, I work on many special projects that interact with the community.

Q. And how long have you been in this role?

A. I have been in this role since 2014.

Q. How many lawyers are in the ICANN legal department?

A. I believe we have 11 or 12.

Q. Do you have regular department meetings?

A. Yes.

Q. And is it fair to say -- and please do not discuss the specifics of any of the discussions of any of those meetings -- that you discuss sort of the legal issues that the department is dealing

with at that time and provide status updates on that; is that fair to say?

A. It depends -- in general, yes. We often don't go into great detail about specifics because we each have our own lines of discussion. So we would speak about it enough to have some general level of understanding amongst the deputies within the department. We might not go into as much detail with an all-hands departmental meeting. But then each deputy also has their time with the general counsel where you have much more in-depth status discussions.

Q. Okay. You state in your witness statement that you joined the IRP Implementation Oversight Team -- which I will for convenience's sake refer to as the IOT today because that's quite a mouthful -- in November 2015; is that the right date?

A. I believe so, yes.

Q. Okay. And you joined as a staff liaison, correct?

A. Correct.

Q. The IOT was the committee and still is the committee tasked with drafting the rules and procedures and conduct for the IRP, right?

A. Yes.

Q. Please. In fact, ICANN's bylaws explicitly provide for the establishment of the IOT; is that right?

A. Yes, the bylaws that went into effect in October 2016.

Q. So if you could draw your attention to Tab 2 in your binder and to Page 15 of that exhibit, you'll see at the bottom Section 4.3(n)(i), which it is continued on to the next page, Page 16. This is, in fact, that paragraph that provides for the creation of the IOT, correct?

A. Correct.

Q. And what it says is that the IOT should be "comprised of members of the global Internet community"; is that right?

A. Yes. In consultation --

Q. In consultation with what? You broke up.

A. The supporting organizations and advisory committee.

Q. And the IOT, once the Standing Panel is established, the IOT "in consultation with the Standing Panel, shall develop clear published rules for the IRP"; is that right?

A. Yes, that's what the bylaws say.

Q. And those rules of procedure need to conform to international arbitration norms, correct?

A. Yes.

Q. Now, the Standing Panel, as of today, has not yet been established, correct?

A. That's correct.

Q. So the IOT did not follow the bylaws provision that says that, "Once the Standing Panel is established, the IOT in consultation with the Standing Panel, shall develop" the rules of procedure; is that right?

A. Well, there wasn't yet a Standing Panel to coordinate with.

Q. The Standing Panel -- the establishment of the Standing Panel is also entrusted to the IOT, correct?

A. No, it is not.

Q. Is the IOT right now processing applications for the Standing Panel?

A. No, it's not. ICANN is in the process of receiving those applications and is also in the process of coordinating with the more general community through the leaders of the supporting organizations and advisory committees to finalize

how those will be processed.

Q. So was there any discussion with the IOT whether or not you should wait for the Standing Panel to be created before developing rules of procedure?

A. No, there was not. The IOT was actually kicked into gear before the bylaws went into effect, so that they are -- there could be work done to get supplemental procedures in place that would conform with the new bylaws, recognizing that there was always the opportunity to update those once a Standing Panel was in place, and we needed to go back -- or if we needed to go back over them with a Standing Panel.

Q. Okay. Now, the bylaws provide that the rules of procedure shall conform with international arbitration norms. So is that like the ICDR rules?

A. That surely is one example, yes.

Q. And the ICC rules, JAMS rules, these are all norms of international arbitration, right?

A. Without being an international arbitration provider, I assume so -- I am not a practitioner of international arbitration, but yes, I assume so.

Q. So I'll represent that I have been a frequent visitor to the IOT's Wiki page, and there

it shows that the IOT was provided with ten or so examples of arbitration rules.

Do you recall that?

A. Yes.

Q. And that was for your reference in drafting the rules of procedure, correct?

A. In part, yes.

Q. The U.S. Rules of Civil Procedure, however, are not a norm of international arbitration, are they?

A. Again, without being a practitioner of international arbitrations, having done litigation in the past, civil procedure rules go to our federal court system and don't govern in arbitration, right.

Q. And I am very much in the same boat as you are, Ms. Eisner. I spend most of my time in federal court.

At least I understand arbitration to be an alternative dispute resolution to that federal judicial process; is that fair to say?

A. Yes.

Q. In August of 2016, Afilias' general counsel, Mr. Scott Hemphill, wrote to ICANN's Board regarding Afilias' concern about the resolution of

the .WEB contention set. ICANN posted the letter to its website.

Were you aware of Afilias' complaint at the time?

A. I don't recall.

Q. Do you recall the first time you became aware that Afilias had complained about the resolution of the .WEB contention set?

A. It likely would have been in that period of 2016, in that later period of it, but I don't recall specifically what brought it to my attention.

Q. Are you aware that ICANN sent a questionnaire to Afilias, VeriSign, NDC and, as we heard today, Neustar, in September of 2016 concerning Afilias' complaint, were you aware of that?

A. No, I'm not.

Q. So you were not involved in the drafting of that questionnaire?

A. I was not.

Q. Do you know who was?

A. No, I don't know who was.

Q. We have also heard about a November 3rd, 2016, Board workshop session where Afilias'

complaints were allegedly discussed. I'll represent to you that that meeting -- at least the testimony is that meeting took place in Hyderabad. Are you aware of that meeting?

A. I am aware of the Board workshop that took place in Hyderabad. I don't have specific recollection of the specific subject matters that were discussed at that meeting.

Q. Did you attend that meeting?

A. Yes. I was in Hyderabad, and I participated in many, if not all, support workshop sessions.

Q. Was there a Board workshop session that specifically concerned Afilias' complaint regarding the resolution of the .WEB contention set?

A. I don't recall.

Q. Do you recall anything about -- and without giving me any specifics, just a yes-or-no question, Ms. Eisner, do you recall any specifics about a Board workshop session in November of 2016 where Afilias' complaints about the resolution of the .WEB contention set were discussed?

A. I really don't recall specifics about it. Our Board workshop sessions are basically done by one- to two-hour blocks, and they go from

discussion to discussion to discussion, and so I -- without having any notes in front of me or anything, and it is something -- it is a meeting I haven't thought about in over three years, so I really don't remember.

Q. Just for my edification and the Panel's edification, Ms. Eisner, when you say the workshops are organized into one- or two-hour blocks, is each block devoted to a particular subject or to a group of subjects?

A. Typically each block would be reserved for a particular topic.

Q. On June 18, 2018, Afilias initiated the cooperative engagement process with ICANN concerning its complaints about the resolution of the .WEB contention set.

Were you aware in June of 2018 that Afilias had initiated a CEP?

A. I don't recall being aware at the time.

Q. Now, ICANN publicly discloses on a chart who has initiated an accountability mechanism; is that right?

A. Yes.

Q. So on that chart published after June 18th, there would be a section for CEPs, right?

A. Yes.

Q. Yes. And Afilias' name would have been listed under it, correct?

A. I presume it would have been, in accordance with ICANN's general practice of publishing that.

Q. Well, is it a practice -- let me rephrase.

Was it your practice to review those charts from time to time to keep yourself informed about who had initiated accountability mechanisms?

A. No, it is not my practice.

Q. Were -- was the status of accountability mechanisms discussed in your legal department meetings?

A. At times they were. Clearly when we have IRPs going or other things of a large interest, I could imagine we would discuss them.

Q. To the best of your recollection, when did you become aware that Afilias had requested CEP regarding the -- its complaints about the resolution of the .WEB contention set?

A. I'm really not sure, though I would say it was some point in that latter half of 2018, but I don't know when it occurred.

Q. Now, the CEP process is a process that's

voluntarily invoked by a party prior to filing an IRP; is that correct?

A. Yes.

Q. And the stated purpose of a CEP is to resolve or narrow issues that are contemplated as issues that may be brought in an IRP; is that right?

A. Yes.

Q. And the IOT from time to time has, in fact, discussed the CEP and at least appears it is on its to-do list to develop standards for the CEP, correct?

A. Yes. It was a responsibility it took over from a different community group.

Q. Now, if a complainant does not participate in the CEP in good faith and ICANN prevails in a subsequent IRP, the complainant is liable to pay ICANN's legal fees; is that correct?

A. I believe that's correct. I'd have to go back and look physically at the documents, but I believe that's correct.

Q. Okay. Well, I'll represent to you that's my understanding. And if my understanding's correct, would you agree with me that's a pretty strong incentive to initiate CEP prior to filing an

IRP; is that right?

A. Without a doubt, yeah.

Q. Yeah. So if you understood that someone had initiated a CEP, is it fair to say that you would also understand that that party was considering filing an IRP in the future?

A. Yes.

Q. Now, I'll represent to you that ICANN terminated the CEP that Afilias initiated on June 18 later that year, on November 13. Were you aware that ICANN had terminated CEP on November 13th?

A. I don't recall specifically about that. There was a period of time around there that I was on vacation, too. I took a couple of weeks of vacation after our ICANN meeting. So I can't recall when I was back in the office.

Q. So that would have been the second half or middle of November 2018; is that right?

A. My vacation?

Q. Yes.

A. Yes. It would have been directly after the end of the ICANN meeting, and we traveled for a period of at least ten days after that.

Q. Were you aware that on August 28th, 2018, in the context of its CEP, Afilias offered to

provide ICANN with a draft of its IRP request?

A. No, I was not aware. The CEP discussions are considered confidential, and we also consider them confidential within ICANN. So as I am not on the team that participates in those, I don't participate in those discussions.

Q. Okay. Now, I'll represent to you, Ms. Eisner, and I think you are aware of this because of what you write in your witness statement, that Afilias, in fact, provided this draft IRP request to ICANN on October 10th, 2018.

Were you aware of that?

A. I became aware of that.

Q. When did you become aware of that?

A. I don't -- I don't recall when I became aware of it. Can I refer back to my witness statement?

Q. Absolutely. It is Tab 1 in your binder for reference, Ms. Eisner.

A. Thank you. Thank you. I wanted to refer back because I thought I heard you say that I had mentioned that in my witness statement, but I didn't recall mentioning that.

Q. I think you mentioned that you stated you were not aware at the time; is that fair to say?

A. Yes, that's correct. I was not aware at the time.

Q. Okay. And are you aware that three weeks, approximately 19 days after receiving Afilias' draft IRP request, ICANN terminated CEP without engaging in any substantive discussion of Afilias' claims?

A. No, I am not aware of the substance of the conversations between ICANN and Afilias about the CEP.

Q. So in general, based on your work on the CEP in the context of the IOT, is it appropriate for ICANN to refuse to engage on the merits of a claim during CEP while at the same time dragging that CEP out for five months?

A. Without knowing the specifics of the conversation, I really can't testify to that.

Q. Okay. The IOT, as I understand, had a meeting in June of 2018, but then did not hold any meetings in July or August or September of 2018; is that correct?

A. I know that we had difficulties bringing people together for a quorum. I don't know the exact dates that we did or did not have meetings, but there was a significant period of time that we

didn't have meetings.

Q. Is it fair to say that when the IOT has a meeting, the transcript of that meeting is published on the IOT Wiki page?

A. Yes.

Q. I will represent to you that there are no transcripts on the IOT Wiki page for either July, August or September of 2018. If my representation is correct, that would mean that the IOT didn't meet during those months; is that fair to say?

A. Yes.

ARBITRATOR BIENVENU: Mr. Litwin, sorry to interrupt you, but we have come to the end of the scheduled time for the hearing today. As you know, one Panel member is sitting in Paris, so it is quite late for that Panel member.

So I think we will break.

Ms. Eisner, you are not to discuss your evidence with anyone until you are completed giving your evidence. So I will instruct you not to do so.

We will resume tomorrow morning at 8:00 a.m. Pacific and continue with your cross-examination, Mr. Litwin.

MR. LITWIN: Thank you very much,

Mr. Chairman.

MR. ALI: Mr. Chairman, if I can raise a point. This addresses --

(Discussion off the record.)

MR. ALI: This is a point you now raised a couple of times referring to the status of the CCWG-Accountability.

ARBITRATOR BIENVENU: Sorry, I cannot hear you, Mr. Ali. Can you speak a bit louder?

(Discussion off the record.)

MR. ALI: Mr. Chairman, there's a point you have raised a couple times, actually a question you put to, I think to us in -- during opening presentations and then also to Ms. Burr, which is the status of the CCWG-Accountability's reports. And just as an FYI, and I don't know how you'd like to handle this, but the CCWG-Accountability reports were approved by the Board on 10 March 2016.

Now, that's not a document that is on record in terms of the Board resolution, but the Board resolution followed by what are known as Board rationale is associated with the approval of all the CCWG-Accountability and its reports and its transmissions to the NTIA.

So if that's a document that the Panel

would be interested in, we can try to agree with the other side that it be made part of the record, given that this is a matter that seems to be of interest to the Panel.

ARBITRATOR BIENVENU: Yeah, thank you. That's helpful, especially if it addresses the point I have raised.

I see Mr. LeVee -- Mr. LeVee, do you want to clarify?

MR. LeVEE: All I would suggest, Mr. Chairman, is that these types of things ought to be addressed by counsel separately after the hearing as opposed to proposing something to the Panel that then should be discussed among the lawyers.

ARBITRATOR KESSEDJIAN: Particularly because the witness is still there, and I am not sure she should hear all we are saying right now.

MR. LeVEE: I think this is something the lawyers should be addressing privately and not having argument about or even suggestions as to what is or is not appropriate in the record.

ARBITRATOR BIENVENU: Okay. So that was, I think, something that Mr. Ali referred to. So why don't you take it up together and see if

something comes out of your consultations.

Thank you all, and we will resume tomorrow morning.

(Whereupon the proceedings were concluded at 1:05 p.m.)

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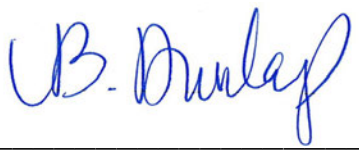

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EXHIBIT Altanovo-4

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD., Claimant,	)	
vs.	)	ICDR Case No. 01-18-0004-2702
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	

VOLUME III

ARBITRATION

AUGUST 5, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465534

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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WEDNESDAY, AUGUST 5, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME III (Pages 424-586)

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INDEX OF EXAMINATION
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CALIFORNIA, CALIFORNIA, AUGUST 5, 2020

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ARBITRATOR BIENVENU: Let me begin by wishing everyone welcome to Day 3 of this hearing. We are a few minutes past the hour, and that's because of me. I had a problem joining the meeting.

Are there any preliminary matters that anyone would wish to raise before we continue with the cross-examination of Ms. Eisner?

MR. ALI: Yes, Mr. Chairman. This is Arif here. Good morning and good evening to everyone.

The matter we would like to raise is one regarding which I just sent a message literally a couple minutes ago, so I apologize for the tardiness, but it is the matter of three documents we would like to add to the record, one of which I mentioned yesterday, mainly the Board resolution associated with the admission -- the Board's acceptance of the CCWG and its report and transmittal to the NTIA.

ARBITRATOR BIENVENU: Mr. Ali, sorry to cut you off. Is this something you have had occasion to discuss with your friends opposite?

MR. ALI: Yes. We transmitted the

documents with a request that the parties agree to have the documents admitted to the record by agreement.

Amici responded that they objected -- can you hear me?

ARBITRATOR BIENVENU: Yes.

MR. ALI: And Mr. LeVee sent a message this morning saying that ICANN endorses and supports the Amici's position objecting to the admission of the documents.

My proposal, sir, is that we address this matter perhaps after Ms. Eisner's testimony, and indeed we can do so at the end of the day if it is not too much of an imposition on Professor Kessedjian, so that we don't take up time and keep Ms. Eisner waiting.

ARBITRATOR BIENVENU: Let's do that. In the meantime, we'll have occasion to read your email message.

Any other preliminary matter?

MR. LeVEE: Mr. Chairman, I apologize for cutting you off. I just wanted to say we have a written response that we are preparing this morning, and we will send that as well. So the Panel can either decide during the break on its own

or it can take a hearing at a convenient time.

ARBITRATOR BIENVENU: That's helpful. Thank you for mentioning this. Let's push it off to the end of the day.

In the meantime, we will have occasion to read the parties' written submissions on the point.

MR. LeVEE: Thank you so much.

MR. ALI: Mr. Chairman, we haven't made a written submission. We were proposing oral argument just to deal with the matter very promptly in the context of the hearings.

But if Mr. LeVee is preparing a written response, then I suppose we should make a formal written application to the Panel, which you could then respond or he puts in his position and then we respond.

ARBITRATOR BIENVENU: Let's let Mr. LeVee put in his position and let us look at the request and the objection to the request, and rest assured that you'll have occasion to address us before a decision is made; is that all right?

MR. LeVEE: It is. The reason that I indicated that we would have a written response is that Mr. Ali sent me a several-paragraph statement yesterday. I thought he was sending me -- I have

been standing here, so I don't have my laptop in front of me. So I did not appreciate that he had only sent a request. Yesterday he sent a fairly thorough request, and if he forwards that to the Panel, I was planning to respond to that.

ARBITRATOR BIENVENU: Okay. Why don't you look at what he sent us and let us look at the request before we, perhaps, make more of something that can be dealt with summarily.

MR. LeVEE: Thank you.

ARBITRATOR BIENVENU: Good with you, Mr. Ali?

MR. ALI: Yes, Mr. Chairman. I went mute and dark. Yes, excellent.

ARBITRATOR BIENVENU: Any other preliminary matters?

MR. LeVEE: No.

MR. ALI: Nothing from claimant.

ARBITRATOR BIENVENU: JD, please bring back Ms. Eisner.

Ms. Eisner, good morning. This is Pierre Bienvenu, Chairman of the Panel. How are you?

THE WITNESS: I am doing very well today. How are you?

ARBITRATOR BIENVENU: Excellent.

Ms. Eisner, you will be testifying under the same solemn -- not solid, for the stenographer -- solemn affirmation as yesterday?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Litwin, you are prepared to continue your cross-examination?

MR. LITWIN: Yes.

ARBITRATOR BIENVENU: Please proceed.

MR. LITWIN: Thank you, Mr. Chairman.

CROSS-EXAMINATION (Cont'd)

BY MR. LITWIN

Q. Good morning, Ms. Eisner. Can you hear me okay?

A. Yes, I can. Can you hear me?

Q. I can. I just wanted to set the stage on where we left off yesterday. We had just established, and I just would ask if you recollect that the IOT had not held any meetings during the months of July, August and September 2008?

Do you recall that?

A. Yes.

Q. And that the IOT's meeting on October 9, 2018, was the committee's first meeting in nearly four months, correct?

A. Yes. There is a likelihood that we were -- we had times that we convened but did not have a quorum. So there might have been a request to continue items on list or take matters through with emails.

So we had likely had times when people had talked, but there was no decisional discussion or anything, and they were not treated as regular meetings because they were not a quorum.

Q. So if there were a nonquorum meeting or an email discussion among IOT members, those emails and transcripts would have been posted to the IOT's Wiki page, correct?

A. So the emails would have been on the probably available mailing list. We would not have continued with the meeting -- we would never have convened a meeting for discussion if it was not a quorum. So there wouldn't be transcripts of that.

Q. Okay. So the first substantive meeting where you discussed the proposed interim rules in detail would have been -- the first one after June 2018 would have been on October 9; is that correct?

A. Based on your representation of the status of the Wiki page, yes.

Q. Okay. So were you aware that there were

only six other people in addition to yourself that participated on October 9, 2018?

A. I don't recall the exact attendee list, but I know that we had very small numbers of attendees, so that would not surprise me.

Q. Okay. And two of the people who attended on October 9 were Kate Wallace of Jones Day and Elizabeth Le of ICANN's in-house legal department, correct?

A. If they were listed among the attendees, yes.

Q. And also Mr. McAuley, David McAuley, who was the chair of the IOT, attended that meeting, correct?

A. Again, if he was recorded as an attendee, yes.

Q. So if you accept my representation that there were seven participants, including yourself, by my count, that is four participants who were either ICANN lawyers or -- well, let me just ask this before I do that.

Mr. McAuley was employed by VeriSign as of October 9, 2018, correct?

A. As far as I am aware.

Q. So going back to my question, by my math,

there were seven attendees, four of whom were either ICANN lawyers or an employee of VeriSign; is that right?

A. If you're referring to Liz, me and Kate from ICANN and then David, yeah.

Q. So I'd like to direct your attention to Tab 3 of your binder, and this is the transcript as it appears on the IOT Wiki page for the October 9, 2018, meeting.

A. Okay.

Q. Can you please turn to Page 14 of that transcript?

A. With your unique numbers?

Q. Yes, my unique numbers. It is Page 13 of the transcript, but Page 14 as we have marked it.

A. Thanks so much.

Q. So you'll see in the middle of the page that a gentleman named Bernard Turcotte is speaking?

A. Correct.

Q. Who is Mr. Turcotte?

A. He is a contractor that in this instance that was employed by ICANN to help facilitate the work of the IOT.

Q. So it's someone who was facilitating the

work of the IOT; he was not a member of the IOT, correct?

A. Correct.

Q. Now, is it fair to say that during this October 9 meeting, Mr. Turcotte was reading the text of various rules to the attending IOT members?

A. Yes.

Q. Now, on Page 14 he's reading the text of what was then the current draft of Rule 7, consolidation, intervention and joinder, correct?

A. Yes.

Q. As Mr. Turcotte reads, Rule 7 provides that, quote, "Requests for consolidation and intervention or participation as an amicus are committed to the reasonable discussion of the" -- it says "properties officer," but I am assuming that's "procedures officer"?

A. Yes. Just so you know and the Panel knows, we were using an automated transcription service. So you will see random items in the transcript that you have to kind of piece together.

Q. Yeah, we'll come to that later. I had to go back to the audio recording to make sense of it.

A. Right.

Q. But thank you for pointing that out.

So that's what Rule 7 provided as of October 9, that participation as an amicus was committed to the reasonable discretion of the procedures officer, right?

A. Yes.

Q. So if we turn to Page 15, which is the next page, and look towards the bottom of the page, it is the second-to-last paragraph, Mr. Turcotte continues, and I quote, "If the procedures officer determines in his or her discretion that the proposed amicus has a material interest relevant to the dispute, he or she shall allow the participation by the amicus curiae."

That is also what Rule 7 provided as of October 9, correct?

A. Correct.

Q. Now, that was a general rule, and there was one exception that the IOT had provided for, and that's what comes next, that if the IRP concerned a review of a decision made by what is quoted here, an underlying proceeding, the participants in that underlying proceeding would be deemed to have a material interest, and therefore, would have a right to participate, correct?

A. Correct.

Q. Now, as you look at Page 15, Rule 7 also provided that the scope of amicus participation was committed to the discretion of the IRP Panel. That's at the very bottom of the page, continuing on to the next page, yeah, Page 16, where Mr. Turcotte quotes, "The IRP Panel may request briefing in the discretion of the IRP Panel and subject to such deadlines and page limits and other procedural rules as the IRP Panel may specify in its discretion."

Do you see that?

A. Yes.

Q. Okay. Now, looking down the page, you'll see that Mr. McAuley responds first. You see where he starts speaking?

A. Yes.

Q. And he says here that he has his hand up because "I want to participate as a participant here." So he's distinguishing his role between being a participant and Chair of the IRP -- of IOT, correct?

A. Correct.

Q. He goes on, he says, "I do have a concern about this, and what I believe is that on joinder intervention, whatever we are going to call it,

it's essential that a person or entity have a right to join an IRP if they feel that a significant -- if they claim that a significant interest they have relates to the subject of an IRP and that adjudicating the IRP in their absence would impair or impede their ability to protect that."

Do you see where he says that?

A. Yes.

Q. So what Mr. McAuley is proposing here is to amend Rule 7 to provide that if an entity believes that it has a significant interest to protect and that interest relates to the subject of an IRP, then that IRP would have a right to participate in the IRP; is that what you understood?

A. Yes.

Q. Now, Mr. McAuley goes on to say on Page 16 that "It's important to provide this right to participate," quote, "especially given the finality of these kinds of proceedings. It's my view that intervention, whatever term we are using, needs to capture that."

Do you see that?

A. Yes.

Q. So essentially Mr. McAuley is saying if

you have a significant interest and that interest is relevant to an IRP, and given the Panel's authority to issue final and binding decisions that affect that interest, you need to be able to participate in the IRP; is that fair?

A. That's my understanding of what he was saying, yes.

Q. Okay. And Mr. McAuley concludes that he would propose specific language on the, quote, "List," and that's the LISTSERV, "the group email for the entire IOT committee," correct?

A. Correct, the publicly-available list, yeah.

Q. In fact, Mr. McAuley did send an email to the IOT list on October 11, 2018, the next day, with his proposed language.

Do you recall that?

A. Yes.

Q. Okay. If you turn to Tab 4 in your binder, that is Mr. McAuley's email from October 11, 2018.

Do you recall reviewing that?

A. Yes, I do.

Q. Okay. If you could turn to Page 5 in that exhibit, which is an attachment to his email,

you'll see that Mr. McAuley has inserted what I'll characterize as a redline. I suppose this was probably Track Changes --

A. Yes.

Q. -- into the draft of Rule 7? What he writes here is that, "In addition, any person, group or entity shall have a right to intervene as a claimant where, one, that person, group or entity claims a significant interest relating to the subjects of the Independent Review Process."

And if you skip down a couple of lines, he says, "Because that entity's absence might impair or impede that person, group or entity's ability to protect that interest."

Do you see that?

A. Yes.

Q. So this is essentially in written form what Mr. McAuley was proposing the day before, on October 9, correct?

A. Right.

Q. Or two days before, sorry. Yeah, two days before, on October 9.

And what he's proposing here essentially is to broaden claimant standing; is that your understanding?

A. Yes.

Q. Okay. And the IOT discussed Mr. McAuley's proposal during its meeting later that day on October 11; is that right?

A. Yes.

Q. Okay. Turning to the next tab in your binder, Tab 5, you'll see that's the transcript from October 11, 2018; is that correct?

A. Yes.

Q. Okay. I'll represent to you that in addition to yourself, there were five other attendees at that meeting. Again, they included Kate Wallace and Liz Le of ICANN's legal department, and Mr. McAuley of VeriSign; is that correct?

A. I don't know. I would ask -- are you taking the attendees off of the recording that would appear from the electronic meeting room or based on the transcript? Because sometimes you might have attendees who would not speak during the meeting.

Q. I will represent to you that I get the participant list from -- there's a page for each IOT meeting, and it lists who attended it. Is that --

A. If you take it from there, yes.

Q. Okay. And that listing on the Wiki page indicates that you and Kate Wallace of Jones Day and Elizabeth Le of ICANN's legal department attended that meeting and Mr. McAuley attended, but there were only six attendees in that meeting.

So do you have any reason to believe that that listing is inaccurate in any way?

A. Do you have the names of the other people? I don't have any reason to believe that what was recorded on the page is incorrect.

Q. Okay. That's fair enough.

Now, during the October meeting, you responded to Mr. McAuley's proposal.

Do you recall that?

A. Yes.

Q. And is it fair to say that in general, your primary concern was that Mr. McAuley was proposing to significantly expand claimant standing; is that right?

A. I would have to look specifically when I said that I know that was a very large part of my concern. I received the text within a short amount of time before the meeting. So I probably had highlighted my biggest concern that I wanted to

raise on this. I believe I also took time to go back to more specifically look at the language.

Q. Fair enough. And do you recall that your proposal was essentially to move some of what Mr. McAuley was proposing from claimant standing down to the amicus participation standing of Rule 7?

I can direct you to Pages 14 and 15 of the transcript, if that will help.

A. Great. Thank you.

Q. That's our 14 and 15, just to be clear.

A. Yes.

So my concerns were both regarding the significant interest test and the confusion between claimant versus amicus status.

Q. Could you explain what you mean by confusion between claimant and amicus?

A. Sure. So one of the issues that we had long -- as a lasting issue, including when we were drafting the new bylaws as well as in the discussions in the IOT, that because the IOT is such a narrow process, that it is really about someone coming to ICANN and saying, "You violated your bylaws or you violated your articles in doing something." It is a very unique set of persons or

entities that would serve as claimant status. And that the IRP is not about adjudicating all of the rights -- all of the issues or disputes that might be amongst ICANN and the claimant or between other people who have interest in the proceeding.

So here what I saw was the suggestion that McAuley had raised that because someone might have an interest in the proceeding, they should be a claimant, which would also technically mean under the bylaws that they would be asserting that ICANN violated its bylaws or its articles, but that might not always be the case for someone who has an interest in a proceeding.

I think it is very important to be clear and narrow in what you mean about who is a claimant for the purposes of an efficient IRP.

Q. Okay.

A. What Mr. McAuley said is creating confusion between those lines.

Q. Right. So Rule 7 is entitled "Consolidation, Intervention and Participation As an Amicus," right?

A. I believe so, yes.

Q. Well, you can refer back to Tab 4 on Page 4 just to refresh your recollection on that.

A. Yes.

Q. So what -- if I understand you correctly, Mr. McAuley had proposed to broaden the intervention rules, and your suggestion was rather you should look to broadening the participation as an amicus rule; is that right?

A. I don't believe it was a broadening of the amicus rule. I think it was a consideration of whether or not there might be other parties that might be appropriate to consider -- deem having a material interest as opposed to leave it up to a briefing matter as to whether or not they had a material interest, but it wasn't necessarily a broadening of the amicus rule.

Because that would have been -- if we had taken, for example, his significant interest test and made that the test for amicus as opposed to material interest, that would have been a broadening, but that's not anything from the ICANN side we were considering or supporting.

Q. Okay. Well, if we can look back at Page 14 of your -- of the October 11 transcript, which is Tab 5, what you say there is, "So I think we can move that down either to amicus. So I think we can put some things into the amicus section that cover

this type of interest in a proceeding."

So you were essentially saying, "I hear what you're saying about entities with a significant interest. Let's look at moving that down to the amicus section"; is that fair?

A. I think it's more I hear what you're saying about the need for having a full and final adjudication -- having parties that are necessary to -- not necessary, but having parties that could be impacted by an IRP decision having the opportunity to participate in some way, shape or form within the IRP so that they are also going to abide by the standing -- the binding decision that's coming out of the IRP Panel.

Because that is one of the significant changes to the IRP that happened throughout this whole process, is that no longer was it just an advisory declaration that the Panel was issuing, but they are now binding precedent across ICANN. So it binds people, even those who are not part of the process.

Q. Okay. So let's look at how Mr. McAuley responded to you, and I am going to refer to the second full paragraph on Page 15, that's our 15, of the October 11 transcript.

As you helpfully previewed a few minutes ago, sometimes the transcript's a little rough. So I will represent to you that I listened to the audio recording, and I am going to read to you what I heard on the audio recording, and I'd like your reaction as to whether or not that's a reasonable and fair and accurate representation of what you recall Mr. McAuley said here.

As I heard it, Mr. McAuley said, "But if it was moved to an amicus thing, I would like to look at the language you came up with. You can tell between this and Rule 8 where I'm coming from is a competitive situation where members of contracted party houses or others who have contracts with ICANN or others that have contracts that are affected by ICANN have to be able to protect their interest in competitive situations. So I used language that largely followed U.S. rules -- U.S. Federal Rules of Procedure, but these rules are fairly -- I think, at least in common-law countries, fairly routinely accepted that someone has an interest can defend themselves because they can't look for the defendant to make their argument for them."

Is that a fair representation of what

Mr. McAuley said?

A. Yes, I believe so.

Q. Now, you proposed that instead of Mr. McAuley's -- strike that.

Now, you responded to Mr. McAuley, and you noted that time was of the essence, and I am referring you to the top of Page 16, that's our 16 in the October 11th transcript, where you state, "From the ICANN org side, we are getting very nervous that we are on the precipice of having IRPs filed for which we don't have an adequate set of procedures to meet the bylaws."

Now, as we discussed yesterday, Afilias had sent a draft of its IRP request to ICANN the day before, on October 10th.

Do you recall that conversation?

A. I recall the conversation, yes.

Q. Yeah. And now you're telling the IOT on October 11th that ICANN was, quote, "On the precipice of having an IRP filed."

Was that a reference to Afilias's forthcoming IRP?

A. No, it was not. I had -- if you go back into the record of the IOT proceedings, back in May of 2018, I had introduced to the IOT the idea of

bringing forth a set of interim rules, because we were nervous then, too, that we could be subject to an IRP because we could be subject to an IRP over anything.

And at this point, we were -- when you sit here in October, we were two years out from the passage of the new ICANN bylaws after the IANA transition. Even in May we were a year and a half out, and we were well-aware from the ICANN side that there would be great confusion if an IRP was filed under the supplementary procedures that did not align with the new bylaws.

So this concern was part of the genesis of even introducing that idea of an interim supplementary procedure note in May.

By this point, we had already -- we had been working with the IOT to get a set of interim procedures finalized and had it on our board agenda for that end of October meeting, and it was becoming very clear that if we weren't going to have a set coming out of the IOT, we then had an even longer delay.

So we had been -- from my side with ICANN, I had been working with a sense of urgency about this since at least May of 2018.

Q. Okay. Now, you state on October 11th that ICANN was on the precipice.

"Precipice" means right at the edge; is that fair?

A. Yes.

Q. And let's just look at what the status was of IRPs and accountability mechanisms on October 11th. The .WEB contention set was on hold because there were two accountability mechanisms pending as of October 11th, 2018; is that correct?

A. I know that the .WEB contention set was on hold. I don't recall the number of accountability proceedings around it.

Q. So I will represent to you that Afilias's CEP was still pending, correct, do you understand that?

A. Based on the conversation, yes, yes.

Q. Were you also aware that Afilias had a reconsideration request pending at that time concerning .WEB?

A. I probably was. I don't recall that today, but I probably was at the time.

Q. Now, on October 11th, ICANN emailed Afilias to request times for a CEP conference between November 1st and November 16th.

Are you aware of that?

A. No, I don't recall that.

Q. And we know from -- well, I will represent to you that at the start of the next conference that we had with ICANN in CEP, which was on November 13th, ICANN terminated the CEP.

Are you aware that ICANN terminated the CEP on November 13th?

A. Only based on your representation yesterday and today.

Q. Now, ICANN had also scheduled a special Board meeting on November 6 to consider Afilias's reconsideration request.

Were you aware of that?

A. I don't have specific recollection about that, but we do have specific time limits within which the Board must consider a reconsideration request. So that is actually a normal thing to happen as a reconsideration request is hitting the end of that deadline.

Q. In fact, on November 6th, ICANN rejected and denied Afilias' reconsideration request.

Are you aware of that?

A. I am aware that Afilias' reconsideration request was denied.

Q. So on --
A. I don't remember the specific date.
Q. So on October 11th, as you are representing to the IOT that ICANN is on the precipice of having an IRP filed, ICANN is getting ready to remove over the next few weeks the only two accountability mechanisms that were keeping the .WEB contention set on hold; is that fair to say?
A. I wasn't involved in the discussions around the reconsideration or the CEP.
Q. And ICANN also knew that Afilias was ready to file its IRP because it had a copy of its draft IRP request which it had gotten the day before; is that right?
A. There might have been people aware at ICANN, but that was not the basis of my participation in the IOT.
Q. So you were under pressure to get the interim rules adopted by the Board at the October 25 Board meeting; is that fair to say?
A. Yes.
Q. And --
A. I felt pressure to do that based on the totality of not having supplementary procedures in place for two years.

Q. Now, the Board was scheduled to meet on -- next in mid-January 2019.

Are you aware of that?

A. I'm aware that the Board has regularly scheduled meetings, and then at that time our practice would be to identify if there's any need for a meeting in between those regularly-scheduled meetings, but at that point we were not -- it was not our practice to have monthly or bimonthly meetings scheduled outside of the ICANN meeting or org workshop session.

Q. So I'll represent to you that if you go to ICANN's website and look at the page for Board meetings for 2018, it shows that the last regular Board meeting was on October 25th, 2018.

Do you recall that being the case for 2018?

A. So in terms of regular -- if it was a meeting titled "Regular," that has a particular meaning within ICANN as opposed to "Special."

So "regular" reflects the times when the Board is expected to come together face-to-face and revisit that in today's world, but then "special" would be the meetings that are convened by teleconference.

So "special" doesn't mean extraordinary in any case, it just is kind of an external designation as to whether or not it happened by teleconference or in a face-to-face setting.

Q. Right. So --

A. So the October 2018 meeting, the last one.

Q. It was regular?

A. Yes. So that would be the last face-to-face meeting scheduled for the Board.

Q. Then there was the November 6 special meeting, correct?

A. Yes. That meeting would have been designated as special, yes.

Q. Then the next regular ICANN Board meeting, the next face-to-face Board meeting, as I can tell from ICANN's website, occurred on January 19, 2019?

A. That date makes sense to me because that would align when we hold our workshops for the Board.

Q. Now, if the Board wanted to take up approval of the interim rules, could it have scheduled a special meeting between October 25th and January 19th?

A. Yes.

Q. Now --

A. If it was prepared to do it on October 25th or 26th, whatever the date was.

Q. But the October 25th date was the one that you felt the pressure to get the interim rules before the Board on, correct?

A. That was the date that we had been working to. I believe we had a version that had come out of the IOT at the end of September, and it was prepared. We had briefed it for the Board. It was already on the Board's agenda. We were trying to keep it on the Board's agenda for that date even when we had late edits coming in, as you see here.

Q. And that's because ICANN was getting ready to terminate CEP and deny Afilias' reconsideration request as early as November 6th, and it was reasonable to believe that after that Afilias would file pretty quickly, right?

A. If ICANN had an intention to terminate the CEP, that was never communicated to me.

Q. In fact, that's what happened, Afilias filed its IRP request on November 14th, correct?

A. Based on our conversations about when the CEP terminated, I accept your representation, and yes, Afilias filed, as far as I recall, on November 14th.

Q. And, in fact, the very next IRP to be filed after this one wouldn't be filed for more than another year, in December of 2019; isn't that right?

A. As far as I recall, yes, but people can file an IRP on any day.

Q. Okay. So now I would like to return to the October 11th transcript, which is Tab 5 in your binder. And on Page 16 you write, "I will come back on list with some proposals about how to integrate some of these ideas into the set of interim rules," which I assume is a reference to the ideas regarding Rule 7 that you had been discussing, correct?

A. Yes.

Q. Okay. I'd like to direct your attention to Tab 6 in your binder. This is a copy of an email that you sent to Mr. McAuley on October 12, 2018, the day after the IOT meeting we had just reviewed.

Starting at the top of your email, you write, "I sat down with this and tried to develop some language, but realized that this is really tricky definitional issue. Without being extremely careful, we would be granting anyone who said they

have an interest in the case the right to participate, which takes away from the discretion of the Panel on a much broader basis than is currently allowed."

Is it fair to say that you were concerned that granting anyone who says they have an interest in an IRP a right to participate would take away from the IRP Panel's discretion in a pretty significant way?

A. Yes.

Q. You proceed to write, "As I was thinking through all this, I realized that giving this participation as of right based on significant interest is broader than what the IOT discussed in the outcomes of the public comment. As I understand, we agreed as an IOT, and we have reflected in the rules, that those who participate in underlying panels should have the ability to participate as of right (either as a claimant, where we've identified that they meet the material harm threshold, or as an amicus, also reflected in there). We do not have comments on nor agree as an IOT, from what I can tell, that having an interest that might be impaired by or is similar to that which is under discussion should give right to

participation."

So to summarize, is it fair to say that you were concerned that granting broader amicus participation as of right went beyond the scope of the IOT's discussion of the public comments?

A. It was -- so just no. I think my statement here is that allowing someone to just put up their hand and say "I have an interest" and then making that sufficient to participate as of right as an amicus was an inappropriate threshold for the IRP and that it would impair the Panel's discretion.

Q. Right. And what you specifically say here is that, "As I understand, we agreed as an IOT and reflect in the rules that those who participate in underlying Panels should have the ability to participate as of right," correct?

A. Yes.

Q. And you go on to say that, "We did not have comments on, nor agree as an IOT on anything else," correct?

A. Well, that we didn't agree that other people with different interests would have the ability to participate as of right. We had very -- we have a lot of discussion about this within the

IOT as we are going over the public comment.

And what was coming out of the IOT is that -- based on the public comment was that there was a need to allow people who did not fit into a claimant category but could state a material interest in the proceedings should be -- should be able to have the opportunity to come in and ask to participate in the proceeding.

And we had already started using that tool of identifying if there was anyone who might come in as of right -- as a matter of reducing the level of briefing and streamlining the IRP proceedings. Again, thinking back to that idea that IRPs are now binding.

So when -- like in this situation, we'll just talk about the situation at hand, there are other parties to this that would be impaired by -- or might not be impaired, but would have -- they would expect to have some visibility into the proceedings when the outcome of the Panel declaration could impact their expectation on a contract right.

That's a little bit different than the very broad discussion that McAuley was bringing in, where he said anyone who has a -- who is just a

contracted party should be able to come in at any time to an IRP.

For looking at that, what he was suggesting was so much broader than how you consider a normal type of interest passer or where you might have reason to draw a line about coming into an IRP either as a claimant or as an amicus.

Q. Okay. So moving on in your email, you then write, "I don't have an objection to continuing this conversation for the final set of rules, but think that from the principles laid out for the interim set, this inclusion goes far beyond."

Just to break there, what you're saying there is, "Look, we are in the home stretch. We are trying to get this done by October 25th. We have principles laid out that govern how we are supposed to adopt rules. Why don't we just take up this discussion when we are working on the final rules?"

Is that fair?

A. Basically. If you want to change the standard or make it really broader than you've ever discussed, this is not the time to do it, and we would have to reserve that conversation for when we

were back and having fulsome conversations about where there were any major revisions that need to happen.

Q. Right. Because what you say here is that, "Working on it for too short a time frame also increases the possibility that we make it too broad and make it very difficult to tailor in the final rule," right? That was your basic concern, that it would overly complicate the IRP, as you have testified here today; is that fair?

A. Yes. If we went, for example, to a significant interest test, that would be a very hard test to move back from in a final rule set. So we didn't want to go -- things like that, going too far, where you could then create new expectations for how people would participate and then moving back is a really difficult way to go.

So if you start narrower, you still have the ability to radically change the rule in the future, but it doesn't make sense to start off too broad when you think you might need to pull it back.

Q. Then you go on to say, "Finally, depending on the scope of the final rule, we propose we'd have to see how significant change it is from what

was posted from comment previously." And that's because if it's a significant change, you would have to go back out for a second public consultation; is that right?

A. Correct.

Q. And that's, in fact, what you did in June of 2018 with Rule 4, correct?

A. Yes. Because that's an issue that there hadn't been any identified trends and public comment on, and one of the proposals was very different from what you saw in the posted for public comment, and there hadn't been significant agreement in the community and the public comment forum about how that should proceed.

Q. Now, you close your October email, October 12 email by writing, "The rules" -- in your view, that, "The rules are broad enough, and in particular, the amicus rules are quite broad as well."

So is it fair to say that in considering Mr. McAuley's concerns, as he discussed them on October 9 in his email of October 11 and at the IOT meeting on October 11, that the rules were probably good enough for the interim; is that a fair representation of what you were saying there?

A. Yes. I was prepared to recommend to the Board that they move along with that version.

Q. Now, I'll represent to you that October 12th was a Friday. And do you recall that Mr. McAuley initially responded to you that he looked at your email over the weekend?

A. I recall he responded in some way, shape or form.

Q. And then on Monday, October 15th, he wrote back to you saying he had some concerns about what you had written and wanted to discuss your October 12th email on your 1:00 p.m. call.

Do you recall that?

A. I don't recall that.

Q. Did you have a regular standing call with Mr. McAuley?

A. No, I did not.

Q. Do you recall having a telephone call with Mr. McAuley on October 15th, 2018?

A. I don't recall specifically having that call.

Q. Between the time that you sent your October 12 email -- actually, let me do this: If you turn to Tab 7 in your binder, you'll see a copy of an email that you sent on Tuesday, October 16,

2018.

Do you see that?

A. Yes.

Q. Between the time that you -- that you sent your email on Friday, October 12th, and your sending of this email, Tab 7 on October 18 at 11:00 a.m., did you speak with Mr. McAuley by phone?

A. I don't recall if I did.

Q. Do you recall around this period of time, when you were drafting Rule 7, having a telephone conversation with Mr. McAuley?

A. I really don't recall that.

Q. Do you recall ever discussing with Mr. McAuley the various concerns that you identified in your October 12 email?

A. Discussing orally?

Q. Yes, orally.

A. I don't recall.

Q. Okay. Well, let's take a look at your October 16 email.

In this email, what you have done here is -- is it fair to say -- to propose specific modifications to Rule 7's amicus participation provisions; is that right?

A. I proposed modifications to those who

could participate as of right, though not changing the basic premise that any party could apply for an amicus to the Panel.

Q. Okay. Just specifically you added -- or you proposed adding two categories of amicus who would be deemed to have a material interest in the IRP; is that correct?

A. Yes.

Q. Okay. The first category relates to an application arising out of ICANN's new gTLD program so that any member of a contention set for a particular new gTLD would have the right to participate as an amicus in an IRP that concerned that gTLD and the resolution of that contention set; is that right?

A. Yes.

Q. So, for example, this IRP concerns Afilias' application for .WEB, correct?

A. Correct.

Q. So any member of the .WEB contention set would have a right to participate in this IRP as of right; is that correct?

A. As an amicus?

Q. As an amicus, yes.

A. Yes.

Q. And that's because all of the members of the .WEB contention set would be deemed to have a material interest in the outcome of this IRP, correct?

A. Under this rule, yes.

Q. And the procedures officer would have no discretion to request their -- to reject their request to participate as an amicus curiae in this IRP, correct?

A. Correct. So --

Q. Please.

A. The Panel would self-discretion about the terms of how they would participate.

Q. So if all of the members of the contention set had applied to appear here and participate as amicus curiae, we could have had five more amici in this IRP, correct?

A. If that's the number who applied for .WEB.

Q. I will represent to you there were seven applicants, two of which are already in the IRP, Afilias and NU DOT CO, and then there were five others. So we would have had five others?

A. Right.

Q. That would seem to cure your concerns on October 12th that this was pretty tricky to draft

and, quote, "Granting anyone that says they have an interest in the case the right to participate takes away from the discretion of the Panel on a much broader basis and could complicate the IRP"; isn't that right?

A. I don't think so. So if you look back at the genesis of some of the concerns around the updating of the IRP and then the history of the use of ICANN's accountability mechanisms, we had become -- within ICANN, I think if you look both at the reconsideration level and at the IRP level, the one that has become a surety within ICANN was when someone lost an application or the right to operate a new gTLD through a process, be it the 2012 process or our previous processes, that those losers, in quotes, I am not trying to be deprecating at all, would then use ICANN's accountability processes to try to challenge that.

We knew that that was a very typical and expected use case for the IRP. So when you step back and you think about it, if you have a contention set, for example, in this case, as I understand it, there were a smaller number of people who got to the final auction of last resort. So those who had previously dropped out likely

wouldn't come in any way.

Contention sets could be small, they could be large. Typically within a contention set, you wouldn't have all seven people coming, but you could. And they might each have an interest in making sure that they got to see how this run if they were all in active contention at the time that ICANN took whatever action that's been complained about.

So if you look at the expectations for how we thought the IRP would be run, on the other hand, would you really want to have a process, as a claimant in the process, to have to consider the briefing of seven different entities to come in where the question could just be what right -- how should these people participate and leave that to the discretion of the Panel instead of barging on the proceedings in seven different, possibly somewhat unique, but very similar situations of requesting amicus status?

So I think you can look at it either way. And really based on the use cases that we knew existed for an IRP, this seemed to be a way to actually streamline the proceedings.

Q. Okay. Now, looking at the next change

that you propose, that's for any person, group or entity who is not in the IRP but whose actions are significantly referred to in the briefings before the Panel, they would also have a right to participate as an amicus, correct?

A. Correct.

Q. Now, the IRP rules are supposed to be based on norms of international arbitration. Can you refer me to a norm of international arbitration that would grant an entity a right to participate in an arbitration solely because the pleadings or briefings before the arbitrator significantly referred to actions taken by that entity?

A. I think this is where the IRP is unique when you consider it alongside arbitration. So typically you would not have a private arbitration outcome that becomes binding across an organization like ICANN to guide future decisions and possibly impact past decisions that go broader than just the dispute between two parties.

This is really the crux of what makes some of the development of the rule set for the supplemental rules difficult and where some of the confusion that we see about issues of intervention and that continued change of -- maybe from a

claimant, maybe from a joinder.

The IRP -- one of the things that we wanted to do, one of the things the community asked us to do with it was to make it a binding process and to make it look more like international arbitration. That's exactly why we had the language in there about the international arbitration norms.

But you can't look at the IRP as it's been designed and suggest that only international arbitration norms should apply. If that's the case, we wouldn't need to have detailed supplemental rules that we have, and we would just pick a set of international arbitration rules to apply and go with it.

But it's always been clear that some modification to those international arbitration norms needed to be in place to better reflect the purpose and the intent and the import of the IRP within the ICANN process.

Q. Okay. So I think I understand. Let me try and just summarize here.

So the IRP was supposed to move more towards what international arbitration looks like, right, and that's why you have the language about

norms of international arbitration, right, that's what you're saying?

A. The big way that the IRP was supposed to move more like international arbitration is it was supposed to become binding.

In the past, IRP declarations were not binding on ICANN, and that's very different from a normal arbitrable proceeding, where the Panel has come to a decision and the parties are expected to abide by it and not just take it as advisory.

Q. Right.

A. That was a big accountability gap that the community said, "We want this closed." So what -- how do you make that closed? You say that it is more like arbitration because you expect the binding nature to be there.

Q. So --

A. They didn't expect it to become arbitration, but they expected it to be final like arbitrations are final.

Q. Got it. Not only final and binding, but because of sort of the unique nature of ICANN and the IRP process, it can be final and binding on a really broad stroke, including the rights of third parties, right?

A. That's right.

Q. Now, where did you get this language from that you were proposing here about entities whose actions were significantly referred to in the briefings before the Panel?

A. I was thinking about past cases we have had, IRPs where we have had mention of other parties, for example, the .AFRICA IRP talks a lot about the actions of some of the other parties to the contention set. I was thinking about how this could present and what would make sense in terms of allowing an IRP to move forward and not get bogged down in briefing just about who can be there as an amicus and who can't.

Q. Well, let me ask you this: Let's assume that there is an IRP that contains a lengthy discussion of a prior IRP, and therefore, in that discussion of the prior IRP, the claimant has a lengthy discussion of what the prior claimant in that prior IRP had done. So its briefings before the Panel contain a relatively significant description of actions taken by that other claimant in the prior IRP.

Under this language, wouldn't that other entity that participated in a different IRP have a

right to participate in this -- in the new IRP?

A. If they chose to, yes. And also, you know, depending on how their actions were being characterized and if it would result in language in a Panel declaration that would impact them or recast their actions in the future, that could be fully appropriate.

But if it is just a recounting of facts like in the facts section, when you are trying to suggest that one situation is like another, that's just a fully factual recounting of what happened, why would they want to come in? They are not required to. This isn't an intervention where you pull them in. It is an opportunity for someone to come in and preserve their right.

So if there is significant discussion, even if it is someone fully outside of a process, but for some reason they are recounting how they did something and it is not correct, that party, if they got on notice about it, should have the ability to come in and clear their name or get something clarified within the process without having to fight about coming to do that.

Q. Well, what about a competitor? A competitor may want to intervene in an IRP just to

disrupt it. And if they have a procedural hook that removes all discretion of the procedures panelists, doesn't that give them a pretty good opportunity just to come in and muck up the process?

A. Well, first, you have to consider what mucking up the process means. Is it making -- is it giving one party the ability to cast however they wish the actions of another? If this is a competitive situation, the competitor wouldn't be able to come into the IRP under this rule, and their actions have been significantly discussed within the papers.

So it is not like someone just looking, oh, Afilias is doing this, I am a competitor, I want to come in, then they have to go through all the normal -- the normal briefings to document how they have a material interest to come in as an amicus, as opposed to saying, "Afilias keeps talking about me. Can you hear me and what I think about this?" That's the difference here.

Q. Okay. I get that.

Now, the Sidley firm had been advising the IOT on the drafting of these rules, correct?

A. Yes.

Q. Did you show these edits that you made here in your October 16 email to anyone at the Sidley firm?

A. No.

Q. Did anyone provide you with advice or language about how to change Rule 7 between the time you sent your October 12 letter to Mr. -- email to Mr. McAuley and the time that you sent these edits on October 16?

A. There may have been privileged interactions internal at ICANN.

Q. Okay. Did you speak with anybody within ICANN? Without revealing the substance of those communications, did you speak with anybody at ICANN about edits to Rule 7 between October 12 and October 16?

A. Likely, yes.

Q. Who?

A. Most likely Liz Le, who I was working with on the IOT.

Q. Anyone else?

A. Not that I recall.

Q. Now, in your October 16 email you also included a proposed footnote that is also underlined. I think as you were stating earlier,

this is where you provided that the IRP Panel should have discretion to determine the proper scope of amicus participation, correct?

A. Yes.

Q. Do you recall that Mr. McAuley proposed amending this footnote to provide that Amici should be allowed to, quote, "Participate broadly in the IRP"?

A. Yes.

Q. And you revised the final version of Rule 7 to reflect Mr. McAuley's proposal, correct?

A. I'd have to look at the final text that was approved to see what I proposed.

Q. Sure. It is in the -- well, we don't need to do that now. That's fine.

A. I do believe that Mr. McAuley was proposing to remove some discretion of the Panel about the terms of that broad participation. If I included the word "broad" in the final topic, it was solely the discretion of the Panel, but encouraging broad participation. I think there's a difference, if I recall what Mr. McAuley proposed and how that was reflected in the Rule 7 that was approved.

Q. Okay. Now, the full set of the interim

supplementary rules were sent to the entire membership of the IOT on Friday, October 19th, correct?

A. I believe that's right, yes.

Q. And the cover note, which is Tab 8 in your binder, if you want to refer to it, states that, "If comments are not received by midnight on Sunday, October 21st, the interim rules would be deemed approved by the committee"; is that right?

A. Yes.

Q. And turning to Tab 9 in your binder, in fact, Mr. Turcotte reports on Sunday, October 21st, that there had been no comments received, correct?

A. Yes.

Q. Now, there was no requirement that any member reply with their assent to the proposed rules, correct?

A. Correct.

Q. So there was no way to confirm whether any member of the IOT had even looked at the draft over the weekend, correct?

A. There was no way to confirm by the record, but this was also in the middle of an ICANN meeting, where by the Saturday most people were on site and active in meetings. So there was hallway

conversation. There were reminders as people were passing each other, "Did you look at this?" "Can you make sure you check it?" So this wasn't a normal weekend, right. It wasn't a normal Friday to Sunday time frame.

This was a time when most of the people who are active on the IOT, including those who hadn't necessarily been quite active, would be typically in meetings, on their email, talking to people, interacting face-to-face with people in the IOT. So there was --

Q. I'm sorry, I cut you -- but there was no record and you can't point to any document to confirm that any other member of the IOT, other than you and Mr. McAuley, had seen the proposed changes to Rule 7 by the time it was deemed approved by the IOT on Sunday, October 21st; isn't that right?

A. There's no record, but there was -- there were additional issues relating to the time for filing issues that made it clear that other members of the IOT were looking at the rule set because they were approved and were having discussions about that in other channels, but not on this list, but not about the amicus.

Q. So those other communications about the time for filing Rule 4, were they posted to the IOT's LISTSERV?

A. I don't believe so. There was a member of the IOT who was coordinating off IOT list a time in writing and a time back -- I don't -- to the extent I might have any of those records, they were only forwarded to me because they weren't on publicly-available lists -- where they were trying to impact the Board consideration regarding the time for filing issue and having that conversation.

Q. And that was Mr. Hutty, correct?

A. Correct.

Q. And Mr. Hutty was one of the few non-ICANN lawyers or VeriSign employees who attended the October 9 and October 11 IOT meetings, correct?

A. He was one of the attendees, yes.

Q. Yeah. And did you hear from any of the other members of the IOT over the weekend between October 19 and October 21st that confirmed that they had, in fact, read the interim rules that were circulated?

A. I don't recall specific conversations that I had.

Q. Now, the ICANN Board voted to adopt the

interim rules on October 25th, correct?

A. Correct.

Q. Did you attend that Board meeting?

A. Yes.

Q. In preparation for Board meetings, is it customary for ICANN legal to draft resolutions for the Board's consideration?

A. Yes, or other members of the organization.

Q. And on October 25th the Board considered a draft resolution adopting the interim rules; is that correct?

A. Correct.

Q. Did you draft those resolution?

A. I did.

Q. I would direct your attention to Tab 10 in your binder, which is a copy -- a full copy of the October 25 Board resolution, and there were quite a few things on the agenda. So I would direct your attention to Page 57. This is where the discussion of the interim supplementary rules start.

If you turn to Page 60, that's the rationale for the resolutions that were adopted; is that right?

A. Correct.

Q. So this is the explanation for why the

Board voted to adopt the interim rules; is that right?

A. Yes.

Q. Turning to Page 62, the resolution reflected the principles that we mentioned earlier about the adoption on how the IOT went about adopting the supplementary rules; is that right?

A. I don't recall that we really discussed that, but yes, they reflect that principle.

Q. And, in fact, I direct your attention to the first page in the document behind Tab 11, which is the final set of rules that were adopted on October 25th. Those principles are reflected in the last paragraph on Page 1, going on to Page 2; is that right?

A. Yes.

Q. Okay. I just want to go through these with you.

In drafting the interim supplementary procedures, what the principles state is that the IOT applied the following principles: "One, remain as close as possible to the current supplementary procedures for the updated supplementary procedures posted for public comment on 28 November of 2016," correct?

A. Correct.

Q. So that first principle was to remain as close as possible to the rules that were already in effect or the draft rules that had been posted for comment in 2016; is that right?

A. Right, the first of three principles, yes.

Q. Yes. We are going to go through all of them, I promise.

A. Okay.

Q. The second principle is, "Two, to the extent that public comments received in response to the draft that was posted in 2016 and reflect clear movement away from either the current supplementary procedures or the draft," the public comment draft, "that the IOT should reflect that movement," so I think as you said, trend, "unless doing so would require significant drafting that should be properly deferred for broader consideration."

Is that a fair summary of what that second principle is?

A. Yes.

Q. So in short, the IOT should reflect the changes that the public suggests unless doing so would require significant drafting; is that right?

A. Correct, and unless -- yes. We don't

necessarily have a significant drafting task, but that's what's there.

Q. And is that because if one comment suggested something and the IOT thought it was a good idea but it required significant drafting, the rest of the community should have an opportunity to see what that is; is that right?

A. And also, if you reflect back, these principles were initially put in in May, when the interim supplementary procedures were initially proposed. So there it was -- there were some situations where it wasn't clear that we had -- if we were to approve a rule set in May, say, for example, the IOT looked at the rule set that was produced in May as the interim set, that would reflect for the IOT why some of those trends that had been reflected in public comment might not be incorporated.

Here we do have some of the passage of time as well, where there had been significant work towards embodying those trends and language and significant agreement amongst the IOT to reflect those trends.

Q. So --

A. Go on.

Q. I'm sorry. I didn't mean to interrupt you. Have you completed your answer?

A. Yes, yes.

Q. Okay. Now, you recall that when the draft IRP rules were posted for public comment in 2016, there was a page devoted to that on the ICANN website, correct?

A. Yes.

Q. And on that -- and I am reading from it right now. I don't have a copy in your binder, but I will represent I am reading to you. It says, "Next Steps. If significant changes are required as a result of the public consultation, the IOT may opt out" -- sorry -- "the IOT may opt to have a further public comment period on these changes. If there are no significant changes, the rule will be included in the updated supplementary procedures."

Do you recall that?

A. Yes.

Q. So I think that it is fair to say that what you told the community in 2016 and what you reflect here in Principle 2 is that we are going to take the public comments unless it's a significant change, and if it's a significant change, like there was in Rule 4, we are going to go back out

for a second public comment; is that right?

A. I think so. What we do -- when we take public comment, if it requires significant change, particularly significant change that is not expected or supported by public comment, we would take it back out for public comment, and that's what the community should expect.

Q. Okay. Looking at Principle 3, it says, "Three, take no action that would materially expand on any part of the supplementary procedures that the IRP-IOT has not clearly agreed upon or that represents a significant change from what was posted for comment and would, therefore, require further public consultation."

So that's basically what we just talked about, correct?

A. Right, right.

Q. Just to refresh your recollection, that's also what you were talking about in your October 12 email that the IOT would need to consider whether the changes to Rule 7 that Mr. McAuley was proposing was a significant change than what had been posted for public comment, right?

A. Right, particularly in that significant interest test that he was introducing.

Q. Now, is it fair to say that when the Board adopts a resolution and it includes a rationale for that conclusion, that the Board has reviewed and agrees with everything that's in the resolution and the rationales?

A. Yes, each Board member has the opportunity to either abstain or vote against.

Q. So would you say, as someone who attends Board meetings and someone who has drafted resolutions and rationales, that these resolutions and rationales that were adopted on October 25th reflect the fact that the Board believed that the IOT had followed these procedures, correct?

A. Yes. And then further in the rationale it also identified the Board's understanding of the continued conversation and how things might have changed over the time leading up to the Board meeting.

Q. Okay. I'd like to direct your attention to the document behind Tab 12 in your binder, and this is, I will represent to you, a redline that we ran some time ago when we were in front of the Panel on Phase I.

And this redline is the current version of Rule 7 that was adopted on the 25th of October 2018

against the version that went out for public comment in November of 2016. And I would just ask you to review the four pages of this document.

And I would ask that whether or not -- given the changes reflected in this redline, this is a significant change, isn't it?

A. If you mean "significant" in terms of volume of words, yes, but I don't think that it is significant in terms of between what was posted, particularly as it relates to the consolidation and intervention.

And the changes there really are reflecting some of the other specifics that were raised through public comment about how to make sure we were doing it correctly, and then the addition of the amicus part also comes out of public comments.

So while there's clearly two and a half additional pages here, I won't say there's not -- there's -- volume alone doesn't mean that it is a significant change.

Q. Well, if you look at the bottom of Page 2 and the top of Page 3, which is "Participation as an Amicus Curiae" -- I know it is called a redline, but this is a blue line. It is all blue, right?

A. Yeah.

Q. And what you had told the community in 2016, that if significant changes are required as a result of the public consultation, the IOT may opt to have a further public comment period on these changes.

So is it fair to say that you opted not to have a further public comment on these changes?

A. There clearly was not a further public comment on these changes because there were multiple comments that asked us to consider including an amicus section, and that's what the IOT delivered.

If we put things back out for public comment once there's a change that clearly reflects a trend for public comment, we would be in a never-ending loop of not getting our work completed.

I think when we look back at the IOT's expectations of this and the community's expectations of this, we didn't hear -- even after the Board approved it, we heard no concerns from the IOT that the Board had approved the rules in this form, and we also didn't hear from the community other than Afilias of a concern that the

Board had approved the rule in this form.

We have a very vocal community that will stand up and raise their hand and raise issues regarding that if they had concerns.

MR. LITWIN: Mr. Chairman, I know we have been going for about an hour and a half now. I probably have about another 10 or 15 minutes for Ms. Eisner. Would you like to take a break now or would you like for me to finish my cross-examination?

ARBITRATOR BIENVENU: I think we should take a break now. How long did you say you still have?

MR. LITWIN: I think 10 or 15 minutes at most.

ARBITRATOR BIENVENU: Okay. Very well. So that means that you're going beyond your estimate, at least as reflected in the agenda.

MR. LITWIN: That is possible, Mr. Chairman. I do expect that future witnesses will go quite a bit faster than anticipated.

ARBITRATOR BIENVENU: Very well. I am not reproaching you. I am just observing that will be the case.

So we will take our first 15-minute break.

Ms. Eisner, as I instructed you yesterday, you are not to discuss your evidence during the break. You are aware of that?

THE WITNESS: Yes, I am. Thank you.

ARBITRATOR BIENVENU: Mr. Wallach, any sense, as we stand now, of the length of your redirect?

MR. WALLACH: It will not be long. I would not expect it to be more than 10 or 15 minutes.

ARBITRATOR BIENVENU: Very well. So we will resume in 15 minutes. Thank you all.

MR. LITWIN: Thank you, Mr. Chairman.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Ms. Eisner, you are under the same solemn affirmation.

And, Mr. Litwin, please continue with your cross.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Ms. Eisner, I'd like to switch topics and ask you a few questions about Rule 4 of the supplementary rules.

Before the interim rules came into effect on October 25th, 2018, the deadline to file an IRP had been set in ICANN's bylaws; is that right?

A. Before October 1st, 2016, the deadlines had been set in ICANN's bylaws.

Q. Before October 2016 the bylaws required a claimant to file within 30 days of the posting of the minutes of a Board meeting, correct?

A. Yes, I believe that's right.

Q. And those bylaws, I think, as you've anticipated my question, were replaced in 2016, and the new bylaws didn't have a timing provision in it; is that right?

A. Correct. The accountability group that came up with the recommendations on the IRP reserved that matter for the IOT to decide.

Q. So I just want to go through the timetable here with you.

Are you aware that ICANN maintains in this IRP that the relevant ICANN action here was the ICANN Board's decision to defer consideration of Afilias' complaints about how the .WEB contention set had been resolved; are you aware of that?

A. I have read the papers, but that's the extent to which I am aware of it.

Q. Okay. Now, that decision to defer consideration, according to ICANN, took place on November 3rd, 2016; are you aware of that?

A. Only from the papers.

Q. Okay. Now, I'll represent to you that ICANN did not disclose the fact that that Board workshop on November 3rd, 2016, was occurring and did not disclose any decision that was taken during that November 3rd meeting.

Are you aware of that?

A. I am not aware of that.

Q. Okay. Now, let's just consider the date of November 13, 2016. I think as you just testified the then-current bylaws did not have any deadline in it for filing an IRP, correct?

A. On November 13th, 2016?

Q. Correct?

MR. BIENVENU: You said 13. Did you mean to say 3rd?

MR. LITWIN: I'm sorry, November 3rd. Thank you, Mr. Chairman.

Q. As of November 3rd, 2016, the then-current bylaws did not have a deadline in it for the filing of an IRP; is that right?

A. That's correct.

Q. And the supplementary rules for the IRP that were in effect on November 3rd, 2016, didn't have a deadline for filing either; is that correct?

A. I believe that's correct. I would have to go back and refer to them, but I believe the bylaws at the time specified, but the supplementary procedures did not.

Q. So let's fast-forward to 2018. Afilias initiated its CEP on June 18, 2018; is that right?

A. That's right, based on your representation.

Q. As of that date, June 18, 2018, there was still no deadline to file an IRP because neither the bylaws nor the supplementary rules that were in effect had a timing provision in it; is that right?

A. Yes.

Q. Now, in October of 2018, Afilias was still in CEP with ICANN; is that correct?

A. Based on our discussions today, yes.

Q. And on October 10, as I have represented to you, Afilias had sent a draft IRP request to ICANN to enable ICANN to respond to the merits of its claim in the context of that CEP.

Do you remember that discussion?

A. Yes, I do.

Q. Now, at the same time within the IOT, is it fair to say that the committee was debating the substance of the interim rules?

A. "At the same time" being that November 3rd, 2016, up through --

Q. During October 2018.

A. During October 2018, yes, the committee was debating the substance of a few different rules that are reflected in the exhibits that you presented.

Q. And one of them was, in fact, Rule 4, the timing provisions, correct?

A. Yes.

Q. In fact, Mr. Hutty objected, I will say strenuously --

A. Yes.

Q. -- to the adoption of those rules?

I always think of A Few Good Men when I say that.

Those draft rules weren't finalized until October 19th, correct?

A. If we consider what was sent in the email, yes, that's correct.

Q. And they were first deemed approved by the IOT on Sunday, October 21st, correct?

A. Yes, I think so.

Q. And they were first sent to the Board on Monday, October 22nd, correct?

A. So let's back up for a second. In terms of deemed approved, I believe that we had had a set at the end of September that had been pretty well gone through, recognizing that there were a few minor changes that might have happened a couple other places. There was -- and then there was a discussion of Rule 7. We will set that aside.

So in the other form -- I have to go back and recall, but I think that one of the only areas where there was any change on the time for filing issue -- if we're discussing that part -- had to do with the fact that we agreed at some point and finalized language on a footnote that would confirm that if there was a future change in a deadline for time for filing, that ICANN would work to make sure no one was prejudiced by that.

But I think that the language otherwise in Rule 4 had remained pretty steady up to that point and there had been final readings through the IOT on that.

Q. And the Board voted on the interim rules, including the text of Rule 4, on October 25th, correct?

A. Yes.

Q. And that's the first time that the

time-bar rules in Rule 4 came into effect, correct?

A. It is the first time that a time for filing had been specified and came into effect for the IRPs after October 1st, 2016.

Q. And then the ICANN Board rejected Afilias' reconsideration request on November 6th, correct?

A. Based on your representation, yes.

Q. And then ICANN terminated CEP on November 13th, correct?

A. Again, based on our discussion, yes.

Q. And then Afilias filed its IRP the next day, on November 14th, correct?

A. I believe that's correct.

Q. But ICANN's Board was going to work to make sure no one would be prejudiced by the adoption of Rule 4; is that what you said?

A. The footnote that was included in the Rule 4 was about the change between the -- we are putting the interim rules into effect.

And then if in the future a discussion where people were suggesting that there should be basically no statute of limitations on the ability to challenge an act of ICANN, if that were to be the predominant view, and what the Board put into effect that there would be some sort of stopgap

measure put in so that anyone who was not able to file under the interim rules and the timing set out there but could have filed if the other rules, the broader rules had been in effect, that we would put in a stopgap to make sure that no one was prejudiced by that differentiation because we had agreed on a different timing for the final set.

Q. Ms. Eisner, who at ICANN legal was responsible for tracking and working on CEPs and IRPs?

A. That would be a team led by Amy Stathos, one of the deputy general counsel, and the people who work for her that she would assign based on availability and subject matter.

Q. So when you -- I'm sorry.

A. Go on. Sorry.

Q. So when you said during the IOT meeting on October 11th that, "We at ICANN org are getting nervous about being on the precipice of having an IRP filed," were you referring to Ms. Stathos?

A. In part. It was a general area of discomfort for us. We committed to have this IRP in place through our bylaws, and we knew that it was a stopgap measure. Every single day we are at risk of having IRPs filed. So it is a general

collective concern.

We are -- we're the lawyers responsible for making sure that our entity's in compliance, and part of that is in compliance to our bylaws, and there's a really big gap there.

Q. And, in fact, Afilias filed its IRP 34 days after that October 11th meeting, right?

A. Yes.

Q. And the next IRP to be filed wouldn't be filed for more than 400 days; is that right?

A. I believe so, based on when you said the next filing was.

MR. LITWIN: Thank you, Ms. Eisner.

I have no further questions, Mr. Chairman.

Thank you, Ms. Eisner, very much for your time today.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: Thank you, Mr. Litwin.

Do my colleagues have questions for Ms. Eisner, starting with Catherine Kessedjian?

ARBITRATOR KESSEDJIAN: I do.

Ms. Eisner, I am Catherine Kessedjian. I am speaking from Paris.

I noted at the very beginning of your

testimony today before us that you are in the position in which you are at ICANN as deputy counsel, general counsel since 2014; is that correct?

THE WITNESS: I have been -- I can't recall when I was promoted to deputy. I believe it was somewhere in 2016, but I have been either associate general counsel or deputy since 2014 and doing the same work since 2014.

ARBITRATOR KESSEDJIAN: Okay. My recollection may not be good, but I think I have seen a CV of yours on the Internet saying that you have joined ICANN in 2009; is that correct?

THE WITNESS: That's correct, yes.

ARBITRATOR KESSEDJIAN: So could you describe for us what you did before becoming the deputy general counsel?

THE WITNESS: Sure. When I joined ICANN in 2009, I joined a three-person department, making it a four-person department, and I was the most junior member of the department at that point.

ARBITRATOR KESSEDJIAN: You mean the legal department?

THE WITNESS: The legal department, yes. So I assisted on any matter that came up before --

across the legal needs of the organization.

So because ICANN itself was a smaller organization and the legal department was smaller, we all covered a lot of the areas and kind of stepped in and out as needed to cover our service areas.

In 2013 ICANN doubled the size of its legal department, and with that came a differentiation of duties. So we wound up separating out the work that we do across Ms. Stathos, who is a deputy -- she was a deputy then and remains a deputy now, who manages our litigation management as well as the internal work.

We have someone that handles a lot of the policy side of what we do and our stakeholder services and actually for the contracted parties.

And I stepped into a role of -- that I explained yesterday of supporting our strategic initiatives work as well as the global stakeholder engagement work and then special projects that come up, such as the community-facing work that I do.

ARBITRATOR KESSEDJIAN: Thank you. You have described many times during the cross-examination the fact that IRPs have been at the center of the worries, if I may say so, of the

legal department and of ICANN org.

Could you explain to us how the information is going through the legal department throughout the community? What information do you get and how often do you discuss that with your colleagues?

And since you were drafting rules about IRPs, how come -- I may have misunderstood you. I would have to read the transcript again -- but how come you cannot recall anything about IRPs? I find a disconnect from what you have been telling us in your cross-examination between the fact that you say it's a major worry and the fact that you have answered a lot that you do not recall when you are asked precise questions about IRPs.

THE WITNESS: Thank you. I appreciate why it might appear that there's a disconnect.

So I am not involved in the day-to-day operation of the IRPs. I am not part of our regular litigation support function that prepares our defenses and really engages on the substance of how ICANN itself will, you know, participate in IRP proceedings or, for that matter, our other accountability mechanisms.

My day-to-day work -- and there's a lot of

it and separate, but that doesn't mean that I am not involved in helping to make sure that ICANN as an organization is prepared to handle those.

So one of my biggest roles in our legal department is to help make sure that we are acting in alignment with our bylaws. It is one of the obligations of all of our counsel, of course.

Because of the specific nature of work that I do and I have been very involved in the accountability processes that led up to the development of the recommendations that enhance the IRPs, and so then I kept going with that work.

That's one of the reasons why we also had Liz Le, Elizabeth Le, who you have heard me discuss and she's been referred to, she works more closely with Amy and her team on the litigation management. I am not sure about her involvement in individual IRPs.

So I am very familiar with the operation of IRPs in general, and I am very familiar with how actions taken within the supplementary procedures might impact efficiency of proceedings, resources needed and those sorts of things.

It is like -- imagine really understanding civil procedure, for example, but not getting

involved in the day-to-day procedure of a case. That's exactly kind of where I sit.

So I, of course -- if that makes sense.

ARBITRATOR KESSEDJIAN: But saying that you are not involved in the day-to-day management of a case, I fully understand that. But when an IRP is filed or about to be filed, there are some conversations within the department of which you are, if not a participant, at least an observer, aren't you?

THE WITNESS: Of course there are times when I know when an IRP is filed. I will get an update about that fact. It is both a special and a regular course of our life at ICANN.

So it is something that -- like this IRP, of course, has touched me much differently than any IRP that has happened since I was a junior attorney in 2009, working with ICANN, where I might have been more directly involved with litigation support, only because as you can manage, my name is in it and it is about the activities and centers around some of that.

But often also the IRPs themselves relate to day-to-day work at ICANN that I am also not involved in. So, for example, I don't do a lot of

the work that relates to the new gTLD Program or those -- as I discussed earlier, much of the IRPs have been about processing the applications for the new gTLD Program.

So because I don't have substantive expertise on that and it's not my role, I hear things are coming in and I am aware of what my colleagues are working on, but I have a full desk of work, so I don't necessarily get involved in a lot of the day-to-day conversations about it.

It becomes a fact of something that's going on, but because it's not something that I need to give attention to, I would only give support when I'm called on to give support for it, but otherwise I don't get involved in regular status updates with my colleagues on it because it is not something that -- typically just a general conversation among our department unless there's -- we know that there's hearings coming up.

Someone says, "There's a hearing coming up in this IRP, so I'll be very busy with that. Maybe you can help pick up some of my work over here." Something like that.

ARBITRATOR KESSEDJIAN: My last question. I understand you cannot recall now in 2020 what has

happened in 2016 and '18, but it would be fair to say that at the time when you were working on those rules, you heard about what was going on in the other parts of the department, and so your thinking may have been influenced by that?

THE WITNESS: I would have had general knowledge of it, but I think it is also important to recall that I -- knowing that someone might be filing an IRP, that's -- it makes it important to make sure we have the basis for that IRP to be filed. That's one thing that exists no matter what the topic or who that entity might be.

So even -- I would assume I was aware at some point that there was a CEP happening, for example, that I don't recall the specifics of because, again, it was a fact of note, right. But it wasn't about who it was. It was about the fact that there was something happening.

ARBITRATOR KESSEDJIAN: Because it was directly important for the work you were doing?

THE WITNESS: In order to make sure that we had the basis of rules coming through. So it could have been any entity that had initiated a CEP, for example. That didn't matter.

So the important thing was we needed to

have some rules that matched with the bylaws to allow the Panel to run an IRP that made sense for everyone.

ARBITRATOR KESSEDJIAN: Thank you very much. I am done.

ARBITRATOR BIENVENU: Mr. Chernick, any questions for Ms. Eisner?

ARBITRATOR CHERNICK: No. Thank you.

ARBITRATOR BIENVENU: Ms. Eisner, could I ask you to turn to Paragraph 5 of your witness statement?

THE WITNESS: Yes. I am there.

ARBITRATOR BIENVENU: So this paragraph deals with the period between 11 October 2018 and 16 October 2018, a period during -- concerning which Mr. Litwin questioned you.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And there is presented in this paragraph a sequence of events which, for the purpose of my question, I'll break down in five steps, if I may.

The first one is Mr. McAuley's suggestion to give claimant status to persons with a significant interest, correct?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Then you mentioned Mr. Hutty's suggestion that interim procedures should specify the categories of persons entitled as a matter of right to participate in an IRP, right?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And then you mentioned that you are tasked by the IOT to propose language to reflect the discussion?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And then you mentioned that you drafted further revisions which included a deemed interest in favor of members of the contention set or an entity whose actions are significantly referred to in the IRP, that's Step 4?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Then you mentioned that you send out those revisions on 16 October to Mr. Turcotte and McAuley and then you and McAuley had subsequent exchanges over the next three days, right?

THE WITNESS: Right.

ARBITRATOR BIENVENU: There is no mention in that sequence of events of the fact that between

Steps 3 and 5, as I understand it, you had contacts with Mr. McAuley and to the fact that Mr. McAuley had input into the drafting of the revisions that were sent out on 16 October; is that correct?

THE WITNESS: I don't recall the contact that you are speaking of.

ARBITRATOR BIENVENU: Can you look at Tab 8 of the witness bundle?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: You recognize this email message? This is the email by which Mr. Turcotte, on behalf of Mr. McAuley, sends out the draft that you have been working on since October 11, correct?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: Can you look at the fifth paragraph?

Just before you do that, we know that this email was, in fact, drafted by Mr. McAuley, who sent that draft to Mr. Turcotte, who then on behalf of Mr. McAuley sent that out to the members of the IOT, correct?

THE WITNESS: That's correct.

ARBITRATOR BIENVENU: So if we look at this paragraph, we read, "As some attempted to

draft a compromise in this respect." So he's talking about the period between the 11th of October and the 16th of October, correct?

THE WITNESS: Let me just refer back to my declaration. Can you repeat your question?

ARBITRATOR BIENVENU: Yes. I am just trying to situate this language here.

What I'm understanding reading this email is that Mr. McAuley is explaining to the members of the IOT that as you were attempting to draft the compromise, basically to deliver on the task that you were given on the 11th of October, you encountered difficulty, and he explains here that you "encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws."

Then he goes on to say, "Sam reached out to me in my participant capacity, and we discussed over the ensuing days, and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list, a way to try to take

advantage of Board action at next week's meeting," end of quote.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: So in point of fact, there were discussions between you and Mr. McAuley on the subject of the changes to Rule 7 between the 11 of October meeting and the 16 of October draft, correct?

THE WITNESS: Yes. And there are email discussions that reflect that that are in the record. For example, at Tab 6 of my binder, the binder that Afilias' counsel presented to me, you'll see the difficulty reflected on that February 12th -- sorry, on that Friday, October 12th, email.

ARBITRATOR BIENVENU: Right.

THE WITNESS: And then we had exchanged emails regarding that. So we had email discussions that I -- that's what I understand he's referring to here.

ARBITRATOR BIENVENU: And do I understand that these discussions were only by emails? There were no telephone discussions?

THE WITNESS: As far as I recall, that's the case.

ARBITRATOR BIENVENU: As you sit here today, Ms. Eisner, do you remember these exchanges?

THE WITNESS: Yes. I remember the email exchanges that are in front of us, yes.

ARBITRATOR BIENVENU: Are you sure that they were only email exchanges, or might you have had telephone exchanges?

THE WITNESS: There were times when I spoke with Mr. McAuley in his role on the IOT on the telephone.

I don't recall specifically when those occurred, and I don't recall if it was around this time period or about this topic.

I did speak with Mr. McAuley at times by telephone, but I don't recall sitting here today if we ever discussed this topic by telephone.

ARBITRATOR BIENVENU: Do you recall -- or I'll put it even in sensitive terms.

Is it possible that in the course of these discussions, Mr. McAuley influenced or shaped the language added to Rule 7 during that very short and critical period, and in particular, the two categories of parties who, according to the new draft, would be deemed to have a material interest?

THE WITNESS: So Mr. -- the revisions that

happened in that middle part of October would never have happened if Mr. McAuley hadn't introduced the new language that he did around the October 9 to October 11 time frame, that's true. We were prepared to move the rules forward.

Whether Mr. McAuley -- to your question of did Mr. McAuley influence the specific language --

ARBITRATOR BIENVENU: I wouldn't even put it in those terms. What I suggested is whether your discussions with him may have influenced or shaped that language? Because they are very specific scenarios that are contemplated there. They emerged during that period.

And what we know based on that email -- unless you correct it -- is that, as he says, you reached out to him and you discussed over the ensuing dates, so the language that you see there is not exactly as discussed on the calls.

So the question I have is: Is it possible that during that period, the language that you came up with was shaped by those discussions?

THE WITNESS: I believe my outreach to him in his participant capacity would have been a Friday, October 12th, email that was directed to him with Mr. Turcotte and Ms. Le. That's where you

see my discomfort with his initial language reflected.

I clearly -- so within my role at ICANN -- or with ICANN and as we get to points where we are getting ready to have something sent to the Board to reach conclusion in a group, it sometimes happens that people come in towards the end and request changes.

No matter who those people are, my role in this group was to help move this language forward. It didn't matter who was presenting it. Anyone else could have raised this language, and I would have had the same obligation to try to move the language forward.

I clearly had to think about the issues that Mr. McAuley was raising that he was expressing regarding why he was proposing this to see if I could move this language within the bounds of the appropriate structure of the IRP, and where it appeared that we had the ability to go with it, to make -- to see if we could move it to a place where we would have rules that we could put in place.

But I was also extremely careful to not expand the rules beyond a place where it didn't seem appropriate.

MR. LITWIN: Mr. Chairman.

ARBITRATOR BIENVENU: Yes.

MR. LITWIN: There is a document that I referred to obliquely in my questioning, which is not a substantive document. It is a two-line email that Mr. McAuley sent to Ms. Eisner at 7:09 a.m. on October 15, 2018. It is one of the documents that ICANN posted to the IOT-IRP website in response to our motion before the procedures officer.

It is not in the record, but I do believe that if we could introduce this document and ask Ms. Eisner about it, it would confirm the existence of a phone call between Mr. McAuley and Ms. Eisner on October 15th.

ARBITRATOR BIENVENU: I don't think we should embark on a discussion of adding to the record at this point, Mr. Litwin.

MR. ALI: Mr. Chairman, if I may, this is a two-line email, which was sent -- where Ms. Eisner, who is the witness before you, is the recipient. It seems to me that she can be asked about it, particularly in light of the line of your questioning.

It is simply a question of confirming or helping her to refresh her memory that, in fact,

there was the phone call that you were alluding to. It is there in black and white. It doesn't take more than 30 seconds for her to review the message.

MR. WALLACH: Mr. Bienvenu, may I say something?

ARBITRATOR BIENVENU: Is that Mr. Wallach?

MR. WALLACH: Yes, it is.

ARBITRATOR BIENVENU: I think Mr. LeVee also wanted to say something, but I'll listen to you, Mr. Wallach.

MR. WALLACH: I would object to the addition of new evidence, new documents into the record at this point on any issue, but particularly on the Rule 7 issue, which has been the subject of significant briefing going back a year and a half now. It has already been the subject of one hearing.

I would also object to Mr. Ali's interjecting himself at this point. We agreed that one attorney would do the examination other than in exceptional circumstances. Mr. Litwin did the examination.

This came up also in respect to Ms. Burr's examination yesterday, where Mr. Litwin did the examination and Mr. Ali interjected himself in

objecting to questions on redirect. I believe we have agreed that one attorney will do the examination, and that should apply to redirect. That should also apply to other issues, such as this, that are interjected during the course of the examination.

MR. ALI: Mr. Chairman, I think that is, I would say, unfortunately an uninformed view. We had agreed that there would be only one counsel to question a witness, which we have stuck by that rule.

I am lead counsel representing Afilias in this matter, and I believe I am entitled, with your permission, to make interventions before you on matters.

I have not posed a single question to a witness. Unfortunately, we are having this conversation in front of Ms. Eisner, and I remember Professor Kessedjian's admonition yesterday. So perhaps Ms. Eisner could go back into the waiting room while we hear from Mr. LeVee on other matters, if I may suggest that.

ARBITRATOR BIENVENU: Yes, that's probably appropriate. Ms. Eisner, forgive us, but we'll ask you to go to another room.

I do want to take this opportunity -- well, I address everybody. We had a discussion about the one-lawyer rule, and we decided that a counsel team would be permitted to consult during cross-examination, and we were asked to pause to allow such consultations, and we will continue to do so. That is appropriate.

To correct you, Mr. Ali, you did yesterday raise an objection in the course of the redirect examination of a witness, and that normally would have been for the counsel who had conducted the cross-examination to do.

We do not want to be formally -- we do not want to be overly formal, but we do want both parties to feel that there are rules of engagement that have been either agreed or determined by the Panel and that those rules apply to everybody.

I don't want to have a discussion about it, Mr. Ali.

MR. ALI: I'd like to put it on the record. No, Mr. Bienvenu, I need to put it on the record.

We are here in a virtual hearing because of ICANN's insistence and because the Panel insisted on having this hearing. We have been put

under incredible pressure because of the way in which this procedure has been played out. The pressure has resulted from the manner in which ICANN has chosen to conduct itself.

I don't want to sound like I'm whining, but the way in which this is played out has not only put us under incredible pressure that if it continues will give rise to issue of fairness, number one.

Number two, we have been put in the position because of the way in which we have been proceeding, where I have had to -- where my team has had to basically break every rule of engagement that is required by the D.C. government and by my law firm in terms of health and safety because of the pace at which we are proceeding.

We are proceeding under immense pressure by this Panel that allows -- that -- where we are. We have nine witnesses.

Mr. Chairman, you, yourself, have been counsel in international arbitrations. One week to get ready for a hearing with nine witnesses that we have to cross-examine is no mean feat, and we are doing so where people are not in the same room. People are having to make special arrangements

because of how they live and where they live and who they live with in order to be able to participate in the hearings, unlike the three arbitrators and some of the members of the team, do not have the luxury of being in a location where they can work easily or, for that matter, the lead counsel and the partners. So it has, indeed, been extremely difficult.

I will say if I were sitting next to Mr. Litwin, as would be the case for any lead counsel, Mr. Chairman and members of the Panel, I would have been able to pass him a note.

So these objections that are being raised I find are to the rules of engagement and the formalities and the procedures. You know, it is either virtual or not virtual. If we are in a virtual world, then allowances need to be made as we are all learning how to manage the technology, how we are trying to manage health and safety issues, how we are trying to manage the time zone witnesses, how we are trying to get nine witnesses done in truncated hearing days.

So, Mr. Chairman, yes, I do need to put that on record, and I apologize if I'm being strident about this, but, frankly, I have reached

the end of my tether in the way in which some of this has been -- how some of this has played itself out.

I do think that allowances need to be made for the circumstances that we are in because I am seeing what this has done and is doing to my team, whose health and safety is paramount.

And together with that is our right to a fair hearing in which we are given an opportunity, a full and fair opportunity to present our case. Thank you.

MR. BIENVENU: Thank you, Mr. Ali. So we will take the request for the addition of this document into the record under advisement. I will discuss it with my colleagues during the next break.

And for the moment, unless there are questions from my colleagues for Ms. Eisner, we would move to the redirect, then probably break and then see if the addition into the record of this document would lead to a few additional questions.

So let's bring the witness back in.

Before we do, Mr. Ali, I will just say that we are conscious of the additional burden that the crisis which befalls the world is putting on

parties engaged in dispute resolution. We are conscious of the fact that the burden is particularly heavy for the party in the case that has to conduct the cross-examination of witnesses, and in your case there are many. We are fully conscious of that.

My recalling the one-counsel rule was to make sure that both parties feel that the rules agreed -- discussed and agreed are followed, so that was the only import of my reference to that rule.

So let us then bring -- I have no more questions for Ms. Eisner. Let's bring her back in.

Mr. Wallach, are you ready for your redirect?

MR. ALI: Just one more point of order before she comes back because I don't want her to hear this question. We would request that she not be released until the Panel has decided on the document.

ARBITRATOR BIENVENU: Of course. It goes without saying.

MR. ALI: Thank you.

ARBITRATOR BIENVENU: So, Mr. Wallach, please proceed with your redirect.

MR. WALLACH: Thank you, Mr. Bienvenu.

REDIRECT EXAMINATION

BY MR. WALLACH

Q. Good morning, Ms. Eisner.

A. Good morning.

Q. I have only a few questions for you.

First, you were asked by Mr. Litwin some questions about the number and identity of attendees at certain meetings of the IOT?

A. Yes.

Q. Were all IOT members given notice before a meeting was held?

A. Yes. It is a practice that there's typically both an email on the list as well as calendar notifications that go out from the secretary to all the people who are in that group.

Q. And were all IOT members given an opportunity to attend any meeting that was held?

A. Yes.

Q. Okay. Moving on to another subject. I believe Mr. Litwin suggested to you -- or asked a series of questions which suggested that any significant change to the version of the supplementary procedures that was sent out for public comment would need to be sent out for a

second public comment period.

Is it a correct statement of your understanding of the standard that any significant change to the supplementary procedures sent out for public comment would need to be sent out for a second public comment period?

MR. LITWIN: Objection; that's a leading question.

ARBITRATOR BIENVENU: Mr. Wallach, do you want to reformulate your question?

Q. BY MR. WALLACH: Okay. What is your understanding of the standard applied within ICANN regarding when a change to the version of the supplementary procedures sent out for public comment would need to be subjected to a second public comment period?

A. My understanding of when a change made to a version of the supplementary procedures that have previously been put out for public comment would have to go out again would be if it was -- if there was a change made that is not reflective of a trend that arrived from that first public comment or if it was significant or an unexpected change -- significant and unexpected change from that version that was previously put out.

Q. Thank you. Did you have a view on whether the changes to Rule 7 were required to be put out for a second public comment period?

A. I did not think that the changes made to Rule 7 as reflected in the version that the Board approved needed to go out for public comment because I believe they were in line with the trend of public comment that we had received on the versions that had been posted in 2016.

Q. Thank you. And now I'd like to look at a document. This is Tab 10 of the binder that was provided to you by Mr. Litwin. It is Exhibit C-314 for the arbitrator.

I'd like to turn to Page 63, using the page numbers that are in the bottom right-hand corner of the document. Actually, if we could refer to 62 for a moment.

On Page 62, you have that on the screen, on Page 62 in the final full paragraph you'll see a paragraph that Mr. Litwin referred to and took you through.

Do you recall that?

A. Yes.

Q. Okay. So now if we could turn over to Page 63 and look at the top paragraph. It says,

"The IOT began consideration of a set of interim supplementary procedures in May 2018. The versions considered by the Board today was the subject of intensive focus by the IOT in two meetings on 9 and 11 October 2018, convened with the intention of delivering a set to the Board for our consideration at ICANN63. There were modifications to four sections identified through those meetings, and a set reflecting those changes was proposed to the IOT on 9 October 2018."

Do you see that?

A. Yes.

Q. What is your view on whether the Board was aware of the changes made to the amicus procedures in the interim supplementary procedures in October 2018?

A. My view is the Board was aware of the changes that had been made.

MR. WALLACH: Thank you. Those are all my questions. Thank you very much for your testimony.

ARBITRATOR BIENVENU: Thank you, Mr. Wallach. Let me just see here.

So I am looking at my colleagues, Professor Kessedjian, Mr. Chernick, would you be agreeable to breaking now? We can have a side-bar

and discuss the request for the addition of a document.

We would ask Ms. Eisner to remain available, and then we would move to hearing either more from Ms. Eisner or to move to Ms. Willett. Is that agreeable to you?

ARBITRATOR CHERNICK: Yes.

ARBITRATOR KESSEDJIAN: Fine. Thank you.

MR. BIENVENU: Very good.

So, Ms. Eisner, I cannot see you, but I think you can still hear me?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Okay. May we ask you to go back in your room, if I may say so, stay available to the parties and the Panel, and we will instruct you and communicate our decision, and we'll go from there.

THE WITNESS: I'll be ready whenever you are.

ARBITRATOR BIENVENU: Thank you very much.

So take our break, 15 minutes, and we'll convene in our break-out room.

Oh, before we break, is everyone still there?

MR. LITWIN: Yes, Mr. Chairman.

ARBITRATOR BIENVENU: This question is for Mr. Litwin or Mr. Ali, depending on who can provide an answer. When did the claimant become aware of the document that you wish to add to the record?

MR. LITWIN: May I answer this, Arif?

MR. ALI: Yeah, I was going to say, Ethan, please do.

MR. LITWIN: Mr. Chairman, as you are aware, we had made a motion before the procedures officer to disclose what is called off-list communications that took place in this October time period because they had not been posted to the ICANN IRP-IOT's Wiki website that contained all the other emails that are in the record.

ICANN produced those on a sliding scale. These were -- this email along with, as you may recall, the October 12th email, were disclosed at the end of April 2019, after we had concluded the procedures panelist process. That record is now closed.

That caused us really on the eve of the Phase I hearing to move the Panel to admit the October 12 email, which ICANN objected to at the time because it was not part of the record that was before this Panel, as we had agreed to abide by the

record that had been developed before the procedures officer.

We were at the time, of course, aware of all the other emails that had been disclosed at the time, but given that they were nonsubstantive in nature, chose only to move to admit the October 12 email at that time.

This is also a nonsubstantive email. It is two lines that respond directly to Ms. Eisner's October 12th email. For that reason and because the relevance of it became clear today, particularly in light of, Mr. Chairman, your questioning, we thought it would assist the Panel in answering a question that you were trying to elicit from Ms. Eisner.

ARBITRATOR BIENVENU: And can you -- could you please repeat, what is the date of that email?

MR. LITWIN: It is Monday, October 15th, 2018, at 7:09 a.m., so a day before Ms. Eisner sends her October 16 email that you questioned her about, and I did as well.

MR. WALLACH: Mr. Bienvenu, could I just briefly respond to that?

MR. ALI: May I just supplement, David, so you can respond to everything?

Just points of information so we have everything in front of the Panel.

Chairman, this isn't clear, Ethan wasn't aware, this is not an email from Ms. Eisner to Mr. McAuley. It is from Mr. McAuley to Ms. Eisner.

ARBITRATOR BIENVENU: Yeah.

MR. ALI: This is a document that would also be helpful to examine Mr. McAuley when he testifies later next week.

Sorry, David.

ARBITRATOR BIENVENU: Someone on behalf of ICANN wanted to say something. Could you please identify yourself? I see Mr. LeVee, but I hear someone else.

MR. WALLACH: Yes. This is David Wallach. I just had something to say very briefly. I haven't seen the document that they are proposing to enter. It has never previously been provided to counsel for ICANN or mentioned in any context before it was raised for the first time this morning. So I obviously have not had a chance to investigate any of what Mr. Litwin said.

I believe the crux of what he said, the answer to your question, was that Afilias has had this document since April of 2019, which, of

course, is approximately 16 months ago.

ARBITRATOR BIENVENU: Yes. I think he was also saying, Mr. Wallach, that the relevance of that document arose out of questions asked by the Panel.

MR. WALLACH: I would not accept that representation, though. The issue of the drafting of these provisions of the interim supplementary procedures and exactly what communications happened in the lead-up to their adoption in October of 2018 has been front and center since the Amici sought to intervene in this proceeding and Afilias opposed their request on the basis of alleged improprieties in the adoption of Rule 7.

So the notion that Afilias had no concept that what they represent this email to say had any relevance until this morning is difficult to understand.

MR. LITWIN: Mr. Chairman, if I might, yes, this issue has been front and center, as Mr. Wallach says, since December 2018, when NDC and VeriSign sought to intervene in this IRP, but ICANN had not disclosed that document by then.

It was also relevant in the hearings before the procedures officer where that issue was

arbitrated, but ICANN had not produced that document at that time.

It was produced months after we made the arguments and the record had closed on the Rule 7 issue. We had agreed to simplify things and not overcomplicate the matters and burden this Panel in Phase I by relying on the record as it had been developed before the procedures officer, i.e., before this document had been produced, which would have, if that rule was followed strictly, exclude the October 12 email, which is so interesting and that the Panel quoted in its entirety in its Phase I decision.

This is not a substantive email. This is not an email that reflects any substantive communication between Mr. McAuley and Ms. Eisner on any point.

It simply goes to answer the question of whether or not there was a telephone call between Mr. McAuley and Ms. Eisner the day before she sent her September -- her October 16 email, and that is it.

MR. BLACKBURN: May I speak for a moment?

MR. WALLACH: May I speak briefly and then I will turn it over to Mr. Blackburn? It will not

take me more than 30 seconds.

ARBITRATOR BIENVENU: Go ahead.

MR. WALLACH: I believe Mr. Litwin said Afilias has been aware of this email and the relevance of this email since prior to the Phase I hearing. There was a deadline for the introduction of all new evidence into the record, which the parties agreed was the 23rd of July.

If they sought -- if Afilias wanted to add this to the record, they could have added it then. They chose to sit on it and wait until Ms. Eisner's testimony was underway and to spring it in the course of that. I believe those circumstances should be sufficient to resolve their application.

ARBITRATOR BIENVENU: Thank you, Mr. Wallach.

I saw counsel for VeriSign raising his hand metaphorically.

MR. BLACKBURN: Yes, Mr. Bienvenu. I just wanted to note on this issue that if the Panel refers back to its Phase I decision, as Mr. Litwin noted, the October 12th email is set out in full followed by a discussion in which I believe the Panel does directly question the communications that occurred between Mr. McAuley and Ms. Eisner

between that date and the October 16th email.

So I would say that the Panel has raised that question first in the Phase I decision in which it also then continued its final decision on Rule 7 to this proceeding.

So the Panel's questions in that regard were evident in the Phase I decision and amplified by you today. That's all.

ARBITRATOR BIENVENU: Thank you very much, sir.

So we will take our second break and resume in 15 minutes.

MR. LITWIN: Thank you, Mr. Chairman.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: So on the request by Afilias to admit into the record an email from Mr. McAuley to Ms. Eisner dated 15 October 2018, the Panel decides as follows: Counsel for Afilias will be permitted to show the email in question to Ms. Eisner in order to see if it assists in refreshing Ms. Eisner's memory on the question of whether before October 11 and October 16 she had conversations with Mr. McAuley, as opposed to email communications, about the draft of Rule 7, a question that I raised with the witness at the end

of her cross-examination by counsel for Afilias.

The email is allowed to be used strictly for that purpose and is not admitted as an additional exhibit into the record, although evidently the transcript will reflect the Panel's decision and the text of the email when it is put to the witness.

Mr. Litwin, we will call the witness back into the hearing room, and you are permitted to show her that email. I will continue with my questions and will ask the witness if that email assists in refreshing her memory.

MR. LITWIN: Very good, your Honor -- Mr. Chairman.

MR. BIENVENU: Ms. Eisner, this is Pierre Bienvenu. So the Panel has decided that counsel for Afilias would be permitted to show you the email -- an email dated 15 October 2018 that Mr. McAuley sent you in order to see if it assists you in recalling whether you had discussions with -- discussions as apart from -- as opposed from email communications with Mr. McAuley during the period between October 11th and October 16th.

So Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

Can we have the exhibit brought up so Ms. Eisner can see it? Chuck, if you can focus in on the top half of that where it is Mr. McAuley's email down to, "Hi, David," because it is very small on my screen.

RECROSS-EXAMINATION

BY MR. LITWIN

Q. Can you see this, Ms. Eisner?

A. Yes.

Q. Ms. Eisner, this is an email dated Monday, October 15th, 2018, and it is an email that Mr. McAuley sent to you in response to that email that you sent to him on October 12th, 2018.

If you can take a minute and review it. And my only question for you is whether this helps refresh your recollection whether you had a telephone call with Mr. McAuley at 1:00 p.m. on October 15th, 2018, to discuss your email of Friday, October 12th, 2018?

A. I don't have any recollection of the call, but I don't have any reason to think this email is untrue.

MR. LITWIN: Mr. Chairman, that is my only question.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Wallach, anything arising from this exchange?

MR. WALLACH: No, nothing for me. Thank you, Mr. Bienvenu.

ARBITRATOR BIENVENU: Okay. Ms. Eisner, it remains for me on behalf of the Panel to thank you very much for your evidence and for assisting the Panel in this matter.

MR. LITWIN: Thank you, Ms. Eisner.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: Ms. Eisner, you're still there?

MR. ENGLISH: I'm sorry, Pierre, I removed her. Do you want her to come back?

ARBITRATOR BIENVENU: Yes, please.

MR. ENGLISH: She's back. Sorry.

ARBITRATOR BIENVENU: Ms. Eisner, I would like to inform you that the sequestration effect of witnesses in this case extends to instructing witnesses after they have been heard by the Panel to not communicate or discuss with other witnesses whose testimony has not yet been heard.

MR. ENGLISH: Sorry, Mr. Bienvenu, she hasn't appeared yet.

ARBITRATOR KESSEDJIAN: She hasn't

appeared. I don't think she is there.

ARBITRATOR BIENVENU: Okay. Mr. Litwin, are you satisfied if we ask your friends opposite to convey these instructions to Ms. Eisner on behalf of the Panel?

MR. LITWIN: Of course, Mr. Chairman.

MR. BIENVENU: Mr. Wallach?

MR. WALLACH: We will give her the instructions.

ARBITRATOR BIENVENU: Thank you very much.

So we move then to the cross-examination -- well, to the introduction of the next witness, which is Ms. Willett. And who will be introducing the witness?

MR. LeVEE: I will, Mr. Chairman, Jeff LeVee.

ARBITRATOR BIENVENU: Mr. LeVee, very well. Is she waiting to be brought into the room?

MR. LeVEE: She has been.

Mr. Chairman, we have a fire alarm that is going. I am assuming since the building is almost empty, that we should follow the alarm.

I will bring my phone so I can relay to Mr. Smith what's happening. Usually these are about five minutes.

ARBITRATOR BIENVENU: Okay. So we will wait to hear from you, Mr. LeVee. We will wait ten minutes.

MR. LeVEE: I apologize. This has certainly never happened to me. We are going to leave the line open. I am going to put us on mute.

ARBITRATOR BIENVENU: We will take a second -- a third break, and perhaps, Mr. De Gramont, when you hear from your friends, or maybe we'll hear directly from them, then we can either reconnect or decide how we are going to move forward.

MR. De GRAMONT: Very good, Mr. Chairman. Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Ms. Willett, good afternoon, or end of morning, and welcome.

My name is Pierre Bienvenu. I chair the Panel hearing this case.

I would like to direct your attention, Ms. Willett, to the witness statement that you signed on the 31st of May 2019.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And at the end of that statement, you swear that the content of the

witness statement is true and correct?

THE WITNESS: Yes, I did.

ARBITRATOR BIENVENU: May I ask you, Ms. Willett, in relation to the evidence that you will give to the Panel today, likewise solemnly to affirm that it will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I so affirm.

ARBITRATOR BIENVENU: Thank you very much.

Mr. LeVee, your witness.

MR. LeVEE: Thank you, Mr. Chairman.

Good very late morning. How are you?

THE WITNESS: I'm well. How are you?

MR. LeVEE: Our apologies for keeping you in your own waiting period, but the fire alarm is over and it is fine.

I did want to ask if you have any corrections to your witness statement?

THE WITNESS: I have one correction. When I signed this witness statement in 2019 it was accurate, but since signing this statement I have left ICANN. I am no longer an employee of ICANN.

So the first paragraph that states I am the vice president of operations, I am no longer in that role at ICANN.

MR. LeVEE: So in order to make it accurate, you can say "I am the former president of operations"?

THE WITNESS: That would be correct.

MR. LeVEE: And likewise, Paragraph 5, it would say, "In my former role as vice president"?

THE WITNESS: That would be accurate.

MR. LeVEE: Okay. Any other corrections that you are aware of at this time?

THE WITNESS: No.

MR. LeVEE: Then, Mr. Chairman, Ms. Willett is available for cross-examination.

ARBITRATOR BIENVENU: Thank you very much, Mr. LeVee.

Mr. De Gramont, are you ready for your cross-examination?

MR. De GRAMONT: I am ready, Mr. Chairman. Thank you. May I proceed?

ARBITRATOR BIENVENU: Please proceed.

CROSS-EXAMINATION

BY MR. De GRAMONT

Q. Good morning, Ms. Willett. My name is Alex De Gramont. I represent Afilias. You should have with you a binder -- or rather a package that contains a binder, and pursuant to our agreement,

you can now open it. Your counsel, Mr. LeVee, who has been eagerly awaiting to open it, may do so as well.

Do you have it in front of you, Ms. Willett?

A. Yes.

Q. So at the first tab you will see your witness statement, and then in the following tabs are documents, some of which, or all of which, we will discuss with you today.

You will see that we have put the page numbers in brackets just so -- sometimes the hardcopies and the PDFs differ. So that we are all on the same page, literally, I will be referring to the page number in brackets.

I just want to confirm, this is the first time you have seen this binder; is that correct?

A. That's correct.

Q. Yes. And you haven't spoken to anyone about the testimony that's been provided in this hearing to date?

A. So today, no, but I have spoken with counsel.

Q. Okay. But you have not spoken to any of the witnesses?

A. No.
Q. And you haven't reviewed any of the transcripts?
A. No.
Q. All right. You said you have left ICANN. When did you leave ICANN?
A. 13 December of 2019.
Q. And what were the reasons for your leaving ICANN?
A. I was terminated as part of a restructuring within the organization.
Q. Okay. Did you sign any sort of agreement providing that you would give testimony in this proceeding?
A. So I did not sign anything pertaining to testimony in this proceeding.
Q. It wasn't part of your separation agreement or anything like that?
A. Correct.
Q. Are you currently employed?
A. I am not.
Q. Have you been employed in any capacity since 13 December 2019?
A. I have not.
Q. When did you start working at ICANN?

A. 1 October 2012 was my first day of employment at ICANN.

Q. Had you ever worked in the DNS industry before that?

A. No, I had not.

Q. And what was your first position in joining ICANN?

A. I believe the title that I was hired in with was as general manager of the new gTLD Program.

Q. Now, the deadline for new gTLD applications was June 2012.

Do you recall that?

A. It was May, June of 2012, prior to my arrival at ICANN.

Q. So you started at ICANN after that deadline had already passed?

A. That is correct.

Q. And just to be clear, you started at ICANN after Afilias, NDC and the other .WEB applicants had submitted their .WEB applications?

A. Yes, that's correct.

Q. After being general manager of the program, you were promoted to vice president of the program; is that correct?

A. I believe that there was a restructuring of titles and title change. So I don't believe there was a promotion, but yes, my title did change.

Q. Did your responsibilities change?

A. At that time of the title change, no.

Q. To whom did you report in those positions?

A. So when I first joined ICANN, I reported to Akram Atallah. His position changed, but I believe he was COO at the time he was hired.

ARBITRATOR KESSEDJIAN: Sorry to interrupt. This is Catherine Kessedjian, a member of the Panel. I have a difficulty understanding what you said. You are cut off from time to time. So perhaps if you want to speak closer to your microphone. Particularly when you turn your head there is a problem.

I'm sorry, but we need to be clear.

THE WITNESS: Is this any better?

ARBITRATOR KESSEDJIAN: Much better.

Q. BY MR. De GRAMONT: When you first started at ICANN, you reported to Mr. Atallah, you were saying?

A. Yes.

Q. And what was his position at that time?

A. I believe his title at that time was chief operating officer.

Q. And did you always report to Mr. Atallah until the time he left ICANN?

A. Yes, I did.

Q. Let's take a look at your witness statement, which is, again, at Tab 1 of your binder, and you will see -- so you can look at the documents in the binder, which I personally find easier. Our exhibit wizard, Chuck Vaughan, will also be putting the documents up on the screen, but I personally prefer to look at the documents in hardcopy, but it is obviously your preference.

If you turn to Page 2 of the witness statement, Paragraph 4, it says, quote, "In connection with the new gTLD Program, ICANN published an applicant guidebook, which sets forth the requirements for new gTLD applications to be approved and the criteria by which they are evaluated. The guidebook was developed in a years-long public consultation process in which numerous versions were published for public comment and revised based on comments received from the public," close quote.

I take it you still agree with that

testimony?

A. Yes, I do.

Q. Now, the guidebook was completed before you started at ICANN; is that correct?

A. Yes. There was a version of the guidebook completed. I don't think that there was any update to the guidebook after I started at ICANN.

Q. So you must --

A. It was completed.

Q. So you must have studied the guidebook upon assuming your position at ICANN?

A. Yes, I did.

Q. Okay. And it's obvious from the guidebook itself that the purpose is, to use your words, set forth, quote, "The requirements of the new gTLD applications and the criteria by which they are evaluated," unquote.

Do you agree?

A. Yes, I do.

Q. And in addition to studying the guidebook, I take it that you also studied ICANN's articles and bylaws?

A. Well, I reviewed them. They were quite lengthy and -- but I could definitely say that there were aspects of the guidebook that I studied

in order to manage the operation of the program. I wouldn't say that I studied the articles of incorporation and the bylaws.

Q. But you understood that the new gTLD Program and the guidebook were designed to promote the principles in the bylaws, correct?

A. Correct.

Q. Okay. Take a look at Tab 3 in your bundle, which is Exhibit C-9. This document is entitled "ICANN Board Rationales for the Approval of the Launch of the new gTLD Program."

I assume you have seen this before?

A. I may have. I honestly don't recall. It does not look familiar to me.

Q. Take a look at Page 9, which is under the heading, quote, "ICANN Board Rationale on the Evaluation Process Associated with the gTLD Program," close quote. Under the heading "Introduction," it states, quote, "Through the development of the new gTLD program, one of the areas that required significant focus is a process that allows for the evaluation of applications for new gTLDs. The Board determined that the evaluation and selection procedure for new gTLD registries should respect the principles of

fairness, transparency and non-discrimination," end quote.

Do you see that?

A. Yes, I do.

Q. And those are all principles that are stated in the bylaws, are they not?

A. I believe them to be.

Q. You don't recall that specifically?

A. I don't.

Q. Okay. But the guidebook had lots of requirements to promote the principles of fairness and transparency and nondiscrimination.

Do you agree with that?

A. I would, yes.

Q. As an example, the guidebook required that the public had the right to know which gTLD strings were being applied for and who was behind the application, right?

A. Correct.

Q. You're familiar with the frequently asked questions about the new gTLD Program which is posted on the ICANN website; is that right?

A. Is there a specific page? There is an entire new gTLD microsite, a subset of the ICANN.org website.

Q. Yeah. Would you turn to Tab 4 of your binder. This is Exhibit C-181, and these are the frequently asked questions that are posted as of today. And I know that 1.6 has been posted since, I believe, at least 2014, and it says, "1.6, how and when can I see which gTLD strings are being applied for and who is behind the application?"

And the answer is: "Approximately 2 weeks after the application submission period closes, ICANN will post the public portions of all applications received, including applied-for strings, applicant names, application type, mission/purpose of the proposed gTLD, and other application data."

Do you see that?

A. Yes, I do.

Q. Do you know who prepared this document?

A. I don't know specifically.

Q. Okay. But, again, we can see that, consistent with the principle of transparency, ICANN committed that the public would be able to see which gTLD strings were applied for and who was behind each application, do you agree?

A. I don't know what you mean by "who was behind." The application required applicants to

disclose -- the applications had to be submitted by an applying entity, by a company, not by an individual. But we did, as part of the application, the directors had to be -- directors, officers, managers had to be disclosed and any ownership interest in the applying entity greater than 15 percent, and the other individual that would have been disclosed would be -- that was definitely public was the applicant primary contact.

So those were the people related to the application.

Q. All right. I am simply quoting the language of the document, who was behind the application. The purpose for that was so the public could know who, in fact, was seeking to obtain a particular gTLD string; is that right?

A. I think it was to inform the public of the entity.

Q. And "the public" included other applicants, correct?

A. Correct.

Q. And so the guidebook, as you say, provided rules for portions of each application to be posted publicly so the public could comment on them.

Do you recall that?

A. I believe there were multiple purposes of posting the public application.

Q. Would you take a look at Tab 5 of your binder, which contains the first 30 pages of Module 1 to the guidebook.

For the record, the entire guidebook is on the record as Exhibit C-3. I'd ask you to look at Page 1-5, which is Section 1.1.2.3, and the guidebook states, quote, "Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes. As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting competition, achieving broad representation of global Internet communities and developing policy appropriate to its mission through bottom-up consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion," unquote.

Those are among the principles that the public comment period were seeking to advance; is that correct?

A. I believe this is describing the intention

of the comment period for applications.

Q. It also provided for governments to submit comments on applications?

A. Yes, yes, did it.

Q. Okay. In fact, on Page 1-6, Page 6, the highlighted paragraph just above "Comments and Formal Objection Process," says, "In the new gTLD application process, all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. Anyone may submit a comment in a public comment forum," unquote.

Was that your understanding?

A. Yes.

Q. There's a separate process by which governments can submit comments in response to applications as well.

Do you recall that?

A. I am not sure what you are referring to.

Q. There's a separate process by which members of the GAC can submit comments on applications?

A. I apologize. What do you mean by "comments"?

Q. Comments, concerns, there was a mechanism by which governments could express any concerns they had with respect to a particular gTLD and who was applying for it?

A. Yes, that's correct.

Q. Okay. Have you ever reviewed the public portions of NDC's .WEB application?

A. Not that I recall.

Q. You never took a look at NDC's application even though you were involved in the investigations that we'll talk about in a little bit?

A. So we had -- we received over 1,900 applications. They were frequently over 100 pages of content and dozens of attachments, and I had a large team of people, over 35, maybe 45 staff as well as hundreds of evaluators on various panels. They were the ones responsible for reviewing the content of the applications.

I on occasion did look at applications, but I don't -- I don't specifically recall looking at NU DOT CO's application.

Q. You recalled that in 2016 you were asked to investigate an allegation that there had been a change of ownership and control.

Did you not review the public portions of

the application at that time?

A. I may have. I don't personally recall looking at the application.

Q. Let's take a look at what's behind Tab 10 of your binder to see if it refreshes your recollection. This is Exhibit C-24, and it is the public portions of the NDC .WEB application. Just tell me when you're there.

A. I am there. Thank you.

Q. If you flip through it, Pages 1 through 3 contain background information about the applicant, who the main contacts are, what the address is and so on, right?

A. Yes.

Q. And it lists two primary contacts, Jose Ignacio Rasco and Mr. Nicolai Bezsonoff.

You see that on Page 2?

A. Yes.

Q. Then if you go to Page 4, it asks for the names and positions of all directors.

Do you see that?

A. Yes, I do.

Q. And, again, it lists Mr. Rasco, Mr. Bezsonoff and also Juan Diego Calle.

Do you see that?

A. Yes, I do.

Q. And then it asks for the names and positions of all officers and partners, and Mr. Rasco is listed as the CFO. Mr. Calle is listed as the CEO, and Mr. Bezsonoff is listed as the COO.

Do you see that?

A. Yes, I do.

Q. It asks for the names and positions of all shareholders holding at least 15 percent of the shares, and here we see Domain Marketing Holdings, LLC, and NUCO LP, LLC.

Do you know who owns those companies?

A. I have no idea.

Q. Okay. Have you reviewed Mr. Rasco's witness statement in this case?

A. I have not.

Q. He refers to beneficial owners of those companies. You don't know who the beneficial owners of these two companies are?

A. I do not.

Q. Now, Paragraph 11(d) says, quote, "For an applying entity that does not have directors, officers, partners or shareholders," it asks for the names and positions of all individuals having

legal or executive responsibility.

What was the purpose of that request, that question?

A. So I'll say I wasn't part of the team drafting the guidebook or the questions, but I can respond from the perspective of how we utilized that information in the course of administering the program.

Q. I assume it was because you wanted to know who, in fact, was controlling the entity if there were no directors, officers, partners or shareholders; is that a fair statement?

A. Well, I guess my understanding is that there's different legal structures in different countries around the globe and that they might -- those entities might not have typical directors, officers, partners, shareholders.

So it was an option that if you didn't -- in a way, if the applicant wasn't able to respond to 11(a), 11(b) and 11(c), then 11(d) was another place where they could respond with relevant information.

Q. Again, that's so ICANN and the public can see who is the controlling entity applying for a particular string, right?

A. I wouldn't use the word "controlling," but individuals who had some involvement in the organization.

Q. Who have legal or executive responsibility; those are the words used, right?

A. In 11(d), yes.

Q. Skipping ahead to Page 6, this is the mission/purpose part of the application, and ICANN requires that to be publicly posted; is that correct?

A. Yes. This is Question 18. This is one of the questions that is publicly posted.

Q. Okay. And you can see that it's one of the longer responses that NDC has given in the application; is that a fair assessment?

A. Well, it's -- their response to 18(b) is over two pages long, but I haven't reviewed the entire application. So two pages is lengthy. Some applicants' applications were very, very long. We did have some sort of -- I think there was some sort of word-count limit to questions.

Q. And if you look at the response to 18(b), "How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?" It says in the last sentence of the first

paragraph, quote, "Prospective users benefit from the long-term commitment of a proven executive team that has a track record of building and successfully marketing affinity TLDs."

You understand the proven executive team to be referring to the NDC executive team?

A. Oh, I see. Sorry.

Q. In your understanding -- I think the plain language understanding that anyone reviewing this in the public portions of the application would understand that the proven executive team is a reference to NDC's executive team; is that a fair reading of this?

A. I don't know what NDC meant, but I would -- that's how I would interpret it.

Q. Okay. And then on Page 7, the first full paragraph, "The experienced team behind this application initially launched and currently operates the .CO ccTLD," and that's a country code TLD?

A. That's correct.

Q. It says, The intention is for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's experience and expertise in marketing and

branding TLD properties, unquote.

Again, the reader would assume the experienced team being referred to is the experienced team at NDC?

A. That's how I would read it.

Q. That's the experienced team behind this application, correct?

A. That would be my understanding.

Q. And then in the -- one, two, three -- third full paragraph on Page 7, last sentence, "We plan to implement a very similar strategy for .WEB in its launch, operation, promotion and growth," and the reader would assume that that's a similar strategy that NDC used for .CO.

Is that a fair reading?

A. I believe so.

Q. And then in the next paragraph, at the last sentence of the paragraph, quote, "The domain's marketing strategy will utilize a three-pillar framework similar to that used with .CO."

Is it fair to assume that the average reader would understand that to mean that NDC was going to use the same or similar strategy that it had used with .CO?

A. I believe so.

Q. And then if you go up in the middle of the second paragraph, it says, "In addition, .CO has become the standard secondary option to .COM from the leading global registrars to having the most conversions when presented with a non-.COM option."

And the suggestion is that NDC will use .WEB in the same manner as it used .CO to compete against .COM; is that a fair reading?

A. I don't -- I don't think I would take that understanding. Could I ask you to repeat the question? I was still reading this paragraph.

Q. Yeah, sure.

So NDC's mission purpose statement is saying that it successfully launched .CO as a -- as another option to .COM, and it is going to use -- it plans to use .WEB in the same manner; is that a fair summary?

A. Yes. I believe they plan to market .WEB in the same way.

Q. Let's turn to Tab 8 of your binder, and that is Module 6 to the guidebook, again, part of Exhibit C-3.

And these are the terms and conditions by which the applicant agrees to be bound when it

submits an application for a gTLD under the new gTLD Program; is that correct?

A. Correct.

Q. And ICANN considers these terms and conditions to be binding on the applicants, right?

A. Yes, they do.

Q. In fact, ICANN considers the submission of a new gTLD application to form a contract between the applicant and ICANN; is that your understanding?

A. I am not a lawyer. I am not quite sure if -- I don't think I could speak to it being a contract.

Q. Have you ever heard ICANN refer to the submission of a new gTLD application to form a contract?

A. I don't recall it being expressed that way.

Q. Okay. Do you recall that Ruby Glen filed a lawsuit in Federal Court against ICANN in connection with .WEB?

A. Yes, I do.

Q. And you submitted a declaration in that lawsuit, right?

A. Yes.

Q. And ICANN invoked the litigation waiver that is a part of Module 6.

Do you recall that?

A. I do.

Q. You don't recall that ICANN argued that the application formed a contract between the applicant and ICANN in those proceedings?

A. I don't recall reading ICANN's arguments in the matter.

Q. Do you remember that the Federal Court dismissed Ruby Glen's lawsuit based on the litigation waiver?

A. I recall that the lawsuit was -- it did not proceed. I believe you that it was based on the litigation waiver, but I don't recall knowing that either.

Q. Ordinarily I would offer you some water, but I'm afraid I can't.

A. Thank you.

Q. Let's take a look at the terms and conditions. And looking at the first paragraph of Module 6, on Page 2, the guidebook states that the applicant agrees to be bound by the terms and conditions, quote, "without modification," unquote.

Do you recall that?

A. I do, yes.

Q. Okay. And you recall that according to Paragraph 1, and I quote, applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, end of quote.

Do you recall that warranty?

A. Yes, I do.

Q. And your understanding is that that warranty applied to all statements and representations contained in the application; is that your understanding?

A. Yes.

Q. Okay. And then the last sentence of Paragraph 1 says, quote, applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading, unquote.

Do you recall that?

A. Yes.

Q. Again, that applies to all of the information submitted in the application; is that

right?

A. Yes.

Q. If we turn to Page 4, Paragraph (c), you'll see the litigation waiver that we just talked about.

Do you recall that?

A. Yes.

Q. And then I have a couple of questions about Paragraph 10 on Page 6. I want to ask you about the first sentence and the last sentence.

So the first sentence says, quote, applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement.

Do you see that?

A. I do.

Q. So by filing an application, an applicant doesn't receive any rights in the gTLD itself; is that your understanding?

A. Correct. It is simply an application to operate a top-level domain in the future.

Q. So it only receives rights in the gTLD if

it enters a registry agreement with ICANN; is that correct?

A. Correct.

Q. By contrast, the last sentence says, quote, applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.

Do you see that?

A. I do.

Q. So ICANN distinguishes between rights and obligations in the gTLD on the one hand from rights and obligations in the application on the other hand; is that right?

A. Yes, ICANN makes a significant distinction.

Q. So just as an example, one of the applicant's rights is that if they make it through the evaluation process and go on to an ICANN auction, they have the right to submit bids on their behalf in advance of the application, right?

A. So participating in an auction, the way I would express that is participating at auction is one of the applicant's rights or not participating in an ICANN auction of last resort.

Q. So they are prohibited under Section 10

from reselling, assigning or transferring that right, correct?

A. Well, they are prohibited from assigning -- reassigning, transferring their application.

Q. Well, you just said that they had certain rights in the application, one of which is to make bids in a public auction -- rather, an ICANN auction, whether to choose to enter a private auction.

So there are particular rights or obligations that they are not allowed to resell, assign or transfer?

A. Well, so applicants, because they were in many cases not always expert in how to submit an application, they engaged with third parties to submit their applications on their behalf or they -- to provide responses to how technical registry operations would be held to essentially provide them with the technical responses to their application.

I mean, in fact, Afilias was one of those consultants. They provided and submitted applications on behalf of a couple dozen other applicants. So applicants all the time were

assigning rights or designating third parties to operate on their behalf.

But the way we -- like, from an operational or transactional perspective, we viewed this Paragraph 10 about not assigning the rights and obligation of the application to be of the total application. You couldn't sell your application in total to someone else.

Q. You could hire someone to assist you, but you couldn't sell to someone the right to tell you whether you are allowed to bid in a public auction or not?

A. I don't -- I am not a lawyer. I don't think -- I haven't evaluated that. I wouldn't say so. I wouldn't agree with that, but I am not a lawyer.

Q. Do you know if anyone at ICANN has prepared any sort of analysis of what the rights or obligations in an application are?

A. Not that I'm aware of.

Q. But in any event, to your knowledge, NDC has not yet entered a .WEB registry agreement with ICANN, correct?

A. That's correct.

Q. And as far as you know, NDC has not

formally requested ICANN to prove -- to approve an assignment of the .WEB registry agreement to VeriSign, has it?

A. Since there's no agreement, registry agreement signed, there's nothing to assign.

Q. And the process for seeking agreement -- or, rather, assignment of an executed registry agreement is different from the process for applying for a new gTLD, do you agree?

A. Yes.

Q. For example, you don't have to pay 185,000 application fee to seek assignment of an executed registry agreement, right?

A. That's correct.

Q. And you don't have to go through a public notice and comment period, do you?

A. I don't recall all of the administrative aspects of assigning a registry agreement. I don't recall if there's a public notice period.

Q. Any event, it's a different process --

A. Yes.

Q. -- from the new gTLD?

A. Yes.

Q. Take a look at Tab 9 of your binder, which is the model Registry Agreement that's included

to -- in the guidebook.

We are going to skip to Page 18 -- sorry, Page 17, Paragraph 7.5, the heading is "Change in Control: Assignment and Contracting," quote, neither party may assign this Agreement without the prior written approval of the other party, which approval will not be unreasonably withheld.

Do you see that?

A. I do.

Q. And that's very different from the language and terms and conditions where they say applicant may not resell, assign or transfer any of the applicant's rights in connection with the application, do you agree?

A. You're asking if I agree that they are different language?

Q. Well, my question, ma'am, is: In the terms and conditions, the language "approval will not be unreasonably withheld" doesn't appear?

A. Correct.

Q. Now, in Paragraph 39 of your witness statement, you mention two transactions involving Afilias, one in which Afilias sought ICANN's permission to assign an executed registry agreement for .MEET to Google.

Do you remember that?

A. I am going to my witness statement. Thank you.

Q. Yes. Please take your time.

A. Yes. Afilias sought ICANN's approval to transfer, assign the .MEET registry agreement. It also -- another entity requested an assignment of the top-level domain .PROMO to Afilias, yes.

Q. Right. Those were requests made with respect to execute Registry Agreements that had already been entered; is that correct?

A. That's correct.

Q. So those requests were evaluated under a different process than the process for applying for a new gTLD; is that correct?

A. Yes.

Q. Are you aware that during the application process, Mr. Kane of VeriSign asked ICANN for information about assigning Registry Agreements?

A. I don't -- I am not aware of that. I don't recall.

Q. Okay. Would you take a look at Tab 11 of your binder, which is Exhibit R-18. It consists of several emails in early September 2015 between Mr. Pat Kane at VeriSign and Mr. Atallah and

Mr. Halloran at ICANN.

And my question is whether you have ever seen this before?

A. I have not.

Q. Okay. Let's skip ahead to the summer of 2016. And you now know that in early June 2016, Mr. Rasco of NDC was corresponding with Mr. Nevett of Donuts about whether .WEB could be resolved through a private auction.

Do you recall that?

A. I recall being informed that they were corresponding. I don't recall the exact date.

Q. Could you take a look at Tab 12 of your binder, Exhibit C-35?

A. I am there.

Q. Okay. We all know who Mr. Rasco is. Mr. Nevett was an executive at Donuts, which owned Ruby Glen, which was one of the .WEB applicants, right?

A. Yes.

Q. And he says in the email below, written on 6 June 2016, "Hi, guys. Jose and I corresponded last week, but I wanted to take another run at the three of you."

Do you understand Jose to be -- well,

obviously it is a reference to Jose Rasco; is that your understanding?

A. That's my understanding.

Q. Okay. And he says, "Until Monday, I believe that we have a right to ask for a two-month delay of the ICANN auction with the agreement of all applicants. Would you be okay with an extension while we try to work this out cooperatively?"

Do you see that?

A. I do.

Q. Have you seen these two emails before?

A. I may have. I recall reading Mr. Rasco's response. It may have been -- I may have seen Mr. Nevett's response, but I don't specifically recall.

Q. Okay. Before we look at Mr. Rasco's response, do you recall that most contention sets are resolved privately?

A. Yes. Without ICANN's involvement, yes.

Q. In fact, in the guidebook, ICANN encourages contention sets to resolve the contention sets privately; is that right?

A. That is correct.

Q. So let's turn back to Tab 7, which is

Module 4 of the guidebook, on string contention procedures, and I'd ask you to turn to Page 6. Just let me know when you're there.

A. Yes, I am there.

Q. Okay. So under 4.1.3, "Self-Resolution of String Contention," it says in the first paragraph, quote, applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website."

Now, this applies only to applicants, correct?

A. Correct. Yes, it is regarding applicants with new gTLD applications.

Q. And it specifically applies only to applicants who have made it through the evaluation process and who are in a contention set?

A. Well, since it's -- I would disagree there. It says that it could happen as soon as the applications are received and the contention sets are posted. Evaluations are not complete at that time.

Q. I see. But, again, it is only referring to entities that have -- submitted applicants and are applying for a particular string and who have been identified in the public comment period?

A. Yeah, that's who had applications, so yes.

Q. Yeah. And applicants can resolve a contention set in any number of ways, right?

A. True.

Q. So if we look at the next paragraph, it says applicants may -- quote, applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications, unquote, right, that's one of the ways they could resolve contention?

A. Correct.

Q. But it goes on to say, "An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture," unquote.

Then the next sentence says, quote, "It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention," unquote.

And the way I understand this is that an applicant could not form a joint venture by -- let

me state that again.

An applicant could not resolve string contention by forming a joint venture with a nonapplicant, but that applicants could establish joint ventures with one another in their efforts to resolve string contention.

A. That would not be my understanding.

Q. What is your understanding?

A. So my understanding was that where it says, "An applicant may not resolve string contention by selecting a new string or replacing itself with a joint venture," meaning company Acme Corporation couldn't form a joint venture with Company B, C, D and E and then say, "We have a Joint Venture ABCDE, and we are now replacing my Acme Corporation application with Company ABCDE." Essentially they couldn't change the applying entity.

But that they could form a joint venture with other applicants, anybody else, other interested parties, some subset of them, and potentially ICANN would not have any cause to reject if -- that new entity or joint venture that acquired Acme Corporation. That would have been consistent with the rules of the program and

consistent with the applicant guidebook.

Q. But the proviso is that any material changes in applications will require reevaluation, and so it goes on to say, quote, "Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation," end quote, right?

A. Yes. So may I explain?

Q. Sure.

A. My understanding -- again, I didn't write the language in the guidebook, but the mechanism for reevaluation was not fully understood and there were significant concerns that reevaluation would be extremely onerous and time-consuming.

During the course of operating the program and because the program went on for so many years, much longer than was anticipated in the guidebook, my team and I, we had to devise a mechanism, various mechanisms for reevaluation.

So truly we -- I believe we reevaluated dozens, possibly hundreds of applications, some portion, either financial reevaluation or technical

reevaluation. But the applicant itself wasn't changing, but some portion of their application may have changed, or the ownership, those interests, the directors and the 15 percent interest might have changed.

Q. Right. But the idea, again, is one of transparency. The joint venture, the combination can't fundamentally change the identity of the applicant or the purpose for which the string is being applied, right?

A. Well, there's a lot thrown in there.

So certainly the applicant couldn't change. That was one of the hard-and-fast rules. The applying entity couldn't change.

However, there were multiple instances where the applying entity was acquired by another organization, did, in fact, no longer -- it ceased to exist, and it was subsumed or there was some -- its assets were acquired by some parent or tertiary organization.

Over years and years there were a variety of scenarios that weren't anticipated, in my belief, in this portion of the applicant guidebook that we then had to find a mechanism to manage, administer as part of the program.

Q. The applicants would have to provide notice to you so you could evaluate them, right?

A. Correct. We asked that they submit what we called an application change request in writing, and then the program team determined if and what reevaluation might have been necessary.

Q. Okay. Let's go back to Exhibit C-35, which is behind Tab 12 of your --

MR. BIENVENU: Mr. De Gramont, I am sorry to interrupt you, but while we are on this page, may I just ask a question?

MR. De GRAMONT: Yes, please.

ARBITRATOR BIENVENU: So the second sentence of the highlighted paragraph, the first scenario there, "An applicant may not resolve string contention by selecting a new string," what does that mean?

THE WITNESS: So if the applicant applied for .WEB and then they noticed, wait, there are six other people who applied for .WEB, they can't say, "Oh, oops. Let me apply for .INTERNET. I don't want to be -- have to fight this out with six other people. So let me just change the string I applied for."

ARBITRATOR BIENVENU: Basically change

contention set?

THE WITNESS: Really even before applications were put into a contention set. Once they were published, the world, the applicants were able to see who had applied for the same string.

Those applicants presumed, rightly so, if you applied for the same string, that was a direct contention and only one applicant could prevail. And we did have requests for applicants to change their string to a completely different word.

ARBITRATOR BIENVENU: Okay. So there's a continuum here in time.

First there is a string contention, and that's when more than one person, one entity applies for a gTLD, and then at a subsequent time -- point in time, there is created a contention set where these competing applicants are placed?

THE WITNESS: Yes. This is a complex aspect of the program. I can explain sort of sequentially what occurred, if that's helpful.

So the applications came in, in May, June of 2012. ICANN published the list of all of those applications and saw -- applicants could see all of the other applications, so it was very easy for

them to see that there were seven applications for .WEB.

At that time, in June of 2012, there were no contention sets. There was another process described in the applicant guidebook that evaluated string similarity. And we had an expert panel who evaluated and made those determinations, and they defined for us what applications were put into the contention set. Those contention sets were published, to my best recollection, February of 2013, but then -- it still goes on.

And then the final complexity is that there were -- there was a type of objection that could be filed, a string-confusion objection, and it was -- such an objection was filed in this case that said even strings that were not obviously similar or hadn't been deemed by that string similarity panel to be in contention, that a party -- an applicant or another party could say -- raise this objection to say that they might be confusingly similar, which would change the constitution, and the members of that contention set.

ARBITRATOR BIENVENU: Right. But focusing back on the language that I was questioning you

about, when we see the words "string contention," that is at a point in time before the creation of a contention set?

THE WITNESS: From my perspective, when the guidebook refers to this and it says, "Applicants may resolve string contention," that is after ICANN has published contention sets. Until then, it was all supposition what would be in a contention set.

ARBITRATOR BIENVENU: Okay. Very well. I understand. Thank you for that clarification.

Mr. De Gramont, we are coming to the end of our hearing day as scheduled.

Today's the day when one member of the Panel has a need for a hard close. It will not always be the case, but today is such a day.

May I ask you how are we doing for time in terms of your game plan and where you are in your cross?

MR. De GRAMONT: Mr. Chairman, we had estimated that we would need about four hours of time for the examination of Ms. Willett. I think we have been going for about an hour and ten minutes, so another two hours and 50 minutes or so should get us there.

ARBITRATOR BIENVENU: So the four hours remains the right estimate?

MR. De GRAMONT: I believe so, Mr. Chairman.

ARBITRATOR BIENVENU: Okay.

So, Ms. Willett, you haven't completed giving your evidence to the Panel, and therefore, I must instruct you not to discuss the case or your evidence with anyone until we resume tomorrow.

MR. De GRAMONT: Mr. Chairman, I assume that the witness should not be looking through the exhibits. Ordinarily in a real hearing, we would probably take back the bundle.

So I would request an instruction to the witness not to be reviewing the exhibits about which we have not yet questioned her.

ARBITRATOR BIENVENU: Very well.

You don't object to that, Mr. LeVee?

MR. LeVEE: No, that's fine.

After the witness leaves, I have a scheduling issue I want to raise. It is something I could raise in the morning. I just want to handle this.

ARBITRATOR BIENVENU: Let's do one thing at a time.

Ms. Willett, you are not to look at the witness binder that you were provided.

THE WITNESS: Understood. Thank you, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you very much. So we say good-bye until tomorrow morning.

And you want to raise something, Mr. LeVee?

MR. LeVEE: Really I am just giving notice to the Panel and to the parties, following Ms. Willett, Mr. Disspain, because of the estimates -- I am not interested in casting dispersions at all -- the Panel has questions, and we will have to sort out questions later.

Mr. Disspain is available tomorrow and also on Friday. He's not available for chunks of next week. So I just wanted to alert everyone, we may -- we should get to Mr. Disspain tomorrow, but he needs to finish Friday.

Under the time estimates, that should not be a problem, but I don't know if anybody else has timing issues with the witness. I just wanted to make sure.

ARBITRATOR BIENVENU: That's very helpful for you to mention that, and everybody has taken

due note of it.

MR. LeVEE: Thank you.

ARBITRATOR BIENVENU: So we'll suspend the hearing until tomorrow morning.

MR. ALI: One other tiny issue is how would you like to deal with the question of the other plea documents?

ARBITRATOR BIENVENU: We will look at the exchange of emails overnight and communicate our decision to the parties tomorrow.

MR. ALI: Thank you.

ARBITRATOR BIENVENU: Thank you, Mr. Ali. Good night, everyone.

MR. De GRAMONT: Thank you, Mr. Chairman. Thank you, everyone.

(Whereupon the proceedings were concluded at 1:03 p.m.)

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I am the reporter that stenographically recorded the testimony in the foregoing proceeding and the foregoing transcript is a true record of the testimony given.

Dated: August 13, 2020

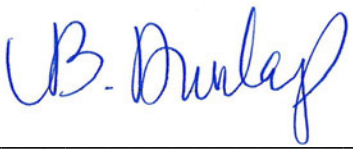

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EXHIBIT Altanovo-5

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

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

WITNESS STATEMENT OF PAUL LIVESAY IN SUPPORT OF ICANN'S REJOINDER AND *AMICI'S* BRIEFS

Confidential – Attorneys' Eyes Only

Not to be Publicly Disclosed in IRP

I, Paul Livesay, declare as follows:

1. I am a former Vice-President and Associate General Counsel of VeriSign, Inc. ("Verisign" or the "Company"). I have personal knowledge of the matters set forth herein, except where I indicate otherwise, and am competent to testify as to those matters.

2. From 2014 through 2018, I served as a Vice-President and Associate General Counsel for Verisign. In that capacity, I was in charge of intellectual property matters, had responsibility for certain strategic business transactions for the Company, and provided general advice and counseling to the Company's management on business and legal matters. My position at the company had both business and legal components. My statement is only a statement of facts and not legal reasoning or opinions. Previously, I had been with Verisign in 2009-2010 as Vice-President, Strategy and Management, for Verisign's digital certificate business.

3. I have been an intellectual property and technology transactions attorney for over twenty-five years. Prior to joining Verisign in 2014, among other roles, I practiced law at the firm of Wilson, Sonsini, Goodrich & Rosati, was General Counsel of RSA Data Security, Inc., was General Counsel at the design firm IDEO LLC, and was Vice-President, Technology, for Symantec Corporation. I am a member of the Bar of the State of California.

The Secondary Market for new gTLDs and Discussions with .WEB Applicants

4. In 2014, I was put in charge of identifying potential business opportunities for Verisign in ICANN's New gTLD Program. Up until that point, Verisign had participated in the New gTLD Program by filing applications for new TLDs that were variants of its company name (*i.e.*, ".Verisign") or internationalized versions of Verisign's existing TLDs, but Verisign had not sought to acquire the rights to a new gTLD not already associated with Verisign.

Redacted - Third Party Designated Confidential Information

. The period for filing new applications as part of the New gTLD Program had ended. Redacted - Third Party Designated Confidential Information

Redacted - Third Party Designated Confidential Information

5. Redacted - Third Party Designated Confidential Information

I studied very closely the New gTLD Applicant Guidebook (the "Guidebook") published by ICANN, the Auction Rules, and other information regarding the New gTLD Program available on ICANN's website, www.icann.org, to familiarize myself with the rules applicable to the Program. Redacted - Third Party Designated Confidential Information

6. The Guidebook and Auction Rules do not prohibit applicants from entering into business transactions with other entities with respect to an applied-for TLD. Based on the Guidebook, it is apparent that ICANN's concern with respect to such transactions is whether a transaction would require re-evaluation of the applicant, which could result in a delay in the resolution of a contention set. For example, Section 4.1.3 of the Guidebook acknowledges that applicants may seek to resolve string contentions (*i.e.*, which of various competing applicants for a TLD would be awarded the TLD) by establishing joint ventures among themselves, which could change the ownership of the applicant or the identity of the applicant itself.[1] The Guidebook cautions that material changes such as these could require re-evaluation, and encourages applicants to combine in ways that do not require re-evaluation: "Applicants are encouraged to resolve contention by combining in a way that does not materially affect the

[1] Afilias C-3 (*gTLD Applicant Guidebook*, Module 4, § 4.1.3, *available at* https://newgtlds.icann.org/en/applicants/agb).

remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation."[2]

7. Similarly, Clause 68 of the Auction Rules recognizes that applicants may enter into "settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction"; although once within an active auction timeline, these activities are prohibited during a "Blackout Period" extending from the deposit deadline for an auction through full payment of the winning auction bid, but permitted both for the period prior to and after the Blackout Period.[3]

8. Redacted - Third Party Designated Confidential Information

). Donuts was a major participant in the new gTLD Program, filing hundreds of applications for new gTLDs. Under the arrangement between Donuts and Demand Media, which was entered into while the new gTLD applications were pending, the gTLDs would be transferred to Demand Media after rights to the subject new gTLDs were awarded to Donuts in exchange for Demand Media's assistance in funding Donuts' acquisition of the gTLDs. Donuts also was one of the several applicants for the .WEB gTLD. Attached hereto as Exhibit A is a true and correct copy of a press release dated June 11, 2012 from Demand Media describing its arrangement with Donuts (https://ir.leafgroup.com/investor-overview/investor-

[2] *Id.*

[3] Afilias C-4 (*Auction Rules for New gTLDs, Indirect Contentions Edition, Version 2015-02-24*, Clause 68(a) & (b), *available at* https://newgtlds.icann.org/en/applicants/auctions).

press-releases/press-release-details/2012/Demand-Media-to-Participate-in-Historic-Expansion-of-Generic-Top-Level-Web-Domain-Name-Extensions/default.aspx).

9. Through my research, I also became aware that it was not uncommon for entities interested in acquiring a new gTLD to form a special purpose entity to be the applicant for a new gTLD. For example, I understand that Donuts formed a separate special purpose entity for each gTLD for which it applied. For .WEB, Donuts formed Ruby Glen, LLC and used that entity to apply for the gTLD. By contrast, Google used the same entity, Charleston Road Registry Inc., to apply for all of the new gTLDs it sought to acquire.

10. One effect of the use of special purpose entities was to facilitate secondary market transfers of new gTLDs through the transfer of the special purpose entity independent of other assets of a party supporting the applicant. Another effect of the use of such entities can be to maintain as confidential the party for whose benefit the application was being pursued. In this regard, the new gTLD application form required the disclosure of the name of the applicant and the identity of any person or entity that owned more than 15% of the applicant.[4] In some instances, this resulted in the disclosure of the real party in interest. For example, Google is identified as the owner of Charleston Road Registry Inc. In other instances, the requirement for a disclosure of the real party in interest was avoided by forming another entity to be the parent of the applicant, so the real parties in interest were not disclosed as the parent entity in the application. Donuts formed "Covered TLD LLC," for example, and made that entity the disclosed parent entity on many of its applications.

11. Redacted - Third Party Designated Confidential Information

ICANN's website identified each new gTLD for which an application had been filed and listed the identity of applicants along with a copy of non-confidential parts of their respective applications. Redacted - Third Party Designated Confidential Information

[4] Afilias C-3 (*gTLD Applicant Guidebook*, Module 2, Attachment to Module 2, *Evaluation Questions and Criteria*, Question 11(c), *available at* https://newgtlds.icann.org/en/applicants/agb).

12. Redacted - Third Party Designated Confidential Information

13. Redacted - Third Party Designated Confidential Information

14. Redacted - Third Party Designated Confidential Information

The Domain Acquisition Agreement between Verisign and NDC

15. Redacted - Third Party Designated Confidential Information

16. Redacted - Third Party Designated Confidential Information

. Private auctions are conducted on terms privately negotiated among the competing bidders for the TLD, and private auction agreements commonly include terms for the losing applicants to split the proceeds of the auction among themselves. In private auctions, which may have been the most common form of resolving contention sets, there are no Guidebook requirements, and commonly no other requirements, with respect to how a participant conducts its bid, disclosure of financing terms, disclosure of interested parties, or post award intentions of the participants. Indeed, some applicants seem to have made a lucrative business out of losing private auctions. In a public auction, by contrast, the terms are not privately negotiated among the participants/competitors, and the proceeds of the auction are placed in a fund to be set up by ICANN for investment benefitting the Internet community as a whole rather than benefitting the losing bidders in a private auction.

17. Redacted - Third Party Designated Confidential Information

18. On August 15, 2015, NDC and Verisign entered into the Domain Acquisition Agreement ("DAA"). A copy of the DAA is attached hereto as Exhibit D. The DAA is a conditional agreement pursuant to which Verisign agreed to provide the funds for NDC to participate in an auction for the .WEB gTLD. In the event NDC prevailed at the auction and

entered into a registry agreement for .WEB with ICANN -- upon application to ICANN and with ICANN's consent -- NDC would assign the .WEB registry agreement to Verisign.

19. Redacted - Third Party Designated Confidential Information

20. The DAA is compliant with all terms of the Guidebook and consistent with transactions by others with respect to the new gTLD Program. Verisign did not acquire any interest in or control over NDC. The application for .WEB was not transferred to Verisign. The DAA's registry agreement assignment provision was conditional and contingent, applied only to an executed registry agreement following an award of .WEB to NDC, and was subject to ICANN's prior consent. The structure of the agreement also was consistent with industry practices in the secondary market for new gTLD applications of which I became aware in my research of the New gTLD Program, as explained above and as further documented below.

21. Redacted - Third Party Designated Confidential Information

22. The express terms of the DAA establish that it does not transfer NDC's application for .WEB and that any transfer to Verisign would be in the future and contingent on

ICANN's normal processes for such transfers, including application to ICANN for consent to an assignment of the registry agreement and ICANN's consent. For example, the DAA provides:

Redacted - Third Party Designated Confidential Information

Thus, a transfer or assignment would only take place after a registry agreement was signed between ICANN and NDC, ICANN's subsequent consent to an assignment of the registry agreement to Verisign, and the subsequent execution and delivery of the Transfer Agreement.

23. The lack of any transfer of rights in NDC's Application or assignment of a registry agreement is further confirmed by the terms of the DAA that permitted a termination of

Redacted - Third Party Designated Confidential Information

24. Redacted - Third Party Designated Confidential Information

25. The Guidebook does not require an applicant to reveal the existence of, sources or amounts of any funding for a public or private auction for a new gTLD or other resolution of a contention set. ICANN's new gTLD application requires applicants to provide certain financial information to ICANN regarding its ability to *operate* a new gTLD.[5] There is no requirement that an applicant disclose any information regarding funding for participation in an auction. It is further my understanding that financial information submitted as part of a gTLD application also is designated confidential by ICANN and not disclosed to other applicants or the public. Accordingly, under the terms of the new gTLD Program, even if the sources or terms of their funding for participation in the auction were subject to disclosure to ICANN, which they were not, other members of the contention set would never have access to that information.

26. As another example of the confidential nature of financial arrangements, it was disclosed after the fact that Automattic Inc. ("Automattic") financed the successful bid in a private auction for the .BLOG gTLD by applicant Primer Nivel S.A. ("Primer Nivel"). The auction took place in February 2015. In May 2016, before the .WEB auction, it was reported that Primer Nivel's bid had been financed by Automattic, the owner of the blogging platform wordpress.com. According to press reports, Automattic paid Primer Nivel $19 million in exchange for Primer Nivel's agreement to assign the .BLOG gTLD to Automattic if it was successful in the private auction. One of the press reports that I reviewed regarding this

[5] Afilias C-3 (*gTLD Applicant Guidebook*, §§ 1.2.1.2 , 1.2.2 & 2.2.2.2, *available at* https://newgtlds.icann.org/en/applicants/agb).

transaction is attached hereto as Exhibit E (Kevin Murphy, WordPress Reveals IT Bought .blog For $19 Million, Domain Incite (May 13, 2016), http://domainincite.com/20440-wordpress-reveals-it-bought-blog-for-19-million). This funding transaction appears to have been kept confidential and not revealed to ICANN or other bidders, which included an Afilias entity (Afilias Domains No. 1 Limited), prior to the .BLOG auction. Specifically, a press report states that WordPress financed Primer Nivel's winning auction bid but "wanted to stay stealth while in the bidding process and afterward in order not to draw too much attention." *See* Ex. F (Alan Dunn, Knock Knock WordPress Acquires Blog for 19 million, NameCorp (May 15, 2016), https://namecorp.com/knock-knock-wordpress-acquires-blog-for-19-million/). On April 29, 2016, ICANN consented to the assignment of .BLOG from Primer Nivel to Knock Knock WHOIS There, LLC, a subsidiary of Automattic. *See* Ex. G (https://www.icann.org/resources/agreement/blog-2015-05-14-en). To the best of my knowledge, Afilias did not object to the .BLOG auction after Automattic's role in financing Primer Nivel's bid was revealed. This transaction further supported my understanding then that pre-auction financing agreements, such as the DAA, were consistent with the Guidebook.

The Assurances of Performance

27. Redacted - Third Party Designated Confidential Information

28. Redacted - Third Party Designated Confidential Information

Afilias Claims in the IRP

29. It is my understanding that Afilias argues in this IRP that the DAA constitutes an impermissible transfer by NDC of rights in its new gTLD application. Such an argument is inconsistent with the express terms of the DAA and Confirmation of Understandings described above. Further, such an interpretation of the Guidebook would be contrary to industry practices with respect to the New gTLD Program that I learned in researching the Guidebook and secondary market.

30. Redacted - Third Party Designated Confidential Information

31. Redacted - Third Party Designated Confidential Information

A public auction is specifically provided for in the Guidebook, is fair and conducted under ICANN's oversight, and I am not aware of any requirement under the Guidebook that an applicant agree to a private auction. To the contrary, the Guidebook provides a private auction may only be conducted if *all* members of the Contention Set agree to have a private auction.[6]

[6] Afilias C-3 (*gTLD Applicant Guidebook*, §§ 4.13 & 4.3, *available at* https://newgtlds.icann.org/en/applicants/agb).

32. Redacted - Third Party Designated Confidential Information

33. Redacted - Third Party Designated Confidential Information

34. Redacted - Third Party Designated Confidential Information

35. I understand that Afilias has stated that its bidding in the .WEB auction was constrained by the terms of its financing arrangement, which limited its bidding to no more than $135 million.[7] The limits on Afilias' funding demonstrates that Afilias' own conduct as a bidder during the .WEB auction was limited by its own financing arrangements, appearing to confirm again the industry practice of financing arrangements with parties not part of the .WEB contention set.

The Auction

36. In accordance with the DAA, Verisign provided funds for NDC to use in bidding for the .WEB gTLD in the public auction. NDC submitted a final bid that ICANN deemed to be and announced as the winning bid. Shortly after the auction, NDC paid ICANN $135 million as the winning bid for the .WEB gTLD. Those funds were provided to NDC by Verisign.

37.]Redacted - Third Party Designated Confidential Information

38. Finally, I understand that Afilias makes a claim that there was some form of collusion between Verisign and ICANN during or following the auction proceedings. This is untrue. I was responsible for this transaction. I did not have any communications with ICANN before or following the auction process. Redacted - Third Party Designated Confidential Information

[7] *See* Witness Statement of Ram Mohan, 1 November 2018, ¶ 35, fn. 38 (https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-mohan-redacted-26nov18-en.pdf).

. As a major participant in the DNS, Verisign has regular dealings with ICANN on a range of matters. Also, with respect to the questionnaire ICANN sent out to Verisign, NDC and contention set members who objected to ICANN regarding the public auction for .WEB, I am unaware of any advance notice by ICANN to NDC or Verisign of the questionnaire.

I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 1st day of June 2020 at San Carlos, California.

By: _____
Paul Livesay

EXHIBIT Altanovo-6

New gTLD Application Submitted to ICANN by: NU DOT CO LLC

String: WEB

Originally Posted: 13 June 2012

Application ID: 1-1296-36138

Applicant Information

1. Full legal name

NU DOT CO LLC

2. Address of the principal place of business

Contact Information Redacted

3. Phone number

Contact Information Redacted

4. Fax number

Contact Information Redacted

5. If applicable, website or URL

Primary Contact

6(a). Name

Jose Ignacio Rasco

6(b). Title

Manager

6(c). Address

6(d). Phone Number

Contact Information Redacted

6(e). Fax Number

6(f). Email Address

Contact Information Redacted

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

7(c). Address

7(d). Phone Number

Contact Information Redacted

7(e). Fax Number

7(f). Email Address

Contact Information Redacted

Proof of Legal Establishment

8(a). Legal form of the Applicant

Limited liability company

8(b). State the specific national or other jursidiction that defines the type of entity identified in 8(a).

NU DOTCO LLC is a UNITED STATES entity, registered in the STATE of DELAWARE as a limited liability company.

8(c). Attach evidence of the applicant's establishment.

Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.

9(b). If the applying entity is a subsidiary, provide the parent company.

9(c). If the applying entity is a joint venture, list all joint venture partners.

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

WEB

14(a). If an IDN, provide the A-label (beginning with "xn--").

14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14(c). If an IDN, provide the language of the label (in English).

14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).

14(d). If an IDN, provide the script of the label (in English).

14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).

14(e). If an IDN, list all code points contained in the U-label according to Unicode form.

15(a). If an IDN, Attach IDN Tables for the proposed registry.

Attachments are not displayed on this form.

15(b). Describe the process used for development of the IDN tables submitted, including consultations and sources used.

15(c). List any variant strings to the applied-for gTLD string according to the relevant IDN tables.

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

NU DOTCO, LLC (“NU.CO”) foresees no known rendering issues in connection with the proposed .LAW TLD which it is seeking to apply for as a gTLD. This answer is based upon consultation with NU.CO’s backend provider, Neustar, which has successfully launched a number of new gTLDs over the last decade. In reaching this determination, the following data points were analyzed:

- ICANN's Security Stability Advisory Committee (SSAC) entitled Alternative TLD Name Systems and Roots: Conflict, Control and Consequences (SAC009);
- IAB - RFC3696 "Application Techniques for Checking and Transformation of Names"
- Known software issues which Neustar has encountered during the last decade launching new gTLDs;
- Character type and length;
- ICANN supplemental notes to Question 16; and
- ICANN's presentation during its Costa Rica regional meeting on TLD Universal Acceptance;

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (http://www.langsci.ucl.ac.uk/ipa/).

Mission/Purpose

18(a). Describe the mission/purpose of your proposed gTLD.

18.1 Mission/purpose of .WEB
The mission of .WEB is to provide the internet community at-large with an alternative "home domain" for their online presence. We envision that through strategic marketing campaigns designed to brand the domain, it will become a premium online namespace for a variety of businesses and websites. This general domain will provide new registrants with better, more relevant alternatives to the limited options remaining for current commercial TLD names.

18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

18.2 How will .WEB benefit registrants, Internet users, and others?
.WEB seeks to offer registrants and the broader internet community, with a reliable, trusted, and secure top level domain (TLD). Congestion in the current availability of commercial TLD names fundamentally advantages older incumbent players. Providing access to additional high-value second level domain names (i.e. shorter and more memorable) will provide an opportunity for new entrants to compete effectively for internet users' finite attention. The domain's coherent and consistent branding will assist registrants in developing meaningful emotional connection with users, allowing them to further differentiate themselves as premium destinations. These marketing efforts along with the initial adoption of key industry players, should reinforce the implicit attribution of "cutting-edge" and "innovativeness" upon its registrants. Prospective users benefit from the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD's (e.g., .CO targeting innovative businesses and entrepreneurs).

The demand for having an online presence continues to grow worldwide, especially as more people and businesses become active internet users, enjoying the increases in productivity and promotional effectiveness that the internet offers. A clear example of this is the number of worldwide internet users, which has grown at an average18% annual rate over the past decade, and domain registrations which have experienced similar adoption rates having grown from approximately 25mm in 2000 to over 225mm today.

In particular for small businesses and entrepreneurs, the Internet offers an incredibly useful way to promote themselves to a wider audience, both locally and globally. Moreover, it allows them to cost-effective offer their products and services directly to consumers, leveling the playing field with larger and more established competitors. A number of new and innovative business models have been established that were not possible prior to the Internet, creating substantial value for society.

However, until a few years ago it was difficult and costly for individuals and small businesses to establish an internet presence. This has changed as prices decreased dramatically and offerings became more accessible and intuitive. This is the result of having many retailers (i.e. registrars or resellers) that compete amongst each other on price, along with product and service differentiation. Differentiation has mainly centered around higher value-add services ancillary to the domain registration itself, such as hosting, web-site builders, SSL, e-mail, etc. The basic product (a domain) has not changed much, and until now, there have been few feasible alternatives to the commercial TLDs. The proposed new TLDs will provide users with more relevant and customized options. Just as ICANN opened up the market for the distribution and registration of domains and created the Registrar industry, which ultimately benefitted hundreds of millions of people and businesses worldwide, we expect that the introduction of new TLDs will yield similar benefits.

The experienced team behind this application initially launched and currently operates the .CO ccTLD. The intention is for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's experience and expertise in marketing and branding TLD properties. Their successful track record proves that properly branded affinity domains can help sites form deeper emotional connections with their users, providing significant value-add. The .CO re-launch is a great illustration of how a new option in TLDs can address the unmet needs an affinity group (e.g., small businesses and start-ups), and we continue to firmly believe that the new .WEB domain will provide better, more relevant solutions for registrants .

Since its launch, .CO's marketing has primarily focused on developing a worldwide ecosystem of innovative small businesses and entrepreneurs. To date, the .CO registry, .CO Internet S.A.S, has reached close to 1.3 million domains under management, with more than one million individual new Registrations in the first year alone and a renewal rate for domains purchased during launch of nearly 70% and a current average renewal rate of 65%. The renewal rate is one of the highest amongst the industry and especially high considering it has not yet reached the multiple year expiration dates, where it's expected to climb even higher. In addition, .CO has become the standard secondary option to .COM for the leading global registrars, having the most conversions when presented with a non-.COM option. Further, .CO has secured a strong position with the tech startup community by securing such high profile users as Twitter (t.co), Google (g.co), tech influencers like Angel list (angel.co) and 500 Startups (500.co), and entrepreneurship organizations like Startup America (s.co).

.CO has differentiated itself from other existing TLDs by combining innovative branding with the highest standards in trademark protection, unprecedented marketing campaigns, and pro-active security monitoring. We plan to implement a very similar strategy for .WEB in its launch, operation, promotion and growth.

We plan to target a similar community of entrepreneurs, startups, and progressive corporate entities that are looking for an online presence with a suitable domain name. We anticipate the addressable community will continue to grow as traditional businesses choose to launch an online presence for their pre-existing operations and as entrepreneurs launch new start-ups. The domain's marketing strategy will utilize a 3 pillar framework, similar to that used with .CO:

- Awareness: We plan to launch marketing campaigns to both the small businesses and entrepreneurs promoting .WEB via a combination of:
o Media placements online and offline
o Social media campaigns
o Events
o Sponsorships
o Endorsements
o PR efforts
o Direct marketing
o Channel marketing

- Usage: We plan to foster the community of users of .WEB via a combination community engagement and outreach, use-case development and direct marketing to base.

- Distribution: The distribution will be done through the existing ICANN accredited registrar channel and will include marketing at the point of sale, packages and bundles, campaigns, etc.

The marketing plans will evolve depending on market conditions, but using .CO as an example, we implemented an awareness and branding strategy that included the creation of a brand identity and logo; mass media placements including 2 super-bowl commercials with one of our partners plus many TV

placements; billboards and other outdoors campaigns; several online media campaigns including networks, re-targeting and videos; ongoing Twitter, Facebook engagements; sponsorship and presence in a variety of events for TMs (INTA), Tech startups (SxSW, Web 2.0, Internetweek, etc.), Startups (Task Rabbit TR.co), Community (ICANN, LACTLD, etc.), etc. We also implemented for .CO a strong usage promotion of the domain by creating and fostering a community of .CO users and case studies. We achieved this through a combination of events, sponsorships, and partnerships with different entities like Angel.co, 500.co, Startup America (s.co), founders institute (fi.co), etc. We also cultivated many case studies of successful .CO users, remaining in close contact with them. Finally, we implemented a rigorous channel marketing and sales plan that included marketing placements at the point of purchase plus co-marketing and community outreach.

While we do plan to follow a similar strategy to achieve widespread awareness, usage and distribution, the budget and actual placements for promoting .WEB will be scaled down accordingly, as neither its volume of registrations or revenues is expected to be in line with that of .CO.

By launching the .WEB domain we expect to provide more descriptive/ relevant options for end-users, including access to desirable second level domain names which are unavailable or occupied by current general TLD's. As illustrated with .CO, the rapid growth to 1.3 million domains is evidence of pent up demand in the marketplace for good, descriptive domain names. We expect that our marketing strategies will result in a new branded and available option that will emotionally connect with potential users and allow them to differentiate themselves through the use of a branded premium domain.

We will also follow the same ICANN rules and distribution methods of major gTLDs thereby ensuring Registrars and Resellers do not have to change their systems to distribute the .WEB domain. As our systems are already integrated with largest registrars in the world and we have implemented industry best practices, the transition to delegation and launch should be seamless to the registrar channel as well as consumers.

We will also implement a thick whois and adopt any ICANN recommendations or requirements in the future. In order to protect the privacy of our users, we will allow the use of Privacy or Proxy registrations by reputable registrars that comply with applicable policies specified by ICANN. We find this service is highly valuable for registrants that want to ensure their information is not available online and would like to maintain a higher level privacy.

18(c). What operating rules will you adopt to eliminate or minimize social costs?

18.3 .WEB operating rules to benefit consumers
We plan to follow all ICANN policies, including the best practices and recommendations for gTLDs. This will allow us to ensure end-users, have an easy way to register/purchase, administer, and use their domains. Adopting these policies will also prevent malicious behavior by third parties and ensure a smooth operation of the domain. The plans for the launch will be similar to the launch process used in .CO, which included:

- Gradual Offering Plan: The .CO launch included a very comprehensive gradual opening plan that both protected trademarks and provided transparency to end users. The launch was lauded by ICANN for its comprehensiveness and management. For the launch of .WEB we will follow ICANN's policies especially as it relates to the Trademark Clearinghouse which was similar to the process we used for .CO:
-
o Sunrise: Provide a period of a few weeks to allow the TM and IP community to register their .WEB domains prior to the opening to the public. Trademark validations will be done by the Trademark Clearinghouse or as specified by ICANN in their policies. If there are multiple validated applications, these would go to auction and allocated based on these results.
o Landrush: Provide a period of a few weeks to allow domain investors and others that are interested in premium domains to apply for these domains. Once the period of the Landrush phase is over, a process to check the applications will determine if these were unique or if there were multiple applicants. If single applicants, then the domain is awarded at that time. If multiple applicants then the domain would go to an auction in which all applicants would be able to participate. For .CO this process included close to 30,000 applications and the resulting auctions were managed by Pool.com. The process was very successful managing to allocate very efficiently domains according to their perceived value by applicants and bidders at the resulting auctions.

- General Availability: For .CO we had 100k registrations in the first 10 minutes and we didn’t have a single issue nor service degradation through the launch or afterwards. We achieved this through a combination of strong planning between our partners, especially Neustar our back-end provider; communication with our Registrars prior and during the launch in a very structured way; strong infrastructure planning and provisioning; and effective load, contingency, and disaster recovery planning. We plan to use similar methods for the launch of .WEB.
o First come first serve during GA and afterwards, which we believe is the best mechanism to ensure a fair allocation of domains once the domain has been launched.
o Use of UDRP and any other best-practices in rights protection mechanisms
o Highly managed General Availability launch
- Premium Domains: We will keep some domains for premium sales and these will be restricted prior to the Gradual Offering Plan begins, but can be applied for during the Sunrise phase. These premium domains will be brokered or sold via auction directly or through an accredited 3rd party. With .CO we used this mechanism as a way to allocate high value domains and also to promote the usage of the domain by high profile companies including Twitter with t.co, Google with g.co, Startup America with s.co, as well as a myriad of smaller startups and other endorsements.

Community-based Designation

19. Is the application for a community-based TLD?

No

20(a). Provide the name and full description of the community that the applicant is committing to serve.

20(b). Explain the applicant's relationship to the community identified in 20(a).

20(c). Provide a description of the community-based purpose of the applied-for gTLD.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.

20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).

Attachments are not displayed on this form.

Geographic Names

21(a). Is the application for a geographic name?

No

Protection of Geographic Names

22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.

In preparation for answering this question, NU DOTCO, LLC (NU.CO) reviewed the following relevant background material regarding the protection of geographic names in the DNS, including:

- ICANN Board Resolution 01-92 regarding the methodology developed for the reservation and release of country names in the .INFO top-level domain (see http://www.icann.org/en/minutes/minutes-10sep01.htm);

- ICANN's Proposed Action Plan on .INFO Country Names (see http://www.icann.org/en/meetings/montevideo/action-plan-country-names-09oct01.htm);

- "Report of the Second WIPO Internet Domain Name Process: The Recognition and Rights and the Use of Names in the Internet Domain Name System," Section 6, Geographical Identifiers (see http://www.wipo.int/amc/en/processes/process²/report/html/report.html);

- ICANN's Governmental Advisory Committee (GAC) Principles Regarding New gTLDs, (see https://gacweb.icann.org/download/attachments/₁₅₄₀₁₂₈/gTLD_principles_0.pdf?version=1&modificationDate=1312358178000); and

- ICANN's Generic Names Supporting Organization (GNSO) Reserved Names Working Group – Final Report (see http://gnso.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm).

Initial Reservation of Country and Territory Names

NU.CO is committed to initially reserving the country and territory names contained in the internationally recognized lists described in Article 5 of Specification 5 attached to the New gTLD Applicant Guidebook at the second level and at all other levels within the .WEB gTLD at which domain name registrations will be provided. Specifically, NU.CO will reserve:

- The short form (in English) of all country and territory names contained on the ISO 3166- 1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union (see http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU);

- The United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and

- The list of United Nations member states in six official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names.

Potential Future Release of Two Character Names

While NU.CO foresees no immediate need for plans to make use of these initially reserved country names at the second level within the .WEB namespace, NU.CO recognizes that there has been several successful and non-misleading use of country names by new gTLD operators as evidenced below:

AUSTRALIA.COOP – Is operated by Co-operatives Australia the national body for State Co-operative Federations and provides a valuable resource about cooperatives within Australia.

UK.COOP – Is operated by Co-operatives UK the national trade body that campaigns for co-operation and works to promote, develop and unite co-operative enterprises within the United Kingdom.

NZ.COOP – Is operated by the New Zealand Cooperatives Association which brings together the country's cooperative mutual business in a not-for-profit incorporated society.

USA.JOBS - Is operated by DirectEmployers Association (DE). While Employ Media the registry operator of the .JOBS gTLD is currently in a dispute with ICANN regarding the allocation of this and other domain names. Direct Employers has a series of partnerships and programs with the United States Department of Labor, the National Association of State Workforce Agencies and Facebook to help unemployed workers find jobs.

MALDIVIAN.AERO - Is the dominant domestic air carrier in Maldives, and provides a range of commercial and leisure air transport services.

The more likely request by NU.CO will come in connection with the un-reservation and allocation of two-letter .WEB domain names, e.g. US.WEB, UK.WEB, etc. If NU.CO should decide in the future to attempt and allocate these domain names, it would submit the proper Registry Service Evaluation Processes (RSEP) with ICANN. In evaluating similar RSEP requests that have been submitted to ICANN by other gTLD registry operators, NU.CO believes that its request would be favorably granted.

Creation and Updating the Policies

NU.CO is committed to continually reviewing and updating when necessary its policies in this area. Consistent with this commitment, NU.CO intends to remain an active participant in any ongoing ICANN policy discussion regarding the protection of geographic names within the DNS.

Registry Services

23. Provide name and full description of all the Registry Services to be provided.

23.1 Introduction

NU DOTCO LLC has elected to partner with NeuStar, Inc ("Neustar") to provide back-end services for the .WEB registry. In making this decision, NU DOTCO LLC recognized that Neustar already possesses a production-proven registry system that can be quickly deployed and smoothly operated over its robust, flexible, and scalable world-class infrastructure. The existing registry services will be leveraged for the .WEB registry. The following section describes the registry services to be provided.

23.2 Standard Technical and Business Components

Neustar will provide the highest level of service while delivering a secure, stable and comprehensive

registry platform. NU DOTCO LLC will use Neustar's Registry Services platform to deploy the .WEB registry, by providing the following Registry Services (none of these services are offered in a manner that is unique to .WEB):

-Registry-Registrar Shared Registration Service (SRS)
-Extensible Provisioning Protocol (EPP)
-Domain Name System (DNS)
-WHOIS
-DNSSEC
-Data Escrow
-Dissemination of Zone Files using Dynamic Updates
-Access to Bulk Zone Files
-Dynamic WHOIS Updates
-IPv6 Support
-Rights Protection Mechanisms
-Internationalized Domain Names (IDN)

The following is a description of each of the services.

23.2.1 SRS

Neustar's secure and stable SRS is a production-proven, standards-based, highly reliable, and high-performance domain name registration and management system. The SRS includes an EPP interface for receiving data from registrars for the purpose of provisioning and managing domain names and name servers. The response to Question 24 provides specific SRS information.

23.2.2 EPP

The .WEB registry will use the Extensible Provisioning Protocol (EPP) for the provisioning of domain names. The EPP implementation will be fully compliant with all RFCs. Registrars are provided with access via an EPP API and an EPP based Web GUI. With more than 10 gTLD, ccTLD, and private TLDs implementations, Neustar has extensive experience building EPP-based registries. Additional discussion on the EPP approach is presented in the response to Question 25.

23.2.3 DNS

NU DOTCO LLC will leverage Neustar's world-class DNS network of geographically distributed nameserver sites to provide the highest level of DNS service. The service utilizes "Anycast" routing technology, and supports both IPv4 and IPv6. The DNS network is highly proven, and currently provides service to over 20 TLDs and thousands of enterprise companies. Additional information on the DNS solution is presented in the response to Questions 35.

23.2.4 WHOIS

Neustar's existing standard WHOIS solution will be used for the .WEB. The service provides supports for near real-time dynamic updates. The design and construction is agnostic with regard to data display policy is flexible enough to accommodate any data model. In addition, a searchable WHOIS service that complies with all ICANN requirements will be provided. The following WHOIS options will be provided:

Standard WHOIS (Port 43)
Standard WHOIS (Web)
Searchable WHOIS (Web)

23.2.5 DNSSEC

An RFC compliant DNSSEC implementation will be provided using existing DNSSEC capabilities. Neustar is an experienced provider of DNSSEC services, and currently manages signed zones for three large top level domains: .biz, .us, and .co. Registrars are provided with the ability to submit and manage DS records using EPP, or through a web GUI. Additional information on DNSSEC, including the management of security extensions is found in the response to Question 43.

23.2.6 Data Escrow

Data escrow will be performed in compliance with all ICANN requirements in conjunction with an

approved data escrow provider. The data escrow service will:

-Protect against data loss
-Follow industry best practices
-Ensure easy, accurate, and timely retrieval and restore capability in the event of a hardware failure
-Minimizes the impact of software or business failure.

Additional information on the Data Escrow service is provided in the response to Question 38.

23.2.7 Dissemination of Zone Files using Dynamic Updates

Dissemination of zone files will be provided through a dynamic, near real-time process. Updates will be performed within the specified performance levels. The proven technology ensures that updates pushed to all nodes within a few minutes of the changes being received by the SRS. Additional information on the DNS updates may be found in the response to Question 35.

23.2.8 Access to Bulk Zone Files

NU DOTCO LLC will provide third party access to the bulk zone file in accordance with specification 4, Section 2 of the Registry Agreement. Credentialing and dissemination of the zone files will be facilitated through the Central Zone Data Access Provider.

23.2.9 Dynamic WHOIS Updates

Updates to records in the WHOIS database will be provided via dynamic, near real-time updates. Guaranteed delivery message oriented middleware is used to ensure each individual WHOIS server is refreshed with dynamic updates. This component ensures that all WHOIS servers are kept current as changes occur in the SRS, while also decoupling WHOIS from the SRS. Additional information on WHOIS updates is presented in response to Question 26.

23.2.10 IPv6 Support

The .WEB registry will provide IPv6 support in the following registry services: SRS, WHOIS, and DNS/DNSSEC. In addition, the registry supports the provisioning of IPv6 AAAA records. A detailed description on IPv6 is presented in the response to Question 36.

23.2.11 Required Rights Protection Mechanisms

NU DOTCO LLC, will provide all ICANN required Rights Mechanisms, including:

-Trademark Claims Service
-Trademark Post-Delegation Dispute Resolution Procedure (PDDRP)
-Registration Restriction Dispute Resolution Procedure (RRDRP)
-UDRP
-URS
-Sunrise service.
More information is presented in the response to Question 29.

23.2.12 Internationalized Domain Names (IDN)

IDN registrations are provided in full compliance with the IDNA protocol. Neustar possesses extensive experience offering IDN registrations in numerous TLDs, and its IDN implementation uses advanced technology to accommodate the unique bundling needs of certain languages. Character mappings are easily constructed to block out characters that may be deemed as confusing to users. A detailed description of the IDN implementation is presented in response to Question 44.

23.3 Unique Services

NU DOTCO LLC will not be offering services that are unique to .WEB.

23.4 Security or Stability Concerns

All services offered are standard registry services that have no known security or stability

concerns. Neustar has demonstrated a strong track record of security and stability within the industry.

Demonstration of Technical & Operational Capability

24. Shared Registration System (SRS) Performance

24.1 Introduction

NU DOTCO LLC has partnered with NeuStar, Inc (”Neustar”), an experienced TLD registry operator, for the operation of the .WEB Registry. The applicant is confident that the plan in place for the operation of a robust and reliable Shared Registration System (SRS) as currently provided by Neustar will satisfy the criterion established by ICANN.

Neustar built its SRS from the ground up as an EPP based platform and has been operating it reliably and at scale since 2001. The software currently provides registry services to five TLDs (.BIZ, .US, TEL, .CO and .TRAVEL) and is used to provide gateway services to the .CN and .TW registries. Neustar’s state of the art registry has a proven track record of being secure, stable, and robust. It manages more than 6 million domains, and has over 300 registrars connected today.
The following describes a detailed plan for a robust and reliable SRS that meets all ICANN requirements including compliance with Specifications 6 and 10.

24.2 The Plan for Operation of a Robust and Reliable SRS

24.2.1 High-level SRS System Description

The SRS to be used for .WEB will leverage a production-proven, standards-based, highly reliable and high-performance domain name registration and management system that fully meets or exceeds the requirements as identified in the new gTLD Application Guidebook.

The SRS is the central component of any registry implementation and its quality, reliability and capabilities are essential to the overall stability of the TLD. Neustar has a documented history of deploying SRS implementations with proven and verifiable performance, reliability and availability. The SRS adheres to all industry standards and protocols. By leveraging an existing SRS platform, NU DOTCO LLC is mitigating the significant risks and costs associated with the development of a new system. Highlights of the SRS include:

-State-of-the-art, production proven multi-layer design
-Ability to rapidly and easily scale from low to high volume as a TLD grows
-Fully redundant architecture at two sites
-Support for IDN registrations in compliance with all standards
-Use by over 300 Registrars
-EPP connectivity over IPv6
-Performance being measured using 100% of all production transactions (not sampling).

24.2.2 SRS Systems, Software, Hardware, and Interoperability

The systems and software that the registry operates on are a critical element to providing a high quality of service. If the systems are of poor quality, if they are difficult to maintain and operate, or if the registry personnel are unfamiliar with them, the registry will be prone to outages. Neustar has a decade of experience operating registry infrastructure to extremely high service level requirements. The infrastructure is designed using best of breed systems and software. Much of the application software that performs registry-specific operations was developed by the current engineering team and a result the team is intimately familiar with its operations.

The architecture is highly scalable and provides the same high level of availability and performance as volumes increase. It combines load balancing technology with scalable server technology to provide a cost effective and efficient method for scaling.

The Registry is able to limit the ability of any one registrar from adversely impacting other registrars by consuming too many resources due to excessive EPP transactions. The system uses network layer 2 level packet shaping to limit the number of simultaneous connections registrars can open to the protocol layer.

All interaction with the Registry is recorded in log files. Log files are generated at each layer of the system. These log files record at a minimum:

-The IP address of the client
-Timestamp
-Transaction Details
-Processing Time.

In addition to logging of each and every transaction with the SRS Neustar maintains audit records, in the database, of all transformational transactions. These audit records allow the Registry, in support of the applicant, to produce a complete history of changes for any domain name.

24.2.3 SRS Design

The SRS incorporates a multi-layer architecture that is designed to mitigate risks and easily scale as volumes increase. The three layers of the SRS are:

-Protocol Layer
-Business Policy Layer
-Database.

Each of the layers is described below.

24.2.4 Protocol Layer

The first layer is the protocol layer, which includes the EPP interface to registrars. It consists of a high availability farm of load-balanced EPP servers. The servers are designed to be fast processors of transactions. The servers perform basic validations and then feed information to the business policy engines as described below. The protocol layer is horizontally scalable as dictated by volume.

The EPP servers authenticate against a series of security controls before granting service, as follows:

-The registrar’s host exchanges keys to initiates a TLS handshake session with the EPP server.
-The registrar’s host must provide credentials to determine proper access levels.
-The registrar’s IP address must be preregistered in the network firewalls and traffic-shapers.

24.2.5 Business Policy Layer

The Business Policy Layer is the “brain” of the registry system. Within this layer, the policy engine servers perform rules-based processing as defined through configurable attributes. This process takes individual transactions, applies various validation and policy rules, persists data and dispatches notification through the central database in order to publish to various external systems. External systems fed by the Business Policy Layer include backend processes such as dynamic update of DNS, WHOIS and Billing.

Similar to the EPP protocol farm, the SRS consists of a farm of application servers within this layer. This design ensures that there is sufficient capacity to process every transaction in a manner that meets or exceeds all service level requirements. Some registries couple the business logic layer directly in the protocol layer or within the database. This architecture limits the ability to scale the registry. Using a decoupled architecture enables the load to be distributed among farms of inexpensive servers that can be scaled up or down as demand changes.

The SRS today processes over 30 million EPP transactions daily.

24.2.6 Database

The database is the third core components of the SRS. The primary function of the SRS database is to provide highly reliable, persistent storage for all registry information required for domain

registration services. The database is highly secure, with access limited to transactions from authenticated registrars, trusted application-server processes, and highly restricted access by the registry database administrators. A full description of the database can be found in response to Question 33.

Figure 24-1 attached depicts the overall SRS architecture including network components.

24.2.7 Number of Servers

As depicted in the SRS architecture diagram above Neustar operates a high availability architecture where at each level of the stack there are no single points of failures. Each of the network level devices run with dual pairs as do the databases. For the .WEB registry, the SRS will operate with 8 protocol servers and 6 policy engine servers. These expand horizontally as volume increases due to additional TLDs, increased load, and through organic growth. In addition to the SRS servers described above, there are multiple backend servers for services such as DNS and WHOIS. These are discussed in detail within those respective response sections.

24.2.8 Description of Interconnectivity with Other Registry Systems

The core SRS service interfaces with other external systems via Neustar’s external systems layer. The services that the SRS interfaces with include:

-WHOIS
-DNS
-Billing
-Data Warehouse (Reporting and Data Escrow).

Other external interfaces may be deployed to meet the unique needs of a TLD. At this time there are no additional interfaces planned for .WEB.

The SRS includes an “external notifier” concept in its business policy engine as a message dispatcher. This design allows time-consuming backend processing to be decoupled from critical online registrar transactions. Using an external notifier solution, the registry can utilize “control levers” that allow it to tune or to disable processes to ensure optimal performance at all times. For example, during the early minutes of a TLD launch, when unusually high volumes of transactions are expected, the registry can elect to suspend processing of one or more back end systems in order to ensure that greater processing power is available to handle the increased load requirements. This proven architecture has been used with numerous TLD launches, some of which have involved the processing of over tens of millions of transactions in the opening hours. The following are the standard three external notifiers used the SRS:

24.2.9 WHOIS External Notifier

The WHOIS external notifier dispatches a work item for any EPP transaction that may potentially have an impact on WHOIS. It is important to note that, while the WHOIS external notifier feeds the WHOIS system, it intentionally does not have visibility into the actual contents of the WHOIS system. The WHOIS external notifier serves just as a tool to send a signal to the WHOIS system that a change is ready to occur. The WHOIS system possesses the intelligence and data visibility to know exactly what needs to change in WHOIS. See response to Question 26 for greater detail.

24.2.10 DNS External Notifier

The DNS external notifier dispatches a work item for any EPP transaction that may potentially have an impact on DNS. Like the WHOIS external notifier, the DNS external notifier does not have visibility into the actual contents of the DNS zones. The work items that are generated by the notifier indicate to the dynamic DNS update sub-system that a change occurred that may impact DNS. That DNS system has the ability to decide what actual changes must be propagated out to the DNS constellation. See response to Question 35 for greater detail.

24.2.11 Billing External Notifier

The billing external notifier is responsible for sending all billable transactions to the downstream financial systems for billing and collection. This external notifier contains the necessary logic to determine what types of transactions are billable. The financial systems use this information to apply appropriate debits and credits based on registrar.

24.2.12 Data Warehouse

The data warehouse is responsible for managing reporting services, including registrar reports, business intelligence dashboards, and the processing of data escrow files. The Reporting Database is used to create both internal and external reports, primarily to support registrar billing and contractual reporting requirement. The data warehouse databases are updated on a daily basis with full copies of the production SRS data.

24.2.13 Frequency of Synchronization between Servers

The external notifiers discussed above perform updates in near real-time, well within the prescribed service level requirements. As transactions from registrars update the core SRS, update notifications are pushed to the external systems such as DNS and WHOIS. These updates are typically live in the external system within 2-3 minutes.

24.2.14 Synchronization Scheme (e.g., hot standby, cold standby)

Neustar operates two hot databases within the data center that is operating in primary mode. These two databases are kept in sync via synchronous replication. Additionally, there are two databases in the secondary data center. These databases are updated real time through asynchronous replication. This model allows for high performance while also ensuring protection of data. See response to Question 33 for greater detail.

24.2.15 Compliance with Specification 6 Section 1.2

The SRS implementation for .WEB is fully compliant with Specification 6, including section 1.2. EPP Standards are described and embodied in a number of IETF RFCs, ICANN contracts and practices, and registry-registrar agreements. Extensible Provisioning Protocol or EPP is defined by a core set of RFCs that standardize the interface that make up the registry-registrar model. The SRS interface supports EPP 1.0 as defined in the following RFCs shown in Table 24-1 attached.

Additional information on the EPP implementation and compliance with RFCs can be found in the response to Question 25.

24.2.16 Compliance with Specification 10

Specification 10 of the New TLD Agreement defines the performance specifications of the TLD, including service level requirements related to DNS, RDDS (WHOIS), and EPP. The requirements include both availability and transaction response time measurements. As an experienced registry operator, Neustar has a long and verifiable track record of providing registry services that consistently exceed the performance specifications stipulated in ICANN agreements. This same high level of service will be provided for the .WEB Registry. The following section describes Neustar’s experience and its capabilities to meet the requirements in the new agreement.

To properly measure the technical performance and progress of TLDs, Neustar collects data on key essential operating metrics. These measurements are key indicators of the performance and health of the registry. Neustar’s current .biz SLA commitments are among the most stringent in the industry today, and exceed the requirements for new TLDs. Table 24-2 compares the current SRS performance levels compared to the requirements for new TLDs, and clearly demonstrates the ability of the SRS to exceed those requirements.

Their ability to commit and meet such high performance standards is a direct result of their philosophy towards operational excellence. See response to Question 31 for a full description of their philosophy for building and managing for performance.

24.3 Resourcing Plans

The development, customization, and on-going support of the SRS are the responsibility of a combination of technical and operational teams, including:

-Development/Engineering
-Database Administration
-Systems Administration
-Network Engineering.

Additionally, if customization or modifications are required, the Product Management and Quality Assurance teams will be involved in the design and testing. Finally, the Network Operations and Information Security play an important role in ensuring the systems involved are operating securely and reliably.

The necessary resources will be pulled from the pool of operational resources described in detail in the response to Question 31. Neustar's SRS implementation is very mature, and has been in production for over 10 years. As such, very little new development related to the SRS will be required for the implementation of the .WEB registry. The following resources are available from those teams:

-Development/Engineering – 19 employees
-Database Administration- 10 employees
-Systems Administration – 24 employees
-Network Engineering – 5 employees

The resources are more than adequate to support the SRS needs of all the TLDs operated by Neustar, including the .WEB registry.

25. Extensible Provisioning Protocol (EPP)

25.1 Introduction

NU DOTCO LLC's back-end registry operator, Neustar, has over 10 years of experience operating EPP based registries. They deployed one of the first EPP registries in 2001 with the launch of .biz. In 2004, they were the first gTLD to implement EPP 1.0. Over the last ten years Neustar has implemented numerous extensions to meet various unique TLD requirements. Neustar will leverage its extensive experience to ensure NU DOTCO LLC is provided with an unparalleled EPP based registry. The following discussion explains the EPP interface which will be used for the .WEB registry. This interface exists within the protocol farm layer as described in Question 24 and is depicted in Figure 25-1 attached.

25.2 EPP Interface

Registrars are provided with two different interfaces for interacting with the registry. Both are EPP based, and both contain all the functionality necessary to provision and manage domain names. The primary mechanism is an EPP interface to connect directly with the registry. This is the interface registrars will use for most of their interactions with the registry.

However, an alternative web GUI (Registry Administration Tool) that can also be used to perform EPP transactions will be provided. The primary use of the Registry Administration Tool is for performing administrative or customer support tasks.
The main features of the EPP implementation are:

-Standards Compliance: The EPP XML interface is compliant to the EPP RFCs. As future EPP RFCs are published or existing RFCs are updated, Neustar makes changes to the implementation keeping in mind of any backward compatibility issues.

-Scalability: The system is deployed keeping in mind that it may be required to grow and shrink the footprint of the Registry system for a particular TLD.

-Fault-tolerance: The EPP servers are deployed in two geographically separate data centers to provide for quick failover capability in case of a major outage in a particular data center. The EPP servers adhere to strict availability requirements defined in the SLAs.

-Configurability: The EPP extensions are built in a way that they can be easily configured to turn on or off for a particular TLD.

-Extensibility: The software is built ground up using object oriented design. This allows for easy extensibility of the software without risking the possibility of the change rippling through the whole application.

-Auditable: The system stores detailed information about EPP transactions from provisioning to DNS

and WHOIS publishing. In case of a dispute regarding a name registration, the Registry can provide comprehensive audit information on EPP transactions.

-Security: The system provides IP address based access control, client credential-based authorization test, digital certificate exchange, and connection limiting to the protocol layer.

25.3 Compliance with RFCs and Specifications

The registry-registrar model is described and embodied in a number of IETF RFCs, ICANN contracts and practices, and registry-registrar agreements. As shown in Table 25-1 attached, EPP is defined by the core set of RFCs that standardize the interface that registrars use to provision domains with the SRS. As a core component of the SRS architecture, the implementation is fully compliant with all EPP RFCs.

Neustar ensures compliance with all RFCs through a variety of processes and procedures. Members from the engineering and standards teams actively monitor and participate in the development of RFCs that impact the registry services, including those related to EPP. When new RFCs are introduced or existing ones are updated, the team performs a full compliance review of each system impacted by the change. Furthermore, all code releases include a full regression test that includes specific test cases to verify RFC compliance.

Neustar has a long history of providing exceptional service that exceeds all performance specifications. The SRS and EPP interface have been designed to exceed the EPP specifications defined in Specification 10 of the Registry Agreement and profiled in Table 25-2 attached. Evidence of Neustar’s ability to perform at these levels can be found in the .biz monthly progress reports found on the ICANN website.

25.3.1 EPP Toolkits

Toolkits, under open source licensing, are freely provided to registrars for interfacing with the SRS. Both Java and C++ toolkits will be provided, along with the accompanying documentation. The Registrar Tool Kit (RTK) is a software development kit (SDK) that supports the development of a registrar software system for registering domain names in the registry using EPP. The SDK consists of software and documentation as described below.

The software consists of working Java and C++ EPP common APIs and samples that implement the EPP core functions and EPP extensions used to communicate between the registry and registrar. The RTK illustrates how XML requests (registration events) can be assembled and forwarded to the registry for processing. The software provides the registrar with the basis for a reference implementation that conforms to the EPP registry-registrar protocol. The software component of the SDK also includes XML schema definition files for all Registry EPP objects and EPP object extensions. The RTK also includes a “dummy” server to aid in the testing of EPP clients.

The accompanying documentation describes the EPP software package hierarchy, the object data model, and the defined objects and methods (including calling parameter lists and expected response behavior). New versions of the RTK are made available from time to time to provide support for additional features as they become available and support for other platforms and languages.

25.4 Proprietary EPP Extensions

The .WEB registry will not include proprietary EPP extensions. Neustar has implemented various EPP extensions for both internal and external use in other TLD registries. These extensions use the standard EPP extension framework described in RFC 5730. Table 25-3 attached provides a list of extensions developed for other TLDs. Should the .WEB registry require an EPP extension at some point in the future, the extension will be implemented in compliance with all RFC specifications including RFC 3735.

The full EPP schema to be used in the .WEB registry is attached in the document titled “EPP Schema Files.”

25.5 Resourcing Plans

The development and support of EPP is largely the responsibility of the Development/Engineering and Quality Assurance teams. As an experience registry operator with a fully developed EPP solution, on-going support is largely limited to periodic updates to the standard and the implementation of TLD

specific extensions.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

-Development/Engineering – 19 employees
-Quality Assurance - 7 employees.

These resources are more than adequate to support any EPP modification needs of the .WEB registry.

26. Whois

26.1 Introduction

.WEB recognizes the importance of an accurate, reliable, and up-to-date WHOIS database to governments, law enforcement, intellectual property holders and the public as a whole and is firmly committed to complying with all of the applicable WHOIS specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement. .WEB's back-end registry services provider, Neustar, has extensive experience providing ICANN and RFC-compliant WHOIS services for each of the TLDs that it operates both as a Registry Operator for gTLDs, ccTLDs and back-end registry services provider. As one of the first "thick" registry operators in the gTLD space, Neustar's WHOIS service has been designed from the ground up to display as much information as required by a TLD and respond to a very stringent availability and performance requirement.

Some of the key features of .WEB's solution include:

-Fully compliant with all relevant RFCs including 3912

-Production proven, highly flexible, and scalable with a track record of 100% availability over the past 10 years

-Exceeds current and proposed performance specifications

-Supports dynamic updates with the capability of doing bulk updates

-Geographically distributed sites to provide greater stability and performance

-In addition, .WEB's thick-WHOIS solution also provides for additional search capabilities and mechanisms to mitigate potential forms of abuse as discussed below. (e.g., IDN, registrant data).

26.2 Software Components

The WHOIS architecture comprises the following components:

-An in-memory database local to each WHOIS node: To provide for the performance needs, the WHOIS data is served from an in-memory database indexed by searchable keys.

-Redundant servers: To provide for redundancy, the WHOIS updates are propagated to a cluster of WHOIS servers that maintain an independent copy of the database.

-Attack resistant: To ensure that the WHOIS system cannot be abused using malicious queries or DOS attacks, the WHOIS server is only allowed to query the local database and rate limits on queries based on IPs and IP ranges can be readily applied.

-Accuracy auditor: To ensure the accuracy of the information served by the WHOIS servers, a daily audit is done between the SRS information and the WHOIS responses for the domain names which are updated during the last 24-hour period. Any discrepancies are resolved proactively.

-Modular design: The WHOIS system allows for filtering and translation of data elements between the SRS and the WHOIS database to allow for customizations.

-Scalable architecture: The WHOIS system is scalable and has a very small footprint. Depending on the

query volume, the deployment size can grow and shrink quickly.

-Flexible: It is flexible enough to accommodate thin, thick, or modified thick models and can accommodate any future ICANN policy, such as different information display levels based on user categorization.

-SRS master database: The SRS database is the main persistent store of the Registry information. The Update Agent computes what WHOIS updates need to be pushed out. A publish-subscribe mechanism then takes these incremental updates and pushes to all the WHOIS slaves that answer queries.

26.3 Compliance with RFC and Specifications 4 and 10

Neustar has been running thick-WHOIS Services for over 10+ years in full compliance with RFC 3912 and with Specifications 4 and 10 of the Registry Agreement.RFC 3912 is a simple text based protocol over TCP that describes the interaction between the server and client on port 43. Neustar built a home-grown solution for this service. It processes millions of WHOIS queries per day.

Table 26-1 attached describes Neustar’s compliance with Specifications 4 and 10.

Neustar ensures compliance with all RFCs through a variety of processes and procedures. Members from the engineering and standards teams actively monitor and participate in the development of RFCs that impact the registry services, including those related to WHOIS. When new RFCs are introduced or existing ones are updated, the team performs a full compliance review of each system impacted by the change. Furthermore, all code releases include a full regression test that includes specific test cases to verify RFC compliance.

26.4 High-level WHOIS System Description

26.4.1 WHOIS Service (port 43)

The WHOIS service is responsible for handling port 43 queries. Our WHOIS is optimized for speed using an in-memory database and master-slave architecture between the SRS and WHOIS slaves.

The WHOIS service also has built-in support for IDN. If the domain name being queried is an IDN, the returned results include the language of the domain name, the domain name’s UTF-8 encoded representation along with the Unicode code page.

26.4.2 Web Page for WHOIS queries

In addition to the WHOIS Service on port 43, Neustar provides a web based WHOIS application (www.whois..WEB). It is an intuitive and easy to use application for the general public to use. WHOIS web application provides all of the features available in the port 43 WHOIS. This includes full and partial search on:

-Domain names
-Nameservers
-Registrant, Technical and Administrative Contacts
-Registrars

It also provides features not available on the port 43 service. These include:

1. Redemption Grace Period calculation: Based on the registry’s policy, domains in pendingDelete can be restorable or scheduled for release depending on the date/time the domain went into pendingDelete. For these domains, the web based WHOIS displays “Restorable” or “Scheduled for Release” to clearly show this additional status to the user.

2. Extensive support for international domain names (IDN)

3. Ability to perform WHOIS lookups on the actual Unicode IDN

4. Display of the actual Unicode IDN in addition to the ACE-encoded name

5. A Unicode to Punycode and Punycode to Unicode translator

6. An extensive FAQ

7. A list of upcoming domain deletions

26.5 IT and Infrastructure Resources

As described above the WHOIS architecture uses a workflow that decouples the update process from the SRS. This ensures SRS performance is not adversely affected by the load requirements of dynamic updates. It is also decoupled from the WHOIS lookup agent to ensure the WHOIS service is always available and performing well for users. Each of Neustar's geographically diverse WHOIS sites use:

-Firewalls, to protect this sensitive data
-Dedicated servers for MQ Series, to ensure guaranteed delivery of WHOIS updates
-Packetshaper for source IP address-based bandwidth limiting
-Load balancers to distribute query load
-Multiple WHOIS servers for maximizing the performance of WHOIS service.

The WHOIS service uses HP BL 460C servers, each with 2 X Quad Core CPU and a 64GB of RAM. The existing infrastructure has 6 servers, but is designed to be easily scaled with additional servers should it be needed.
Figure 26-1 attached depicts the different components of the WHOIS architecture.

26.6 Interconnectivity with Other Registry System

As described in Question 24 about the SRS and further in response to Question 31, "Technical Overview", when an update is made by a registrar that impacts WHOIS data, a trigger is sent to the WHOIS system by the external notifier layer. The update agent processes these updates, transforms the data if necessary and then uses messaging oriented middleware to publish all updates to each WHOIS slave. The local update agent accepts the update and applies it to the local in-memory database. A separate auditor compares the data in WHOIS and the SRS daily and monthly to ensure accuracy of the published data.

26.7 Frequency of Synchronization between Servers

Updates from the SRS, through the external notifiers, to the constellation of independent WHOIS slaves happens in real-time via an asynchronous publish/subscribe messaging architecture. The updates are guaranteed to be updated in each slave within the required SLA of 95%, less than or equal to 60 minutes. Please note that Neustar's current architecture is built towards the stricter SLAs (95%, less than or equal to 15 minutes) of .BIZ. The vast majority of updates tend to happen within 2-3 minutes.

26.8 Provision for Searchable WHOIS Capabilities

Neustar will create a new web-based service to address the new search features based on requirements specified in Specification 4 Section 1.8. The application will enable users to search the WHOIS directory using any one or more of the following fields:

-Domain name

-Registrar ID

-Contacts and registrant's name

-Contact and registrant's postal address, including all the sub-fields described in EPP (e.g., street, city, state or province, etc.)

-Name server name and name server IP address

-The system will also allow search using non-Latin character sets which are compliant with IDNA specification.
The user will choose one or more search criteria, combine them by Boolean operators (AND, OR, NOT) and provide partial or exact match regular expressions for each of the criterion name-value pairs. The domain names matching the search criteria will be returned to the user.

Figure 26-2 attached shows an architectural depiction of the new service.

To mitigate the risk of this powerful search service being abused by unscrupulous data miners, a layer of security will be built around the query engine which will allow the registry to identify rogue activities and then take appropriate measures. Potential abuses include, but are not limited to:

-Data Mining
-Unauthorized Access
-Excessive Querying
-Denial of Service Attacks

To mitigate the abuses noted above, Neustar will implement any or all of these mechanisms as appropriate:

-Username-password based authentication
-Certificate based authentication
-Data encryption
-CAPTCHA mechanism to prevent robo invocation of Web query
-Fee-based advanced query capabilities for premium customers.

The searchable WHOIS application will adhere to all privacy laws and policies of the .WEB registry.

26.9 Resourcing Plans

As with the SRS, the development, customization, and on-going support of the WHOIS service is the responsibility of a combination of technical and operational teams. The primary groups responsible for managing the service include:

-Development/Engineering – 19 employees
-Database Administration – 10 employees
-Systems Administration – 24 employees
-Network Engineering – 5 employees

Additionally, if customization or modifications are required, the Product Management and Quality Assurance teams will also be involved. Finally, the Network Operations and Information Security play an important role in ensuring the systems involved are operating securely and reliably. The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. Neustar's WHOIS implementation is very mature, and has been in production for over 10 years. As such, very little new development will be required to support the implementation of the .WEB registry. The resources are more than adequate to support the WHOIS needs of all the TLDs operated by Neustar, including the .WEB registry.

27. Registration Life Cycle

27.1 Registration Life Cycle

27.1.1 Introduction

.WEB will follow the lifecycle and business rules found in the majority of gTLDs today. Our back-end operator, Neustar, has over ten years of experience managing numerous TLDs that utilize standard and unique business rules and lifecycles. This section describes the business rules, registration states, and the overall domain lifecycle that will be use for .WEB.

27.1.2 Domain Lifecycle - Description

The registry will use the EPP 1.0 standard for provisioning domain names, contacts and hosts. Each domain record is comprised of three registry object types: domain, contacts, and hosts.

Domains, contacts and hosts may be assigned various EPP defined statuses indicating either a particular state or restriction placed on the object. Some statuses may be applied by the Registrar; other statuses may only be applied by the Registry. Statuses are an integral part of the domain lifecycle and serve the dual purpose of indicating the particular state of the domain and indicating any restrictions placed on the domain. The EPP standard defines 17 statuses, however only 14 of these

statuses will be used in the .WEB registry per the defined .WEB business rules.

The following is a brief description of each of the statuses. Server statuses may only be applied by the Registry, and client statuses may be applied by the Registrar.

-OK – Default status applied by the Registry.
-Inactive – Default status applied by the Registry if the domain has less than 2 nameservers.
-PendingCreate – Status applied by the Registry upon processing a successful Create command, and indicates further action is pending. This status will not be used in the .WEB registry.
-PendingTransfer – Status applied by the Registry upon processing a successful Transfer request command, and indicates further action is pending.
-PendingDelete – Status applied by the Registry upon processing a successful Delete command that does not result in the immediate deletion of the domain, and indicates further action is pending.
-PendingRenew – Status applied by the Registry upon processing a successful Renew command that does not result in the immediate renewal of the domain, and indicates further action is pending. This status will not be used in the .WEB registry.
-PendingUpdate – Status applied by the Registry if an additional action is expected to complete the update, and indicates further action is pending. This status will not be used in the .WEB registry.
-Hold – Removes the domain from the DNS zone.
-UpdateProhibted – Prevents the object from being modified by an Update command.
-TransferProhibted – Prevents the object from being transferred to another Registrar by the Transfer command.
-RenewProhibted – Prevents a domain from being renewed by a Renew command.
-DeleteProhibted – Prevents the object from being deleted by a Delete command.

The lifecycle of a domain begins with the registration of the domain. All registrations must follow the EPP standard. Upon registration a domain will either be in an active or inactive state. Domains in an active state are delegated and have their delegation information published to the zone. Inactive domains either have no delegation information or their delegation information in not published in the zone. Following the initial registration of a domain, one of five actions may occur during its lifecycle:

-Domain may be updated
-Domain may be deleted, either within or after the add-grace period
-Domain may be renewed at anytime during the term
-Domain may be auto-renewed by the Registry
-Domain may be transferred to another registrar.

Each of these actions may result in a change in domain state. This is described in more detail in the following section. Every domain must eventually be renewed, auto-renewed, transferred, or deleted. A registrar may apply EPP statuses described above to prevent specific actions such as updates, renewals, transfers, or deletions.

27.2 Registration States

27.2.1 Domain Lifecycle – Registration States

As described above the .WEB registry will implement a standard domain lifecycle found in most gTLD registries today. There are five possible domain states:

-Active
-Inactive
-Locked
-Pending Transfer
-Pending Delete.

All domains are always in either an Active or Inactive state, and throughout the course of the lifecycle may also be in a Locked, Pending Transfer, and Pending Delete state. Specific conditions such as applied EPP policies and registry business rules will determine whether a domain can be transitioned between states. Additionally, within each state, domains may be subject to various timed events such as grace periods, and notification periods.

27.2.2 Active State

The active state is the normal state of a domain and indicates that delegation data has been provided

and the delegation information is published in the zone. A domain in an Active state may also be in the Locked or Pending Transfer states.

27.2.3 Inactive State

The Inactive state indicates that a domain has not been delegated or that the delegation data has not been published to the zone. A domain in an Inactive state may also be in the Locked or Pending Transfer states. By default all domain in the Pending Delete state are also in the Inactive state.

27.2.4 Locked State

The Locked state indicates that certain specified EPP transactions may not be performed to the domain. A domain is considered to be in a Locked state if at least one restriction has been placed on the domain; however up to eight restrictions may be applied simultaneously. Domains in the Locked state will also be in the Active or Inactive, and under certain conditions may also be in the Pending Transfer or Pending Delete states.

27.2.5 Pending Transfer State

The Pending Transfer state indicates a condition in which there has been a request to transfer the domain from one registrar to another. The domain is placed in the Pending Transfer state for a period of time to allow the current (losing) registrar to approve (ack) or reject (nack) the transfer request. Registrars may only nack requests for reasons specified in the Inter-Registrar Transfer Policy.

27.2.6 Pending Delete State

The Pending Delete State occurs when a Delete command has been sent to the Registry after the first 5 days (120 hours) of registration. The Pending Delete period is 35-days during which the first 30-days the name enters the Redemption Grace Period (RGP) and the last 5-days guarantee that the domain will be purged from the Registry Database and available to public pool for registration on a first come, first serve basis.

27.3 Typical Registration Lifecycle Activities

27.3.1 Domain Creation Process

The creation (registration) of domain names is the fundamental registry operation. All other operations are designed to support or compliment a domain creation. The following steps occur when a domain is created.

1. Contact objects are created in the SRS database. The same contact object may be used for each contact type, or they may all be different. If the contacts already exist in the database this step may be skipped.

2. Nameservers are created in the SRS database. Nameservers are not required to complete the registration process; however any domain with less than 2 name servers will not be resolvable.

3. The domain is created using the each of the objects created in the previous steps. In addition, the term and any client statuses may be assigned at the time of creation.

The actual number of EPP transactions needed to complete the registration of a domain name can be as few as one and as many as 40. The latter assumes seven distinct contacts and 13 nameservers, with Check and Create commands submitted for each object.

27.3.2 Update Process

Registry objects may be updated (modified) using the EPP Modify operation. The Update transaction updates the attributes of the object.

For example, the Update operation on a domain name will only allow the following attributes to be updated:

-Domain statuses
-Registrant ID

-Administrative Contact ID
-Billing Contact ID
-Technical Contact ID
-Nameservers
-AuthInfo
-Additional Registrar provided fields.

The Update operation will not modify the details of the contacts. Rather it may be used to associate a different contact object (using the Contact ID) to the domain name. To update the details of the contact object the Update transaction must be applied to the contact itself. For example, if an existing registrant wished to update the postal address, the Registrar would use the Update command to modify the contact object, and not the domain object.

27.3.4 Renew Process

The term of a domain may be extended using the EPP Renew operation. ICANN policy general establishes the maximum term of a domain name to be 10 years, and .WEB will follow that term restriction. A domain may be renewed/extended at any point time, even immediately following the initial registration. The only stipulation is that the overall term of the domain name may not exceed 10 years. If a Renew operation is performed with a term value will extend the domain beyond the 10 year limit, the Registry will reject the transaction entirely.

27.3.5 Transfer Process

The EPP Transfer command is used for several domain transfer related operations:

-Initiate a domain transfer
-Cancel a domain transfer
-Approve a domain transfer
- Reject a domain transfer.

To transfer a domain from one Registrar to another the following process is followed:

1. The gaining (new) Registrar submits a Transfer command, which includes the AuthInfo code of the domain name.

2. If the AuthInfo code is valid and the domain is not in a status that does not allow transfers the domain is placed into pendingTransfer status

3. A poll message notifying the losing Registrar of the pending transfer is sent to the Registrar’s message queue

4. The domain remains in pendingTransfer status for up to 120 hours, or until the losing (current) Registrar Acks (approves) or Nack (rejects) the transfer request

5. If the losing Registrar has not Acked or Nacked the transfer request within the 120 hour timeframe, the Registry auto-approves the transfer

6. The requesting Registrar may cancel the original request up until the transfer has been completed.

A transfer adds an additional year to the term of the domain. In the event that a transfer will cause the domain to exceed the 10 year maximum term, the Registry will add a partial term up to the 10 year limit. Unlike with the Renew operation, the Registry will not reject a transfer operation.

27.3.6 Deletion Process

A domain may be deleted from the SRS using the EPP Delete operation. The Delete operation will result in either the domain being immediately removed from the database or the domain being placed in pendingDelete status. The outcome is dependent on when the domain is deleted. If the domain is deleted within the first five days (120 hours) of registration, the domain is immediately removed from the database. A deletion at any other time will result in the domain being placed in pendingDelete status and entering the Redemption Grace Period (RGP). Additionally, domains that are deleted within five days (120) hours of any billable (add, renew, transfer) transaction may be deleted for credit.

27.4 Applicable Time Elements

The following section explains the time elements that are involved.

27.4.1 Grace Periods

There are six grace periods:

-Add-Delete Grace Period (AGP)
-Renew-Delete Grace Period
-Transfer-Delete Grace Period
-Auto-Renew-Delete Grace Period
-Auto-Renew Grace Period
-Redemption Grace Period (RGP).

The first four grace periods listed above are designed to provide the Registrar with the ability to cancel a revenue transaction (add, renew, or transfer) within a certain period of time and receive a credit for the original transaction.
The following describes each of these grace periods in detail.

27.4.2 Add-Delete Grace Period

The APG is associated with the date the Domain was registered. Domains may be deleted for credit during the initial 120 hours of a registration, and the Registrar will receive a billing credit for the original registration. If the domain is deleted during the Add Grace Period, the domain is dropped from the database immediately and a credit is applied to the Registrar’s billing account.

27.4.3 Renew-Delete Grace Period

The Renew-Delete Grace Period is associated with the date the Domain was renewed. Domains may be deleted for credit during the 120 hours after a renewal. The grace period is intended to allow Registrars to correct domains that were mistakenly renewed. It should be noted that domains that are deleted during the renew grace period will be placed into pendingDelete and will enter the RGP (see below).

27.4.4 Transfer-Delete Grace Period

The Transfer-Delete Grace Period is associated with the date the Domain was transferred to another Registrar. Domains may be deleted for credit during the 120 hours after a transfer. It should be noted that domains that are deleted during the renew grace period will be placed into pendingDelete and will enter the RGP. A deletion of domain after a transfer is not the method used to correct a transfer mistake. Domains that have been erroneously transferred or hijacked by another party can be transferred back to the original registrar through various means including contacting the Registry.

27.4.5 Auto-Renew-Delete Grace Period

The Auto-Renew-Delete Grace Period is associated with the date the Domain was auto-renewed. Domains may be deleted for credit during the 120 hours after an auto-renewal. The grace period is intended to allow Registrars to correct domains that were mistakenly auto-renewed. It should be noted that domains that are deleted during the auto-renew delete grace period will be placed into pendingDelete and will enter the RGP.

27.4.6 Auto-Renew Grace Period

The Auto-Renew Grace Period is a special grace period intended to provide registrants with an extra amount of time, beyond the expiration date, to renew their domain name. The grace period lasts for 45 days from the expiration date of the domain name. Registrars are not required to provide registrants with the full 45 days of the period.

27.4.7 Redemption Grace Period

The RGP is a special grace period that enables Registrars to restore domains that have been inadvertently deleted but are still in pendingDelete status within the Redemption Grace Period. All domains enter the RGP except those deleted during the AGP.

The RGP period is 30 days, during which time the domain may be restored using the EPP RenewDomain command as described below. Following the 30day RGP period the domain will remain in pendingDelete status for an additional five days, during which time the domain may NOT be restored. The domain is released from the SRS, at the end of the 5 day non-restore period. A restore fee applies and is detailed in the Billing Section. A renewal fee will be automatically applied for any domain past expiration.

Neustar has created a unique restoration process that uses the EPP Renew transaction to restore the domain and fulfill all the reporting obligations required under ICANN policy. The following describes the restoration process.

27.5 State Diagram

Figure 27-1 attached provides a description of the registration lifecycle.

The different states of the lifecycle are active, inactive, locked, pending transfer, and pending delete. Please refer to section 27.2 for detailed descriptions of each of these states. The lines between the states represent triggers that transition a domain from one state to another.

The details of each trigger are described below:

-Create: Registry receives a create domain EPP command.
-WithNS: The domain has met the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
-WithOutNS: The domain has not met the minimum number of nameservers required by registry policy. The domain will not be in the DNS zone.
-Remove Nameservers: Domain's nameserver(s) is removed as part of an update domain EPP command. The total nameserver is below the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
-Add Nameservers: Nameserver(s) has been added to domain as part of an update domain EPP command. The total number of nameservers has met the minimum number of nameservers required by registry policy in order to be published in the DNS zone.
-Delete: Registry receives a delete domain EPP command.
-DeleteAfterGrace: Domain deletion does not fall within the add grace period.
-DeleteWithinAddGrace: Domain deletion falls within add grace period.
-Restore: Domain is restored. Domain goes back to its original state prior to the delete command.
-Transfer: Transfer request EPP command is received.
-Transfer Approve/Cancel/Reject: Transfer requested is approved or cancel or rejected.
-TransferProhibited: The domain is in clientTransferProhibited and/or serverTranferProhibited status. This will cause the transfer request to fail. The domain goes back to its original state.
-DeleteProhibited: The domain is in clientDeleteProhibited and/or serverDeleteProhibited status. This will cause the delete command to fail. The domain goes back to its original state.

Note: the locked state is not represented as a distinct state on the diagram as a domain may be in a locked state in combination with any of the other states: inactive, active, pending transfer, or pending delete.

27.5.1 EPP RFC Consistency

As described above, the domain lifecycle is determined by ICANN policy and the EPP RFCs. Neustar has been operating ICANN TLDs for the past 10 years consistent and compliant with all the ICANN policies and related EPP RFCs.

27.6 Resources

The registration lifecycle and associated business rules are largely determined by policy and business requirements; as such the Product Management and Policy teams will play a critical role in working with NU DOTCO LLC to determine the precise rules that meet the requirements of the TLD. Implementation of the lifecycle rules will be the responsibility of Development/Engineering team, with testing performed by the Quality Assurance team. Neustar's SRS implementation is very flexible and configurable, and in many case development is not required to support business rule changes.

The .WEB registry will be using standard lifecycle rules, and as such no customization is anticipated. However should modifications be required in the future, the necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The

following resources are available from those teams:

-Development/Engineering – 19 employees
-Registry Product Management – 4 employees

These resources are more than adequate to support the development needs of all the TLDs operated by Neustar, including the .WEB registry.

28. Abuse Prevention and Mitigation

28.1 Abuse Prevention and Mitigation

Strong abuse prevention of a new gTLD is an important benefit to the internet community. .WEB and its registry operator and back-end registry services provider, Neustar agree that a registry must not only aim for the highest standards of technical and operational competence, but also needs to act as a steward of the space on behalf of the Internet community and ICANN in promoting the public interest. Neustar brings extensive experience establishing and implementing registration policies. This experience will be leveraged to help .WEB combat abusive and malicious domain activity within the new gTLD space.

One of those public interest functions for a responsible domain name registry includes working towards the eradication of abusive domain name registrations, including but not limited to those resulting from:

-Illegal or fraudulent actions
-Spam
-Phishing
-Pharming
-Distribution of malware
-Fast flux hosting
-Botnets
-Distribution of child pornography
-Online sale or distribution of illegal pharmaceuticals.

More specifically, although traditionally botnets have used Internet Relay Chat (IRC) servers to control registry and the compromised PCs, or bots, for DDoS attacks and the theft of personal information, an increasingly popular technique, known as fast-flux DNS, allows botnets to use a multitude of servers to hide a key host or to create a highly-available control network. This ability to shift the attacker’s infrastructure over a multitude of servers in various countries creates an obstacle for law enforcement and security researchers to mitigate the effects of these botnets. But a point of weakness in this scheme is its dependence on DNS for its translation services. By taking an active role in researching and monitoring these sorts of botnets, NU DOTCO LLC’s partner, Neustar has developed the ability to efficiently work with various law enforcement and security communities to begin a new phase of mitigation of these types of threats.

28.1.1 Policies and Procedures to Minimize Abusive Registrations

A Registry must have the policies, resources, personnel, and expertise in place to combat such abusive DNS practices. As .WEB’s registry provider, Neustar is at the forefront of the prevention of such abusive practices and is one of the few registry operators to have actually developed and implemented an active “domain takedown” policy. We also believe that a strong program is essential given that registrants have a reasonable expectation that they are in control of the data associated with their domains, especially its presence in the DNS zone. Because domain names are sometimes used as a mechanism to enable various illegitimate activities on the Internet often the best preventative measure to thwart these attacks is to remove the names completely from the DNS before they can impart harm, not only to the domain name registrant, but also to millions of unsuspecting Internet users.

Removing the domain name from the zone has the effect of shutting down all activity associated with the domain name, including the use of all websites and e-mail. The use of this technique should not be entered into lightly. .WEB has an extensive, defined, and documented process for taking the necessary action of removing a domain from the zone when its presence in the zone poses a threat to the security and stability of the infrastructure of the Internet or the registry.

28.1.2 Abuse Point of Contact

As required by the Registry Agreement, .WEB will establish and publish on its website a single abuse point of contact responsible for addressing inquiries from law enforcement and the public related to malicious and abusive conduct. .WEB will also provide such information to ICANN prior to the delegation of any domain names in the TLD. This information shall consist of, at a minimum, a valid e-mail address dedicated solely to the handling of malicious conduct complaints, and a telephone number and mailing address for the primary contact. We will ensure that this information will be kept accurate and up to date and will be provided to ICANN if and when changes are made. In addition, with respect to inquiries from ICANN-Accredited registrars, our registry services provider, Neustar shall have an additional point of contact, as it does today, handling requests by registrars related to abusive domain name practices.

28.2 Policies Regarding Abuse Complaints

One of the key policies each new gTLD registry will need to have is an Acceptable Use Policy that clearly delineates the types of activities that constitute “abuse” and the repercussions associated with an abusive domain name registration. In addition, the policy will be incorporated into the applicable Registry-Registrar Agreement and reserve the right for the registry to take the appropriate actions based on the type of abuse. This will include locking down the domain name preventing any changes to the contact and nameserver information associated with the domain name, placing the domain name “on hold” rendering the domain name non-resolvable, transferring to the domain name to another registrar, and/or in cases in which the domain name is associated with an existing law enforcement investigation, substituting name servers to collect information about the DNS queries to assist the investigation.

.WEB will adopt an Acceptable Use Policy that clearly defines the types of activities that will not be permitted in the TLD and reserves the right of NU DOTCO LLC to lock, cancel, transfer or otherwise suspend or take down domain names violating the Acceptable Use Policy and allow the Registry where and when appropriate to share information with law enforcement. Each ICANN-Accredited Registrar must agree to pass through the Acceptable Use Policy to its Resellers (if applicable) and ultimately to the TLD registrants. Below is the Registry’s initial Acceptable Use Policy that we will use in connection with .WEB.

28.2.1 .WEB Acceptable Use Policy

This Acceptable Use Policy gives the Registry the ability to quickly lock, cancel, transfer or take ownership of any .WEB domain name, either temporarily or permanently, if the domain name is being used in a manner that appears to threaten the stability, integrity or security of the Registry, or any of its registrar partners – and/or that may put the safety and security of any registrant or user at risk. The process also allows the Registry to take preventive measures to avoid any such criminal or security threats.

The Acceptable Use Policy may be triggered through a variety of channels, including, among other things, private complaint, public alert, government or enforcement agency outreach, and the on-going monitoring by the Registry or its partners. In all cases, the Registry or its designees will alert Registry’s registrar partners about any identified threats, and will work closely with them to bring offending sites into compliance.

The following are some (but not all) activities that may be subject to rapid domain compliance:

-Phishing: the attempt to acquire personally identifiable information by masquerading as a website other than .WEB’s own.
-Pharming: the redirection of Internet users to websites other than those the user intends to visit, usually through unauthorized changes to the Hosts file on a victim’s computer or DNS records in DNS servers.
-Dissemination of Malware: the intentional creation and distribution of ”malicious” software designed to infiltrate a computer system without the owner’s consent, including, without limitation, computer viruses, worms, key loggers, and Trojans.
-Fast Flux Hosting: a technique used to shelter Phishing, Pharming and Malware sites and networks from detection and to frustrate methods employed to defend against such practices, whereby the IP address associated with fraudulent websites are changed rapidly so as to make the true location of the sites difficult to find.
-Botnetting: the development and use of a command, agent, motor, service, or software which is

implemented: (1) to remotely control the computer or computer system of an Internet user without their knowledge or consent, (2) to generate direct denial of service (DDOS) attacks.
-Malicious Hacking: the attempt to gain unauthorized access (or exceed the level of authorized access) to a computer, information system, user account or profile, database, or security system.
-Child Pornography: the storage, publication, display and/or dissemination of pornographic materials depicting individuals under the age of majority in the relevant jurisdiction.

The Registry reserves the right, in its sole discretion, to take any administrative and operational actions necessary, including the use of computer forensics and information security technological services, among other things, in order to implement the Acceptable Use Policy. In addition, the Registry reserves the right to deny, cancel or transfer any registration or transaction, or place any domain name(s) on registry lock, hold or similar status, that it deems necessary, in its discretion; (1) to protect the integrity and stability of the registry; (2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process; (3) to avoid any liability, civil or criminal, on the part of Registry as well as its affiliates, subsidiaries, officers, directors, and employees; (4) per the terms of the registration agreement or (5) to correct mistakes made by the Registry or any Registrar in connection with a domain name registration. Registry also reserves the right to place upon registry lock, hold or similar status a domain name during resolution of a dispute. \

28.2.2 Taking Action Against Abusive and/or Malicious Activity
The Registry is committed to ensuring that those domain names associated with abuse or malicious conduct in violation of the Acceptable Use Policy are dealt with in a timely and decisive manner. These include taking action against those domain names that are being used to threaten the stability and security of the TLD, or is part of a real-time investigation by law enforcement.

Once a complaint is received from a trusted source, third-party, or detected by the Registry, the Registry will use commercially reasonable efforts to verify the information in the complaint. If that information can be verified to the best of the ability of the Registry, the sponsoring registrar will be notified and be given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the Registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry will place the domain on “ServerHold”. Although this action removes the domain name from the TLD zone, the domain name record still appears in the TLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

28.2.2.1 Coordination with Law Enforcement

With the assistance of Neustar as its back-end registry services provider, .WEB can meet its obligations under Section 2.8 of the Registry Agreement where required to take reasonable steps to investigate and respond to reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of its TLD. The Registry will respond to legitimate law enforcement inquiries within one business day from receiving the request. Such response shall include, at a minimum, an acknowledgement of receipt of the request, Questions or comments concerning the request, and an outline of the next steps to be taken by .WEB for rapid resolution of the request.

In the event such request involves any of the activities which can be validated by the Registry and involves the type of activity set forth in the Acceptable Use Policy, the sponsoring registrar is then given 12 hours to investigate the activity further and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry will place the domain on “serverHold”.

28.2.3 Monitoring for Malicious Activity

.WEB’s partner, Neustar is at the forefront of the prevention of abusive DNS practices. Neustar is one of only a few registry operators to have actually developed and implemented an active “domain takedown” policy in which the registry itself takes down abusive domain names.

Neustar’s approach is quite different from a number of other gTLD Registries and the results have been unmatched. Neustar targets verified abusive domain names and removes them within 12 hours regardless of whether or not there is cooperation from the domain name registrar. This is because

Neustar has determined that the interest in removing such threats from the consumer outweighs any potential damage to the registrar/registrant relationship.

Neustar's active prevention policies stem from the notion that registrants in the TLD have a reasonable expectation that they are in control of the data associated with their domains, especially its presence in the DNS zone. Because domain names are sometimes used as a mechanism to enable various illegitimate activities on the Internet, including malware, bot command and control, pharming, and phishing, the best preventative measure to thwart these attacks is often to remove the names completely from the DNS before they can impart harm, not only to the domain name registrant, but also to millions of unsuspecting Internet users.

28.2.3.1 Rapid Takedown Process

Since implementing the program, Neustar has developed two basic variations of the process. The more common process variation is a light-weight process that is triggered by "typical" notices. The less-common variation is the full process that is triggered by unusual notices. These notices tend to involve the need for accelerated action by the registry in the event that a complaint is received by Neustar which alleges that a domain name is being used to threaten the stability and security of the TLD, or is part of a real-time investigation by law enforcement or security researchers. These processes are described below:

28.2.3.2 Lightweight Process

In addition to having an active Information Security group that, on its own initiatives, seeks out abusive practices in the TLD, Neustar is an active member in a number of security organizations that have the expertise and experience in receiving and investigating reports of abusive DNS practices, including but not limited to, the Anti-Phishing Working Group, Castle Cops, NSP-SEC, the Registration Infrastructure Safety Group and others. Each of these sources are well-known security organizations that have developed a reputation for the prevention of harmful agents affecting the Internet. Aside from these organizations, Neustar also actively participates in privately run security associations whose basis of trust and anonymity makes it much easier to obtain information regarding abusive DNS activity.

Once a complaint is received from a trusted source, third-party, or detected by Neustar's internal security group, information about the abusive practice is forwarded to an internal mail distribution list that includes members of the operations, legal, support, engineering, and security teams for immediate response ("CERT Team"). Although the impacted URL is included in the notification e-mail, the CERT Team is trained not to investigate the URLs themselves since often times the URLs in Question have scripts, bugs, etc. that can compromise the individual's own computer and the network safety. Rather, the investigation is done by a few members of the CERT team that are able to access the URLs in a laboratory environment so as to not compromise the Neustar network. The lab environment is designed specifically for these types of tests and is scrubbed on a regular basis to ensure that none of Neustar's internal or external network elements are harmed in any fashion.

Once the complaint has been reviewed and the alleged abusive domain name activity is verified to the best of the ability of the CERT Team, the sponsoring registrar is given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the registry to keep the name in the zone.

If the registrar has not taken the requested action after the 12-hNeustar's period (i.e., is unresponsive to the request or refuses to take action), Neustar places the domain on "ServerHold". Although this action removes the domain name from the TLD zone, the domain name record still appears in the TLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

28.2.3.3 Full Process

In the event that Neustar receives a complaint which claims that a domain name is being used to threaten the stability and security of the TLD or is a part of a real-time investigation by law enforcement or security researchers, Neustar follows a slightly different course of action.

Upon initiation of this process, members of the CERT Team are paged and a teleconference bridge is immediately opened up for the CERT Team to assess whether the activity warrants immediate action. If the CERT Team determines the incident is not an immediate threat to the security and the stability of

critical internet infrastructure, they provide documentation to the Neustar Network Operations Center to clearly capture the rationale for the decision and either refers the incident to the Lightweight process set forth above. If no abusive practice is discovered, the incident is closed.

However, if the CERT TEAM determines there is a reasonable likelihood that the incident warrants immediate action as described above, a determination is made to immediately remove the domain from the zone. As such, Customer Support contacts the responsible registrar immediately to communicate that there is a domain involved in a security and stability issue. The registrar is provided only the domain name in Question and the broadly stated type of incident. Given the sensitivity of the associated security concerns, it may be important that the registrar not be given explicit or descriptive information in regards to data that has been collected (evidence) or the source of the complaint. The need for security is to fully protect the chain of custody for evidence and the source of the data that originated the complaint.

28.2.3.3.1 Coordination with Law Enforcement & Industry Groups

One of the reasons for which Neustar was selected to serve as the back-end registry services provider by .WEB is Neustar's extensive experience with its industry-leading abusive domain name and malicious monitoring program and its close working relationship with a number of law enforcement agencies, both in the United States and internationally. For example, in the United States, Neustar is in constant communication with the Federal Bureau of Investigation, US CERT, Homeland Security, the Food and Drug Administration, and the National Center for Missing and Exploited Children.

Neustar is also a participant in a number of industry groups aimed at sharing information amongst key industry players about the abusive registration and use of domain names. These groups include the Anti-Phishing Working Group and the Registration Infrastructure Safety Group (where Neustar served for several years as on the Board of Directors). Through these organizations and others, Neustar shares information with other registries, registrars, ccTLDs, law enforcement, security professionals, etc. not only on abusive domain name registrations within its own TLDs, but also provides information uncovered with respect to domain names in other registries' TLDs. Neustar has often found that rarely are abuses found only in the TLDs for which it manages, but also within other TLDs, such as .com and .info. Neustar routinely provides this information to the other registries so that it can take the appropriate action.

With the assistance of Neustar as its back-end registry services provider, .WEB can meet its obligations under Section 2.8 of the Registry Agreement where required to take reasonable steps to investigate and respond to reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of its TLD. .WEB and/or Neustar will respond to legitimate law enforcement inquiries within one business day from receiving the request. Such response shall include, at a minimum, an acknowledgement of receipt of the request, Questions or comments concerning the request, and an outline of the next steps to be taken by .WEB and/or Neustar for rapid resolution of the request.

In the event such request involves any of the activities which can be validated by .WEB and/or Neustar and involves the type of activity set forth in the Acceptable Use Policy, the sponsoring registrar is then given 12 hours to investigate the activity further and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), Neustar places the domain on "serverHold".

28.3 Measures for Removal of Orphan Glue Records

As the Security and Stability Advisory Committee of ICANN (SSAC) rightly acknowledges, although orphaned glue records may be used for abusive or malicious purposes, the "dominant use of orphaned glue supports the correct and ordinary operation of the DNS." See http://www.icann.org/en/committees/security/sac048.pdf.

While orphan glue often support correct and ordinary operation of the DNS, we understand that such glue records can be used maliciously to point to name servers that host domains used in illegal phishing, bot-nets, malware, and other abusive behaviors. Problems occur when the parent domain of the glue record is deleted but its children glue records still remain in DNS. Therefore, when the Registry has written evidence of actual abuse of orphaned glue, the Registry will take action to remove those records from the zone to mitigate such malicious conduct.

Neustar run a daily audit of entries in its DNS systems and compares those with its provisioning system. This serves as an umbrella protection to make sure that items in the DNS zone are valid. Any DNS record that shows up in the DNS zone but not in the provisioning system will be flagged for investigation and removed if necessary. This daily DNS audit serves to not only prevent orphaned hosts but also other records that should not be in the zone.

In addition, if either .WEB or Neustar become aware of actual abuse on orphaned glue after receiving written notification by a third party through its Abuse Contact or through its customer support, such glue records will be removed from the zone.

28.4 Measures to Promote WHOIS Accuracy

.WEB acknowledges that ICANN has developed a number of mechanisms over the past decade that are intended to address the issue of inaccurate WHOIS information. Such measures alone have not proven to be sufficient and therefore .WEBwill put forth additional efforts to address this by undertaking the following measures:

1) A mechanism a procedures to address domain names with inaccurate or incomplete WHOIS data
2) Policies and Procedures to ensure compliance including include audits

- Mechanism to address with inaccurate WHOIS data: a procedure whereby third parties can submit complaints directly to the Applicant (as opposed to ICANN or the sponsoring Registrar) about inaccurate or incomplete WHOIS data. Such information shall be forwarded to the sponsoring Registrar, who shall be required to address those complaints with their registrants. Thirty days after forwarding the complaint to the registrar, .WEB will examine the current WHOIS data for names that were alleged to be inaccurate to determine if the information was corrected, the domain name was deleted, or there was some other disposition. If the Registrar has failed to take any action, or it is clear that the Registrant was either unwilling or unable to correct the inaccuracies, Applicant reserves the right to suspend the applicable domain name(s) until such time as the Registrant is able to cure the deficiencies.

- Policies and Procedures to ensure compliance: .WEB shall on its own initiative, no less than twice per year, perform a manual review of a random sampling of .WEB domain names to test the accuracy of the WHOIS information. Although this will not include verifying the actual information in the WHOIS record, .WEB will be examining the WHOIS data for prima facie evidence of inaccuracies. In the event that such evidence exists, it shall be forwarded to the sponsoring Registrar, who shall be required to address those complaints with their registrants. Thirty days after forwarding the complaint to the registrar, the Applicant will examine the current WHOIS data for names that were alleged to be inaccurate to determine if the information was corrected, the domain name was deleted, or there was some other disposition. If the Registrar has failed to take any action, or it is clear that the Registrant was either unwilling or unable to correct the inaccuracies, .WEB reserves the right to suspend the applicable domain name(s) until such time as the Registrant is able to cure the deficiencies.

28.5 Resourcing Plans

Responsibility for abuse mitigation rests with a variety of functional groups. The Abuse Monitoring team is primarily responsible for providing analysis and conducting investigations of reports of abuse. The customer service team also plays an important role in assisting with the investigations, responded to customers, and notifying registrars of abusive domains. Finally, the Policy/Legal team is responsible for developing the relevant policies and procedures.
The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

-Customer Support – 12 employees
-Policy/Legal – 2 employees

The resources are more than adequate to support the abuse mitigation procedures of the .WEB registry.

29. Rights Protection Mechanisms

29.1 Rights Protection Mechanisms

NU DOTCO LLC is firmly committed to the protection of Intellectual Property rights and to implementing the mandatory rights protection mechanisms contained in the Applicant Guidebook and detailed in Specification 7 of the Registry Agreement. .WEB recognizes that although the New gTLD program includes significant protections beyond those that were mandatory for a number of the current TLDs, a key motivator for .WEB's selection of Neustar as its registry services provider is Neustar's experience in successfully launching a number of TLDs with diverse rights protection mechanisms, including many the ones required in the Applicant Guidebook. More specifically, .WEB will implement the following rights protection mechanisms in accordance with the Applicant Guidebook as further described below:

-Trademark Clearinghouse: a one-stop shop so that trademark holders can protect their trademarks with a single registration.
-Sunrise and Trademark Claims processes for the TLD.
-Implementation of the Uniform Dispute Resolution Policy to address domain names that have been registered and used in bad faith in the TLD.
-Uniform Rapid Suspension: A quicker, more efficient and cheaper alternative to the Uniform Dispute Resolution Policy to deal with clear cut cases of cybersquatting.
-Implementation of a Thick WHOIS making it easier for rights holders to identify and locate infringing parties

29.1.1 Trademark Clearinghouse Including Sunrise and Trademark Claims

The first mandatory rights protection mechanism ("RPM") required to be implemented by each new gTLD Registry is support for, and interaction with, the trademark clearinghouse. The trademark clearinghouse is intended to serve as a central repository for information to be authenticated, stored and disseminated pertaining to the rights of trademark holders. The data maintained in the clearinghouse will support and facilitate other RPMs, including the mandatory Sunrise Period and Trademark Claims service. Although many of the details of how the trademark clearinghouse will interact with each registry operator and registrars, .WEB is actively monitoring the developments of the Implementation Assistance Group ("IAG") designed to assist ICANN staff in firming up the rules and procedures associated with the policies and technical requirements for the trademark clearinghouse. In addition, .WEB's back-end registry services provider is actively participating in the IAG to ensure that the protections afforded by the clearinghouse and associated RPMs are feasible and implementable.

Utilizing the trademark clearinghouse, all operators of new gTLDs must offer: (i) a sunrise registration service for at least 30 days during the pre-launch phase giving eligible trademark owners an early opportunity to register second-level domains in new gTLDs; and (ii) a trademark claims service for at least the first 60 days that second-level registrations are open. The trademark claim service is intended to provide clear notice" to a potential registrant of the rights of a trademark owner whose trademark is registered in the clearinghouse.

.WEB's registry service provider, Neustar, has already implemented Sunrise and/or Trademark Claims programs for numerous TLDs including .biz, .us, .travel, .tel and .co and will implement the both of these services on behalf of .WEB.

29.1.1.1 Neustar's Experience in Implementing Sunrise and Trademark Claims Processes

In early 2002, Neustar became the first registry operator to launch a successful authenticated Sunrise process. This process permitted qualified trademark owners to pre-register their trademarks as domain names in the .us TLD space prior to the opening of the space to the general public. Unlike any other "Sunrise" plans implemented (or proposed before that time), Neustar validated the authenticity of Trademark applications and registrations with the United States Patent and Trademark Office (USPTO).

Subsequently, as the back-end registry operator for the .tel gTLD and the .co ccTLD, Neustar launched validated Sunrise programs employing processes. These programs are very similar to those that are to be employed by the Trademark Clearinghouse for new gTLDs.

Below is a high level overview of the implementation of the .co Sunrise period that demonstrates Neustar's experience and ability to provide a Sunrise service and an overview of Neustar's experience in implementing a Trademark Claims program to trademark owners for the launch of .BIZ. Neustar's experience in each of these rights protection mechanisms will enable it to seamlessly provide these

services on behalf of .WEB as required by ICANN.

a) Sunrise and .co

The Sunrise process for .co was divided into two sub-phases:

-Local Sunrise giving holders of eligible trademarks that have obtained registered status from the Colombian trademark office the opportunity apply for the .CO domain names corresponding with their marks
-Global Sunrise program giving holders of eligible registered trademarks of national effect, that have obtained a registered status in any country of the world the opportunity apply for the .CO domain names corresponding with their marks for a period of time before registration is open to the public at large.

Like the new gTLD process set forth in the Applicant Guidebook, trademark owners had to have their rights validated by a Clearinghouse provider prior to the registration being accepted by the Registry. The Clearinghouse used a defined process for checking the eligibility of the legal rights claimed as the basis of each Sunrise application using official national trademark databases and submitted documentary evidence.

Applicants and/or their designated agents had the option of interacting directly with the Clearinghouse to ensure their applications were accurate and complete prior to submitting them to the Registry pursuant to an optional “Pre-validation Process”. Whether or not an applicant was “pre-validated”, the applicant had to submit its corresponding domain name application through an accredited registrar. When the Applicant was pre-validated through the Clearinghouse, each was given an associated approval number that it had to supply the registry. If they were not pre-validated, applicants were required to submit the required trademark information through their registrar to the Registry.
As the registry level, Neustar, subsequently either delivered the:

-Approval number and domain name registration information to the Clearinghouse
-When there was no approval number, trademark information and the domain name registration information was provided to the
Clearinghouse through EPP (as is currently required under the Applicant Guidebook).

Information was then used by the Clearinghouse as either further validation of those pre-validated applications, or initial validation of those that did not go through pre-validation. If the applicant was validated and their trademark matched the domain name applied-for, the Clearinghouse communicated that fact to the Registry via EPP.

When there was only one validated sunrise application, the application proceeded to registration when the .co launched. If there were multiple validated applications (recognizing that there could be multiple trademark owners sharing the same trademark), those were included in the .co Sunrise auction process. Neustar tracked all of the information it received and the status of each application and posted that status on a secure Website to enable trademark owners to view the status of its Sunrise application.

Although the exact process for the Sunrise program and its interaction between the trademark owner, Registry, Registrar, and IP Clearinghouse is not completely defined in the Applicant Guidebook and is dependent on the current RFI issued by ICANN in its selection of a Trademark Clearinghouse provider, Neustar’s expertise in launching multiple Sunrise processes and its established software will implement a smooth and compliant Sunrise process for the new gTLDs.

b) Trademark Claims Service Experience

With Neustar’s biz TLD launched in 2001, Neustar became the first TLD with a Trademark Claims service. Neustar developed the Trademark Claim Service by enabling companies to stake claims to domain names prior to the commencement of live .biz domain registrations.

During the Trademark Claim process, Neustar received over 80,000 Trademark Claims from entities around the world. Recognizing that multiple intellectual property owners could have trademark rights in a particular mark, multiple Trademark Claims for the same string were accepted. All applications were logged into a Trademark Claims database managed by Neustar.
The Trademark Claimant was required to provide various information about their trademark rights, including the:

-Particular trademark or service mark relied on for the trademark Claim
-Date a trademark application on the mark was filed, if any, on the string of the domain name
-Country where the mark was filed, if applicable
-Registration date, if applicable
-Class or classes of goods and services for which the trademark or service mark was registered
-Name of a contact person with whom to discuss the claimed trademark rights.

Once all Trademark Claims and domain name applications were collected, Neustar then compared the claims contained within the Trademark Claims database with its database of collected domain name applications (DNAs). In the event of a match between a Trademark Claim and a domain name application, an e-mail message was sent to the domain name applicant notifying the applicant of the existing Trademark Claim. The e-mail also stressed that if the applicant chose to continue the application process and was ultimately selected as the registrant, the applicant would be subject to Neustar's dispute proceedings if challenged by the Trademark Claimant for that particular domain name.

The domain name applicant had the option to proceed with the application or cancel the application. Proceeding on an application meant that the applicant wanted to go forward and have the application proceed to registration despite having been notified of an existing Trademark Claim. By choosing to "cancel," the applicant made a decision in light of an existing Trademark Claim notification to not proceed.

If the applicant did not respond to the e-mail notification from Neustar, or elected to cancel the application, the application was not processed. This resulted in making the applicant ineligible to register the actual domain name. If the applicant affirmatively elected to continue the application process after being notified of the claimant's (or claimants') alleged trademark rights to the desired domain name, Neustar processed the application.

This process is very similar to the one ultimately adopted by ICANN and incorporated in the latest version of the Applicant Guidebook. Although the collection of Trademark Claims for new gTLDs will be by the Trademark Clearinghouse, many of the aspects of Neustar's Trademark Claims process in 2001 are similar to those in the Applicant Guidebook. This makes Neustar uniquely qualified to implement the new gTLD Trademark Claims process.

29.1.2 Uniform Dispute Resolution Policy (UDRP) and Uniform Rapid Suspension (URS)

29.1.2.1 UDRP

Prior to joining Neustar, Mr. Neuman was a key contributor to the development of the Uniform Dispute Resolution Policy ("UDRP") in 1998. This became the first "Consensus Policy" of ICANN and has been required to be implemented by all domain name registries since that time. The UDRP is intended as an alternative dispute resolution process to transfer domain names from those that have registered and used domain names in bad faith. Although there is not much of an active role that the domain name registry plays in the implementation of the UDRP, Neustar has closely monitored UDRP decisions that have involved the TLDs for which it supports and ensures that the decisions are implemented by the registrars supporting its TLDs. When alerted by trademark owners of failures to implement UDRP decisions by its registrars, Neustar either proactively implements the decisions itself or reminds the offending registrar of its obligations to implement the decision.

29.1.2.2 URS

In response to complaints by trademark owners that the UDRP was too cost prohibitive and slow, and the fact that more than 70 percent of UDRP cases were "clear cut" cases of cybersquatting, ICANN adopted the IRT's recommendation that all new gTLD registries be required, pursuant to their contracts with ICANN, to take part in a Uniform Rapid Suspension System ("URS"). The purpose of the URS is to provide a more cost effective and timely mechanism for brand owners than the UDRP to protect their trademarks and to promote consumer protection on the Internet.

The URS is not meant to address Questionable cases of alleged infringement (e.g., use of terms in a generic sense) or for anti-competitive purposes or denial of free speech, but rather for those cases in which there is no genuine contestable issue as to the infringement and abuse that is taking place.

Unlike the UDRP which requires little involvement of gTLD registries, the URS envisages much more of an active role at the registry-level. For example, rather than requiring the registrar to lock down a domain name subject to a UDRP dispute, it is the registry under the URS that must lock the domain

within 24hours of receipt of the complaint from the URS Provider to restrict all changes to the registration data, including transfer and deletion of the domain names.

In addition, in the event of a determination in favor of the complainant, the registry is required to suspend the domain name. This suspension remains for the balance of the registration period and would not resolve the original website. Rather, the nameservers would be redirected to an informational web page provided by the URS Provider about the URS.
Additionally, the WHOIS reflects that the domain name will not be able to be transferred, deleted, or modified for the life of the registration. Finally, there is an option for a successful complainant to extend the registration period for one additional year at commercial rates.

.WEB is fully aware of each of these requirements and will have the capability to implement these requirements for new gTLDs. In fact, during the IRT's development of f the URS, Neustar began examining the implications of the URS on its registry operations and provided the IRT with feedback on whether the recommendations from the IRT would be feasible for registries to implement.

Although there have been a few changes to the URS since the IRT recommendations, Neustar continued to participate in the development of the URS by providing comments to ICANN, many of which were adopted. As a result, Neustar is committed to supporting the URS for all of the registries that it provides back-end registry services.

29.1.3 Implementation of Thick WHOIS

The .WEB registry will include a thick WHOIS database as required in Specification 4 of the Registry agreement. A thick WHOIS provides numerous advantages including a centralized location of registrant information, the ability to more easily manage and control the accuracy of data, and a consistent user experience.

29.1.4 Policies Handling Complaints Regarding Abuse

In addition the Rights Protection mechanisms addressed above, NU DOTCO LLC will implement a number of measures to handle complaints regarding the abusive registration of domain names in its TLD as described in .WEB's response to Question 28.

29.1.4.1 Registry Acceptable Use Policy

One of the key policies each new gTLD registry is the need to have is an Acceptable Use Policy that clearly delineates the types of activities that constitute "abuse" and the repercussions associated with an abusive domain name registration. The policy must be incorporated into the applicable Registry-Registrar Agreement and reserve the right for the registry to take the appropriate actions based on the type of abuse. This may include locking down the domain name preventing any changes to the contact and nameserver information associated with the domain name, placing the domain name "on hold" rendering the domain name non-resolvable, transferring to the domain name to another registrar, and/or in cases in which the domain name is associated with an existing law enforcement investigation, substituting name servers to collect information about the DNS queries to assist the investigation. .WEB's Acceptable Use Policy, set forth in our response to Question 28, will include prohibitions on phishing, pharming, dissemination of malware, fast flux hosting, hacking, and child pornography. In addition, the policy will include the right of the registry to take action necessary to deny, cancel, suspend, lock, or transfer any registration in violation of the policy.

29.1.4.2 Monitoring for Malicious Activity

.WEB is committed to ensuring that those domain names associated with abuse or malicious conduct in violation of the Acceptable Use Policy are dealt with in a timely and decisive manner. These include taking action against those domain names that are being used to threaten the stability and security of the TLD, or is part of a real-time investigation by law enforcement.

Once a complaint is received from a trusted source, third-party, or detected by the Registry, the Registry will use commercially reasonable efforts to verify the information in the complaint. If that information can be verified to the best of the ability of the Registry, the sponsoring registrar will be notified and be given 12 hours to investigate the activity and either take down the domain name by placing the domain name on hold or by deleting the domain name in its entirety or providing a compelling argument to the Registry to keep the name in the zone. If the registrar has not taken the requested action after the 12-hour period (i.e., is unresponsive to the request or refuses to take action), the Registry will place the domain on "ServerHold". Although this action removes the domain

name from the TLD zone, the domain name record still appears in the TLD WHOIS database so that the name and entities can be investigated by law enforcement should they desire to get involved.

29.3 Resourcing Plans

The rights protection mechanisms described in the response above involve a wide range of tasks, procedures, and systems. The responsibility for each mechanism varies based on the specific requirements. In general the development of applications such as sunrise and IP claims is the responsibility of the Engineering team, with guidance from the Product Management team. Customer Support and Legal play a critical role in enforcing certain policies such as the rapid suspension process. These teams have years of experience implementing these or similar processes.

The necessary resources will be pulled from the pool of available resources described in detail in the response to Question 31. The following resources are available from those teams:

-Development/Engineering – 19 employees
-Product Management- 4 employees
-Customer Support – 12 employees

The resources are more than adequate to support the rights protection mechanisms of the .WEB registry.

30(a). Security Policy: Summary of the security policy for the proposed registry

30.(a).1 Security Policies

NU DOTCO LLC and our back-end operator, Neustar recognize the vital need to secure the systems and the integrity of the data in commercial solutions. The .WEB registry solution will leverage industry-best security practices including the consideration of physical, network, server, and application elements.
Neustar’s approach to information security starts with comprehensive information security policies. These are based on the industry best practices for security including SANS (SysAdmin, Audit, Network, Security) Institute, NIST (National Institute of Standards and Technology), and CIS (Center for Internet Security). Policies are reviewed annually by Neustar’s information security team.

The following is a summary of the security policies that will be used in the .WEB registry, including:

1. Summary of the security policies used in the registry operations
2. Description of independent security assessments
3. Description of security features that are appropriate for .WEB
4. List of commitments made to registrants regarding security levels

All of the security policies and levels described in this section are appropriate for the .WEB registry.

30.(a).2 Summary of Security Policies

Neustar has developed a comprehensive Information Security Program in order to create effective administrative, technical, and physical safeguards for the protection of its information assets, and to comply with Neustar’s obligations under applicable law, regulations, and contracts. This Program establishes Neustar’s policies for accessing, collecting, storing, using, transmitting, and protecting electronic, paper, and other records containing sensitive information.

-The policies for internal users and our clients to ensure the safe, organized and fair use of information resources.
-The rights that can be expected with that use.
-The standards that must be met to effectively comply with policy.
-The responsibilities of the owners, maintainers, and users of Neustar’s information resources.
-Rules and principles used at Neustar to approach information security issues

The following policies are included in the Program:

1. Acceptable Use Policy
The Acceptable Use Policy provides the “rules of behavior” covering all Neustar Associates for using Neustar resources or accessing sensitive information.

2. Information Risk Management Policy
The Information Risk Management Policy describes the requirements for the on-going information security risk management program, including defining roles and responsibilities for conducting and evaluating risk assessments, assessments of technologies used to provide information security and monitoring procedures used to measure policy compliance.

3. Data Protection Policy
The Data Protection Policy provides the requirements for creating, storing, transmitting, disclosing, and disposing of sensitive information, including data classification and labeling requirements, the requirements for data retention. Encryption and related technologies such as digital certificates are also covered under this policy.

4. Third Party Policy
The Third Party Policy provides the requirements for handling service provider contracts, including specifically the vetting process, required contract reviews, and on-going monitoring of service providers for policy compliance.

5. Security Awareness and Training Policy
The Security Awareness and Training Policy provide the requirements for managing the on-going awareness and training program at Neustar. This includes awareness and training activities provided to all Neustar Associates.

6. Incident Response Policy
The Incident Response Policy provides the requirements for reacting to reports of potential security policy violations. This policy defines the necessary steps for identifying and reporting security incidents, remediation of problems, and conducting “lessons learned” post-mortem reviews in order to provide feedback on the effectiveness of this Program. Additionally, this policy contains the requirement for reporting data security breaches to the appropriate authorities and to the public, as required by law, contractual requirements, or regulatory bodies.

7. Physical and Environmental Controls Policy
The Physical and Environment Controls Policy provides the requirements for securely storing sensitive information and the supporting information technology equipment and infrastructure. This policy includes details on the storage of paper records as well as access to computer systems and equipment locations by authorized personnel and visitors.

8. Privacy Policy
Neustar supports the right to privacy, including the rights of individuals to control the dissemination and use of personal data that describes them, their personal choices, or life experiences. Neustar supports domestic and international laws and regulations that seek to protect the privacy rights of such individuals.

9. Identity and Access Management Policy
The Identity and Access Management Policy covers user accounts (login ID naming convention, assignment, authoritative source) as well as ID lifecycle (request, approval, creation, use, suspension, deletion, review), including provisions for system/application accounts, shared/group accounts, guest/public accounts, temporary/emergency accounts, administrative access, and remote access. This policy also includes the user password policy requirements.

10. Network Security Policy
The Network Security Policy covers aspects of Neustar network infrastructure and the technical controls in place to prevent and detect security policy violations.

11. Platform Security Policy
The Platform Security Policy covers the requirements for configuration management of servers, shared systems, applications, databases, middle-ware, and desktops and laptops owned or operated by Neustar Associates.

12. Mobile Device Security Policy
The Mobile Device Policy covers the requirements specific to mobile devices with information storage

or processing capabilities. This policy includes laptop standards, as well as requirements for PDAs, mobile phones, digital cameras and music players, and any other removable device capable of transmitting, processing or storing information.

13. Vulnerability and Threat Management Policy
The Vulnerability and Threat Management Policy provides the requirements for patch management, vulnerability scanning, penetration testing, threat management (modeling and monitoring) and the appropriate ties to the Risk Management Policy.

14. Monitoring and Audit Policy
The Monitoring and Audit Policy covers the details regarding which types of computer events to record, how to maintain the logs, and the roles and responsibilities for how to review, monitor, and respond to log information. This policy also includes the requirements for backup, archival, reporting, forensics use, and retention of audit logs.

15. Project and System Development and Maintenance Policy
The System Development and Maintenance Policy covers the minimum security requirements for all software, application, and system development performed by or on behalf of Neustar and the minimum security requirements for maintaining information systems.

30.(a).3 Independent Assessment Reports

Neustar IT Operations is subject to yearly Sarbanes-Oxley (SOX), Statement on Auditing Standards #70 (SAS70) and ISO audits. Testing of controls implemented by Neustar management in the areas of access to programs and data, change management and IT Operations are subject to testing by both internal and external SOX and SAS70 audit groups. Audit Findings are communicated to process owners, Quality Management Group and Executive Management. Actions are taken to make process adjustments where required and remediation of issues is monitored by internal audit and QM groups.
External Penetration Test is conducted by a third party on a yearly basis. As authorized by Neustar, the third party performs an external Penetration Test to review potential security weaknesses of network devices and hosts and demonstrate the impact to the environment. The assessment is conducted remotely from the Internet with testing divided into four phases:

-A network survey is performed in order to gain a better knowledge of the network that was being tested
-Vulnerability scanning is initiated with all the hosts that are discovered in the previous phase
-Identification of key systems for further exploitation is conducted
-Exploitation of the identified systems is attempted.

Each phase of the audit is supported by detailed documentation of audit procedures and results. Identified vulnerabilities are classified as high, medium and low risk to facilitate management’s prioritization of remediation efforts. Tactical and strategic recommendations are provided to management supported by reference to industry best practices.

30.(a).4 Augmented Security Levels and Capabilities

There are no increased security levels specific for .WEB. However, Neustar will provide the same high level of security provided across all of the registries it manages.
A key to Neustar’s Operational success is Neustar’s highly structured operations practices. The standards and governance of these processes:

-Include annual independent review of information security practices
-Include annual external penetration tests by a third party
-Conform to the ISO 9001 standard (Part of Neustar’s ISO-based Quality Management System)
-Are aligned to Information Technology Infrastructure Library (ITIL) and CoBIT best practices
-Are aligned with all aspects of ISO IEC 17799
-Are in compliance with Sarbanes-Oxley (SOX) requirements (audited annually)
-Are focused on continuous process improvement (metrics driven with product scorecards reviewed monthly).

A summary view to Neustar’s security policy in alignment with ISO 17799 can be found in section 30.(a).5 below.

30.(a).5 Commitments and Security Levels

The .WEB registry commits to high security levels that are consistent with the needs of the TLD. These commitments include:

Compliance with High Security Standards

-Security procedures and practices that are in alignment with ISO 17799
-Annual SOC 2 Audits on all critical registry systems
-Annual 3rd Party Penetration Tests
-Annual Sarbanes Oxley Audits

Highly Developed and Document Security Policies

-Compliance with all provisions described in section 30.(b) and in the attached security policy document.
-Resources necessary for providing information security
-Fully documented security policies
-Annual security training for all operations personnel

High Levels of Registry Security

-Multiple redundant data centers
-High Availability Design
-Architecture that includes multiple layers of security
-Diversified firewall and networking hardware vendors
-Multi-factor authentication for accessing registry systems
-Physical security access controls
-A 24x7 manned Network Operations Center that monitors all systems and applications
-A 24x7 manned Security Operations Center that monitors and mitigates DDoS attacks
-DDoS mitigation using traffic scrubbing technologies

EXHIBIT Altanovo-7

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD., Claimant,	)	
vs.	)	ICDR Case No. 01-18-0004-2702
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	

VOLUME V

ARBITRATION

AUGUST 7, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR 465536

INDEPENDENT REVIEW PROCESS

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FRIDAY, AUGUST 7, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME V
(Pages 788-1008)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

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CALIFORNIA, CALIFORNIA, AUGUST 7, 2020

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ARBITRATOR BIENVENU: Good day, everyone. It is an early morning on the West Coast. We have a big day ahead of us.

I'll ask if there are preliminary matters that the parties or Amici would like to raise.

MR. ALI: Just very briefly, Mr. Chairman. Mr. LeVee had asked me earlier today to provide an estimate regarding the cross-examination times for Mr. Rasco and Mr. Disspain.

All I can say is that we worked pretty much late into the night and all night to cut back our examinations of both as much as we could to allow the Panel time to ask questions and for Mr. LeVee and Mr. Marenberg to conduct their respective redirects of the witnesses.

I can't say much more than that because I think we have done what we can. We hope that the witnesses will be efficient in their responses and that the redirects will be efficient as well to allow you sufficient time to question the witnesses.

I did make a commitment to Mr. LeVee, and we will do everything that we can to abide by the

commitment that we made to do our part to get both witnesses done today.

ARBITRATOR BIENVENU: Excellent. Thank you, Mr. Ali, for that.

Mr. LeVee, will you be introducing -- no, Mr. Marenberg will be introducing the witness this morning, correct?

MR. MARENBERG: Correct.

MR. LeVEE: Yes.

ARBITRATOR BIENVENU: Good morning, Mr. Marenberg.

MR. MARENBERG: Good morning.

ARBITRATOR BIENVENU: Do you have any preliminary matters that you would like to raise, or can we bring the witness in the hearing room?

MR. MARENBERG: Nope, I think we can bring the witness in. The only thing I would say is -- and probably Mr. LeVee would echo this -- we have gotten a commitment to finish both witnesses today. That is obviously dependent on the length of the cross-examination, and I think we should monitor it as we are going forward carefully because we can easily get off time.

ARBITRATOR BIENVENU: Yes, I think we are all conscious of these constraints.

Mr. English, if you could bring the witness in.

Morning, Mr. De Gramont.

MR. De GRAMONT: Morning.

MR. ENGLISH: The witness is now in the meeting.

ARBITRATOR BIENVENU: Good morning, Mr. Rasco. Can you hear me?

THE WITNESS: I can. Good morning.

ARBITRATOR BIENVENU: My name is Pierre Bienvenu. I serve as Chair of the Panel. My colleagues are Professor Catherine Kessedjian, who is joining us from Paris, and Mr. Richard Chernick, who is in Los Angeles.

Can you see all three of us on your screen?

THE WITNESS: Yes. Good morning. I believe I can, yes.

ARBITRATOR BIENVENU: Excellent. So, Mr. Rasco, welcome and thank you for participating in this hearing.

You have signed a witness statement in relation to this case dated 30 May 2020?

THE WITNESS: That's correct.

ARBITRATOR BIENVENU: And at the end of

your witness statement, you swear that the content of this statement is correct to the best of your knowledge and belief, correct?

THE WITNESS: That's correct.

ARBITRATOR BIENVENU: May I ask you, sir, in relation to the evidence that you will give to the Panel today, likewise solemnly to affirm that it will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Thank you, sir.

Mr. Marenberg, any introductory questions?

MR. MARENBERG: Mr. Rasco, is there anything that you would like to change or augment to your witness declaration before cross-examination starts?

THE WITNESS: Sure. Thanks, Steve.

Just in reviewing my witness statement, I just wanted to point out a clarification. I believe it is Paragraph 107 where I mentioned that I communicated with ICANN primarily -- I communicated with ICANN through the portal, and I didn't mean that to be an exhaustive list. I also did initiate communications with ICANN, I believe, by email, and I think I attempted by phone call.

So I just wanted to clarify that. By no means was I trying to exclude the fact that there was other means of communications, but primarily ICANN communications have been through the portal.

MR. MARENBERG: Mr. Rasco, what period of time do the communications referenced by Paragraph 107 infer?

THE WITNESS: After the auction.

MR. MARENBERG: I have nothing further, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you, Mr. Marenberg.

Mr. De Gramont, you will be conducting the cross on behalf of the claimant?

MR. De GRAMONT: I will, Mr. Chairman.

ARBITRATOR BIENVENU: Morning to you.

MR. De GRAMONT: Morning to you. Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. De GRAMONT

Q. Good morning, Mr. Rasco. My name is Alex de Gramont. I represent Afilias. Thank you very much for being with us this morning.

You should have a package that has a binder of documents, and I would ask you to open it

now.

A. Okay.

MR. MARENBERG: May I open mine as well?

MR. De GRAMONT: I don't know about that, Mr. Marenberg. Yes, please go ahead.

Q. Mr. Rasco, you have a binder in front of you. We have included your witness statement behind Tab 1, and then behind that are various documents that we're going to discuss with you.

The good news is we are going to skip a lot of them in an effort to speed up the examination, but we will be asking you about some of them. You will see that we have put brackets at the bottom of the page that has page numbers, and that's because sometimes the PDF and the hardcopies had different page numbers. Just so everyone can follow, we will be looking at the bracketed page numbers, okay?

A. Thank you.

Q. Okay. So, Mr. Rasco, you are still one of the managers and the chief financial officer of NU DOT CO, or NDC; is that correct?

A. That's correct.

Q. Are you currently employed in any other capacity?

A. Yes, I am.

Q. And can you tell me in what other capacity or capacities?

A. Sure, yeah, I have multiple -- multiple jobs. I am the CEO and founder of the .HEALTH top-level domain. I also operate a coworking space here in Miami, so -- and also a real-estate-related business.

Q. Okay. Thank you. You testify in your witness statement that you and Juan Diego Calle and Nicolai Bezsonoff founded NDC in 2012; is that correct?

A. That's correct.

Q. And in Paragraph 6 of your witness statement, you explain that at its founding, NDC had two shareholders, the first was Domain Marketing Holdings, LLC, or DMH, which owned 85 percent of NDC; is that correct?

A. That's right.

Q. And then Nuco LP, which owned the other 15 percent; is that right?

A. That's correct.

Q. And who owned DMH?

A. Redacted - Third-Party Designated Confidential Information

Q. Can you tell us who owns STRAAT Investments?

A. Redacted - Third-Party Designated Confidential Information

Q. And then who owned Nuco?

A. Redacted - Third-Party Designated Confidential Information

Q. And do you know if that information was provided to ICANN?

A. I don't believe so. I believe the application only asked you who owned more than 15 percent.

Q. Now, you and Mr. Calle and Mr. Bezsonoff had previously launched the .CO ccTLD; is that correct?

A. That's correct, along with Lori Anne Wardi and Eduardo Santoyo.

Q. And the term "ccTLD" is an abbreviation for "country code TLD," correct?

A. That's correct.

Q. For ccTLDs each country decides how to choose the registry for its own country TLD; is that right?

A. That's right. They generally set up the guidelines for running it.

Q. So Colombia had a public auction, and your company .CO won the auction; is that correct?

A. It wasn't an auction; it was an RFP.

Q. And that took place under the procurement laws of the Republic of Colombia, I assume?

A. That's correct.

Q. So it is a different process than the one that ICANN used for issuing gTLDs in the new gTLD Program, correct?

A. Yeah, that's right, that's right.

Q. Okay. So NDC was formed in 2012 for the purpose of applying for new gTLD strings in the new gTLD Program; is that right?

A. That's right.

Q. And NDC ultimately applied for 13 gTLD strings, including .WEB, correct?

A. Thirteen, yes.

Q. And the one -- and the one gTLD that NDC acquired was .HEALTH; is that right?

A. No, that's not correct. .HEALTH was applied for by a different entity, so NDC has nothing to do with .HEALTH.

Q. With respect to the 13 gTLD strings, I assume that NDC paid the 185,000 application fee for each application, right?

A. That's right.

Q. When you applied for .WEB and the other strings in 2012, were you hoping to obtain the Registry Agreement and operate the registries for all of those gTLDs?

A. Redacted - Third-Party Designated Confidential Information

Q. And did you envision in 2012 that there would be private auctions and other settlement of contention sets to, quote, "monetize," unquote, the applications?

A. Well, we speculated, but there was no way to be sure at that time.

Q. Okay. And you and Mr. Bezsonoff completed NDC's .WEB application; is that correct?

A. Primarily. We might have had help from other folks in several sections. It was a very

long application times 13 times. It was a pretty long process.

Q. Did you hire consultants or proposal writers to assist you?

A. No. We hired a young man by the name of David McCombie who kind of helped us kind of theorize about different outcomes and try to come up with valuations for the different strings.

Q. And what kind of consultant was Mr. McCombie?

A. David is a -- I guess like a management consultant, McKinsey kind of background, or Bain, one of those.

Q. Okay. Thank you.

You understood that the public portions of the application would be publicly posted for public comment, correct?

A. Yes. I can't recall which exact portions, but yes, I remember that there was -- there were definitely many aspects of the application that were to remain public.

Q. Okay. And that was so the public could see who was applying for each particular gTLD; is that your understanding?

A. I believe so, yes.

Q. Okay. Skipping ahead to 2015, you state in your witness statement that by 2015 market conditions had changed and

Redacted - Third-Party Designated Confidential Information

Do you recall that testimony?

A. I recall that section in my testimony, yes.

Q. And you recall that given changing market -- given what you described as changing market conditions, you thought that

Redacted - Third-Party Designated Confidential Information

A. My experience to that point is that in the auctions that we participated in, just our competitors were willing to bid a lot more than we were.

Q. Okay. And you reached the same conclusion with respect to .WEB; is that right?

A. That's correct.

Q. And you state that the, quote, "market expectations for .WEB were high."

Do you recall that testimony?

A. Yes, I do.

Q. And that means that you believe that .WEB

was going to command a high price whether at an ICANN auction or a private resolution of the contention set; is that correct?

A. Yeah. Mostly in -- going back all the way to 2011, when all of us potential applicants would talk about the gTLD Program, .WEB was frequently mentioned as one of the more attractive strings.

Q. Okay. And you knew who all the members of the .WEB contention set were?

A. Not all of them personally, but yes, in general I knew the organizations.

Q. And based on that knowledge, NDC was able to consider how best to develop a strategy that would allow for a return on your investment in preparing the .WEB application; is that accurate?

A. Well, I don't necessarily think that knowing who all the applicants were really affected us. I think the market conditions are the things that kind of drove our decision-making.

Q. Well, you mentioned in your witness statement that there were some big players in the .WEB contention set, Google, et cetera, so that must have helped you assess the likely price at which the contention set was going to be resolved, whether privately or through an ICANN auction; is

that fair?

A. Well, it definitely influenced. However, you know, Google had -- we had participated in auctions with Google, and Google didn't value everything very highly. They didn't bid up a lot of things. So it really depended on the individual string.

Q. On the individual string and on the individual companies in the particular contention set?

A. That's right.

Q. Okay. And you state in your witness statement that in around May 2015 you, quote, "received a phone call from VeriSign expressing interest in working with NDC to acquire the rights to .WEB," unquote. It is at Paragraph 41 of your witness statement if you want to take a look.

A. I remember that.

Q. You remember that.

So who at VeriSign called you?

A. I believe the first contact that I had was with Pat Kane. I don't know his exact title, but he's generally the face of their registry program and someone who I was friendly with and familiar with.

Q. Okay. Do you recall what Mr. Kane said to you?

A. He was trying -- he wanted me to have -- he didn't explain too much, but he wanted me to have a conversation with a colleague of his at VeriSign.

Q. And who was that colleague?

A. That was Paul Livesay.

Q. And we have been arguing about whether it is pronounced Livesay or Livesay. Is it Livesay?

A. I think it is. I haven't spoken to Paul in many years, but I think that's what it is.

Q. How long after your call with Mr. Kane did you make -- did it take for you to make contact with Mr. Livesay?

A. I can't recall exactly, sir, but I don't believe it was the same day. It might have been the next day or it could have been a few days. I really don't recall.

Q. It was soon thereafter, soon after the call with Mr. Kane?

A. That's probably accurate, yeah.

Q. And do you recall what Mr. Livesay said?

A. I think just speaking generally, you know, I think the message was,

Q. Did he mention that VeriSign had failed to timely make applications for the gTLDs itself?

A. I am not sure that he told me that. I knew that they had applied and participated in the program to a certain extent, but obviously he was asking me about strings that they didn't apply for.

Q. So after that phone call, did you enter into negotiations with VeriSign that led to the Domain Acquisition Agreement, or the DAA?

A. Yeah, I can't recall the exact timeline, but yes, after that phone call we started talking. We started discussing what they would be interested in doing and went through various different thoughts as to how to work out some kind of a deal, which consummated in the DAA, I think in August of that year.

Q. Was he interested in any other gTLDs, or was the focus only on .WEB?

A. Well, when we first started talking, we were talking about our applications in general, our

gTLDs in general, and we were negotiating primarily the three -- so at that moment we had four applications remaining, I believe it was .WEB, obviously, .INC, .LLC and .CORP, all four of those applications -- yeah, all four of those applications were on hold.

So mine and my partners' attitude was, all right, if we are going to end up doing a deal, let's try to do a deal for all our applications and all these strings and then we're done with this program. So we first started talking about all of them.

Q. Did you reach an agreement on any of those TLDs other than .WEB?

A. We didn't end up signing anything, no.

Q. And do you know why that is? How did it come to be that only .WEB was the subject of your agreement with VeriSign?

A. So we were actually negotiating on the three primaries, which I would call .WEB, .INC and .LLC. .CORP, there was some significant questioning as to whether .CORP would ever see the light of day, and that ended up being true.

So we actually were negotiating on those three. The negotiations became difficult and

complicated, and at some point in those negotiations, rather than breaking down completely, I think we said, "Look, let's do this one at a time."

Q. And did you have to enter into a nondisclosure agreement in connection with the negotiations, do you recall?

A. I don't recall. I wouldn't be surprised if I did.

Q. Okay.

A. But I don't recall.

Q. And who conducted the negotiations for NDC?

A. I was the primary point of contact with VeriSign. And when it came down to actually structuring the agreement, my attorney, Brian Leventhal.

Q. And who conducted the negotiations for VeriSign?

A. Mr. Livesay.

Q. Anyone else at VeriSign?

A. I met with several lawyers a few times, again, I think more in the course of structuring the agreement, but in terms of hard-nose negotiations, it was myself and Mr. Livesay.

Q. Do you recall the names of the VeriSign lawyers with whom you met?

A. I don't. I think one was Kevin, Kevin R., if I recall his initials.

Q. Did VeriSign send you the first draft of the DAA?

A. I can't recall.

Q. Do you recall how many drafts were exchanged over time?

A. No, not exactly, no.

Q. And were you, meaning you, Mr. Rasco, focused on the substantive terms of the DAA or were you focused primarily on the payment terms or both?

A. Well, you know, as in any negotiation, you have stages. So first we tried to figure out what we were all dealing with and then you try to come to terms on the financial portion and then how you execute it.

So I was involved in all of it, but really, obviously, when it comes down to the legal matters, I defer those, the legalities to Brian Leventhal.

Q. Had Mr. Leventhal helped you on other application issues?

A. Brian's been our corporate attorney for

many years, so he's well aware of all of our businesses.

Q. Did you and Mr. Livesay meet in person to negotiate or were the negotiations by phone?

A. Both.

Q. Do you recall how many times you met in person?

A. We met one time in my office in Miami, and we met one time definitely in VeriSign's office in Virginia.

Q. And the DAA was executed on August 25th, 2016; is that correct?

A. That sounds correct.

Q. Was it executed in person?

A. I believe so, yes. I think Paul -- I think Mr. Livesay was in my office.

Q. Let's take a look at the DAA, which is at Tab 2 of your agreement. It is Exhibit C-69. And you'll see that throughout NDC is referred to as "the Company" and VeriSign is referred to as "Verisign"; is that correct?

A. I see that, yes.

Q. Redacted - Third-Party Designated Confidential Information

Do you see that?

A. Yes.

Q. And that's NDC, correct?

A. Yes.

Q. And if you turn to

Redacted - Third-Party Designated Confidential Information

Do you see that?

A. I see that, yes.

Q. So you understood that after signing this agreement, entering into this agreement,

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A. Well, I don't necessarily agree with that. I think,

Redacted - Third-Party Designated Confidential Information

Q. In spite of what this says.

Okay. Let's look at some of the other provisions. Let's take a look at

Redacted - Third-Party Designated Confidential Information

A. I believe that's correct.

Q. In fact, it is more detailed than that. Let me just read some of the language.

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So if I understand that correctly, you had

Redacted - Third-Party Designated Confidential Information

A. Yes.

Q. And you had to

Redacted - Third-Party Designated Confidential Information

Do you recall those requirements?

A. Yes, I do. I recall their

Redacted - Third-Party Designated Confidential Information so I felt that these provisions were appropriate.

Q. I am not asking whether they are appropriate. I am just asking if -- if my understanding of them is consistent with yours, which is that

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A. Correct.

Q. Redacted - Third-Party Designated Confidential Information

A. You know, I believe I did. There may be

an occasion or two where I didn't think about some of these. For the most part, I don't think I was trying to conceal anything from VeriSign.

Q. And if you turn to

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A. That's correct.

Q. But it also provides that

Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. So Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Is that your understanding?

A. I believe that's about accurate, I think, yes.

Q. Okay. Let's take a look at

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So here's the proviso.

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Redacted - Third-Party Designated Confidential Information

I am going to stop there. I know that's a lot, but what this provision is saying is that

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A. I think, as you've mentioned, there's some provisos, as you call them, but yes, in general, that's correct.

Q. Okay. And that's true even if

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A. I think, as you read, as long as we

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Q. Okay Redacted - Third-Party Designated Confidential Information

A. Correct. Redacted - Third-Party Designated Confidential Information

Q. And you think that if the DAA had been disclosed, it would have affected the outcome of the auction?

A. I can't pretend to know what might have happened.

Q. So if Redacted - Third-Party Designated Confidential Information

A. I don't think that the DAA Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Now, you have testified in your witness

statement that you thought this arrangement with VeriSign was acceptable under the guidebook, correct?

A. I did.

Q. Did you wonder why

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A. No, not really. As I just mentioned, I think

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Q. And you thought that it was prudent not to let anyone know that NDC -- strike that.

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Redacted - Third-Party Designated Confidential Information

Do I understand that correctly?

A. That's correct. My experience working with public companies, they are pretty quirky about

Redacted - Third-Party Designated Confidential Information

Q. Was it your understanding that under the guidebook a nonapplicant was permitted to indirectly participate in the resolution of the contention set or otherwise seeking to become the registry operator through an applicant's application?

A. I'm sorry, can you kind of rephrase that question? I don't understand.

Q. Yeah. What this provision states, if I understand it correctly, is that

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A. Well, I believe what this says is -- not what this says, but they Redacted - Third-Party Designated Confidential Information

Q. Yeah. That's not what this says, though, is it, sir?

A. It is contingent on a lot of things.

Q. Yeah. And so your view is that when they say they were Redacted - Third-Party Designated Confidential Information

A. I think in terms of Redacted - Third-Party Designated Confidential Information

So yeah, that's the way I viewed it.

Q. Redacted - Third-Party Designated Confidential Information So what was the interest rate on the loan that VeriSign was providing you with?

A. Redacted - Third-Party Designated Confidential Information

Redacted - Third-Party Designated Confidential Information

Q. But NDC effectively

Redacted - Third-Party Designated Confidential Information

A. I don't -- I don't see how you come to that. Redacted - Third-Party Designated Confidential Information

Q. You basically

Redacted - Third-Party Designated Confidential Information

A. No, I disagree.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information At that point, when we signed the DAA, there was not even any clarity as to whether or not the .WEB TLD would ever be delegated. It was on hold and had been on hold for years. So I don't...

Q. Redacted - Third-Party Designated Confidential Information

A. If that's the way you want to phrase it.

Q. The answer is yes, that's what you thought?

A. Well, the DAA, Redacted - Third-Party Designated Confidential Information

Q. Did you ever ask Mr. Livesay why Redacted - Third-Party Designated Confidential Information

A. I don't believe I did. As I mentioned, I have been fortunate to do a few deals with public companies, so I didn't think anything was strange in terms of confidentiality. I don't even know how many people within VeriSign knew about our arrangement.

Q. And did you ever discuss with Mr. Calle or Mr. Bezsonoff why Redacted - Third-Party Designated Confidential Information

A. Did I speak about that particularly with Mr. Calle or Mr. Bezsonoff, I don't believe that I did.

Q. Let's turn to Exhibit A Redacted - Third-Party Designated Confidential Information

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A. I believe so. It looks like it is part of the original agreement.

Q. Redacted - Third-Party Designated Confidential Information

Do you see that?

A. I do, yes.

Q. And by the way,

Redacted - Third-Party Designated Confidential Information

A. I mean, if you're saying it is. I don't recall, but sounds fair.

Q. Okay. I think that will become evident as we go through the provisions.

A. Okay.

Q. So you understood that

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that correct?

A. Yes, that was for -- in my mind,

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Q. And let's look at some of the terms and conditions. Redacted - Third-Party Designated Confidential Information

A. I think this section

Redacted - Third-Party Designated Confidential Information

Q. Yeah, we'll come to that, sir.

Redacted - Third-Party Designated Confidential Information

Do you see that?

A. I do.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Well, I wouldn't phrase it that way. VeriSign was not the bidder. NDC was the bidder. NDC always retained control. As the one putting up

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yes, that's correct.

Q. Did you arrive two business days prior to the start of the auction?

A. I believe it was one business day. I don't think it ended up being two, but I can't be certain. I think it was just one business day.

Q. Redacted - Third-Party Designated Confidential Information

Do you see that?

A. I do, yes.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. So how did this work, you and Mr. Leventhal were sitting in a conference room at VeriSign's offices; is that right?

A. That's correct.

Q. And who from VeriSign was there with you?

A. Mr. Livesay was there, and people would come in and out. I am not sure who was there. There might have been an IT support person that was around. I am not sure exactly who else, but obviously my relationship and my primary contact was always Mr. Livesay.

Q. And do you recall how many bids you put in during the bidding process?

A. No. The bid last -- the auction lasted two days, so there were several rounds. I don't recall exactly how many rounds. It is public, so that information is available.

Q. And did Mr. Livesay tell you each bid to make?

A. Well, the way the auction works is that I believe you have a continue price. So the auction provider generally provides a threshold for continuing the auction. You have to bid something above that amount in order to continue or that amount to continue, and I believe that's how it

worked. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Well, as our funding source, we were kind of limited as to what we were going to bid, just as I'm sure my competitors who were financed by outside sources were limited as to how much they were going to bid.

Q. And you think that your competitors had their financing sources sitting with them, telling them whether they could bid on each specific round?

A. I can't pretend to know how they handled it.

Q. Did VeriSign provide any financial-modeling people for the bidding process?

A. I never participated in anything like that.

Q. Okay. So you are not aware whether they had financial-modeling people to figure out how much to bid or not?

A. I don't know.

Q. Okay.

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. How did you know that?

A. We had discussions.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. And they did that during the negotiations?

A. I believe so, yes.

Q. Okay. We are going to come back to that point, but let me just ask you this: If that was VeriSign's position,

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yes, I am there.

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

Do you recall that?

A. I do, yes.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. But if you disclosed -- strike that.
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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

Redacted - Third-Party Designated Confidential Information

A. You know, I don't know what I would have done in that circumstance.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

MR. De GRAMONT: Mr. Chairman, I am going to suggest that we take our break earlier today. It might enable me to cut down on some of the questions. Would that be acceptable to the Panel?

ARBITRATOR BIENVENU: It would certainly be acceptable to us, and I don't expect Mr. Marenberg would have any difficulty with that.

MR. MARENBERG: No objection, Mr. Chairman.

ARBITRATOR BIENVENU: Excellent. So let's break for 15 minutes.

And, Mr. Rasco, sorry, we have to -- you still there, Mr. Rasco?

THE WITNESS: I am still here.

ARBITRATOR BIENVENU: Yes. I am going to instruct you during our break, and that holds true

until the end of your evidence, not to discuss your evidence with anyone during the break.

THE WITNESS: Understood.

ARBITRATOR BIENVENU: Thank you, sir.

THE WITNESS: Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. Rasco, good morning again.

THE WITNESS: Good morning.

ARBITRATOR BIENVENU: We will continue with your cross-examination.

Mr. De Gramont, please proceed.

MR. De GRAMONT: Thank you, Mr. Chairman.

Q. Welcome back, Mr. Rasco.

A. Thank you.

Q. Now, there are various scenarios set forth in the rest of Exhibit A as to what happens depending on the outcome of the contention set. I am going to focus primarily on the scenario which actually happened, which was NDC winning the ICANN auction.

So I'd like to direct you to

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A. That is correct.

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Do you see that, sir?

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

A. That seems accurate, yes.

Q. Redacted - Third-Party Designated Confidential Information

Redacted - Third-Party Designated Confidential Information

A. That's what it says.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yeah. But, I mean, look, as a businessperson, I don't know that anything is that simple when you're talking about something of this magnitude.

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

A. What do you mean by that?

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

Do you recall that?

A. I do recall.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. That seems likely, yes.

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Yes, it did.

Q. Redacted - Third-Party Designated Confidential Information

A. That is correct.

Q. Redacted - Third-Party Designated Confidential Information

A. We did receive that, yes.

Q. Redacted - Third-Party Designated Confidential Information

Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. We have.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Right, correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Not technically, no.

Q. Do you have a rough estimate?

A. Redacted - Third-Party Designated Confidential Information

Q. Pretty good return on investment, right?

A. It was a fantastic deal.

Q. Okay. Congratulations for that.

A. It is not done yet, unfortunately.

Q. Okay. You write in your witness statement that in April 2016 ICANN sent notice to the contention set that ICANN had scheduled the ICANN auction for .WEB on 27 July 2016; is that correct?

A. That's correct.

Q. Do you recall this?

A. Yes, I do.

Q. And certain members of the contention set commenced discussions about a private resolution of

the contention set, right?

A. I believe so, yes. It was a general practice, in my experience, in general, when a string became available at the auction, then you'd start talking.

Q. Do you recall when you advised the other members of the contention set that NDC was not willing to participate in a private auction?

A. I don't know -- I don't know if I actively or affirmatively told them at some point other than probably some of the correspondence that we are going to speak of here today.

Q. Do you know if anyone else at NDC, Mr. Calle or anyone else, advised the other members of the contention set that it was not going to participate in a public auction?

A. Other than some of the exhibits that were kind of in front of us here today, I don't believe so.

Q. Okay. Let's take a look at what's behind Tab 6. It's Exhibit C-33. And if we look at the last page, Page 4, we see that on October 12th, 2015, Mr. Jon Nevett of Donuts sent an email to you and other members of the contention set advising that the Vistaprint decision had been issued and

asking if everyone was available to discuss next steps.

Do you see that?

A. I see that, yep.

Q. Okay. And do you remember receiving that email?

A. I see that I am a recipient here. I don't remember this email specifically, but it looks like I most likely received it.

Q. And then if you look up a couple emails on October 18, 2015, you replied all, quote, "All, I won't be joining you in Dublin, but I'll support however I can. Just let me know. Have a great meeting. Jose."

Do you recall writing that email?

A. Yeah, this recalls my memory, yeah, sure.

Q. And this is a couple months after you've entered the DAA, correct?

A. Correct. That would have been August, so yes.

Q. And under the DAA

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A. I guess we read that, yeah, sure.

Q. And do you recall if you forwarded this to

VeriSign?

A. I don't recall doing so.

Q. Yeah, okay. Let's turn to Page 2, and this is skipping forward to May of 2016, and if you look at the second email from the bottom, May 5th, 2016, at 11:44 p.m., Mr. Sandeep Ramchandani of Radix wrote, "The GDD is just around the corner. If most of us are going to be there, would be a good opportunity to catch-up face to face," unquote.

What was GDD?

A. GDD is an industry meeting put on by ICANN. GDD stands for the Global Domains Division. Outside of the regular ICANN meetings there's usually -- or there had been for a few years a GDD meeting, which was really for the registry operators primarily and the registrars.

So a lot less policy, you know, high-level ICANN policy and more registry/registrar-related policy and business.

Q. And if you go up a couple of emails to the middle of the page, you'll see that on May 6, 2016, Jon Nevett writes, quote, "I'm free for a call at that time, but it shouldn't be that hard to schedule the auction and decide what to do about

.WEBS."

And then right above that, on May 9th, you write, Jose Ignacio Rasco writes, "Sandeep, I am available for a call tomorrow if needed. Regards, Jose," end quote.

Do you recall if that call took place?

A. I don't believe it did. I don't remember being a part of a call like that.

Q. Do you recall if you forwarded this on to VeriSign, Redacted - Third-Party Designated Confidential Information

A. I don't recall, no.

Q. If you turn to Page 1, at the bottom you'll see a May 11, 2016, email from John Kane at Afilias, and he writes, quote, "Good news! I have spoken directly with most members of the contention set and/or saw confirmation in email that everyone is willing to participate in a .WEB only auction. If for any reason anyone's position has changed, please let the group or the auction house know ASAP. If we are going to keep it on track, I suggest to do an auction the week of June 13th," unquote.

Do you recall receiving this email?

A. I don't particularly recall, but, yeah, it is likely that I saw this as part of the contention

set.

Q. Do you recall if you or anyone else at NDC had indicated that NDC would be willing to participate in a private auction?

A. No. I remember speaking to the auction providers and them giving the updates, but other than that, I don't believe I ever committed affirmatively or negatively.

Q. Okay. Redacted - Third-Party Designated Confidential Information

A. No, no. My assumption all along was that my default position was we are going to an ICANN auction. If anything changed, I assumed we'd discuss it.

Q. And then why were you talking to the private auction providers if you knew that you were going to an ICANN auction?

A. Just to stay informed.

Q. Just to stay informed?

A. Just to stay informed, yeah.

Q. And I assume you were passing that information on to VeriSign?

A. I was probably updating VeriSign on what

was happening with the contention set, most likely, yes.

Q. If you knew that you were not going to a private auction, why didn't you just tell the other members of the contention set of that fact?

A. Honestly, I didn't feel obligated to do so. ICANN had set the public auction, and outside of that, that's what was going to be next.

Q. Well, if all the members were talking about privately resolving the contention set, you felt no obligation to tell them that they shouldn't be wasting their time because you were going to insist on an ICANN auction?

A. No. I mean, at some point I do communicate clearly that I am not changing my mind.

Q. Well, when you say changing your mind, have you ever advised the members of the contention set that NDC was likely going to seek an ICANN auction as opposed to a private auction?

A. I don't recall, but honestly, the history of NDC, we had participated in both. So one could assume, you know, that we would participate in a private auction.

Q. If you look up to the next email in Exhibit C-33, you'll see there's a Jon Nevett email

dated July 7. He says, quote, "Hi guys. Just so you are not surprised, we are seeking a postponement of the .WEB ICANN auction. I don't want to get into the details yet, but I don't want you guys to be surprised if a postponement was announced."

You are not copied on this email. I assume by this point you had informed the other members of the contention set that you were not going to participate in the private auction?

A. No, I hadn't. I definitely had an exchange with Jon Nevett in June where I told him that we were not going to participate in the private auction.

Q. Okay. Let's take a look at that. It is behind Tab 8 of your email -- I'm sorry. It's behind Tab 8 of your binder. It is Exhibit C-35.

A. Got it.

Q. And Mr. Nevett writes on June 6, "Hi guys. Jose and I corresponded last week, but I wanted to take another run at the three of you. Not sure if you three are still the Board members of your applicant, but I wanted to reach out to discuss a couple of ideas," unquote.

And he asks for a two-month delay of the

ICANN auction and whether you would be agreeable to that.

Do you recall receiving that email, that's what you just referred to?

A. I do, yes.

Q. Okay. And do you recall whether you forwarded it to anybody at VeriSign?

A. I don't believe I did, no.

Q. Okay. And then on June 7th you respond, quote, "Thanks for the message. Sorry for the delay. The three of us" -- and there you're referring to yourself, Mr. Calle and Mr. Bezsonoff?

A. That's correct, yes.

Q. "The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the Board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and will not be seeking an extension."

So I have a few questions about this.

A. Sure.

Q. When you stated that "the decision goes

beyond just us," that was accurate, right? The decision was really in the hands of VeriSign?

A. No, not at all. Really what I was referring to there is that, you know, as an LLC, as a company, you know, yes, while Juan, Nicolai and I are the managers in general for major decisions, we speak about it with the shareholders. So that's what I was referring to.

Q. You were referring to the shareholders, even though you had signed an agreement with VeriSign Redacted - Third-Party Designated Confidential Information

A. Well, no, as I previously stated, Redacted - Third-Party Designated Confidential Information

Subject to anything changing, that was going to be our position.

Q. So your reasoning is -- sorry, I didn't mean to cut you off, sir.

A. No, that's okay.

Q. So your thinking is that since you made the decision to enter into an agreement which Redacted - Third-Party Designated Confidential Information

A. Well, I kind of disagree with your premise. I don't believe there's any rights to participate in a private auction. ICANN says you can try to resolve these contention sets however you want, and if you can't, you come to an ICANN auction of last resort. So that's really what we were doing.

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Q. Well, the question, sir, isn't whether there's an obligation to participate in a private auction, but all applicants have the choice as to whether to participate in a private or ICANN auction, Redacted - Third-Party Designated Confidential Information

A. Well, I believe you said that

Redacted - Third-Party Designated Confidential Information

There's no right to participate in a private auction, so I don't think I was obliged to explain to any of my competitors how I was going to resolve our contention set.

Q. Well, there's no obligation to participate in a private auction, but every applicant had a right to do so, correct?

A. Well, no, ICANN says if there's a contention set, figure it out. If you can't figure it out, then you come to an auction. I didn't want to figure it out. I already knew what I was doing.

Q. Right. Redacted - Third-Party Designated Confidential Information

A. No, I disagree.

Q. All right. Then you say, "Nicolai is at NSR full time and no longer involved with our TLD applications."

What is "NSR"?

A. "NSR" is Neustar.

Q. And you say, "I'm still running our program and Juan sits on the Board with me and several others."

Who were the other Board members to whom you were referring?

A. Well, I was referring there to our other shareholders, the Board members. As you probably are aware, LLCs don't have a Board of Directors. They have managers and members. So there I was just referring to our members.

Q. Sir, there were three members in the LLC, correct?

A. No, there's three managers.

Q. Three managers. Oh, and when you say the members, you're talking about the owners of the other shares?

A. Shareholders.

Q. I see. Why didn't you simply say other shareholders?

A. I mean, I was just writing an email. I wasn't intending this to be some kind of official document describing the inner workings of NU DOT CO. I was really just trying to redirect and put off Mr. Nevett, who I had a friendly relationship, and, I mean, how many different ways could I tell him we are not going to a private auction?

So I guess it was my fault for trying to be a little polite in trying to just redirect him.

Q. But you certainly couldn't tell him the truth, Redacted - Third-Party Designated Confidential Information

A. Well, I wasn't going to tip my funding sources for an ultimate auction. That would affect the outcome of the auction.

Q. So you knew who all the other applicants were, but they didn't know that VeriSign was behind your application?

A. Well, VeriSign was not behind my application. NU DOT CO is and always was in control of our application. There was never -- VeriSign never controlled our application and never controlled NU DOT CO.

Q. Well, I think the Panel will have to determine that based on the terms of the DAA, sir.

Let me point you to the last sentence of your June 7th email. It says, quote, "It pains me personally to stroke a check to ICANN like this, but that's what we're going to have to do just like others did on .APP and .SHOP."

Now, it couldn't have been that painful to stroke a check to ICANN since VeriSign was paying for it, right?

A. Well, no matter what, yes, it was painful.

Q. How so?

A. Figuratively speaking it was just sending ICANN $135 million wasn't -- actually, at this time I didn't know how much it was going to be, but I was just speaking figuratively.

Q. But it was VeriSign's money, but it pained

you to take VeriSign's money and pay it to ICANN as opposed to --

A. It was my application. Again, I was trying to be polite and just get this guy off my back, quite frankly.

Q. In any event, you're aware now that Mr. Nevett contacted ICANN about a potential change in control in NDC, right?

A. I later learned of that, yes.

Q. And you can see why based on your email he thought there might have been a change in the ownership or control; isn't that fair?

A. I mean, I can't pretend to understand what he was thinking, but I see how he took my email out of context and tried to create a barrier, a delay to moving forward with the ICANN auction.

Q. When you say "out of context," you mean that he thought you were being truthful?

A. I mean, yes, I probably told him a little white lie in order to get him off my back, and yes. Again, I was not trying to tell him how exactly things operated internally at NU DOT CO. But most clear to me is that NU DOT CO hadn't had any changes to our organization, to our application or anything else.

Q. Now, on June 27th you received an email from Jared Erwin.

Do you recall that?

A. Yes.

Q. It is behind Tab 10 of your binder. It is Exhibit M to your witness statement. And the bottom email is from Mr. Erwin. He writes, quote, "We would like to confirm that there have not been changes to your application or the NU DOT CO LLC organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts)," unquote.

You appear to have responded very quickly to that email, although I can't tell whether there's a time change in this because you were in a different time zone.

Do you recall responding very quickly?

A. I honestly don't. Just for your context, this is not an email. This is a message system within the customer service portal. So yeah, just based on the time stamps, yeah, it looks like I got to him pretty quickly, but I can't tell if I opened

that message at 12:45 or at 12:05.

Q. And you say, quote, "I can confirm that there have been no changes to the NU DOT CO LLC organization that would need to be reported to ICANN."

Do you recall that?

A. Yes, I do.

Q. But you didn't answer the part of his question asking you to confirm that there had not been changes to the application.

Do you see that?

A. Yeah. As I testified, I honestly thought this was a routine inquiry one month out from the auction, considering the fact that it had been four years since we submitted our application. I just read it and fired off an answer.

I mean, I don't think anything was inaccurate or misleading here. Nothing did change in our application and nothing did change in NU DOT CO.

Yeah, I see that I direct the answer, the part of the organization, but I never intended to withhold anything. There was no changes that I felt I needed to report.

So I really just, again, as a routine

inquiry, I was like, okay, I guess they are getting ready for the auction.

Q. And you state that other members of the contention set were putting pressure on you to do a private auction and you had your conversation with Mr. Nevett re: the additional Board members, et cetera, but it never entered into your mind that this communication from ICANN had anything to do with that?

A. No, at this point, no. I hadn't heard back from Jon. I don't believe I heard back from Jon after our exchange, and I don't recall having heard from anyone, so no, it didn't spark anything at that point.

Q. Notwithstanding the terms of the DAA that we just reviewed, your view was that nothing about your application had changed whatsoever; is that your testimony, sir?

A. Nothing in the application changed that would require any kind of disclosure to ICANN.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

Do you recall that?

A. Correct. Redacted - Third-Party Designated Confidential Information

Q. Okay. You had several exchanges of emails with the ombudsman on July 6, 7 and 8.

Do you recall that?

A. I do. I recall one email that I responded to him, but yes.

Q. Okay. And then on July 8th, Ms. Willett emailed you and asked you to call her.

Do you recall that?

A. I do, yes.

Q. And, in fact, you did call her, correct?

A. I did.

Q. Okay. And if you take a look behind Tab 13, we see the message that she sent to you on July 8th. It is Tab 13, "Rasco Witness Statement Exhibit O." At the bottom of the page she asks you

to call her, and then there's an email on the top that says -- well, in which you responded to her after that conversation.

Do you recall when she sent you this email or text or message?

A. Well, it says July 8th that she sent it to me, and then the one you have in the box right now is my follow-up response to her.

Q. I can't see a date here. You don't recall when you sent that to her?

A. Just in reviewing for this, I don't know if it was the next day or two days after. I am not sure exactly.

Q. Okay. At the second-to-last paragraph you write, quote, "I share your understanding that the complaint was raised in order to get more time to convince us to resolve the contention set via a private auction, even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN's auction as scheduled," unquote.

So did Ms. Willett tell you that she thought the complaint was raised simply to get more time to convince NDC in the private auction?

A. I don't recall if she raised that possibility. I know we discussed it, and she seemed to sympathize with that position.

Q. You mentioned that NDC had participated in other ICANN auctions?

A. At least two that I can recall, yes.

Q. And do you recall in those auctions when you received inquiries like that, you received from Mr. Erwin about your management and control?

A. I don't recall, but they would have been much earlier in the program.

Q. Okay.

A. There was a lot of preauction correspondence getting ready for auctions, so I honestly don't recall if a similar message to Mr. Erwin ever came in.

Q. Would you take a look at what's behind Tab 14, which is Exhibit D to Ms. Willett's witness statement. I don't know if you have seen this before. Looking at Page 3, it is an email dated Saturday, July 9, 2016, from Ms. Willett to Chris LaHatte, who I understand was the ICANN ombudsman at the time.

Have you ever seen this before?

A. I think I have.

Q. Let me rephrase it. Have you ever seen this email outside the context of preparing for your testimony?

A. No, I have not.

Q. I am going to refer you to Paragraph 5 and it says, quote, "He" -- and she's referring to Mr. Rasco. "He was contacted by a competitor who took some of his words out of context and is using them as evidence regarding the alleged change in ownership. In communicating with that competitor, he used language to give the impression that the decision to not resolve contention privately was not entirely his. However, this decision was, in fact, his," end of quote.

Did you tell Ms. Willett that the decision to skip the private auction and participate in the ICANN auction was, in fact, your decision?

A. I told her that we as NDC had decided already that we were going to the ICANN auction. I don't know if I told her this was Jose Rasco's decision, but collectively I told her, "Listen, we had already decided that we weren't going to consider a private auction."

Q. And, again, the decision was actually your decision to enter the DAA; is that your testimony?

A. That's correct.

Q. Okay. Would you turn to Tab 15 of your binder?

A. Yes.

Q. Actually, let me take a -- let's go back to Willett Exhibit D for a moment. I want to ask you a few follow-up questions about your saying that the decision to enter the DAA was, in fact, NDC's.

Again, you had entered the DAA a year earlier in Redacted - Third-Party Designated Confidential Information

MR. MARENBERG: Objection; misstates the document and misstates his prior testimony.

Q. BY MR. De GRAMONT: Sir, do you disagree that Redacted - Third-Party Designated Confidential Information

A. Sorry, is that for me or for my attorney?

Q. It is for you, sir.

A. Sorry. Can you repeat it?

Q. Yes. We looked at the DAA, Redacted - Third-Party Designated Confidential Information

Redacted - Third Party Designated Confidential Information

Do you recall that provision in the DAA?

A. I recall that there's a provision that says Redacted - Third-Party Designated Confidential Information

Q. Let me just read to you again Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. In your witness statement you testified

that your communications with ICANN were as, quote, "thorough and responsive as possible," unquote.

Do you recall that?

A. I mean, you'd have to point it out to me, but if you're saying it is in my witness statement, then I'll take that.

Q. It is at Paragraph 80.

In Paragraph 90 you testified that your statements to ICANN were, quote, "unequivocally true," unquote.

Do you recall that?

A. I don't, but if that's in my witness statement, then I believe so.

Q. So when you --

MR. MARENBERG: Excuse me. Can you ask Mr. De Gramont to put up these statements? Because he's actually taking snippets of these statements out of context, I believe.

ARBITRATOR BIENVENU: So the sentence is now projected on the screen.

Q. MR. De GRAMONT: If you like, Mr. Rasco, you can look at the hardcopy of the witness statement, which is behind Tab 1 of your binder, whichever you prefer.

Let me first read Paragraph 80.

MR. MARENBERG: If you could put up Paragraph 80, that would be helpful, please.

Q. BY MR. De GRAMONT: Paragraph 80 says, In particular, Mr. LaHatte referenced an email, quote, "which suggests that one of [NDC's] directors is no longer taking an active part in the application, and that there are other directors now involved," unquote. And he informed me that the, quote, "complainant also suggested that NDC's shareholders have changed since the original application," close quote. "In the communications with ICANN that followed, I endeavored to be as thorough and responsive as possible, and I provided what I thought were clear answers to the questions I was asked," unquote.

So did your testimony that you were providing thorough and responsive answers extend to your communication to Ms. Willett that the decision as to whether to enter a private or ICANN auction was NDC's decision?

A. I don't know. Can you rephrase that? Because I am confused by what -- you're talking about Ms. Willett and Mr. LaHatte in here, and I am a little bit confused.

Q. It was a long question, and I apologize.

When you told Ms. Willett that the decision to skip the private auction was NDC's decision, were you being as thorough and responsive as possible?

A. I told her what I believed to be true, which was Redacted - Third-Party Designated Confidential Information And really -- and primarily when answering my competitors, I didn't check with anyone, and I think --

Q. No, I'm sorry. I am not talking about communications with your competitors. I am talking about your communications with ICANN.

A. They are asking me about my communications with the competitors.

Q. Did Ms. Willett ask you if the decision to forego the private auction was NDC's decision?

A. I don't believe she asked me that.

Q. But you told her it was NDC's decision?

A. Can you -- I told her -- I told her what I told my competitors. I am not trying to be vague or anything. At the end of the day, I do believe the decision was ours, and I told my competitors something to get them off my back.

Q. Just to be clear, you never mentioned the DAA in your response to Ms. Willett or anyone else

at ICANN?

A. I absolutely did not.

Q. Did you ever tell Ms. Willett or anyone else at ICANN that VeriSign was funding your application?

A. I did not.

Q. Prior to the auction?

A. Prior to the auction, I didn't mention that anyone else was involved in the auction.

Q. Your testimony to the Panel is that when you told Ms. Willett the decision to skip the private auction was, in fact, NDC's, that that testimony was, quote, "unequivocally true," unquote?

A. Yes, that's correct.

Q. Okay. So the auction went forward on 27 July 2016, correct?

A. That's right.

Q. Let's turn to what's behind Tab 15 of your binder. It is Exhibit C-97. It is a letter dated July 26, 2016, from Mr. Livesay to you.

Do you recall at this time, were you already at VeriSign's headquarters in Virginia? This was the day before the auction.

A. Was I -- was I there when?

Q. On July 26, when you received this letter?

A. Well, I'm not sure that -- I am not sure when I exactly received the letter, but I know it was signed on July 26.

Q. And do you recall if you signed it in VeriSign's offices?

A. I believe I did, yes, in person.

Q. And the first paragraph says, quote, Redacted - Third-Party Designated Confidential Information

Did you understand Redacted - Third-Party Designated Confidential Information Mr. Livesay was referring to?

A. I assume they were talking about the noise that Donuts was making.

Q. And how did -- how did Mr. Livesay become aware of the noise that Donuts was making?

A. Well, I can't recall precisely at this point, but I believe Donuts tried to enjoin the auction and get a postponement of the auction by filing something, I don't know, in District Court or something along those lines.

Q. Had you informed Mr. Livesay or anyone else at VeriSign about the communications that you

had had with ICANN following Mr. Nevett's email with you?

A. I can't recall precisely, but in most likely circumstances, yes, I did.

Q. Okay. If you look at Page 2,

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Do you see that?

A. I do.

Q. And do you recall that there had been discussions over the last several months prior to this letter in which

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A. I honestly don't recall discussions. As I mentioned before, I think the -- my assumption and

baseline position was that

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Q. Before we move on, just a few more questions about your phone conversation with Ms. Willett.

Did she ask about VeriSign during -- did she mention VeriSign during that call?

A. I don't think so, no.

Q. Did anyone from ICANN ever mention VeriSign in its preauction conversations with you?

A. Not that I can recall, no.

Q. Did she ask you any questions about the email that you had sent to Mr. Nevett?

A. Did she ask me -- I think the basis for the communication was that email and the ombudsman inquiry. So I don't know -- I think that's what the basis of the conversation was.

Q. Did she or anyone else from ICANN ask you what you meant when you were referring to other Board members, do you recall?

A. I think that was part of the communication with Mr. LaHatte. I believe my phone conversation with Christine, with Ms. Willett, was confirming everything that I had told Mr. LaHatte.

Q. And so were you specifically asked about what you meant when you were referring to all the powers that be?

A. I don't know if Christine asked me about that, honestly.

I took it as a we want to make absolutely sure that there hasn't been any change in control that you need to report or anything else that would cause a change in your application. So that's the context for which I was answering her completely. As I mentioned before, the DAA was not something that affected the application.

Q. Did either the ombudsman or Ms. Willett walk you through your email to Mr. Nevett, do you recall?

A. I don't think they did, no.

Q. Okay. So the auction proceeds on 27 July,

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and were declared the winning bidder; is that correct?

A. NU DOT CO won the auction, that's correct, yes.

Q. And do you recall that on July 31st, 2016, you wrote Ms. Willett

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A. I do recall that, yes, I do.

Q. And how did you know that

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A. I can't be certain, but I believe VeriSign told me.

Q. Let's take a look at Exhibit C-100. It is behind Tab 18. And at the bottom you wrote to Ms. Willett on July 31st, 2016,

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You don't remember

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A. Like I said, my primary contact for most issues was Mr. Livesay.

Q. Do you specifically remember Mr. Livesay telling you that?

A. No, I don't.

Q. Do you recall someone from VeriSign telling that you someone from VeriSign would or -- would soon be or already had contacted Akram Atallah?

A. I can't remember, but if I had to assume it was someone, it might have been Mr. Livesay.

Q. Did the person from VeriSign tell you who from VeriSign would be calling Mr. Atallah?

A. Not that I know of, no.

Q. Okay. Do you know who called Mr. Atallah from VeriSign?

A. I don't know that anyone actually did call Mr. Atallah.

Q. So if we go up higher in this document, there's an exchange of emails with Ms. Willett on August 4th. You wrote

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Tell me how this worked.

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How did that work?

A. Logistically you want me to go through it?

Q. Very briefly.

A. So I believe

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Q. And then on Friday, August 5th, Ms. Willett confirmed receipt of the proceeds and said you should expect to receive an invitation to contracting later that day.

Do you recall receiving the CIR later that day?

A. I can't recall if we received it that day. I know I did receive it at some point. I just don't know when it was.

Q. Do you recall if it was in August 2016?

A. I can't, no.

Q. Okay. Do you recall if it was in 2016 at all?

A. I don't recall honestly, no.

Q. Okay. Let's take a look at your witness statement again. This is Paragraph 104. Tell me when you're there. It is on Page 38, almost at the end of your witness statement.

So you're there?

A. Yes, yes.

Q. Paragraph 104 says, quote, "On September 16, 2016, I received an email from Ms. Willett at ICANN stating that Ruby Glen and Afilias had continued to complain that NDC should not have participated in the .WEB public auction and that

NDC's application should be rejected. This letter was a surprise to me, as prior to receiving it I had not heard from or communicated with Ms. Willett or anyone else at ICANN about .WEB since confirming our payment for .WEB in August 2016," unquote.

Do you see that?

A. Yes, I do.

Q. Now, were you aware that on August 23rd, 2016, VeriSign's outside counsel had written a letter to ICANN's outside counsel forwarding the DAA and various other information?

A. I had to have been aware.

Q. Let's take a look at the letter. It is Tab 20 of your binder, Exhibit C-102.

When you say you had to be aware, do you specifically remember being aware or are you assuming -- I'm sorry.

A. I recall the existence of the letter, but as it was kind of a fairly legal matter, I wasn't overly involved. Probably Brian Leventhal would have been running point on something like this.

Q. You don't recall if you read it at the time?

A. No, it is probable that I read it, but I can't recall being overly involved in this.

Q. Do you have any understanding of what prompted this letter to be sent from Arnold & Porter to Jones Day?

MR. MARENBERG: Objection; calls for privileged communication. If we can just limit it to outside privileged communications, I would have no problem with this question, Mr. Chairman.

MR. De GRAMONT: I'll rephrase.

ARBITRATOR BIENVENU: Would you like to rephrase your question?

MR. De GRAMONT: I will, Mr. Chairman.

Q. Outside of communications with your lawyer, do you have any understanding of what prompted Arnold & Porter to send this letter to Jones Day?

A. Outside of communications with Brian, I can't recall.

Q. Do you recall wondering at the time why Jones Day, the outside counsel, was reaching out to VeriSign's outside counsel about this matter?

MR. MARENBERG: Objection.

THE WITNESS: I don't.

Q. BY MR. De GRAMONT: Let me restate it.

Did it seem strange to you that Jones Day had reached out to VeriSign's outside counsel

rather than simply having ICANN contact NDC?

A. Did I think it was strange that ICANN's outside counsel -- I didn't -- I didn't think about this, honestly.

Q. If you take a look at -- do you recall that NDC prepared responses to the questionnaire from Ms. Willett?

A. What we referred to as the 20 questions?

Q. Yes. Those are the -- I actually didn't count them, but that's how many questions Ms. Willett sent to you?

A. I believe so. I was aware of that document, yes.

Q. And you recall that NDC provided responses, right?

A. We did, yes.

Q. And did you read them?

A. I definitely read them, at least some sort of draft of them, yes.

Q. And did you read VeriSign's responses?

A. I can't recall. Again, this was a similar situation where obviously it was increasingly legal and legalese in nature, so I had Brian running this process.

Q. And are you aware that many of the answers

are verbatim identical in the two responses?

A. Identical to what?

Q. To each other.

A. Sorry, can you rephrase?

Q. So for example --

A. I just don't know what you're comparing.

Q. So if you take a look at NDC's answers and VeriSign's answers to the questionnaire --

A. Oh, I understand.

Q. -- many of those answers are verbatim identical.

Do you remember that?

A. I don't recall, but obviously we were a part of the same deal. So it doesn't sound strange to me that, you know, our interpretation of our deal is similar.

Q. And in some instances,

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Do you recall that?

A. I don't particularly recall that.

Q. Okay. You're aware that the Antitrust Division of the Department of Justice commenced an investigation in late 2016 or early 2017 about the transaction, right?

A. I'll never forget that.

Q. And the investigation lasted until January 2018?

A. That sounds about right.

Q. And was it your understanding that everything regarding .WEB was on hold pending that investigation?

A. I don't know that there was a firm policy announcement by ICANN, but that was my general understanding, that while the DOJ was looking at this, nothing was going to happen on the ICANN side.

Q. If you look at Paragraph 107 of your witness statement, I think this is the paragraph that Mr. Marenberg referred to you earlier on?

A. Yes. That's the one that I opened up the proceedings with in adding to.

Q. I just wanted to make sure I understand the clarification.

It says, quote, "Since submitting those responses in October 2016, NDC has periodically made inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB. ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the pendency of the accountability mechanisms or similar

processes."

Could you just tell me the clarification again so I make sure I understand that?

A. Yeah, here in the second line I said "inquiries through the ICANN customer service portal" -- it probably could have said "customer services portal, email or phone call" -- regarding the status of .WEB.

Q. So you do recall having communications with ICANN after receiving the 2016 twenty questions?

A. Yes, definitely.

Q. Do you recall that you reached out to ICANN in December 2017?

A. I do.

Q. Let's take a look at that email. I think we are both referring to the same thing. It is behind Tab 31, Exhibit C-182, and down at the bottom there's an email dated December 12th, 2017, from Peg Rettino referring to a meeting that was being scheduled in December of 2017.

Can you tell me what the meeting schedule was?

A. If I recall correctly, I believe the context of this message was around this time, just

prior to the holidays, I think we had received maybe unofficial word from the DOJ that that process was coming to an end sooner rather than later.

So I believe I reached out to ICANN to inquire as to what was next. What was going on with -- at the time, besides the DOJ, there was an ongoing accountability mechanism, which was the CEP between Donuts and ICANN, CEP being Cooperative Engagement Process.

So, you know, from my viewpoint, I was trying to get ahead of the fact that, hey, if the DOJ was going to end, I wanted to know what's going on with the Donuts CEP, is that -- can that end? Can we get to a signing?

I wanted my Registry Agreement to sign, quite frankly. It had been already quite some time since we had won the auction.

Q. And did you have a conversation with people at ICANN in December 2017?

A. I believe we did, yes.

Q. Do you remember who you spoke to?

A. If I recall correctly, it probably would have been John Jeffrey, general counsel, and Akram Atallah, I believe at the time president of the

GDD.

Q. And was anyone else on the line from NDC?

A. I believe Mr. Marenberg was on the line with me.

Q. And had Mr. Marenberg replaced your earlier lawyer, whose name I am drawing a blank on?

A. Brian Leventhal. So we added Mr. Marenberg to the team once we -- once we saw that there was any potential litigation surrounding this and for his experience handling the DOJ inquiry.

Q. And was Mr. Marenberg recommended by VeriSign?

A. Mr. Marenberg, I believe Brian and I had a conversation about hiring an attorney and --

MR. MARENBERG: Objection.

Let me caution the witness. You should not disclose your communications with Mr. Leventhal.

I'll object to the question to the extent that it calls for disclosure of those communications on the grounds that it invades privilege.

ARBITRATOR BIENVENU: Your response to the objection, Mr. De Gramont?

MR. De GRAMONT: Let me rephrase the question because I don't want to elicit any client-counsel communications.

Q. This is just a yes-or-no question. Do you know -- strike that.

Did VeriSign, to your knowledge, recommend Mr. Marenberg for this assignment to NDC?

A. No. I recall VeriSign -- I recall VeriSign proffering a few suggestions on law firms to potentially hire, or speak to, at least.

Q. And do you recall if Mr. Marenberg was on that list?

A. I can't recall. Honestly, these go to my communications with Mr. Leventhal.

Q. I am sure Mr. Marenberg is on everyone's list, but you don't recall if he was on the list provided by VeriSign?

A. If he isn't, he should be.

Q. But you don't recall?

A. I can't recall, no.

Q. But you do recall that VeriSign provided you with a list of possible lawyers for this representation?

A. I believe they made some suggestions.

Q. Okay. So Mr. Marenberg was on the phone

with you. Anybody else from NDC?

A. No, I don't think on this call, no.

Q. Was anyone from VeriSign on the call?

A. No.

Q. Had VeriSign asked you to reach out to ICANN?

A. No.

Q. And do you recall if anyone other than John Jeffrey and Akram Atallah were on the line?

A. I don't believe that anyone else was on -- at least no one was disclosed to me if they were.

Q. And do you recall what you said to Mr. Jeffrey and Mr. Atallah?

A. I think in summary, what I just previously mentioned, which was, "Listen, I am sure you are hearing just like we are that the DOJ investigation is going to end without further action. You know, I know that the Donuts CEP has been going on for a very long time and can we expect that to come to an end any time soon?"

Q. And what did they tell you?

A. There wasn't much of a concrete answer. You know, all along I think for some time the general message that we were getting was that that Donuts CEP was going to end, but it never did.

Obviously it did eventually, but there was no real concrete answer given other than when it ends and if there are no accountability mechanisms, we'll follow our process.

Q. Did they say that when it ends and when there are no accountability mechanisms pending, they would proceed to contract for .WEB with NDC?

A. I can't say that they said that verbatim, but I think it was along the lines that they would follow their process. As far as I knew it, the process was that if there were no accountability mechanisms, there was nothing standing in the way from a Registry Agreement.

Q. A Registry Agreement with NDC?

A. With NDC, correct.

Q. Okay. Let me ask you this: Did you follow up with anyone at VeriSign about the conversation you had with Mr. Jeffrey and Mr. Akram and Mr. Marenberg?

A. I probably gave them a summary of the conversation, yes, although I can't be certain. In most likely circumstances, I updated them on the conversation.

Q. Are you aware that someone from VeriSign reached out to ICANN staff in January 2018 to ask

about the process of having NDC assign the Registry Agreement to VeriSign?

A. I recall in preparation for this, I recall perhaps seeing that there was a contact about that.

Q. Let's just take a quick look at it. It is Tab 32, Exhibit C-115.

I have two questions. First of all is whether outside of preparing for the testimony, do you recall seeing this exchange of emails at the time?

A. I can't recall, no.

Q. Were you aware that these communications were taking place at the time?

A. I honestly can't recall. I recognize Jessica Hooper's name as someone who was assigned by VeriSign at some point to help with the assignment process. I think she was becoming familiar with the assignment process.

Q. Do you recall speaking to her or anyone else about that?

A. You know, I believe I did have a phone call with someone. I think Jessica -- Ms. Hooper was probably one of those people. It is just kind of a preparatory call where we kind of talked about what their understanding of the assignment process

was as the way they read it through ICANN's website and the guidebook.

Q. Do you recall when that conversation took place?

A. I really can't, no.

Q. Do you recall if they --

A. It was obviously premature.

Q. Do you recall if they told you that they had already been in contact with ICANN?

A. No. I don't recall that.

Q. Okay. Let's take a look at what's behind Tab 31 of your binder, which is Exhibit C-182, and this is an email -- oh, we were looking at that.

So this is the email on top of that email chain. It is an email from you to John Jeffrey and Akram Atallah, dated February 15, 2018.

Do you recall whether between the phone call in December 2017 and this February 15th, 2018, email, there had been any other communications between you and ICANN?

A. I can't be certain, but I don't believe there were.

Q. Okay. And so you write to Mr. Jeffrey and Mr. Atallah, quote, "I hope this message finds you well. In line with our previous conversation, I am

contacting you regarding NuDotco signing the Registry Agreement for .WEB. Now that the DOJ CID has concluded and that there are no pending accountability mechanisms associated with our successful bid at the auction for this string in 2016, the next step in the process is for us to execute the Registry Agreement. Please let me know if you'll have sufficient time to get that to me this week. Thanks so much for all your help throughout this process, and I look forward to wrapping this up."

Did you write this email yourself?

A. It definitely looks like my language, yes.

Q. Did anyone from ICANN respond to this email?

A. I don't believe they did.

Q. So what was the next communication you had with ICANN after this?

A. Again, I can't be certain, but I guess at some point there was a notification that -- well, I can't be certain if there was a notification that there was no longer any accountability mechanisms or whether or not that was for the entire contention set, or in -- I believe it is in June we received the Registry Agreement to sign.

Q. And when you received the Registry Agreement, you signed it and returned it to ICANN?

A. As fast as I possibly could.

MR. De GRAMONT: Mr. Chairman, I think I am getting close to the end of my examination. Could I just have a two-minute break? I may have about 15 minutes more or so, but I just want to confer with my colleagues.

ARBITRATOR BIENVENU: Absolutely. I think we will keep the witness in the hearing room, but you are free to consult your colleagues.

MR. De GRAMONT: Thank you, Mr. Chairman.

(Whereupon a recess was taken.)

MR. De GRAMONT: Mr. Chairman, I'm sorry that it took a little longer break than we thought, but the time was well spent.

I have no further questions, Mr. Rasco. Thank you very much for your time today.

THE WITNESS: Thank you very much.

ARBITRATOR BIENVENU: Mr. Marenberg has a few questions for Mr. Rasco, and as we did for the previous witness, I will begin. If my colleagues have additional questions, they will go after me.

Mr. Rasco, could I ask you to take a look at Paragraph 58 of your witness statement?

THE WITNESS: Yes, Mr. Chairman.

ARBITRATOR BIENVENU: There you say in the first sentence that

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Do you see that?

THE WITNESS: I do, that's correct.

ARBITRATOR BIENVENU: The question of whether

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THE WITNESS: I don't recall it being a part of the negotiations, Mr. Chairman.

ARBITRATOR BIENVENU: You don't recall the determination being made on the part of NDC or as part of its negotiations with VeriSign as to whether or not -- let me finish, if I may.

THE WITNESS: Yeah, sorry.

ARBITRATOR BIENVENU: Do you recall a determination being made -- and, of course, please do not disclose any discussion you may have had with counsel. But do you recall the determination being made in the course of your negotiations with VeriSign

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THE WITNESS: I am having a little trouble to try to figure out how to answer the question.

The way that I understood

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ARBITRATOR BIENVENU: Was the question of whether the guidebook -- or I'll say the program rules in order to include both the guidebook and the auction rules. Was the question of whether the program rules required disclosure of the DAA to ICANN discussed with ICANN?

THE WITNESS: Discussed with ICANN, no, I don't believe so. In what context? I am not sure.

ARBITRATOR BIENVENU: I am asking if you had a discussion with ICANN about whether that kind of an agreement needed to be disclosed to them?

THE WITNESS: No, sir. No, we did not.

MR. MARENBERG: Mr. Chairman, you meant to be inquiring about discussions he had with ICANN and not VeriSign?

ARBITRATOR BIENVENU: Yes, I meant to ask ICANN. Prior I asked the clarifying, but now I was talking about ICANN.

Mr. Rasco, as you sit here today, I believe you are aware that in November 2016 the ICANN Board turned its mind to the question of whether NDC's bid was compliant with the program rules and decided not to pronounce itself on that question. Are you aware of that?

THE WITNESS: In the context of this hearing, I became aware of that.

ARBITRATOR BIENVENU: Exactly.

Now, when did you -- withdrawn.

Were you informed of that decision in the days, weeks or months following that decision?

THE WITNESS: I don't believe I ever was, no.

ARBITRATOR BIENVENU: So it is in the

context of this IRP that you became aware of that?

THE WITNESS: I believe that's correct.

ARBITRATOR BIENVENU: So if we look at the letter under Tab 33, which is a letter sent by Mr. Marenberg to ICANN, you recognize this letter? It is the very last tab of the witness binder.

THE WITNESS: Yes, I see that, yes.

ARBITRATOR BIENVENU: You recognize that letter?

THE WITNESS: I do. I haven't seen it in some time, but I vaguely recognize it, yes.

ARBITRATOR BIENVENU: If we look at the last paragraph of that letter, so basically this is a letter complaining to ICANN that a lot of time has passed since the auction, and we have reached a point when a Registry Agreement should be delivered for execution to NDC. In substance, I believe that's what the letter says.

In the last paragraph we read this, "ICANN has gone to great lengths over a very long period of time to protect what it thought might be any interests of other parties, including," et cetera, and then we have the sentence, "That process is complete."

When that letter was sent out, and I

assume it was with your approval, you were not aware that the ICANN Board had deferred consideration of whether NDC's bid was compliant with the program rules, were you?

THE WITNESS: I was not aware. In my experience, most new TLD applications didn't go before the ICANN Board to go to signing. But I was not aware that the Board had made a decision not to decide.

ARBITRATOR BIENVENU: Thank you, Mr. Rasco.

Do my co-panelists have questions for Mr. Rasco?

ARBITRATOR CHERNICK: I do not.

ARBITRATOR KESSEDJIAN: Sorry, took me some time to unmute. No. I decided not to ask the questions that I initially had because the topics had been covered, even though I am still fairly confused about some of the answers, but I think in terms of time, I think I will refrain.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Marenberg, any redirect for Mr. Rasco?

MR. MARENBERG: Yes. May I just have two minutes to cut some questions and make it very brief?

ARBITRATOR BIENVENU: Of course. Wave your hand when you're ready.

MR. MARENBERG: I am just going to go off and then come back.

(Whereupon a recess was taken.)

MR. MARENBERG: I am ready whenever you are, Mr. Chairman.

ARBITRATOR BIENVENU: We are ready for your questions, Mr. Marenberg. Please proceed with your redirect.

REDIRECT EXAMINATION

BY MR. MARENBERG

Q. Can we put up Rasco Exhibit O, please? Would you go to the text of the email?

ARBITRATOR BIENVENU: Do you know which tab of the exhibit book?

MR. De GRAMONT: It is Tab 13.

ARBITRATOR BIENVENU: 13, thank you, Mr. De Gramont.

Q. BY MR. MARENBERG: I believe, Mr. Rasco, you were shown this exhibit by Mr. De Gramont, and he asked you a couple questions about it.

I just want to confirm, Ms. Willett from ICANN reached out to you and asked you to call her; is that correct?

A. That's correct.

Q. And you did that same day?

A. I believe it was the same day, yes.

Q. Now, if we could put up paragraph -- excuse me, Exhibit C-75 and turn to Page 4, which is Ms. Willett's summary of the conversation that she had with Mr. Rasco. Go to Page 4, please.

Mr. De Gramont, what was -- that's it. Right there.

And you were shown this exhibit earlier in your testimony here today.

Do you recall that?

ARBITRATOR BIENVENU: This is Tab 14 of the witness exhibit?

THE WITNESS: Yes, I recall.

Q. BY MR. MARENBERG: Now, Mr. De Gramont highlighted various sections of this document with you, and he has with other people.

I want to highlight another section. Would you highlight Paragraph 1. It reads, "When ICANN previously contacted him about potential changes, he assumed that the confirmation was part of the standard auction process, and his response was relatively brief."

Mr. Rasco, is it your understanding that

what Ms. Willett is referring to there is your initial email exchange or exchange on the portal with --

A. Mr. Erwin.

Q. -- Mr. Erwin; is that correct?

A. That's correct.

Q. All right. And Ms. Willett is recounting what you said to her about that exchange in 2016, correct?

A. That sounds correct, yes.

Q. Now, a fair amount of ink has been spilled insinuating that you have changed your view of what you said to Mr. Erwin over time now that we are in an IRP proceeding.

But at the time you had this conversation with Ms. Willett in 2016, was there an IRP proceeding involving Afilias?

A. No, there was not.

Q. And so when you told Ms. Willett and gave the explanation of your response to Mr. Erwin as that it was simply part of the standard auction process and that you quickly responded to Mr. Erwin, that was not in the context of any declaration or witness statement prepared in connection with any IRP or litigation?

A. No, not at all.

Q. All right. Before there was ever any of this contention, you had told Mr. Erwin essentially what you said in your witness statement -- you had told Ms. Willett essentially what you said in the witness statement, which was, "I fired off a quick response to Mr. Erwin as part of the standard auction process"?

MR. De GRAMONT: Mr. Chairman, I am not objecting to leading questions because I want this to go fast, but at some point Mr. Marenberg cannot testify for the witness. So I will object to that last question as leading.

MR. MARENBERG: I'll withdraw it.

ARBITRATOR BIENVENU: I think, Mr. De Gramont, we all understand what's happening here, but your point is well-taken by your colleague, I'm sure.

MR. De GRAMONT: Thank you.

Q. BY MR. MARENBERG: Now, if we could put up Exhibit C-100, which is Tab 18 in the binder?

ARBITRATOR BIENVENU: Just so that it is clear, when I said we all understand what's happening now, I meant to say that counsel is simply trying to go through points to be covered in

the most efficient way. That's what I meant.

MR. MARENBERG: Right. Thank you, Mr. Chairman.

Q. So this is your exchange with Ms. Willett on the 31st of July of 2016, and you write to her,

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To your knowledge, was this the first time you said anything to ICANN about VeriSign's involvement in the .WEB TLD?

A. I believe this was the first time I mentioned VeriSign, that's correct.

Q. Now, did you discuss

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A. I don't recall exactly, Mr. Marenberg, but I know that the plan all along was, subsequent to the auction, to notify ICANN immediately of

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Q. Did you have an understanding yourself as to whether Redacted - Third-Party Designated Confidential Information

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A. I knew that no matter what, they were going to be aware of the agreement. I can't be sure as to whether or not they were going to ask for a copy of it, but I knew that we were going to have to let them know about our agreement and about

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Q. Is it fair to say that

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A. Well, yeah, correct.

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Q. Is it accurate to say, in essence, from the beginning of the negotiations with VeriSign over this deal,

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MR. De GRAMONT: Mr. Chairman, I want this to go quickly, but Mr. Marenberg is really testifying for the witness. So object to that question as leading.

ARBITRATOR BIENVENU: Mr. Marenberg, do

you want to reformulate your question?

MR. MARENBERG: I'll withdraw it, your Honor.

Q. Now, let me just go back to the Exhibit C-100.

At the time that you mentioned to Ms. Willett on July 31st that Redacted - Third-Party Designated Confidential Information what was the nature of the blogosphere as it concerned the .WEB TLD?

A. So if I recall correctly, even prior to the auction I believe the filings from Donuts or Ruby Glen were made public in their attempts to try to stop the auction. So at that point I guess the scuttlebutt or the gossip going around was, wow, there must be someone behind this. And there were kind of -- I don't know if you would say suppositions or there were assumptions that, wow, it must -- what if one of the big players is here? What if, could it possibly be VeriSign?

And then subsequent to the auction or around the time of the auction when the actual dollar amount came out, I have a feeling, if I recall correctly, there was, you know, definitely bloggers, whether it was Kevin Murphy of Domain Incite or Kieren McCarthy, I forget where he was

writing at the time, but probably writing about the potential participation of VeriSign.

Q. Can we put up Exhibit C-43, please?

MR. De GRAMONT: Mr. Chairman, I have a feeling counsel is about to go beyond the scope of cross-examination, and if so, I will object to that.

MR. MARENBERG: I don't believe so.

ARBITRATOR BIENVENU: Would you like to respond to that objection, Mr. Marenberg?

MR. MARENBERG: I think I am just putting up the clarifications that Mr. De Gramont asked him and putting it in that context.

MR. De GRAMONT: I didn't go through that with this witness, but why don't we hear the question and then I'll deal with the objection.

Q. BY MR. MARENBERG: Is this an example of the types of communications that were circulating in the blogosphere in the aftermath of the .WEB auction?

A. That's correct, this is an example of those assumptions that VeriSign was potentially involved.

Q. Okay. Now, let's go back to Exhibit C-100, please.

ARBITRATOR BIENVENU: Tab 18?

MR. MARENBERG: Tab 18.

Q. Now I want to focus your attention on the next email after the one you sent on July 31st and after Ms. Willett's response.

That's your email of August 4th. For what purpose were you writing Ms. Willett on August 4th?

A. I was confirming that they received the payment and inquiring about the CIR, which is the invitation to contracting.

Q. Okay. At this point in time, did you have an understanding when you were communicating with Ms. Willett as to whether she understood that VeriSign was involved in some way in the .WEB TLD?

A. I don't know what she thought, but I had already -- Redacted - Third-Party Designated Confidential Information , so I am assuming she already knew about it.

Q. Okay. And let's go to the top email on the page, which is Ms. Willett's response. Same document, top email, please, C-100. Thank you.

And Ms. Willett responds to you, Redacted - Third-Party Designated Confidential Information

What did you understand she was telling you there?

A. From my point of view,

Q. This was after VeriSign's involvement had been disclosed, correct?

A. That's correct. It didn't -- in other words, it didn't look like there was much of a surprise here.

MR. MARENBERG: I have no further questions.

ARBITRATOR BIENVENU: Thank you very much, Mr. Marenberg.

Mr. Rasco, I would like, on behalf of the other members of the Panel and indeed on behalf of all the participants in this process, to thank you for your evidence and for your time.

THE WITNESS: Thank you very much, Mr. Chairman. It was fun.

ARBITRATOR BIENVENU: Mr. Rasco, I must instruct you not to discuss your evidence and your testimony with any other persons who are scheduled to appear before the Panel.

THE WITNESS: Yes, sir.

ARBITRATOR BIENVENU: Thank you very much, indeed.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: We are on to our next witness. Mr. LeVee, will you be leading or introducing the witness?

ARBITRATOR KESSEDJIAN: Can we can have a short break, probably five or eight minutes, no more?

ARBITRATOR BIENVENU: An unscheduled break?

ARBITRATOR KESSEDJIAN: An unscheduled break, yes.

ARBITRATOR BIENVENU: I see agreement by our friend Mr. Chernick, so let's have an unscheduled break of five minutes.

In the meantime, Mr. LeVee, you can perhaps ensure that the witness -- can you tell us

if the witness is ready?

MR. LeVEE: The witness should be in his own holding room. I believe that's been confirmed. I apologize. I had expected the Panel to take a short break.

ARBITRATOR KESSEDJIAN: I am reading your mind, Mr. LeVee.

MR. LeVEE: My apologies, but I am sitting here getting my computer activated.

ARBITRATOR KESSEDJIAN: Let's meet in five minutes.

MR. LeVEE: Five minutes is good with me.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Welcome, again, Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

ARBITRATOR BIENVENU: Mr. Disspain, welcome. My name is Pierre Bienvenu. I chair the Panel in this IRP. My colleagues are Professor Catherine Kessedjian, whom I assume you see on your screen, and Mr. Richard Chernick.

THE WITNESS: Yes, I can see them. Thank you.

ARBITRATOR BIENVENU: Very well. So first of all, on behalf of the Panel, welcome to you.

Sir, you have signed a witness statement in relation to this case dated 1st June 2020.

THE WITNESS: Yes, I have.

ARBITRATOR BIENVENU: And at the end of your statement, you swear that the content of your statement is true and correct?

THE WITNESS: Yes, I do.

ARBITRATOR BIENVENU: May I ask you, sir, likewise solemnly to affirm that the evidence that you will give to the Panel today will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, I do so affirm, sir.

ARBITRATOR BIENVENU: Thank you very much.

Mr. LeVee.

MR. LeVEE: Thank you, Mr. Chairman.

Good evening, Mr. Disspain. How are you?

THE WITNESS: I'm fine, Mr. LeVee. Thank you. How are you?

MR. LeVEE: I am fine. Thank you.

I have just two questions. One, are you in the United Kingdom? Is that where you are testifying from?

THE WITNESS: Yes, I am.

MR. LeVEE: Okay. And second, the Chair showed you your witness statement. Do you have any

corrections to your witness statement that you'd like to correct?

THE WITNESS: No, I don't.

MR. LeVEE: Then, Mr. Chair, I have no additional questions and submit Mr. Disspain to cross-examination.

ARBITRATOR BIENVENU: Thank you, Mr. LeVee.

The cross-examination will be conducted by Mr. Litwin.

Mr. Litwin, your witness.

MR. LITWIN: Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. LITWIN

Q. Mr. Disspain, can you hear me okay?

A. Yes, I can. Thank you very much.

Q. Excellent. Good evening, sir. I understand you have received a bundle containing our exhibits?

A. I do have it, yeah.

Q. If you could open that on camera, and Mr. LeVee may do the same.

A. I will do my best to open it on camera without cutting myself.

Q. Don't cut yourself. We see it is

unopened.

A. I will put it down so I can open it properly. Okay. There we go. Okay. There we are.

Q. I regret to say we killed quite a number of trees with it, and I am not sure we are actually going to review much of it.

A. It would appear so, but I can use it for scrap paper later.

Q. Very good. I am happy to hear to that.

But if I do refer to a document in that binder, you will see that we have marked each page at the bottom right-hand corner with a unique page number that is new, and I will be referring to that page number, not to the original document number.

A. You said the bottom right-hand corner?

Q. Yeah, should be the bottom right-hand corner.

A. So that's ICANN-WEB_ something?

Q. Yes.

A. The binder wants to spring itself open, so just give me a second so I don't lose any documents. I will do my best. It is kind of damaged.

Q. No worries. As I said, I don't expect to

look at much of anything in there.

A. Just so you know, it is actually broken. Don't worry. My apologies.

Q. I apologize.

A. No, it is not your fault. I just didn't want to be an inconvenience to you.

Q. Mr. Disspain, you are a member of ICANN's Board of Directors, correct?

A. Yes, that's correct.

Q. When did you first join the Board?

A. October 2011.

Q. And you have been a member of the Board since that time, correct?

A. That is correct.

Q. I would like to take you back to the events of November 2016. You stated in your witness statement that ICANN lawyers periodically provided updates to the Board regarding the status of .WEB; is that correct?

A. That's correct.

Q. And these updates address various legal matters, such as the Ruby Glen litigation against ICANN regarding .WEB, correct?

A. Yes, that's correct.

Q. And the associated CEP that Donuts, Ruby

Glen's parent entity, had initiated concerning .WEB; is that correct?

A. Yes, that's correct as well.

Q. And the complaints that Afilias had made to ICANN's ombudsman regarding .WEB?

A. Well, I think we knew that a complaint had been made, but we didn't have any of the details. That would not have been appropriate. Complaints to the ombudsman, obviously they'd complained to the ombudsman, so we didn't have any of the details of that.

Q. What about the letters that Afilias had written to Mr. Akram Atallah that had raised concerns regarding how the .WEB contention set had been resolved, were those discussed during those updates?

A. I think we certainly knew about them because they were -- as Akram said, they were public. They would have been part of the briefing, if you will, to discuss the issue.

Q. And at the time in 2016, Mr. Atallah was the president of ICANN's Global Domains Division, correct?

A. I believe so, yeah.

Q. Generally speaking, he was responsible for

overseeing the administration of the new gTLD Program, right?

A. Reporting to the CEO, but yes.

Q. Now, you attended the public ICANN meetings that were held in Hyderabad, India in November 2016, correct?

A. I did, indeed.

Q. And during those meetings, did you attend a Board workshop session on November 3rd, 2016, where ICANN legal briefed the Board about .WEB?

A. The answer to that is yes, although I couldn't be certain about the actual dates, but yes, at Hyderabad in November we had a briefing session on the issue.

Q. I will represent to you that in ICANN's privilege log, there is an entry for a transcript of a Board workshop session that took place on November 3rd. If I am representing that correctly, would that help you recall that that is the subject of the discussion?

A. If that's what it says, then I accept that's what it was, yes.

Q. I will also represent, as far as I can tell from ICANN's website, the first meeting of the ICANN Board was on November 5th. Is it your

recollection that this workshop was held before that regular meeting?

A. So you say "meeting," you mean formal meeting of the Board?

Q. Yes.

A. If you do, the answer is yes.

Q. Okay. Was there a discussion during that November 3rd workshop that the conversation you were having was privileged?

A. Yes.

Q. And that meeting took place in India, correct?

A. It took place in Hyderabad, yes.

Q. And ICANN carries out its activities in conformity with the principles of international law, correct?

A. I can't -- I don't understand -- I can't answer that question. I don't know what you mean. ICANN carries out its activities pursuant to California law, I think.

Q. So already I have misrepresented to you, sir, we are going to take a look at your witness binder.

A. Not a problem.

Q. But it is at the beginning?

A. Given the state of it --
Q. If you can turn to Tab 4, sir.
A. Yes, I have got Tab 4.
Q. And if you can, if you just give me a minute here, if you turn to Page 5, these are ICANN's bylaws.
A. Hang on, is this your page number?
Q. Yes. Exhibit C-1, Page 5.
A. I am on Page 5, yep, yep, yep.
Q. If you look at Section 1.2(a).
A. Yes, I have got that.
Q. It says, "In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law."

Do you see that?

A. I am fine with that, and yes, that's absolutely what the bylaws say.
Q. So when there was a -- when you write in your witness statement, sir, that the Board's communications with counsel during the November 3rd workshop session were privileged, which set of laws

regarding the legal privilege are you referring to?

A. I'm referring to advice received by our lawyers. I am not an international lawyer, and you are asking me to provide you with a legal opinion, which I can't do.

Q. So you don't -- sitting here today, you do not have an understanding of which laws concerning legal privilege were governing that meeting in India?

A. I have an understanding.

MR. LeVEE: Mr. Chairman, could I interrupt briefly? There has already been litigation or activity regarding Afilias's claims relating to this meeting, and the Panel concluded what it did. I am not going to say what the Panel concluded in front of the witness.

But this clearly is an improper line of questioning with respect to a legal issue. The witness has already said he doesn't know the legal issue, but he also did say he understood California law applied.

ARBITRATOR BIENVENU: Let us see where we're headed with Mr. Litwin's questions, and I invite you to reformulate your objection as the case may be.

MR. LeVEE: I will do that.

Q. BY MR. LITWIN: Mr. Disspain, do you need me to restate?

A. Yes, I do. I have no idea what you were asking me. So you have to start again, I'm afraid.

Q. So my only question was whether, sitting here today, you have any understanding as to which privilege rules applied to the meeting you were having in Hyderabad, India?

A. My understanding is we were instructed that that meeting was privileged, not specifically by what law, but that it was privileged.

Q. Now, Mr. Disspain, I am going to ask you a series of questions regarding the November 3rd workshop session.

I will not ask you to reveal the substance of any privileged communication made during that workshop, and certainly by my questions I am not intending to elicit any answers that would reveal any such privileged communications.

I would therefore request that, just to be safe, you keep your responses brief, but naturally you should be guided by the instructions of your counsel in this regard. But I just wanted to make that clear up front.

A. I appreciated it, and I understand. Thank you very much.

Q. To the best of your recollection, how many directors attended the November 3rd workshop session where issues related to .WEB were discussed?

A. I wouldn't start to put a number on it. My recollection is there were a significant number of Board members present, but I couldn't tell you how many.

Q. Could you give me an approximation of what percentage of the Board was present?

A. It would be very much a guess, but in my mind I would suggest it was certainly more than 50 percent. It could have been up to -- it could have been everyone, but certainly more than 50 percent, in my mind.

Q. Did anyone from ICANN staff attend the November 3rd workshop?

A. Yes, lots of people from -- are you talking about this specific session or just general?

Q. Yes, yes.

A. This specific session?

Q. This specific session, where -- the

November 3rd workshop I am going to refer to when the issue -- the legal issues regarding .WEB were discussed.

A. Yes, certainly the lawyers did. John Jeffrey was there. I think Amy Stathos was there, the CEO was there. Again, I don't have a clear recollection. I would be surprised to discover that Akram Atallah wasn't there. I am not telling you stuff from actual memory. I am telling you it would surprise me if he hadn't been, but yes, there was certainly staff present.

Q. So just to be clear, Mr. Disspain, I am not asking you to speculate. I am asking you, to the best of your recollection, was Mr. Atallah in attendance?

A. I believe he was.

Q. What about Ms. Willett?

A. I don't remember.

Q. Other than Mr. Atallah, were there any other members of ICANN staff present at the November 3rd workshop session, also other than legal staff, that you recall?

A. Not that I can recall.

Q. So just to clarify again, what we are talking about in the November 3rd workshop session,

is it fair to say, and this is really a yes-or-no question, that multiple topics were discussed during the entirety of that November 3rd workshop unrelated to .WEB?

A. Now you have confused me because you said before, you said when you refer to the November 3rd workshop, you are specifically referring to a discussion about this.

Q. Correct. What I am trying to just get at, sir, I just want to understand, this was one of the topics that were discussed at the workshop? And then we'll go on.

A. During the day, during our sessions, a number of topics were discussed, yes, that is correct.

Q. Okay. So from now on when I refer to the November 3rd workshop session, I am just going to refer to the discussion regarding .WEB.

To the best of your recollection, how long was the discussion concerning .WEB?

A. I couldn't -- I genuinely couldn't say. I don't know. I would be speculating.

Q. Okay.

A. I would be saying -- I'd be thinking it through and saying, well, I know what was

discussed, how long would that take, et cetera, and that's what you don't want me to do, so I don't know.

Q. Would you say it was more than 15 minutes?

A. I'm going to resort to a reply I gave you earlier in another context. I would be surprised if it wasn't more than 15 minutes, but I remember there being a full and open discussion about the topic. How long it actually took, I couldn't say.

Q. Okay. Had there been another sort of full and open discussion of legal issues regarding .WEB in any of the other updates that had been provided to the Board?

A. You mean at Hyderabad?

Q. No, at any other time that you recall.

A. I don't recall there being any face-to-face discussion. I do recall that we were kept up to speed with what was happening to some extent, but I don't recall that -- so we received updates in respect to what was going on with .WEB, but I don't recall a Board discussion.

Q. Now, the discussion regarding .WEB that took place on November 3rd, did that -- ICANN was involved in active federal court litigation with Ruby Glen at the time. So the briefing, I assume,

would have included a discussion of Ruby Glen's case; is that right?

A. Well, it included an update on Ruby Glen's case, yes.

Q. And Donuts' CEP that we mentioned earlier?

A. Again, it would have been -- we would have been briefed that that had happened, that was happening, yes.

Q. What about what ICANN was doing in response to the letters that Mr. Atallah had received from Afilias?

MR. LeVEE: That question I will object to because it is so vague.

Ethan, can you make it a little bit more clear? We are trying to make sure -- you are trying to make sure he doesn't waive the privilege. I am trying to make sure he doesn't waive the privilege. That question --

THE WITNESS: I'll be guided by both of you as to whether I am waiving the privilege or not, so I am comfortable.

Q. BY MR. LITWIN: I think you should listen to ICANN's lawyer.

A. I think you are probably right.

Q. That's not my role here today, but I do

want to make sure that I am sensitive to this.

So I will rephrase the question. So did the Board also receive an update about ICANN's response to Afilias' letters to Mr. Atallah?

A. My recollection is that we knew that ICANN had sent out a questionnaire, if that's what you're asking me.

Q. Yes. That is what I'm asking you. Thank you.

Did the Board discuss on November 3rd Ms. Willett's preauction investigation of NDC? I am asking just for a yes-or-no question, not about the substance.

A. I don't know what you're referring to, so I am afraid I can't -- I don't know what Ms. Willett's preauction investigation is, so I can't answer that.

Q. What about the ombudsman's pre-investigation auction -- excuse me. Let me rephrase.

What about the ombudsman preauction investigation of NDC, was that discussed?

A. We wouldn't discuss what the ombudsman had done, because that's a matter for the ombudsman and that remains with him and no one else.

Q. I can represent that other contention set members had complained about the .WEB auction at one point or another. Did the Board discuss any complaints that were brought by any contention set member other than Afilias or Ruby Glen during the November 3rd workshop?

A. Not that I can recall.

Q. You note in your witness statement that Board members asked questions of ICANN's legal counsel during the November 3rd discussion of .WEB.

To the best of your recollection, sir, could you please identify everyone who asked a question of ICANN's legal counsel during the November 3rd discussion of .WEB?

A. Well, no, for a couple of reasons, but mainly because I can remember the events and the discussion, but you're asking me to identify particular individuals who had asked particular questions, and I can't do that.

I know there was a discussion. I know that Board members were present. I know that -- I believe, as I have already said, that 50 percent of the Board was present, but I would not be able to tell you who spoke, and I wouldn't be able to tell you what questions they asked.

Q. Well, I am certainly not asking you to reveal what questions were asked, sir.

Let me ask you this: Did you ask any questions during that November 3rd discussion of .WEB?

A. I believe that I probably did.

Q. Sitting here today, do you have a recollection one way or another?

A. Well, you see, here's the challenge. I know me, so I know that it's highly likely I would have asked questions.

But if you're asking me can I actually remember, I know you are not going to ask me what they were, but logically for me to remember, I would need to remember the questions, the answer is no. To revert to a previous answer, I would be surprised if I did not.

Q. Understood. We sound very much alike, Mr. Disspain.

You note in your witness statement that you received briefing materials in advance of the November 3rd meeting, correct?

A. Correct.

Q. And did those briefing materials include a copy of the August 25th, 2015, VeriSign-NDC Domain

Acquisition Agreement?

A. Not to my recollection.

Q. Did the briefing materials contain a copy of the August 23rd, 2016, letter from Mr. Ronald Johnston of Arnold & Porter on behalf of VeriSign to Mr. Eric Enson of Jones Day on behalf of ICANN?

A. Again, not to my recollection.

Q. You mentioned a few minutes earlier that ICANN had sent questionnaires out in response to Afilias's complaints. Were the responses to those questionnaires that were received from Afilias included in your briefing materials?

A. Not to my recollection.

Q. What about the answers that were received to the questionnaire from VeriSign or NDC, do you recall?

A. I don't recall any responses or the questionnaire.

Q. Did you ever discuss any issues regarding .WEB with Mr. Atallah?

A. Are you asking me personally or are you asking me --

Q. Yes, personally.

A. Not that I can recall, no.

Q. Since the Board was also discussing the

Ruby Glen .WEB litigation, did the briefing materials also contain -- or did the briefing materials contain a copy of Ruby Glen's pleadings from that case?

A. Again, not that I can recall. I don't remember seeing those.

Q. Did the briefing materials contain a copy of any of the legal briefs at that had been filed as of November 3rd, 2016, in that case?

A. Again --

MR. LeVEE: Let me just interrupt. I am letting this go on, but I am confident that whatever materials were provided to the Board would themselves be -- the fact of a lawyer giving a document to the Board would itself be privileged.

I don't think it is appropriate -- and I don't want to waive the privilege, but I don't think it is appropriate for questions to be asked about what specific materials were provided to the Board. They were selected by counsel. That's already been established.

MR. LITWIN: Mr. Chairman, may I respond to that, please?

ARBITRATOR BIENVENU: I was going to invite you to do so.

MR. LITWIN: Thank you, Mr. Chairman.

Without belaboring the point, it is well-established that the identity of a document that is provided by a lawyer to a client is not privileged, but the contents of that document and any discussion about that document to the extent the document is privileged.

So I believe I am entitled to know what documents were provided to the Board. To the extent that they are nonprivileged documents, I would ask questions about them. To the extent it is a privileged document, I obviously would not ask questions about them.

MR. LeVEE: May I respond?

ARBITRATOR BIENVENU: Just a minute, Mr. LeVee. I have a question.

What you say is well-established, Mr. Litwin, is this a matter of New York law, California law, U.S. federal law or all?

MR. LITWIN: I believe it is all of the above, and I will represent that I checked with my ethics counsel before embarking on these questions here today. I would be happy to provide a written opinion to the Panel if it so desires.

ARBITRATOR BIENVENU: Mr. LeVee, you want

to respond?

MR. LeVEE: Thank you, Mr. Chairman.

The Panel has already ruled that California law applies, so I am going to stick with California law.

Under California law, the fact that a document exists, that's not privileged. The fact that a lawyer gives the document to the client, that is privileged because the lawyer is making a determination of what materials to provide to the client, and that is privileged.

So I agree with Mr. Litwin to the extent that a document itself, the very existence of the fact that a letter was sent, that's not a privileged fact. I haven't argued that it was, but the transmission by the lawyer to the client is privileged. There are many cases in California that agree with that concept.

MR. LITWIN: Mr. Chairman, if I might, I am really at the end of these questions, so I think we are having a debate over an academic point. But if the Panel would like to hear further on this, I would be happy to submit something in writing so we do not take up any more of Mr. Disspain's time.

ARBITRATOR BIENVENU: So would you like,

then, to withdraw your question and move on to the next topic?

MR. LITWIN: Yes, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you.

Q. BY MR. LITWIN: Mr. Disspain, you stated in your witness statement that on November 3rd the Board, quote, "Chose not to take any action at that time," close quote, concerning .WEB.

Did the Board take a vote on November 3rd?

A. No.

Q. Was a straw poll taken?

A. Not that I can recall.

Q. Was there a show of hands?

A. Not that I can recall.

Q. Was there a call of ayes and nays?

A. No, again, not that I can recall. It was a decision to -- a choice, if you will, to do what we would usually do, normally do with a longstanding practice of not interfering when there was an outstanding accountability mechanism.

Q. I will represent to you, Mr. Disspain, that ICANN has stated at oral argument in this IRP that the Board, quote, "decided to defer" --

A. But it wasn't a vote or a straw poll.

ARBITRATOR BIENVENU: Mr. Litwin, I think

you hadn't completed your question.

MR. LITWIN: To clear up the record, why don't I ask my question again.

Q. So as I was saying, Mr. Disspain, at oral argument ICANN's counsel represented that during the November 3rd meeting, the Board, and I quote, "decided to defer," end quote, "consideration of Afilias's complaints regarding the resolution of the .WEB contention set."

Would you agree with that statement that the Board took a, quote, "decision to defer"?

A. We decided that it was -- there were outstanding accountability mechanisms.

ARBITRATOR BIENVENU: I'm sorry to interrupt you. There was a break in the communication, so we did not hear the beginning of your question. Could I ask you to start again at the very beginning of your answer?

THE WITNESS: The beginning of my answer. I will do my best.

The Board discussed the briefing and it decided that -- we had agreed that we would continue the longstanding practice of not doing anything where there is an outstanding accountability mechanism.

I don't recall if there was a specific agreement to not to deal with Afilias' issues. It was more -- my recollection, it was more it is not appropriate for us to be doing anything in respect to this because there are accountability --

(Discussion off the record.)

THE WITNESS: -- and our variable practices.

MR. LeVEE: Mr. Disspain -- go ahead, Mr. Chairman.

THE WITNESS: Would it be helpful if I disconnect and reconnect? Would that be helpful?

ARBITRATOR KESSEDJIAN: Yes.

THE WITNESS: Shall I just do that?

ARBITRATOR KESSEDJIAN: Mr. Disspain, Catherine Kessedjian, make sure you are close to your Wi-Fi connection.

THE WITNESS: Close to my Wi-Fi connection. Thank you. I will disconnect and reconnect now.

ARBITRATOR BIENVENU: Yeah, okay.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: You are back with us. So let's -- do you have a live feed of the transcript? Mr. Litwin, do you know where we left

off?

THE WITNESS: I do. I think --

ARBITRATOR BIENVENU: I think you should repeat your question.

And, Mr. Disspain, you are going to have to repeat your answer, I'm afraid.

THE WITNESS: Not a problem.

Q. BY MR. LITWIN: Just to summarize, Mr. Disspain, because I think you generally do recall what my question was, was -- would you agree with ICANN's counsel's statement that the Board took a, quote, "decision to defer," end quote, during the November 3rd workshop session?

A. So what I said to you in response to that question is I think the Board made a choice to follow its longstanding practice of not doing anything when there is an outstanding accountability mechanism.

I cannot say that the Board proactively decided, proactively agreed, proactively chose to as to put to do -- as to do it as you put it, which is to not pursue Afilias' complaints.

We just decided that it was our standard practice not to do anything because there were outstanding accountability mechanisms.

Q. So when you say that the Board did not proactively decide, is it fair to say you received a brief from legal counsel, questions were asked of legal counsel, responses to those questions were given, and then you moved on to the next item on the agenda?

A. Yeah, it wasn't before us for a decision -- for a formal decision unless we had chosen to move to a formal decision.

What we chose to do was to follow our longstanding practice.

MR. LITWIN: Excuse me for one second, please.

(Whereupon a recess was taken.)

Q. BY MR. LITWIN: So, Mr. Disspain, I think you testified earlier that certain members of staff were present during the November 3rd workshop where the .WEB issues were discussed, correct?

A. Correct, yes, that's correct.

Q. And that included Mr. Atallah?

A. That's my recollection.

Q. So Mr. Atallah, at the least, would have heard the conversation and heard the questions that were asked of legal counsel and the responses that were given, correct?

A. Yes. If my recollection is correct and he was in the room, then yes, he would have heard.

Q. The ICANN bylaws require that ICANN must make, quote, "any action taken by the Board publicly available within seven business days of the conclusion of each meeting."

Are you aware of that, sir?

A. Yes, I am aware of what you just said, yes.

Q. And that if the Board determines not to disclose any action, that the Board must disclose the reasons for that disclosure; is that also correct?

A. That sounds right.

Q. Are you aware that Afilias sent a DIDP -- again, that's D-I-D-P for the court reporter -- a DIDP request to ICANN in early 2018 demanding that ICANN disclose the status of its .WEB investigation and the .WEB contention set; are you aware of that?

A. I am aware there was a DIDP question from Afilias, and I think that's the one you're referring to, yes.

Q. Are you aware, in response to ICANN's response to that DIDP request, Afilias filed a reconsideration request?

A. Yep.

Q. Are you aware that ICANN, in its response to the DIDP request, did not disclose anything about the November 3rd workshop?

A. Yes, I think I would have been aware of that at the time. At the time the reconsideration request came in, I would have been aware of that, yes.

Q. Are you aware that the Board denied Afilias' --

A. Yes.

Q. -- reconsideration request?

A. Yes.

Q. You state in your -- yes?

ARBITRATOR BIENVENU: Excuse me. The Chair here. I am sorry to break your flow.

Could you, for my benefit, recall what precisely was being sought by the DIDP and what was the decision and then what precisely was being sought by the reconsideration request?

MR. LITWIN: Mr. Chairman, I do not have those documents in front of me, but I believe we will have time that my team can compile those so we can put those on the screen when I complete my questions. Would that be acceptable, Mr. Chairman?

ARBITRATOR BIENVENU: Yeah, I don't need to see the documents. I just need to have an understanding exactly of what was being sought at each step and what decision was at each step.

But if it takes too long to summarize it, let's defer it.

MR. LITWIN: I just don't want to misrepresent anything, Mr. Chairman. I would prefer to take that later on in the examination, if I might.

ARBITRATOR BIENVENU: That's fine. Please proceed.

Q. BY MR. LITWIN: Mr. Disspain, you state in your witness statement that it did not seem prudent for the Board to interfere or preempt issues that were the subject of accountability mechanisms concerning .WEB; is that right?

A. Yes, that's correct.

Q. Now, as of November 3rd, 2016, Donuts had filed a CEP concerning .WEB; is that correct?

A. Yes.

Q. And the claims at issue in the CEP had also been brought in court as part of Ruby Glen's litigation against ICANN; is that correct?

A. If you say so. I can't confirm that

personally.

Q. Is it your understanding that the claims that were at issue, at least in the CEP, concerned the conduct of ICANN's preauction investigation of NDC?

A. I haven't looked at that for some time. That sounds right, but I can't remember exactly. I just know that there was an outstanding CEP and that, therefore, waiting for that or any others would be a prudent way to deal with the matter.

Q. Now, other than the Donuts CEP, as of November 3rd, 2016, there were no other accountability mechanisms pending concerning .WEB, correct?

A. Not that I can recall, no, I don't believe so.

Q. You state in your witness statement that the Board also considered that there might be future accountability mechanisms brought concerning .WEB, correct?

A. That's correct.

Q. So there could be more CEPs, right?

A. There could be more CEPs. There could be reconsideration requests. There could be DIDP requests. There could be other considerations,

yes.

Q. Is a DIDP request an accountability mechanism?

A. Probably not. Fair enough. It would be a reconsideration request or a CEP.

Q. Or an IRP?

A. Or an IRP as an accountability mechanism, that's correct.

Q. Now, if an IRP was brought, the bylaws strongly encouraged and were designed to strongly encourage complainants to bring a CEP before an IRP, right?

A. Correct.

Q. Now, the purpose of a CEP is to narrow claims in advance of filing an IRP; is that right?

A. Yeah, but I think it is also -- yes, but in the main, it is also about getting the parties together to discuss things and see if we can avoid an IRP, if possible. But yes, you're right. The purpose is to do exactly what you just said.

Q. I guess if everybody agrees you have narrowed the claims completely and everybody can go home happy, right?

A. Correct.

Q. So if ICANN determines if it agreed with

the claimant on any issue, that would help narrow the claims in dispute in advance of filing an IRP, right?

A. If they agreed. If the claimant and ICANN agreed on something, absolutely it would.

Q. And if the ICANN --

A. By the way, if the claimant agreed with ICANN or ICANN agreed with the claimant, absolutely.

Q. Point taken. And if the ICANN Board determined that it agreed with the claimant on any issue, that would also help to narrow the claims in dispute in advance of filing an IRP, right?

A. It would except for the fact that the Board hasn't involved itself and didn't involve itself in CEPs. The Board -- CEP is an accountability mechanism. The accountability mechanism takes place -- that particular accountability mechanism takes place between ICANN and the claimant, and so the Board wouldn't get involved at all in that respect.

Q. Wouldn't it be consistent with the CEP for the ICANN Board, if it had the opportunity to do so, to consider the merits of a claim presented to ICANN during CEP?

A. It never has. As far as I am aware, it never has.

Q. You state in your witness statement that you recall that once there were no pending accountability mechanisms in June of 2018, that ICANN staff changed the status of the .WEB contention set from "on hold" to "resolved" and NDC's status from "on hold" to "in contracting"; is that right?

A. Yes.

Q. And Afilias' status had changed at the same time from "on hold" to "will not proceed"; is that also correct?

A. If you say so. I think that's a natural corollary from the move that you previously laid out, so yes.

Q. So just -- it would be ICANN's general practice that if one member of a contention set's status had changed to "in contracting," the other members of the contention set would move to "will not proceed," correct?

A. That sounds right.

Q. Are you aware that those changes were made the very day after Afilias' reconsideration request was denied?

A. No. I mean, I am aware they were made. I wasn't -- I was aware -- not -- in contrast of the fact it was the very day after.

Q. The ICANN Board did not meet to consider the merits of Afilias' complaints during the resolution -- regarding the resolution of the .WEB contention set in June of 2018 after those accountability mechanisms had expired, did it?

A. I don't think so. Again, you need to run that past me one more time. Are you asking me that we didn't meet to discuss what, Afilias' complaints?

Q. Yes. So on November 3rd you stated that the Board had --

A. Yes.

Q. -- chosen not to discuss any of the issues regarding .WEB until all accountability mechanisms had expired?

You write in your witness statement that they had expired in June of 2018 --

A. Correct.

Q. -- and now my question is: Did the Board meet in June of 2018, after those accountability mechanisms had expired, to discuss those issues regarding the .WEB?

A. That's a slightly different question. Yes is the answer, the Boards did meet. Certainly the Board Accountability Mechanisms Committee met. It may have been that there were -- my recollection would be that there were other Board members present.

But originally you asked me specifically to discuss Afilias' complaints, I think, and that's -- I wouldn't say that. What I would say is that we met -- we were briefed that after the contract came off hold that that is what had occurred, and, in fact, the Board Accountability Mechanisms Committee was briefed prior to it coming off hold, that the next step -- the next step in the process would be that it would come off hold.

And it was also briefed that Afilias had written letters, maybe a letter, I can't remember, one or more than one, to say that if that happened, if it came off hold, Afilias was going to launch an accountability mechanism. I can't remember if it says an IRP or not, but launch an accountability mechanism. The BAMC was aware of that.

Q. Did the BAMC discuss the substance of Afilias' complaints about how the resolution of the .WEB set had occurred?

A. No.

Q. Did the Board during June of 2018 discuss the merits of Afilias' complaints regarding the resolution of the .WEB contention set?

A. No.

Q. So, Mr. Disspain, as it turns out, this was not the only period where there was no accountability mechanism pending concerning .WEB. I will represent to you that the Donuts CEP that we discussed earlier terminated on January 30th of 2018 and that Donuts was given until February 14 of 2018 to file an IRP.

Are you aware of that?

A. That sounds right.

Q. And are you also aware that Donuts did not, in fact, file an IRP by February 14?

A. Yes, I am aware of that.

Q. And Afilias filed its first reconsideration request on April 23rd, 2018.

Are you aware of that?

A. I am, indeed.

Q. So during the period when there was no accountability mechanisms pending, the ICANN Board held workshop sessions on March 9th and 11th.

Did the Board take up the merits of

Afilias' .WEB complaints during those workshops?

A. No.

Q. And on March 15th the Board held a regular meeting, and by "regular meeting," I mean the formal meeting that's called the regular meeting that's set forth in ICANN's bylaws.

Did the Board consider the merits of Afilias' .WEB complaints during the March 15 meeting?

A. No. The Board has, to my recollection, not considered the merits of Afilias' complaint.

MR. LITWIN: Mr. Chairman, at this time I would request that we would take our recess. I realize it is a bit early, but I am coming towards the end, and I would like to confer with my team and also respond to your question about the reconsideration requests.

ARBITRATOR BIENVENU: Surely. We will take our 15-minute recess.

Mr. Disspain, you are not to discuss your evidence with anyone during the break.

THE WITNESS: I shall not do so, Mr. Chairman. Thank you very much. I will, however, be leaving the camera. I believe the expression is to take a comfort break.

ARBITRATOR BIENVENU: That's fine. Thank you, Mr. Disspain.

MR. LITWIN: Thank you, Mr. Disspain.

THE WITNESS: Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. Litwin, do you wish to continue your cross-examination?

MR. LITWIN: I do, Mr. Chairman. Thank you.

Chuck, if you could bring up Exhibit C-78, please.

MR. VAUGHAN: Is this in the binder?

MR. LITWIN: This is not in the binder. This is in response to the question the Chairman asked of me earlier. I just wanted to have this up to walk Mr. Disspain through it.

Q. Mr. Disspain, I will represent to you that this is a letter that my colleague, Arif Ali, sent to the Board of ICANN regarding a request for update on ICANN's investigation of the .WEB contention set and containing also a request for documents pursuant to the DIDP.

So, Chuck, could we look at the top of Page 2, please.

MR. LeVEE: Can I ask, Ethan, that you

just thumb through the whole thing so we can see how long it is?

MR. LITWIN: Of course. It is a five-page letter.

Chuck, if you could just scroll briefly through all five pages, please.

Now, if you could go back to Page 2. If you could just blow up the first -- the bullet and the heading, rather, in the first two paragraphs -- three paragraphs. I'm sorry. That will be easiest, yes.

Q. You will see, Mr. Disspain, this is entitled "Request for Update on ICANN's Investigation of .WEB Contention Set."

Do you see that, sir?

A. I do.

Q. Mr. Ali writes, "Therefore, pursuant to ICANN's transparency obligations, we respectfully request that ICANN provide an update on the status of ICANN's investigation of the .WEB contention set, including: (1) the steps (if any) taken by ICANN to disqualify NDC's bid on the basis that NDC violated the rules applicable to its application; and (2) the steps (if any) taken by ICANN to assess competition issues arising out of delegation of

.WEB to VeriSign."

Do you see that, sir?

A. I do.

Q. And turn to the next page. And if you could just highlight the Point Heading II, Chuck.

This says, "Request for Documents Pursuant to the DIDP," and you understand, Mr. Disspain, that refers to the document information -- now I can't remember. What is DIDP? Document Information Disclosure Policy?

A. Yes.

Q. Yes. If we could turn to the next page, Page 4 of the February 23rd, 2018, letter, Mr. Ali requests the disclosure of, No. 6, "All documents concerning any investigation or discussion related to the .WEB contention set."

Do you see that, sir?

A. I do.

Q. So this DIDP request was sent on February 23rd of 2018.

Are you aware that ICANN responded to it on March 24th?

A. I am aware that ICANN responded to it. I have no idea what the date was.

Q. Are you aware that ICANN did not disclose

documents pursuant to this request?

A. Yes, I am.

Q. Are you aware that ICANN did not provide a status update as requested pursuant to Point Heading I?

A. Not specifically. I am aware that there was a reconsideration request in respect to the DIDP request, so matters that were part of that reconsideration request, I would have been aware of it at the time we were considering the reconsideration request.

Q. I am just going to take you through the timeline, Mr. Disspain.

On April 23rd, are you aware that Afilias filed a reconsideration request regarding the denial of the DIDP request that had been sent in February of 2018?

A. Again, I am aware they filed a reconsideration request. I take your word for it that it was on that date.

Q. And are you aware that also on April 23rd Afilias filed a second DIDP request requesting, in sum and substance, the same information as in February 23rd?

A. I do recall there was a -- I do recall

that there was a second DIDP request, yes.

Q. Now, on May 23rd, are you aware that ICANN responded to this second DIDP request?

A. If you're asking me about the date, no. If you're asking am I aware they responded, yes.

Q. And are you aware that they received the same answer, which is essentially nothing?

A. Yes, I believe that that's correct.

Q. And then on June 5th, are you aware that Afilias' reconsideration request that had been filed on April 23rd was considered within the BAMC?

A. So I am. Again, if you say it was on June the 5th, I will accept that. I am aware of that. I have a memory of that discussion, yes.

Q. And I believe it was your testimony from earlier today that the BAMC recommended that Afilias' reconsideration request be denied; is that a fair statement?

A. It is a little difficult to remember with it, because there were two, but yes, I believe that that's correct, we did, indeed.

Q. And are you aware that the -- that Afilias' reconsideration request was never presented to the full Board?

A. I believe that under the bylaws at that

time, that's correct, yes.

MR. LITWIN: Mr. Chairman, does that clarify your questions about the timeline and what was requested under Afilias' DIDP request and reconsideration requests?

ARBITRATOR BIENVENU: Yes, it does. Thank you very much. All of these correspondence are in the file, are in the record?

MR. LITWIN: They are, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you very much.

Q. BY MR. LITWIN: Mr. Disspain, you testified earlier today that ICANN and the ICANN Board has a policy of not considering the merits of complaints that are subject to outstanding accountability mechanisms; is that correct?

A. No. I said that we had a longstanding practice. And I'm sorry to be picky, but the term "policy" in the context of ICANN has a different meaning.

Q. And what is the difference between practice and policy, in your mind, as a Board member?

A. Well, policy is -- a policy in the ICANN context is the policy that is set by the supporting organizations for dealing with -- in the case of a

gTLD, the GNSO in the case of country codes and ccNSO.

I didn't say "policy." I said "practice." I don't use the word "policy" because that has a different meaning to me.

Q. So the Board has certain practices that it observes in its functioning; is that fair to say?

A. Yes. If you're implying that there's a list of them somewhere, no. But there are things that we have generally done over time, and our practice has -- was in respect to new gTLDs, very specifically, to avoid stepping in where there are outstanding accountability mechanisms running.

Q. Is that practice documented anywhere?

A. Not -- I couldn't say, don't know.

Q. Is it in the bylaws, for example?

A. Not as far as I'm aware.

Q. Is there a document on ICANN's website that reveals that practice?

A. Not as far as I'm aware, but it may be that there are documents on the website that reveal discussions that will reveal rationale. There may be mentions in rationales and resolutions that say, "In accordance with ICANN's longstanding practice." They may appear in "whereas" clauses to

resolutions, you know, "whereas there was an accountability mechanism outstanding." I don't know. I can't say.

Q. So is it fair to say if I were to -- let me just ask you, sir, just to bottom this out --

A. Sure.

Q. -- can you direct me to any resolution or rationale that discloses this practice?

A. No. But I can direct you to numerous occasions where -- there have been a number of occasions where the Board has not done anything because there have been accountability mechanisms running. It's just our practice.

Q. Were those examples -- well, strike that.

Can you give me another example of when the Board has not intervened because of an outstanding accountability mechanism.

A. Not off the top of my head, and I wouldn't do that without going away and doing some research, but I can assure you they exist.

Q. So it's fair to say, sitting here today, you could not direct me to any minutes or transcripts of a Board meeting where that practice was disclosed?

A. It would be fair to say that I cannot

direct you there today, but I can confirm that it is a longstanding practice.

Q. Now, the practice, as you say, was exercised during the November 3rd workshop session. There was no transcript posted from that workshop, correct?

A. No, there wasn't, and the discussion was privileged, in any event.

Q. So is it fair to say that where this practice had arisen previously was likely to be in the context of a privileged discussion with counsel?

A. It's possible. It's equally possible that it could have been disclosed, as I said, as part of a formal resolution as a parse action in a "whereas" clause. I don't know.

So I don't think you can draw that conclusion. I think you can say that it's -- either way is possible. I can only comment on this particular occasion and tell you that it was privileged.

Q. Okay. ICANN has collected hundreds of millions of dollars in fees and auction proceeds as a consequence of its administration of the new gTLD Program; is that correct?

A. Yes, that's correct.

Q. In fact, just looking at auction proceeds, ICANN has collected net revenues of approximately $240 million; is that correct?

A. That's about right.

Q. So if my math is correct, the .WEB auction brought in somewhere north of 50 percent of that $240 million; is that fair to say?

A. If your math is correct, then yes, that is correct.

Q. Now, ICANN represented to the community that it would hold the auction proceeds in a fully segregated bank and investment account earmarked for use in a community-developed plan, correct?

A. You are going to have to tell me where we represented that, because I don't recall that term. I am not saying that -- I am not saying that -- I'm saying that I don't remember us saying we would put it in an entirely separate bank account, et cetera, et cetera, et cetera. I don't remember any of that.

Q. Okay. Are you aware that there is a CCWG, a Cross Community Working Group, that was formed to discuss the final plan for use of the funds; is that correct?

A. I am aware of that, yes.

Q. Are you aware that they have yet to develop a final plan for the use of those funds?

A. They have developed a number of proposals, but the plan is as of yet still forming. We anticipate we will be sending a report through to the Board relatively soon.

Q. Since VeriSign paid the $135 million winning bid to ICANN, that money has earned interest; is that fair to say?

A. Yes, I believe so. I wouldn't have any of the details.

Q. Is it fair to say that ICANN has, in fact, earned over $10 million in interest on the auction funds that it is holding in its bank in investment accounts?

A. I have no idea. I could find out, but I don't know.

Q. In the event that ICANN is required to refund part or all of the $135 million to VeriSign, would it need to pay interest on that?

A. I don't know.

Q. If it is required to pay interest, would it be a fair estimate to say that it is a proportion relative to the overall value of the

$135 million, as opposed to the full corpus that's in that account?

A. I don't understand the question.

MR. LeVEE: Okay.

MR. LITWIN: I will rephrase. That was a terrible question.

Q. Mr. Disspain, assuming my math is correct and the $135 million winning bid that was paid on .WEB represents more than 50 percent of the corpus of that investment account where the auction proceeds are held --

A. Yes.

Q. -- is it fair to say that if ICANN is required to refund that winning bid payment to VeriSign and it had to pay interest on that, that a reasonable estimate would be somewhere over 50 percent of the interest earned to date on that account?

A. Well, there are so many ifs in that question it is not helping me to answer it. I don't know.

If you're saying -- I mean, if you're asking me if you took the full amount of the money and you got paid 1 percent interest on it and if ICANN was refunding that money to VeriSign and it

was required to refund the portion of the interest, then obviously it seems to me logical to say that the 1 percent on that money would be paid. But I don't know for sure, and I have no idea what the actual arrangements are off the top of my head.

Q. Is it true that ICANN has already moved $36 million out of this account that holds the auction proceeds and moved it into ICANN's reserve fund?

A. It is correct that ICANN has repaid the reserve fund with the amount of money calculated to have been the cost of the gTLD Program, but that is -- if you say that's 36 million, again, I'll take your word for it. Off the top of my head, I can't remember the exact amount. But yes, that is correct, the amount, the costs of the new gTLD Program have been refunded.

Q. And a reserve fund is used to pay operating expenses when a company runs a deficit; is that right?

A. Well, we could get into an extraordinarily long discussion about what reserve funds are for and whether it is a reserve fund and/or a contingency fund, whether it should be the amount of money to pay to wind down an organization in the

event that it's being wound up, et cetera, et cetera. So I would prefer not to provide a cast-iron definition of what a reserve fund is for. It is entirely dependent on the organization itself.

And ICANN has dipped into the reserve fund on occasions and has a policy -- the Board has an agreement, rather, to try to increase the amount of the reserve fund to a reasonable amount. I can't remember the exact number off the top of my head.

Q. When you say that ICANN has dipped into the reserve fund, that is from time to time to pay operating expenses, correct?

A. It pays some of the New gTLD expenses out of its reserve funds, so yes. If you want to characterize that as operating expenses, yes, that's correct.

MR. LITWIN: Chuck, can you pull up Module 4 of the AGB, please, the applicant guidebook, and I would refer your direction to Page 4-19.

ARBITRATOR BIENVENU: Is that in the witness binder, Mr. Litwin?

MR. LITWIN: I am going to check, but I don't believe it is.

ARBITRATOR BIENVENU: Okay. That's fine.

We will look at it on the screen.

MR. LITWIN: Oh, it is. It is Tab 6.

THE WITNESS: My strong advice is to tell me to look at it on the screen instead of the binder.

MR. LITWIN: Yeah, I think we have -- Chuck, I need Module 4, not Module 6. I think it is Exhibit 314, if that helps. Okay. This is not what I asked for.

Mr. Chairman, I am just going to go off the record, but I think I am done with the witness. May I have two minutes?

MR. ALI: Wait a second. You are not done with the witness, Ethan. Why don't you and I just have a chat first.

MR. LITWIN: Yeah, that's fine. That's what I was going to say.

ARBITRATOR BIENVENU: Okay. So let's pause for a few minutes to give counsel for the claimant an opportunity to consult.

THE WITNESS: Mr. Chairman, are you okay if I disappear briefly?

ARBITRATOR BIENVENU: I think you will be made to disappear, but you may disappear.

THE WITNESS: Thank you so much. I

appreciate it.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: All right. We are ready to resume.

Mr. Disspain, I believe Mr. Litwin has more questions for you.

Q. BY MR. LITWIN: Mr. Disspain, thank you very much. I have just a couple of questions for you.

Earlier, a few minutes ago, I represented to you that ICANN had represented to the community that it would hold the auction proceeds in a fully segregated bank account, investment account earmarked for community use.

I'd like to direct your attention to Module 4 of the guidebook. This is Exhibit C-3.

Do you see that, sir, on your screen?

Mr. Disspain, I'll ask you again, do you see Module 4 of the guidebook up on your screen there?

A. Yes, I do.

Q. If we could turn to Page 4-19 of the guidebook, which I understand is on Page 203 of the PDF, and on that page, if you can bring up that footnote on the bottom, please, you will see in

that second paragraph that the guidebook says that, "Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined."

And then it says -- I am trying to find where it says this -- that, "Possible uses of auction funds include formation of a foundation with a clear mission and transparent way to allocate funds to projects that are of interest to the greater Internet community."

Do you see that?

A. I do. That's what the working group is currently working on, yes.

Q. And if you can -- if I could now call up Exhibit 314, which are the Board resolutions.

MR. LeVEE: Is that in the binder?

MR. LITWIN: It is not.

Q. So these are -- if we could turn to Page 45, please.

MR. LeVEE: Ethan, if you would give me a second with the exhibits. You are faster than I am at putting them up, and I have to get copies.

MR. LITWIN: I understand that. Please let me know when you're ready, Jeff.

MR. LeVEE: Thank you. Is it C-314?

MR. LITWIN: It is -- I believe it is. My

team has told me it is 314.

MR. LeVEE: Okay. I have got it. Thank you. For the record, it is C-314, I believe.

Q. BY MR. LITWIN: Can we blow up Page 45, please?

A. What is it I am actually looking at?

Q. These are the Board resolutions from October 25th, 2018.

Chuck, can you just blow up that page? I'm sorry, I apologize.

Arif, if you have anything on this, let me know, but I'm sorry, I don't see the quote.

MR. ALI: Just one second, please.

ARBITRATOR KESSEDJIAN: I don't see the Chair of the Tribunal anymore.

ARBITRATOR BIENVENU: I have lost my connection, but I can still see the proceedings using our administrative secretary's screen. I am in the process of reconnecting.

ARBITRATOR KESSEDJIAN: Okay. You'll have the time to find out what you want to show us.

(Discussion off the record.)

MR. LITWIN: Mr. Chairman, I would just ask that, given that I cannot find what my team is trying to refer to me, that perhaps Mr. Ali could

ask whatever question he is asking me to ask the witness, just to be more efficient, given the time limits.

ARBITRATOR BIENVENU: Mr. LeVee, any objection to that?

MR. LeVEE: If it is one or two questions, I have no objection to that.

ARBITRATOR BIENVENU: Mr. Ali, good afternoon to you, and please proceed.

MR. De GRAMONT: Mr. Chairman, this is Mr. De Gramont. Mr. Ali is just trying to find the relevant page. This is one of the challenges of having everybody spread out in different places, and the associate who knows the documents best is at home in Pennsylvania.

So if you'll just bear with us for another minute, we'll be right back. Thank you.

ARBITRATOR BIENVENU: Thank you.

(Whereupon a recess was taken.)

MR. LeVEE: I wonder if the Panel has questions. They could begin, conscious of the time.

ARBITRATOR BIENVENU: Does that foreshadow the length of your redirect, Mr. LeVee?

MR. LeVEE: It is only because I do not

know how long the members of the Panel will ask questions.

ARBITRATOR BIENVENU: I was joking.

I think I prefer to wait until the cross-examination is completed.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Please proceed, Mr. Ali.

MR. ALI: Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. ALI

Q. Mr. Disspain, good afternoon. This is Arif Ali here. It's been a long time since we have seen each other.

A. It has, indeed.

Q. At the bottom of Page 66, you see that language that says "Resolved"?

A. Yeah.

Q. "The Board directs the president and CEO, or his designee(s)"?

A. Yep.

Q. Then we go to the top of the next page, "to take all actions necessary to increase the Reserve Fund through annual excesses from the operating fund of ICANN organization by a total

amount of 32 million over a period of seven to eight years starting with fiscal year 2019."

So my question is: If that money -- those are moneys that are coming from the auction fund; is that correct?

A. No. That's a resolution to direct the president and CEO to take all actions necessary to increase the reserve fund through annual excesses from the operating fund by 32 million over a period of seven to eight years. If they were to take funds from the auction proceeds fund, then it would be able to come out in one go and it would say "auction proceeds funds" rather than "operating fund."

Q. All right. Then let's continue down below.

A. Yep. That's the resolution that deals with the repayment of the costs of the -- of the new gTLD Program, I believe.

Q. So what you're telling us is that no money has been taken from the proceeds of the auctions to fund the reserve fund?

A. That is correct. I am telling you that one payment has been made -- well, a payment, I don't know if it was one, but the new gTLD Program

was costed to be a cost of 36 million, and the Board resolved that the auction proceeds should -- the 36 million should be taken from the auction proceeds.

And I believe from memory that that means that the Cross Community Working Group is working on the principle that the funds for .WEB being cast aside to a different category, that there is roughly speaking, ignoring those, roughly speaking, some 80-something to $3 million left of the proceeds, apart from the .WEB proceeds, and that is the number they are working on, because no one has any idea what will happen to the .WEB proceeds at this stage.

And there is a separate resolution above that which has to do with ongoing replenishment of the reserve fund over a period of seven to eight years, which is the Board's decision based on the fact that the Board believes that that should be set at a particular level, and I cannot remember off the top of my head what that level is.

Q. None of those moneys from the reserve fund would come from the auction proceeds; that's your testimony?

A. Didn't say that. I said that the $36

million from the auction proceeds that you referred to here is repayment to the -- for the new GTLD process -- sorry, new gTLD Program costs.

The previous resolution refers very specifically to $32 million being funded into the reserve fund from annual excesses from the operating fund of ICANN over seven to eight years, which is not the same as the auction proceeds.

MR. ALI: Thank you, Mr. Disspain. I have no further questions.

ARBITRATOR BIENVENU: Thank you, Mr. Ali.

Mr. Litwin, does that complete the cross-examination of Mr. Disspain by the claimant?

MR. LITWIN: It does, Mr. Chairman.

Mr. Disspain, thank you very much, and I do apologize about the kerfuffle at the end here.

THE WITNESS: There is nothing to apologize for except possibly your binder.

ARBITRATOR BIENVENU: So do my colleagues have questions for Mr. Disspain, or shall I begin and you have supplementary questions and you go after? What's your preference?

ARBITRATOR CHERNICK: Go ahead, Pierre.

ARBITRATOR KESSEDJIAN: Yeah, I think that's good if you go ahead.

ARBITRATOR BIENVENU: Mr. Disspain, just a couple of questions.

Turning your mind back to the November 2016 workshop session concerning .WEB, and repeating the caution not to disclose any privileged communication or any privileged advice, do you know whether, as part of the briefing that was provided to the Board at that session, the staff of ICANN or, you know, what I think you referred to as ICANN org had taken a position and that position was conveyed to the Board as to whether the NDC bid complied with the program? Was there an ICANN staff position on this question?

THE WITNESS: I think I understand your question, Mr. Chairman.

MR. LeVEE: Mr. Chairman, I am really uncomfortable making this objection, but I do think you are asking about the contents of a privileged communication.

ARBITRATOR BIENVENU: Because you -- well, I do not want to do so.

Basically it is a question I asked Ms. Willett, I believe, what I tried to explore with Ms. Willett, but if you're saying that whatever position ICANN staff would have taken

would reflect the advice of counsel, I am prepared to move forward.

MR. LeVEE: I am saying that.

ARBITRATOR BIENVENU: Okay. Very well.

Mr. Disspain -- and forgive me, Mr. LeVee, I really didn't want to elicit privileged communications or advice.

MR. LeVEE: Fair enough.

ARBITRATOR BIENVENU: Mr. Disspain, did the Board discuss at the November 2016 working session that its decision not to take any action regarding the claims arising from the .WEB auction should not be made public, including should not be communicated to those who were within the contention set? Was that part of the discussion?

THE WITNESS: No, I don't believe it was.

ARBITRATOR BIENVENU: And you as a Board member, do you know that the decision taken by the Board at that workshop session was only communicated to the claimant as is alleged by the claimant in the course of these proceedings?

THE WITNESS: Forgive me, Mr. Chairman. I am not sure I actually understand your question.

ARBITRATOR BIENVENU: Let me reformulate it.

Are you aware, as you sit here today, that the decision taken by the Board during that workshop was only communicated to Afilias in the course of the proceedings in this IRP, so just very recently?

THE WITNESS: No. I am now aware of that. I wasn't aware of that at the time. I am aware of it because it's been mentioned.

ARBITRATOR BIENVENU: At the November 2016 session, Mr. Disspain, you were made aware that Afilias -- and you might have been aware of that from prior correspondence -- was taking the position that NDC's bid, supported as it was by VeriSign through an agreement with NDC, that Afilias was taking the position that that bid did not comply with the guidebook and the auction rules, correct?

THE WITNESS: Yes, I am aware that Afilias had said that in correspondence.

ARBITRATOR BIENVENU: So after the November 2016 working session, you knew as a Board member that the question of whether the bid was compliant or not was a pending question, one on which the Board had not pronounced and had decided not to address in November 2016; is that correct?

THE WITNESS: Yes. I was -- I knew that we had not -- that it had not been addressed. Well, no -- yes, you're right. I knew that.

ARBITRATOR BIENVENU: Right. And by early 2018, the situation as I have just described it, remained unchanged; is that correct?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Can you look now at Paragraphs 12 and 13 of your witness statement?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And there you refer to the events of the first half of the year 2018?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: So first you referred to the DOJ announcement in January 2018 that it had closed its investigation?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: Then to the withdrawal by Donuts of its CEP?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: And then the denial by the Board of Afilias' reconsideration request regarding its document requests, correct?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: And then you come to

ICANN's decision in June 2018 to change the status of the .WEB contention set and send a draft Registry Agreement for .WEB to NDC?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: And in Paragraph 13, you mention that this was a decision of ICANN staff.

Do you see that?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Does that mean that the Board was not consulted about this decision?

THE WITNESS: Well, it depends on what you mean by the word "consulted." But let me tell you what actually happened. Perhaps that would be helpful.

Again, I can't give you dates, but I can tell you that prior to the -- I think I have already said this to Mr. Litwin. Prior to the lifting of the hold on the contention set, the matter was discussed in the Board Accountability Mechanisms Committee, I believe as part of its general litigation update, but I am not certain.

In that discussion we were told that the next step in the process was for -- should all of the accountability mechanisms be dealt with, was

for it to come off hold, but that Afilias had made it abundantly clear that in the event that it did come off hold, that they would file an IRP.

And we were also clear as a Board committee that Afilias would be aware that it had come off hold because all of the contention set members would be informed that it had come off hold. So that occurred.

And then secondly, a couple days -- again, I don't know exactly, I can't remember exactly when -- after it had actually come off hold, there was another discussion at which we were told that it had come off hold and that an IRP claim from Afilias was expected -- I am going to paraphrase here -- at any minute, so to speak, because that is what they said they would do.

I hope that's helpful and clear.

ARBITRATOR BIENVENU: Yes, it is. In fact, it kind of anticipates what was my next question. When you say in the penultimate sentence of Paragraph 13, "Given the letters we had received from Afilias threatening to take legal action in such circumstances, I fully expected, as did others, that Afilias would immediately initiate another Accountability Mechanism" --

THE WITNESS: Yes.

ARBITRATOR BIENVENU: -- so that suggests that you as a Board member actually turned your mind to this issue. And in light of that expectation -- well, I shouldn't say that, but you turned your mind to this, and you anticipated that an IRP would be coming?

THE WITNESS: We as a group meeting -- again, I'm sorry. I cannot remember. I am fairly sure it was the Board Accountability Mechanisms Committee meeting, but I imagine there would have been other Board members present as well. We were very clear that our understanding was that Afilias had said categorically that they would launch an IRP in the event that the contention set was taken off hold.

ARBITRATOR BIENVENU: By ICANN sending a draft Registry Agreement to NDC for execution, would you consider, Mr. Disspain, that ICANN was, in effect, expressing disagreement with those who claimed that NDC's bid was noncompliant and that the auction rules had been breached by NDC because of its agreement with VeriSign?

THE WITNESS: No, I don't think so. I think that ICANN was taking the next step in its

process. You know, there are two -- without wishing to place any weight on either side in this matter, there are two sides. There are the Afilias side, who are bringing this IRP; and then there are others on the other side who believe that they are entitled to the TLD. So both sides need to be treated fairly by ICANN. The best way for ICANN to do that is to follow its process.

To be clear, having been told in no uncertain terms by Afilias that they were intending to lodge an IRP, that is what we expected to happen, and that is exactly what did happen. I don't think you can read into the step, the process step, a motive, if you will, that says we, therefore, believe that this is the right thing to do.

ARBITRATOR BIENVENU: Let us assume, Mr. Disspain, that contrary to your and your colleagues's expectations, Afilias had not commenced an IRP, what would have happened then? Would ICANN have executed the Registry Agreement that NDC had promptly signed and returned to ICANN?

THE WITNESS: Well, Mr. Chairman, I can't say what would have happened. I can say that the Board would have known that Afilias had not filed

an IRP. I can say that the Board -- when I say "the Board," I am mainly talking about the Accountability Mechanisms Committee, but for the purposes of this discussion, it amounts to the same thing, and that the Board would have known that the contract -- or the BAMC had known that the contract had been returned, and I can't say what the Board would have done in those circumstances. But I can say that the Board would have been aware.

ARBITRATOR BIENVENU: Are you aware, Mr. Disspain, that in November 2018, after Afilias filed its IRP, ICANN took the position in the context of the IRP that it would only keep the dot contention set on hold until 27 November 2018, so as to give an opportunity to Afilias to file a request for emergency relief, barring which -- barring which ICANN would take the contention set off of its on-hold status?

THE WITNESS: Yes, I am.

ARBITRATOR BIENVENU: You were aware of that?

THE WITNESS: And I am aware that this is the practice in respect to IRPs, that the process itself -- it differs slightly from the way that reconsideration requests are dealt with, in that

there is a mechanism by which the claimant can bring a -- I think you used the expression "emergency relief claim" to stay the moving forwards. So yes, I am aware of that and that that is the practice.

But I am not ICANN's lawyer, and what lawyers instructed, advised us to do, I can't comment.

ARBITRATOR BIENVENU: And what I'm interested in asking you, Mr. Disspain, is whether in so doing, ICANN was again taking a position that might have resulted in .WEB being awarded to NDC, delegated to NDC without the Board having the opportunity to determine the question that it chose not to pronounce upon in November 2016, namely whether the bid was compliant?

THE WITNESS: So the answer to that question is, again, I need to say I don't know what the Board would have done, but to take the leap to say does ICANN's position in the legal proceedings imply that the delegation would have taken place is a leap -- is not a leap I would take because I don't know what the Board would have done.

And it is not -- it is impossible to suggest that the Board would have stepped in, but I

don't know. I can't say whether they would or wouldn't. That is purely a hypothetical.

ARBITRATOR BIENVENU: Now, I assume that you are aware that in this IRP, as we speak today, ICANN takes no position as to whether NDC's bid violated the guidebook or not, you're aware of that?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: So the matter, then, comes before -- the matter comes before the IRP Panel, and the Panel doesn't have the benefit of ICANN's view on the -- on whether the bid is compliant or not even though the guidebook emanates from ICANN.

You don't think it would have been useful to the Panel to have the view of ICANN as to the reach or the interpretation of the guidebook in relation to an agreement like the DAA?

THE WITNESS: Well, I think two things, Mr. Chairman. I think that the Board -- the Board has rigorously stuck to its practice and its processes.

And secondly, that the scope of the Panel, as I understand it, doesn't stretch to a discussion -- or, rather, a decision in respect to

the actual DAA itself.

Now, I am not holding myself out as an expert in this respect. I am merely reading the bylaws. That's my understanding. So I can only say what I understand.

ARBITRATOR BIENVENU: I think you have very accurately described the position of ICANN before the Panel, but the claimant is taking a different position.

THE WITNESS: I understand that.

ARBITRATOR KESSEDJIAN: Mr. Chairman, can I ask a follow-up question on this one without interrupting you, or do you want to finish your questions?

ARBITRATOR BIENVENU: No, if it is a follow-up question.

ARBITRATOR KESSEDJIAN: Mr. Disspain, this is Catherine Kessedjian. I am speaking from Paris, so we are actually closer.

THE WITNESS: Is it as hot there as it is here?

ARBITRATOR KESSEDJIAN: It's very warm.

I have a follow-up question on this very question of how you understand the scope of the jurisdiction of the IRP. It is one of the issues

we have.

You just said that you don't think -- you were careful, and if I rephrase in a way that is not correct, please interrupt me.

But you said that you don't think that the IRP jurisdiction will stretch to whether or not the DAA was validly entered into considering the guidebook rules; is that correct?

THE WITNESS: Yes. That is, in essence, what I said, yes.

ARBITRATOR KESSEDJIAN: Okay. So if you consider this is not our jurisdiction, whose jurisdiction is that? Where does an applicant go to have this question resolved?

THE WITNESS: Well, Professor, that is an extraordinarily good question, and I believe that at the end of the day, the answer may well be that it is a matter for the Board. But that's just my opinion, and I am not here to debate the legal issues.

The IRP itself is -- the bylaws are very clear about what an IRP does and what an IRP does not do.

Let me suggest something to you as a sort of answer to your question.

The Board -- I was asked earlier on what would have happened if the Board had not -- if the IRP had not happened, and I said I don't know because I don't know what the Board would have done.

What I do know is what the Board will do with respect to this IRP. If the IRP finds in favor of ICANN, the Board is going to consider the decision of that IRP, and what the Board will do is to take very seriously -- it will operate within its fiduciary responsibility and its responsibility to the community, within its responsibility to ICANN's mission and bylaws and public interest, and it will take very seriously anything that the Panel says by way of recommendation outside of its decision on the finer points of what the Panel's scope extends to in respect to the bylaws.

Now, I can't say what the Board will do, and I can't say that the Board will necessarily do anything. But what I can say is that this Panel operates under the terms of the bylaws, and I think my understanding of an interpretation of bylaws is the correct one.

I don't know if that's helpful.

ARBITRATOR KESSEDJIAN: I am just

surprised by the beginning of your answer, or beginning of your explanation, for which I am very grateful.

Sorry, I don't have the feed of the court reporter.

THE WITNESS: Not a problem.

ARBITRATOR KESSEDJIAN: Did you say that the Board would take seriously only if the IRP was in favor of ICANN?

THE WITNESS: No, no, no. I was not suggesting that at all, no. What the Panel decides is what the Panel decides. I was simply suggesting that if the Panel -- I was simply saying that the Panel -- it is open to the Panel to make its decision.

And if the Panel, on making its decisions, makes a series of recommendations, those recommendations are something that we treat very seriously by the Board.

ARBITRATOR KESSEDJIAN: Thank you very much.

THE WITNESS: That's all I was trying to say. I hope that's clearer.

ARBITRATOR KESSEDJIAN: Yes, indeed.

THE WITNESS: I apologize if we missed

each other.

ARBITRATOR KESSEDJIAN: No, no, that's great. Thank you.

ARBITRATOR BIENVENU: My last question, Mr. Disspain, is the following: I am speaking under the control of Mr. LeVee, but I understand -- not because we are treading near privilege, but because I am about to summarize the position of ICANN.

THE WITNESS: Okay. Thank you.

ARBITRATOR BIENVENU: I think I am correct in describing ICANN's position in this IRP as being that the proper scope of the IRP requires the Panel to limit itself in deciding whether in making the decision that it did in November 2016, the Board acted reasonably.

My question to you is: Let us imagine that we accept that position and that we refuse the claimant's invitation to pronounce on the question of whether the NDC's bid was compliant with the program rules, then what will happen then and when will the Board have an opportunity to resolve that question and to pronounce upon it?

THE WITNESS: Thank you. I am going to, in some respects, repeat what I just said to

Professor Kessedjian, but in the context of your question. So when will the Board have an opportunity?

My recollection is that the Board, there is a set time frame in which the Board must address any decision made by the Panel. I can't remember what it is off the top of my head, but there is a set time frame. So that is the answer, whatever the set time frame is, that's the answer to that question.

In respect to what the Board will do, I don't know what the Board will do. Let me say it again. I believe that the Board would take very seriously any recommendations made by this Panel outside of its decision within scope. This Panel would have heard everything, and this Panel will be -- what it says in respect to its decision is its decision.

If it wants to make a series of recommendations outside of its decision, I am saying, when the Board looks at the decision of this Panel, I would expect the Board to take those recommendations very seriously.

ARBITRATOR BIENVENU: My question was slightly different --

THE WITNESS: I apologize.

ARBITRATOR BIENVENU: -- than Professor Kessedjian's question.

My question was: If we accept ICANN's submission that in making the decision that it did, the Board acted reasonably, and accept the further submission by the respondent that we should go no further, then the question that was not addressed in November 2016 and that remains as yet unaddressed, when will that question be resolved?

THE WITNESS: I don't know. All I can tell you is that pursuant to the decision of this Panel, the Board will meet and the Board will consider what this Panel has to say. But I can't give you -- I apologize. I can't give you a clearer answer than that.

ARBITRATOR BIENVENU: No, that's fair enough. Thank you. Thank you, Mr. Disspain.

Any questions from my colleagues?

ARBITRATOR CHERNICK: No, thank you.

ARBITRATOR KESSEDJIAN: No other questions.

ARBITRATOR BIENVENU: Mr. LeVee, any redirect?

MR. LeVEE: I do have some redirect. I am

mindful that it is seven minutes before we are supposed to conclude, and if it's possible to go over just a couple, I'll do my best to be efficient.

ARBITRATOR BIENVENU: Thank you, Mr. LeVee.

REDIRECT EXAMINATION

BY MR. LeVEE

Q. Mr. Disspain, thank you for staying with us.

Let me return you briefly to the November 2016 meeting.

Do you recall anyone at the meeting voicing opposition to the decision that was taken?

A. Do you mean voicing opposition to deciding that we would not do anything pending the accountability mechanisms running their course?

Q. Yes.

A. No, I do not.

Q. You were asked about whether the bylaws required the publication of a decision from a workshop like this.

A. Yes.

Q. I am not going -- I don't have the time to take you through all the bylaws.

Do you have an understanding of whether the bylaws require publication of actions taken at Board workshops?

A. I don't believe that the bylaws do.

Q. Okay. Now, you were shown an application under the DIDP policy, but you were not shown the response. So I am going to ask Ms. Ozurovich to bring up the response, and I think the exhibit number is VeriSign-24.

Do you see that on your screen?

A. Yes, I do.

Q. And this is dated 24 March 2018.

Do you see that?

A. I do. Very large font now.

Q. The very first paragraph, can you read it without Ms. Ozurovich blowing it up?

A. Yeah, I can read that perfectly well. Thank you.

Q. Okay. In the first paragraph it references a letter dated 23 February 2018, which was Exhibit C-78 that you were shown earlier?

A. Yep, I remember that.

Q. And it included a request for an update and then also a request under the DIDP policy.

Do you see that?

A. Yes, I do.

Q. And there was a statement by counsel that ICANN provided no documents in response.

I wanted just briefly to show you that -- have you seen this before?

A. No, not that I can recall.

Q. Okay. Do you know --

A. Who is it from?

Q. Well, it is from ICANN.

A. Okay. Fine.

Q. Do you know whether as part of the DIDP response ICANN refers people who submit DIDP applications to documents that are in -- that are publicly available?

A. I do know that ICANN does that, if the document is published, then they will say go here.

Q. Okay. So ICANN doesn't actually send copies of the documents; ICANN identifies where in the public domain those documents exist?

A. Absolutely.

Q. So just by way of example, if you look -- I am going to go to Page 6. We are going to look at the -- that's 4. If you look at the bottom, do you see where it says, "Item 4, all applications and all documents," et cetera, et cetera?

A. Yep.

Q. You see that ICANN provided links to a number of materials?

A. Yep.

Q. I am going to ask you to turn to Page 16, Ms. Ozurovich, just so you can see that initially the response is 16 pages. I am not going to take the time to go through all the responses.

Do you see that?

A. Yep.

Q. And then if you turn, Ms. Ozurovich, just sort of scan through the next page, next several pages, through Page 28, are additional links that ICANN provided to Afilias and its counsel where materials can be found?

A. Correct.

Q. And is that what you understand to be ICANN's policy in terms of responding to the DIDP request?

A. When you say is that what I understand, you mean where the documents are public to provide links? Yes.

Q. Yes.

A. Yes.

Q. Do you understand whether ICANN discloses

information that is privileged in response to a DIDP request?

A. No, it doesn't.

Q. Okay. You were asked about the extent to which ICANN's practice of keeping contention sets on hold as a result of accountability mechanisms -- and I am not going to -- I am trying to avoid saying what you said, but you reference the possibility that ICANN has published material on this topic.

Do you remember your testimony on that?

A. Yes, I did. I said it is possible. I have no idea whether it's happened or not, but it is possible.

Q. Let me ask everyone to take a look at Exhibit R-33. Do you recall that ICANN published updates on application status and contention sets from time to time?

A. I certainly do, yeah.

Q. This particular one is dated August 1, 2016. Do you know if ICANN published them regularly?

A. Yes. But how regularly, I don't know.

Q. Okay. And you can see -- I am not going to read it all. I am going to go to the second

page in a second, but you can see that in the middle there's a bold that says "Application Status and Contention Set Status."

Do you see that?

A. Yes, yes.

Q. Toward the bottom it says "Explanation of Application Status."

Do you see that?

A. Yes, I do.

Q. Now, I am going to just read at the bottom. It says, "Alternatively" -- the very last line, "Alternatively, the page may reflect one of the following statuses for an application."

Do you see that?

A. Yep, yes.

Q. Okay. Now we'll turn the page. I am going to have Ms. Ozurovich blow up just that top section, just like that.

A. Brilliant.

Q. So one of the statuses is that the application has been withdrawn, correct?

A. Yes, yep.

Q. Another is that it is not approved?

A. Yep.

Q. Another is that it will not proceed?

A. Yep.
Q. And then it says, "On-Hold"?
A. Yes.
Q. "May be applied if there are pending activities (e.g., ICANN accountability mechanisms, ICANN public comment periods)," so forth and so on?
A. Yep.
Q. Is that some recognition of the practice that ICANN posted on its website that accountability mechanisms result in an on-hold status?
A. Yes.
Q. Okay.
ARBITRATOR BIENVENU: What's the exhibit number of this document that you just introduced? Because the transcript says 433.
MR. LeVEE: "R," as in "Robert," 33.
ARBITRATOR BIENVENU: R-33, thank you.
MR. LeVEE: Of course.
Q. Do you know whether in June 2018 -- I think I misspoke.
You may be on mute, Mr. Disspain.
A. Sorry. I had to close the window due to bats flying around.
Q. Sounds like a good excuse.

A. Trust me, you don't want one in the house.

Q. I am positive.

Do you know whether prior to June of 2018, when Afilias initiated what was actually a CEP at that time, do you know whether Afilias had initiated an accountability mechanism relating to the .WEB auction?

A. Not as far as I can recall.

Q. Okay. So the status at that time was that Afilias had sent letters?

A. Yeah, they sent heaps of letters saying this was wrong, this should happen, that should happen, et cetera. The questionnaire had gone out and so on.

But they had not of themselves actually filed any form of -- ignoring the DIDP, which is separate, they had not filed any accountability mechanism in this .WEB matter, no.

Q. Okay. In your witness statement, which is the first tab of the binder, if you'd like to look at it.

A. Yeah.

Q. You say -- I am not going to read it, but you comment -- you address how ICANN deals with letters, right?

A. Yeah, yep.

Q. And the practice of ICANN was that absent the accountability mechanisms, such as a reconsideration request, CEP and so forth, that was the way to know that a contention set would be placed on hold; is that correct?

A. Well, kind of. In essence, the way I would put it is you can write whatever letters you like. The way that you move forward with an issue of this nature is through using ICANN's accountability mechanisms. That's what they are there for.

MR. LeVEE: Mr. Chairman, may I take one minute to consult with my colleagues, including Mr. Smith, who, of course, is in San Francisco?

ARBITRATOR BIENVENU: Of course.

MR. LITWIN: Before we break, I would beg the Panel's indulgence to allow me one brief recross on a document that was inspired by your question, Mr. Chairman, that I think would clarify one of Mr. Disspain's responses. It would be no more than two minutes.

ARBITRATOR BIENVENU: That's fine. We will hear the question, but first I will allow Mr. LeVee to consult his colleagues.

MR. LeVEE: Just for the record, Mr. Chairman, I do object to redirect -- sorry, recross. It is not part of the rules. It is not something we have done, and I just want the objection noted for the record.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. LeVee.

MR. LeVEE: I have no additional questions. I do repeat that I am concerned about recross, and if there is recross, I would ask that I be given at least the opportunity to respond to it.

ARBITRATOR BIENVENU: Yes, yes, well, I agree with you that there is no recross, but I didn't understand Mr. Litwin to ask for recross, and if he did, I would disallow it.

However, we are an international arbitration, and it is customary to allow counsel to ask, you know, supplementary questions if they arise out of redirect.

So I am sure that Mr. Litwin will be disciplined, as he should be at this stage in the process, and ask a question that only is supplemental to your redirect, and he will do so under our watchful eye.

MR. LeVEE: Thank you, Mr. Chairman.

MR. LITWIN: Mr. Chairman, just as a point of clarification, my question arises not out of Mr. LeVee's redirect, but in response to an answer Mr. Disspain gave to one of your questions.

ARBITRATOR BIENVENU: That's fine. Please proceed, but understand this is a supplementary question, not a continuation of your cross.

MR. LITWIN: I understand, Mr. Chairman.

SUPPLEMENTARY EXAMINATION

BY MR. LITWIN

Q. Mr. Disspain, do you recall the Chairman asking you about whether or not the Registry Agreement would have been signed by ICANN in June of 2018?

A. Can I interrupt you for one second? I lost you at the beginning of your question. I just heard you for the last ten seconds.

Can you go back and start again for me, please?

Q. Mr. Disspain, do you recall that the Chairman asked you whether or not ICANN would have executed the Registry Agreement in June of 2018, and you said that one way or another, you could not speculate as to what would have happened?

Do you recall that?

A. Yes.

MR. LITWIN: I would ask Chuck to bring up Exhibit 170, please.

MR. LeVEE: Mr. Chairman, I can tell already, this is recross.

ARBITRATOR BIENVENU: I'll allow the question, Mr. LeVee.

Q. BY MR. LITWIN: Mr. Disspain, I am showing you an email that was sent from Mr. Grant Nakata from ICANN internally, and he writes, "I want to provide an update on the WEB Registry Agreement."

This email was sent on June 20th, 2018, two days after Afilias filed its CEP.

He says, "Prior to the execution of the WEB Registry Agreement, we received notice that a Cooperative Engagement Process (CEP) was initiated on .WEB. The .WEB/WEBS contention set has been placed On Hold. We will void the current Registry Agreement (via DocuSign). If or when we are able to proceed, we will reinitiate this approval process."

If you look down in this document at the bottom of Page 1 and onto Page 2, you will see that the Registry Agreement had been approved by

Ms. Christine Willett and the other members of her team.

Do you see that, sir?

A. It would appear so, yes.

Q. So does that refresh your recollection that had Afilias not filed its CEP, that ICANN was ready to sign the Registry Agreement?

A. No, it doesn't, because this doesn't refresh my recollection. I don't have a recollection. I simply said what I said. I am not aware of these emails. They are internal emails, so I can't comment on them.

Q. That's because the Board does not have to approve a Registry Agreement. It simply required the signature of Mr. Atallah; is that correct?

A. The Board does not have to approve an agreement, that is correct. However, as I already said, the BAMC in its discussion with ICANN org prior to -- sorry, post the lifting of hold would have been aware if Afilias had not filed a -- what's the word I'm looking for? Accountability mechanism, that's the word. Thank you. Accountability mechanism.

But I am talking about what the Board was doing. I can't tell you what ICANN org was doing.

That's a matter for ICANN org.

MR. LITWIN: Okay. Thank you, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you, Mr. Litwin.

Mr. LeVee?

MR. LeVEE: I do not have follow-up. Thank you.

ARBITRATOR BIENVENU: Mr. Disspain, it remains for me and the members of the Panel and, indeed, all the participants in this process, to thank you very much for your time and for your evidence. We appreciate it very much.

THE WITNESS: Thank you very much, indeed.

MR. LITWIN: Thank you, Mr. Disspain.

THE WITNESS: Thank you, Mr. Chairman. Thank you all.

ARBITRATOR BIENVENU: Mr. Disspain, one last point. Per the sequestration order, it requires that I instruct you not to discuss the case with other persons who may appear as witnesses before us.

THE WITNESS: Not a problem. Thank you.

ARBITRATOR BIENVENU: Thank you. Thank you for your time.

THE WITNESS: Thank you very much. Good-bye.

ARBITRATOR BIENVENU: Well, it's been a long day. Is there anything that absolutely needs to be raised now, as opposed to when we resume next Monday? Looking at the claimant.

MR. ALI: I apologize. Nothing from claimant's side, Mr. Chairman, other than thank you for a good week.

ARBITRATOR BIENVENU: On the respondent's side, Mr. LeVee?

MR. LeVEE: Nothing beyond wishing everyone a very nice weekend. We will see you on Monday.

ARBITRATOR BIENVENU: Those are wishes I send back from everyone on the Panel.

I wish to thank everyone for what I know was an extremely demanding week. We are certainly impressed, but mostly very grateful for the extraordinary work of counsel throughout the week, and in particular for going through our demanding agenda today.

So thank you all. Have a good weekend. We resume on Monday at the normal hour. And the next witness is?

MR. ALI: Mr. McAuley.

ARBITRATOR CHERNICK: Is the normal hour 8:00 a.m. Pacific?

ARBITRATOR BIENVENU: That's correct.

ARBITRATOR CHERNICK: Okay. That's fine.

ARBITRATOR BIENVENU: Thank you all. And I wish you all a restful weekend.

ARBITRATOR KESSEDJIAN: Have a good weekend.

MR. LITWIN: Thank you.

MR. LeVEE: Have a good weekend.

(Whereupon the proceedings were concluded at 1:18 p.m.)

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REPORTER'S CERTIFICATE

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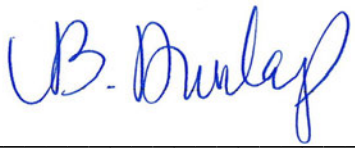
STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 18th day of August, 2020.



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INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD., Claimant,	)	
vs.	)	ICDR Case No. 01-18-0004-2702
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	

VOLUME VII

ARBITRATION HEARING HELD BEFORE

AUGUST 11, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR 465538

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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TUESDAY, AUGUST 11, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME VII (Pages 1113-1308)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

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CALIFORNIA, AUGUST 11, 2020

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ARBITRATOR BIENVENU: Mr. Livesay, good morning. Good morning, sir. I don't know where you're joining us from, but I made the presumption that "good morning" would work.

THE WITNESS: Yes, it's morning. I am here in California.

ARBITRATOR BIENVENU: Excellent. Sir, could I ask you to speak closer to your mic or to increase the volume of your mic?

THE WITNESS: Is that better? Can you hear me now better?

ARBITRATOR BIENVENU: It is better, but we could do with a bit more volume.

THE WITNESS: Let me put the mic here in front of my face. How about that?

ARBITRATOR BIENVENU: Mr. Livesay, my name is Pierre Bienvenu. I chair the Panel. My colleagues are Catherine Kessedjian, who is joining us from Paris, and Mr. Richard Chernick, who is joining from Los Angeles.

You have, sir, filed in connection with this Independent Review Process a witness statement dated 1st June 2020, correct?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: And your statement ends with your swearing that the statements in your witness statement are true and correct?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: I would ask you, sir, in relation to the evidence that you will give to the Panel today, likewise, solemnly to affirm that it will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Thank you.

Mr. Johnston.

MR. JOHNSTON: Good morning, Mr. Livesay. Have you recently had an opportunity to review your witness statement?

THE WITNESS: I have over the last few days.

MR. JOHNSTON: And are there any corrections you wish to make to it?

THE WITNESS: I think the only clarification is there might be where I said not four --

(Discussion off the record.)

ARBITRATOR BIENVENU: Maybe, Mr. Livesay,

maybe you could put your mic on something else so it would be higher up. If you rest it on a book or binder or whatever, it will be closer to you.

(Discussion off the record.)

ARBITRATOR BIENVENU: I believe Mr. Johnston was asking if you had any corrections that you wish to make to your witness statement, and you were cut off in the course of your answer.

THE WITNESS: Right. I was simply stating there's a point where I said I may have talked to four or five of the potential set members, and I can confirm I have only talked to four, not four or five. It is a clarification. I don't think it is inconsistent with the original statement.

MR. JOHNSTON: Mr. Chairman, we offer Mr. Livesay for cross-examination.

ARBITRATOR BIENVENU: Thank you very much, Mr. Johnston.

Mr. Litwin, you ready to proceed with your cross-examination?

MR. LITWIN: I am, Mr. Chairman. Thank you very much.

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BY MR. LITWIN

Q. Good morning, Mr. Livesay. My name is Ethan Litwin. I am from the law firm of Constantine Cannon. I understand that you have likely received a package from us, as has Mr. Johnston, and I would ask that you both open them now.

A. All right.

Q. Mr. Livesay, as you will see, in fact, if you just turn to your witness statement, which is behind Tab 1, you'll see that we've marked each page of the documents in that binder with a unique page number. When I direct your attention to these documents, I will refer to that unique page number, okay?

A. The lower right-hand corner?

Q. Correct.

A. Okay.

Q. Now, there are a few documents that are not in the binder. Those will be on the screen. So I assume that you have been able to see on your screen the documents that Chuck has been pulling up this morning?

A. Yes.

Q. Okay. You're a little faint again, but I think I can make it out.

A. I think it is just because when I look away.

(Discussion off the record.)

Q. BY MR. LITWIN: All right. We are in business.

Mr. Livesay, can you please tell me, in addition to your witness statement, what other documents you reviewed to prepare for your testimony here today?

A. I reviewed some of the filings, I believe Afilias' filing from May, and then I also read through some of the filings afterward, including Afilias' response and some of the other papers, but largely just the filings over the last couple of months.

Q. Did you look at any of the exhibits that were referenced in those filings?

A. Exhibits -- I just read the filings mostly directly.

Q. Okay. Mr. Livesay, you were employed at VeriSign as a vice president and associate general counsel between 2014 and 2018; is that correct?

A. Correct.

Q. And you had previously worked at VeriSign in 2009-2010 as the vice president, strategy and management for VeriSign's digital certificate business; is that correct?

A. Correct.

Q. And in 2010, you left VeriSign to join Symantec when it acquired VeriSign's certificate business; is that right?

A. Correct. I was sold off in that transaction, correct.

Q. Do you recall the month in 2014 when you returned to VeriSign?

A. I think I started early June, like the first week of June 2014.

Q. And what about the month in 2018 that you left?

A. I believe my last day was early May of 2018.

Q. And what was the reason for your departure in 2018?

A. I live in the Silicon Valley and VeriSign is in Reston, Virginia. I was commuting every other week for almost -- well, a long time. I got separated from my wife in 2017 and ultimately just had to return home.

And at that same time my mother was going through a severe decline, had to take over as her medical attorney-in-fact, and she went into hospice. So I had that kind of stuff.

Q. Understood, Mr. Livesay.

A. I also wanted to take care of some stuff.

Q. Did you sign any sort of termination agreement when you left VeriSign?

A. I'm sure I was exited as part of a reduction in force. I am sure there was some forms that I signed or whatnot.

Q. Did you sign anything related to providing VeriSign with assistance in matters relating to disputes concerning .WEB?

A. I don't recall anything like that as a part of my departure, no.

Q. Since you left VeriSign, where have you been employed?

A. Since leaving VeriSign, I am basically working as an independent attorney contractor, as you say, because I was dealing with a lot of other family stuff at the time.

Q. Have you done any work for VeriSign since leaving in 2018?

A. No, not until they contacted me in early

May regarding this matter.

Q. In early May of?

A. This year.

Q. Of this year?

A. Yeah.

Q. Are you providing your testimony in this case pursuant to any contractual agreement with VeriSign?

A. No.

Q. Have you been compensated in any way for the assistance you have provided to VeriSign in connection with these disputes concerning .WEB?

A. Nope.

Q. Do you have any financial interest in the outcome of the .WEB dispute?

A. Nope.

Q. Okay. In 2014 you were asked to identify potential business opportunities for VeriSign in ICANN's new gTLD Program; is that right?

A. Yeah, towards the end of '14, yeah, I began -- I started middle of '14 I was doing some stuff having to do with strategy and the patent group stuff. Later in the fall I kind of got into this program, yeah.

Q. Who gave you this assignment?

A. My boss at the time, Tom Indelicarto, and Jim Bidzos, the CEO.

Q. Mr. Bidzos personally instructed you to identify opportunities in the new gTLD Program?

A. I worked for two people at the company, my immediate boss and his boss. I do what they ask me to do.

Q. Well, my question is: Do you recall receiving this assignment from somebody?

A. You know, we had small discussions. I don't recall a specific -- I am not really sure what you're asking, because, like I said, I had discussions with these two executives, and I was asked to pursue and find opportunities in this area.

Q. Okay. That's fair enough.

Just for the court reporter, could you spell Indelicarto and Bidzos for her?

A. This is going to be good. Indelicarto, I-n-d-e-l-i-c-a-r-t-o, Indelicarto, I think.

Q. I think that's right.

A. Bidzos, B-i-d-z-o-s.

Q. Thank you. Did you report back to Mr. Indelicarto or Mr. Bidzos as you proceeded to work on this assignment?

A. Sure, absolutely.
Q. How often?
A. Probably weekly or biweekly as we progressed trying to investigate this area. Obviously -- go ahead. Sorry.
Q. In what form did you report back, was it in writing, email, memo, small meetings?
A. Most commonly small meetings talking about the development and progress of matters.
Q. Did you collaborate on this project with anyone else at VeriSign?
A. Not sure what you mean by "collaborate," depending on where in the project we were. Early on it was a very small group. As we got into later, working on the agreement became more involved. There were other attorneys involved in the drafting and that kind of stuff.
Q. So let's break this into the -- what I'll call the investigative stage and the contracting stage; is that fair, Mr. Livesay?
A. Within reason, yes, that's probably fair.
Q. Okay. So during the investigative stage, how big was the group you were working with?
A. It was pretty small. A little project group. I don't know entirely who else might have

been aware of the project outside of the few executives I mentioned. I am not telling anyone outside my -- those folks at that time.

Q. So outside of Mr. Bidzos and Mr. Indelicarto, is there anyone else who was working with you to identify opportunities in the new gTLD Program?

A. Well, certainly there was some people on the business side who were evaluating and making the decisions whether it makes sense for us to get into the gTLD market.

Q. Who were they -- I'm sorry.

A. I am not sure of everyone. I know I worked with a gentleman by the name of John Cochran at the time who was in the corporate strategy group. I think he rolled up through finance.

To be fair, though, there's a distinction, I think, between the business folks looking at whether it makes sense for us to go into this business and whether or not they were necessarily involved in the project of pursuing opportunities.

What I mean by that is there was a decision to potentially look at this opportunity, but the folks developing that intel maybe weren't necessarily aware of what I was doing in trying to

pursue an actual agreement with a contention member.

Q. Okay. And what was Mr. Indelicarto's title?

A. He's general counsel.

Q. And Mr. Bidzos?

A. He's the chairman, CEO and whatever stuff you could put on there.

Q. Now, when you moved to the contracting time of this project, you mentioned that other lawyers were involved. Who were they?

A. Specifically a guy by the name of Kevin Ristau, R-a-s-t-a-u, I think it is, and Rob Wilson.

Q. And the Panel is familiar with a document called the Domain Acquisition Agreement, which is the agreement you signed with NDC. Did Mr. Ristau and Mr. Wilson draft that document?

A. They were definitely involved in the drafting of that document for sure.

Q. Were you involved in the drafting of that document?

A. Sure.

Q. I'm sorry, didn't hear that?

A. Yes.

Q. Did you work with Mr. David McAuley on

this project at all?

A. I don't recall that name, no, not on that project.

Q. Do you know Mr. McAuley?

A. The name sounds familiar. Maybe he's a VeriSign person, but it's been a while. I don't recall.

Q. That's the same exact answer he gave about you. He knew your name, but wasn't familiar.

Now, you got this project in 2014, and that was after the new gTLD application window had closed, correct?

A. I believe the application window closed in '12, so yeah.

Q. Following the closure of the application window, VeriSign had raised concerns with ICANN about the risk of name collision; is that right?

A. I am not sure. I don't know. I think that's handled within another group within VeriSign.

Q. So are you aware that name collision concerns the risk that delegation of new gTLDs could interfere with the attempts to reach a private domain and instead would result in resolving to a public domain as well?

A. I thought you asked whether I was aware somebody had communicated about it. I thought that's what you asked. I am aware of the concept of name collision.

Q. Okay. And just to be clear that we understand what name "collision" is, so if there were a registry for, let's say, .HOME or .CORP, for example, a lot of people use those for their private Internets, right?

A. I don't know. That's not my expertise.

Q. Would it be fair to say through its lobbying efforts on name collision, VeriSign managed to at least preliminarily take close to 10 million domain names off the market in 2013?

A. I have no idea what you mean by VeriSign's lobbying, and I was not with the company in 2013.

Q. In January of 2014, ICANN announced that it had received over 1,900 applications for new gTLDs.

Do you recall that?

A. I wasn't with the company at that time. You said January '14; is that right?

Q. Yes.

A. No. I joined in June of '14.

Q. Did you follow the progress of the new

gTLD Program during your time at Symantec?

A. No. Prior to joining VeriSign in 2014, I had never been a part of the DNS world. Prior to that, my history in security infrastructure had been on the encryption side and then on the certificate side. So me coming to VeriSign related to the naming business was a new industry to me.

Q. Okay. When you joined VeriSign in June of 2014, were you aware that ICANN had announced that it had received over 1,900 applications for new gTLDs?

A. I am aware that they received a lot of applications. That number sounds correct.

Q. And did you become aware in June of 2014, when you began work on this assignment -- scratch that.

When you returned to VeriSign, did you become aware that ICANN had announced that it was possible that the DNS would end up expanding by over 1,300 gTLDs; is that right?

A. Certainly as I looked into the gTLD program, I became aware of the large increase in number of TLDs that would become available potentially.

Q. And over the course of 2013 and 2014, are

you aware that quite a few articles had been published from the financial press raising concerns about the slowdown in the growth of the .COM registry?

A. I wasn't with the company in 2013.

Q. Well, in your discussions with Mr. Bidzos, the CEO, and Mr. Indelicarto, the general counsel, did they disclose to you that there had been concerns raised about the slowdown in the growth of the .COM registry?

MR. JOHNSTON: Excuse me, Mr. Chairman, I'd like to ask the witness to be conscious of the fact that that question specifically refers to conversations with Mr. Indelicarto, who is the general counsel of the company, and ask the witness, in the event of answering the question, it might divulge any attorney-client communications with Mr. Indelicarto, that he alert us so that doesn't happen. Thank you.

MR. LITWIN: If I might respond briefly, Mr. Chairman, I think we've established that the meetings between Mr. Livesay, Mr. Indelicarto and Mr. Bidzos concerned the business side of VeriSign. I am asking a business question. I am not asking for the witness to divulge any legal advice.

ARBITRATOR BIENVENU: I understand your point, and Mr. Johnston did not object to the question. He simply cautioned the witness not to disclose what could be privileged communications in the course of his answer.

Unless Mr. Johnston advises otherwise, I did not hear him object to the question.

MR. JOHNSTON: That's correct.

MR. LITWIN: Okay. Thank you, Mr. Chairman.

Q. Mr. Livesay, I will echo Mr. Johnston's comment that at no time during my examination I would ask you to reveal the substance of a privileged communication. And please tell me if my question, in your mind, elicits one.

My question is: Over the course of your discussions with Mr. Indelicarto and Mr. Bidzos concerning the -- finding opportunities for VeriSign in the new gTLD Program, did they reveal to you that during 2013 and 2014 there had been articles published in the financial press raising concerns about the slowdown in the growth of the .COM registry?

A. I don't recall having any specific discussions with Bidzos about that. I do know that

there has been obvious legal history and work around that topic, but I am not a competition attorney. I am not involved in the running of .COM. That was a separate business unit, and I was really invoked to try to find ways that the company could simply have more opportunities at other domains to sell more domain.

The history of .COM was a separate running enterprise, not my forte.

Q. Now, in 2015, VeriSign sought to acquire the rights to the .WEB registry by concluding the DAA; is that correct?

A. I'm sorry, say that again?

Q. In 2015, VeriSign sought to acquire the rights to the .WEB registry by concluding the DAA with NDC; is that correct?

A. I don't know about the DAA, period. There are several steps in that agreement. The goal was hopefully finance or help NDC finance, win the auction, and if they became the registry, that they would seek to have it assigned to us.

So there were definitely some steps involved. I don't know if I would say -- use your description about finally signing.

Q. Well, let me rephrase it, Mr. Livesay.

Is it fair to say that the ultimate objective that VeriSign sought to achieve by entering into the DAA with NDC was the acquisition of the rights to the .WEB registry?

A. The goal was for us to become the operator of .WEB.

Q. And VeriSign has not signed any other deals to acquire other gTLDs; is that right?

A. Not that I am aware of. Not in the time that I was there.

Q. Were you aware, as you worked on this project during the end of 2014 and 2015, that the .COM Registry Agreement was due in the fall of 2016?

A. I don't recall being aware of that at the time, no.

Q. Is it fair to say that the .COM Registry Agreement is the single most important contract that VeriSign has?

A. I don't think I'd be a good judge of that.

Q. Well, .COM is responsible for over a billion dollars in revenue for VeriSign; isn't that right?

A. That's true. But you asked if that's the most important agreement. I don't know. I don't

run that business. I am not part of that business. I don't know.

Q. Would it be fair to say -- strike that.

In connection with your assignment in 2014 to identify potential business opportunities in the new gTLD Program, you state in your witness statement that you studied very closely the new gTLD application guidebook; is that correct?

A. I did, yep.

Q. And the auction rules?

A. When we got around to the auction, yep.

Q. And the other rules -- let me step back.

So when you say when you got around to the auction, does that mean that you studied those rules in the run-up to the auction in 2016?

A. At some point I would have been reading the auction rules and become aware of them. I don't recall exactly when, but yep.

Q. Well, was that before or after you executed the DAA -- or VeriSign executed the DAA in August of 2015?

A. I don't recall reviewing auction or bidding agreements prior to signing the DAA, but I don't know. I don't recall it.

Q. And did you study the other body of rules

that comprise the relevant rules that govern the new gTLD Program?

A. Like what?

Q. Well, you mentioned -- let's look at your witness statement. If you can turn to Tab 1 in your binder, and I would direct your attention to Paragraph 5, you write, "I studied very closely the new gTLD Application Guidebook published by ICANN, the Auction Rules, and other information regarding the new gTLD Program on ICANN's website to familiarize myself with the rules applicable to the Program."

So I guess my question is, Mr. Livesay: Other than the guidebook and the auction rules, what other rules did you review?

A. You know, I think generally I am referring to -- the ICANN website has a lot of information on it. Anything I could read, I did. That's where I found information about, say, applicants, what they had done, where they are located. I think that end there is saying I used the ICANN website as the primary source of information for how the program is run and the applicants and the contention sets.

Q. Redacted - Third-Party Designated Confidential Information

Redacted - Third-Party Designated Confidential Information

A.

Q. I would now like to refer to you Tab 4 in your binder.

A. You know, I am just looking at this side of the paper. That's why I'm looking down.

Q. Okay. That's fair. I am going to be largely doing the same thing over here.

Chuck will put things up on the screen in case it is unclear.

So these are some significant excerpts from the new gTLD guidebook, and I will just represent to you that we've included the entire module where we have accepted the module, but we do have the entire version available electronically.

I would like to direct your attention to Page 95. And on Page 95 you will see Rule 4.1.3, which you discuss in your witness statement.

This section is entitled "Self-Resolution of String Contention."

Do you see that, sir?

A. Yep.

Q. Now, it provides that, "Applicants that

are identified as being in contention are encouraged to reach settlement or agreement among themselves that resolves the contention."

It goes on to say, "Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications."

It goes on to say, "It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention," and then concludes, it says, "Accordingly," and I would interpret that as "however," given how we have gone through this, that, "new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to reevaluation."

Do you see that, sir?

A. Yep.

Q. So it's fair to say that ICANN encourages applicants to resolve contention sets among themselves before an ICANN auction; is that fair?

A. That's fair.

Q. And one of the ways in which ICANN envisioned that this may happen was by establishing joint ventures among themselves; is that right?

A. It says it right there, correct.

Q. But ICANN cautions applicants that in creating joint ventures, they shouldn't do so in a manner that would require reevaluation under the rules, right?

A. That's what it says.

Q. Okay. If you could please turn back to Page 32 of Tab 4, you will see Rule 1.2.7 there.

Do you see that, sir?

A. What page number are we on?

Q. Page 32 of Tab 4.

A. All right. Yep.

Q. And what Section 1.2.7 provides, it says, "Notice of Changes to Information. If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms."

And then at the bottom, it says that, "ICANN reserves the right" -- I guess it is in the middle, rather -- "reserves the right to require a re-evaluation of the application in the event of a material change"; is that right?

A. That's what it says.

Q. Now, you can turn back to Page 95 if you want, where Rule 4.1.3 is, but is it fair to say

that the lesson you drew from reviewing Rule 4.1.3 is that when applicants were seeking to resolve contention among themselves, ICANN's primary concern was that they did so in a way that would not require reevaluation and thus not cause delay in the resolution of the contention set; is that fair?

A. It seems to be that they knew or were expecting that people would resolve contention sets through various agreements and simply wanted to ensure that -- to try and do it in a way that did not trigger reevaluation. I agree with that statement.

That seemed to be what they were encouraging and were also aware and wanted to be clear, don't do anything that actually changes the organizational function. I think they say -- I don't recall where, but having an entity acquire an applicant might require reevaluation. So they gave some examples, I believe, about things you could or shouldn't do. It seemed to be that's what they were looking for in the guidebook.

Q. Now, of course, you were aware at the time that VeriSign was not an applicant for .WEB; is that right?

A. That's correct.

Q. Now, Section 1.2.7 requires applicants to notify changes in their application via submission of the appropriate forms, correct?

A. No. It says a material change to the applicant or that becomes untrue or inaccurate. I don't believe anything in the application of NU DOT CO changed.

Q. Let's just keep it general for now, Mr. Livesay. I will agree with you that where -- and I believe this is what you're saying, but if you would confirm that Section 1.2.7 provides that where a -- where information in the application that had been previously submitted by the applicant becomes untrue or inaccurate, that applicant must promptly notify ICANN via submission of the appropriate forms?

A. Correct. If something's untrue or inaccurate, the applicant needs to do that.

Q. Now, those forms were analyzed pursuant to ICANN's change request criteria, correct?

A. I don't know what form you're talking about.

Q. You did not familiarize yourself with the ICANN application portal?

A. We weren't making any changes to an application requiring submission of a form. It sounds like you jumped over something in this last question, that's all.

Q. So Section 1.2.7 says if an application previously submitted has information in it that becomes untrue or inaccurate, the applicant must promptly notify ICANN, correct?

A. Yeah. And you had asked me whether or not I looked at the form, and I said no, because we didn't do anything that changed the applicant that made it untrue or inaccurate.

Q. Okay. Right now I am just trying to inquire, Mr. Livesay, into your review of the ICANN rules and procedures governing the new gTLD Program. We'll come back to the particular transaction in a minute.

Chuck, can you put up Exhibit C-56, please.

ARBITRATOR BIENVENU: Is that in the binder, Mr. Litwin?

MR. LITWIN: It is not. I apologize, Mr. Chairman. There's a handful of documents that are not in the binder.

Chuck, if you could just blow up -- yeah,

that part. That would be great.

Q. This is a document from ICANN's website called the "New gTLD Application Change Request Process and Criteria."

Have you seen this document before?

A. Doesn't look familiar to me, nope.

Q. So when you say that you carefully studied the rules and procedures governing the new gTLD Program, you did not review the change request process?

A. I didn't say that. I am saying it doesn't look familiar. Right now I can't see the document on the screen because you have this thing blown up in front of it.

MR. LITWIN: Chuck, can you please take that off. Is there any way to blow up the whole document, or at least the first page of it?

THE WITNESS: Your question was did I review this when I reviewed the guidelines?

Q. BY MR. LITWIN: Correct.

A. When I went through the guidelines, I looked for things that seemed relevant, and when I got to something like this, which said "Change Request Process," I look at what the requirement is, doesn't apply, so I move on.

Q. Okay. So is it fair to say you did not discuss the change request criteria with NDC?

A. Nope.

Q. Is it also fair to say in your work on the DAA you did not consult with ICANN regarding the applicability of the change request criteria?

A. Say that again?

Q. And is it fair to say that in connection with your work on the DAA, you did not consult with ICANN regarding the applicability of the change request criteria?

A. Correct. I didn't contact ICANN in this regard, no.

Q. And it is true, Mr. Livesay, that NDC, in fact, never filed a change request with ICANN; is that right?

A. As far as I am aware.

Q. Okay. Now, directing your attention to the first page and to the section called change request overview, you can see that the document quotes that part of 1.2.7 that we just reviewed, that when, "any time during the evaluation process information previously submitted by the applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the

appropriate forms."

Do you see that, sir?

A. I see that, yep.

Q. And ICANN notes that the Application Change Request process was, in fact, created "in order to allow applicants to notify ICANN of changes to application materials."

Do you see that at the bottom of that?

A. Yep.

Q. Now, if we can look at the next section, it identifies seven criteria, and it is on the bottom of this first page and the top of the next page. I will just wait a second for Chuck to blow that up for you.

And the seven criterion are, one, explanation; two, evidence that the original submission was in error; three, other parties affected; four, precedents; five, fairness to applicants; six, materiality; and seven, timing, correct?

A. That's what it says.

Q. Now, ICANN states right below this -- and Chuck, if you could blow that up -- that, "These criteria were carefully developed to enable applicants to make necessary changes to their

applications while ensuring a fair and equitable process for all applications."

Do you see that, sir?

A. I see where that's written, yeah.

ARBITRATOR BIENVENU: "For all applicants," not "for all applications."

MR. LITWIN: "For all applicants." Sorry. I misspoke, Mr. Chairman.

Q. Let's move down to the next section, which goes through these criterion in more detail.

So the first -- maybe just -- yeah, pull up that whole box so we don't have to keep doing it. That's great.

So the first criterion is explanation. This is, as ICANN says here, simply an opportunity to allow the applicant to provide an explanation for the change.

A. If you weren't making a change, this wouldn't apply, correct?

Q. Excuse me?

A. Since we didn't make a change, this wouldn't apply, we didn't need to provide an explanation if the change hadn't been made, correct?

Q. What I am doing, sir, is just going

through the document so that we understand what ICANN provided as their criterion. We'll come back and look at the NDC application.

A. Right. When you read this, if you step into these seven criteria on the presumption that a change has been made and an application for a change has been made, I agree these are all written, but we didn't request a change because an applicant -- and NDC's application wasn't altered.

Q. I understand that. I understand that that is what you have testified to here today, Mr. Livesay.

What I am trying just to establish is that in the event that a change request had been submitted, these are the criterion that ICANN would have looked at, correct?

A. That seems to be the case. It is right there in black and white.

ARBITRATOR BIENVENU: Mr. Litwin, this is Pierre Bienvenu. Could I ask your colleague Chuck to blow the introductory paragraph to the text that we are looking at now. Thank you. This puts the subparagraphs in context. Please continue with your questions.

MR. LITWIN: Thank you, Mr. Chairman.

Q. So in the event -- and I'll phrase it like that so it is clear, Mr. Livesay. In the event that a change request was submitted to ICANN or -- I'll use the subjunctive -- were to be submitted to ICANN, ICANN would first look at the explanation.

But is it fair to say that because this is simply an opportunity to allow the applicant to provide an explanation for the change, the criterion is always satisfied and does not bear as much weight as the others; is that fair, Mr. Livesay?

A. I have no way of understanding of how ICANN would weigh these in your hypothetical. You are presenting a hypothetical to which you want a hypothetical answer. I don't know.

Q. So what this says, and I will quote, it says, "As such, this criterion is always met and does not bear as much weight as the other criteria."

Is that what it says, sir?

A. That's what it says.

Q. So turning next to evidence that the original submission was an error. You know, I think we can agree that even if NDC had submitted a change request, which you testified they did not,

to your knowledge, this would not apply, in any event, correct?

A. I don't know. I don't know. You are creating a hypothetical which you want me to create an answer to. I don't know. They did not submit a change request because no change was made, and now you're asking me to apply these rules that ICANN would in your hypothetical.

Q. Well, fair enough, Mr. Livesay. In the event that a change request is submitted --

A. This is a hypothetical question?

Q. Yes. In the event that a change request were submitted to ICANN and it does not concern an error in the original submission, but rather a changed circumstance, this criterion would not apply; is that correct?

A. I am not really familiar with how ICANN applies these rules. You're reading the words the same as I am right now.

Q. Let's skip down to "Precedents" and look at that one. Here ICANN notes that if a change request would create a new precedent, that change request would be unlikely to be approved; is that fair?

A. I am reading the same words you are.

Q. Well, is it fair, Mr. Livesay, based on your reading of the same words that I am, that if a change request were to create a new precedent, that change would be unlikely to be approved?

A. That's what the words say. How ICANN interprets it, I don't know.

Q. Now, going back to the "Other third parties affected" criterion, this criterion evaluates whether a change request materially impacts other third parties, particularly other applicants; is that correct?

A. That's what it says.

Q. And, in fact, it says that in cases where a change to application material has the potential to materially impact the status of another applicant's application, this criterion is heavily weighted; is that correct, sir?

A. You read the line.

Q. Now, closely related to the "Other third parties affected" criterion is the "Fairness to applicants" criterion. Here ICANN notes that it will evaluate change requests to determine whether granting the request, quote, "would put the applicant in a position of advantage or disadvantage compared to the other applicants,"

correct?

A. That is what it says.

Q. And ICANN further states that, quote, "if a change request is found to materially impact other third parties, it will likely be found to cause issues of unfairness," right?

A. That's what it says.

Q. In other words, if granting the change would be unfair to other applicants, this criterion would weigh against granting the change, correct?

A. I don't know if your rewording is accurate or the way ICANN would read it. I go with the words that are on the page.

Q. The next criterion is "Materiality," which notes that ICANN will consider whether a change request will impact competing applications, correct?

A. That's what it says.

Q. So if a change request would impact other members of a contention set, that would satisfy the materiality criterion, correct?

A. I mean, I am just reading the words here. I am not really sure what you're trying to read differently.

Q. I am not trying to read anything

differently, Mr. Livesay. I am just asking that this "Materiality" criterion provides that if a change request would impact other members of a contention set -- and you can see the word "contention set" in Line 2?

A. Yep.

Q. Do you see that?

A. Yeah.

Q. I'm sorry, are you saying "yes" or "yep"?

A. Yes, I see where you have highlighted.

Q. Then the "Materiality" criterion would be satisfied; isn't that correct?

A. I don't see the word "satisfied" in there.

Q. Well, you understand that these criterion are used by ICANN to determine whether or not to approve a change request; is that right?

A. That's why I defer to how ICANN interprets something. You are providing interpretations of your reading, and I would have to defer to ICANN's interpretation. You are providing hypotheticals for a situation I don't believe we are in.

Q. I am just reading the rules.

A. You are reading them and then asking me to affirm your ultimate reading where you change a few words. You can read them, and I will affirm the

words on the page are what they are, but I have no reason to take an interpretation because this isn't a world -- a situation we were in. I will defer to ICANN. How can I put my mind in what ICANN would use in the seven criterion?

Q. Is it fair to say, Mr. Livesay, as you conducted your review of the rules in the guidebook, for example, you just looked at the plain language of the rule and just applied that in terms of your thinking about how to structure a transaction?

A. Certainly not. I am not really sure where you get that interpretation.

Q. Well, what I am asking --

MR. JOHNSTON: I would ask Mr. Litwin to allow the witness to finish his answer before interrupting with another question.

MR. LITWIN: I apologize. I thought he was done.

Q. Please continue, Mr. Livesay.

A. I don't remember what the question was. Where were we?

Q. Let me go back, because I think it was a poorly-phrased question, and allow me to rephrase it for you.

In reviewing these change request criterion, you say -- well, you agree that that's what it says, but, you know, if you're trying to interpret it, it is really ICANN's job to interpret it; is that right?

A. You presented on the screen right now the seven criteria after a change request was submitted and what ICANN would use to evaluate. This isn't the standard for how you get into a change request. This is once it is already there.

You asked previously did I look at the rule and just decide there not to go through a change request. No, there's a lot of factors. There's a lot of rules.

I looked at other transactions going on in the market. I saw disclosures of different companies having funded other activities of other applicants. I see elsewhere in the guidebook where it encourages parties to resolve without changing their application so as to not delay or have the string -- I guess "delay" is the right word, or put on hold. So there's a lot of factors that went into this.

But at the end of the day, the path we took is we are not looking to become the applicant.

We are looking to become the registry of this domain and to try to help fund NDC to win the auction. And if they ended up winning and we successfully signed a Registry Agreement, they would then apply to have it assigned to us, and we would be evaluated at that time.

So I don't think there's anything -- we were following -- we had a lot of different things, both through what we see in the marketplace and what the guidebook suggests, and we think we did it correctly.

Q. So, Mr. Livesay, I am not trying to imply here that NDC submitted a change request. I think we have established that NDC did not submit a change request.

What I am trying to do is to progress through a set of ICANN rules that inform how ICANN would consider a change request and asking you what your view of the rule is outside of what may or may not have happened regarding NDC.

A. And I have told you before, it is hard to give you hypothetical answers to hypothetical questions. So you just read one rule, and did it go this way, no, it is not that.

Like I said, the way we approached this is

we are reading the rules. We are looking at activities in the marketplace. We are looking at what other strings and how other contention sets get resolved. We look at other information in the guidebook itself that suggests, recommends parties reorganize themselves in a way that doesn't require reevaluation, and we think we did that correctly.

Q. Mr. Livesay, is it fair to say that this document that we are looking at now, Exhibit C-56, concerns how ICANN evaluates change requests?

A. That is exactly what it says.

Q. And is it also fair that this document informs whether or not a change request should be filed?

A. That doesn't tell me that, no.

Q. So the description that ICANN provides here about how it goes about evaluating and the things it considers in evaluating a change request has no bearing whatsoever to the decision on whether or not to file a change request?

A. As I look at the document, there's a criteria for filing the change request, which we did not think applied, and these standards here, as I read them, are once you're in that realm, this is how those change requests would be addressed. It

would seem unusual to think that the change request criteria are how you get into the change request criteria, seems circular the way you have described it.

Q. So the rule -- if we can turn back to the first page of this document, C-56, ICANN quotes the rule from the applicant guidebook?

A. That's right.

Q. That says if any information previously submitted by an applicant becomes untrue or inaccurate, that applicant is obligated to promptly notify ICANN, correct?

A. That's what it says.

Q. And turning through this document, it does suggest that, well, in determining whether or not Rule 1.2.7 applies, whether those changes would be unfair to applicants, whether those changes would create new precedents, whether those --

A. You are jumping again. Those changes, if there are no changes, you can't bootstrap yourself into the criteria. There were no material changes that made the application untrue and inaccurate.

Q. Okay. We'll come back to that. We'll come --

MR. JOHNSTON: Stop interrupting.

THE WITNESS: I am confused at what you're asking at this point, I guess.

MR. JOHNSTON: Your Honor, Mr. Chair, I object to this line of questioning. We have been spending a lot of time on this document, and virtually every question posed lacked foundation and most just asked the witness to read the document.

If Mr. Litwin wants to make these arguments in closing argument, that's appropriate. But to spend all this time with the witness asking questions that lack foundation is not appropriate.

ARBITRATOR BIENVENU: Your objection is noted, Mr. Johnston.

As to the question of foundation, Mr. Livesay, may I ask you just to clarify your evidence as regards the knowledge that you had when you familiarized yourself with the guidebook of the requirement to notify ICANN of changes in an application.

I am looking at Page 32 of the rough transcript, and Mr. Litwin, having displayed the document we have been talking about, said, "This is a document from ICANN's website called the 'New gTLD Application Change Request Process and

Criteria.' Have you seen this document before?"

Your answer was, "It doesn't look familiar to me, nope.

"Question: So when you say that you carefully studied the rules and procedures governing the new gTLD Program, you did not review the change request process?

"Answer: I didn't say that. I am saying it doesn't look familiar. Right now I can't see the document on the screen because you have got -- you have this thing blown up in front of it."

And then we went on.

Let me ask you this, Mr. Livesay: Was it a concern to you, as you were considering on behalf of VeriSign the potential of striking a deal with NDC, that the agreement not trigger a notice of change to information under Section 1.2.7 of the guidebook?

I'm sorry, please --

(Discussion off the record.)

THE WITNESS: I said that's correct, we were looking for --

(Discussion off the record.)

ARBITRATOR BIENVENU: Shall I repeat my question?

(Discussion off the record.)

THE WITNESS: Please repeat the question.

(Discussion off the record.)

ARBITRATOR BIENVENU: Okay. So I am going to read it, Mr. Livesay, so I don't interpret it.

"Was it a concern to you, as you were considering on behalf of VeriSign the potential of striking a deal with NDC, that the agreement not trigger a notice of change to information under Section 1.2.7 of the guidebook?"

THE WITNESS: That is correct. It was a concern --

(Discussion off the record.)

THE WITNESS: So yes, it was a concern that we not trigger or do anything to change the application that would trigger a reevaluation because we knew that that -- couple of things. One, the guidebook suggests, one, to try and resolve things without triggering reevaluation.

Two, if it did trigger reevaluation, that might actually delay the string in getting resolution. So yeah, it was a concern of ours to not trigger that.

ARBITRATOR BIENVENU: Excellent.

Now, given that this was a concern, as you

sit here today, do you recall looking at the form on which you were questioned in the past 15 minutes entitled "New gTLD Application Change Request Process and Criteria," do you recall looking at that?

THE WITNESS: I recall only the portion -- the reference to 1.2.7. I don't recall specifically the other, but this was a long time ago, five or more years, and the guidebook is a long document.

ARBITRATOR BIENVENU: Very well. Very well. I am sorry for the interruption, Mr. Litwin. Please proceed.

MR. LITWIN: Thank you, Mr. Chairman.

Q. I just have two more questions on this document, Mr. Livesay. If you look at the next page, Page 3 of this document, is it your understanding that where change requests were submitted to ICANN, they were posted on ICANN's website?

A. Are you asking if I'm aware whether they were?

Q. Yes.

A. I don't recall one way or the other. I decline whether I knew that or not.

MR. LITWIN: Mr. Chairman, perhaps this is a good time to take our first break today. I am at a good breaking point in my outline.

ARBITRATOR BIENVENU: Very well. Mr. Livesay, we are going to break for 15 minutes. I am required by our sequestration order to ask that you not discuss your evidence during the break.

THE WITNESS: That's good.

ARBITRATOR BIENVENU: Thank you very much, sir. So we will resume in 15 minutes, and you'll be brought virtually to a separate room.

THE WITNESS: Okay. Thank you.

ARBITRATOR BIENVENU: Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Thank you very much. Mr. Johnston, you are there?

MR. JOHNSTON: Yes, I am.

ARBITRATOR BIENVENU: Mr. Litwin, and is Mr. Livesay back with us?

MR. ENGLISH: No, he's in the waiting room.

ARBITRATOR BIENVENU: Okay. So you may bring him back.

You ready to proceed, Mr. Litwin?

MR. LITWIN: I am, Mr. Chairman.

MR. ENGLISH: Okay. Mr. Livesay has joined the meeting, and if he could unmute himself.

THE WITNESS: You can hear me all right with the new microphone?

ARBITRATOR BIENVENU: We can hear you.

MR. LITWIN: Much better.

ARBITRATOR BIENVENU: Thank you very much. So, Mr. Livesay, under the same solemn affirmation, Mr. Litwin, please proceed.

Q. BY MR. LITWIN: Mr. Livesay, I just wanted to ask you one last question about -- and just to clarify your earlier testimony, about the change request criterion document that we have been reviewing, Exhibit C-56, I think what you said, that it did not matter what you or VeriSign think about the rules set forth in here, I think your testimony was it's what ICANN thinks that matters; is that a fair statement?

A. You read the provisions and then you rephrased them and asked me if your rephrasing was fair. I simply said I defer to ICANN how they would interpret the plain language of these provisions.

Q. Okay. Thank you.

So moving on, I would refer you back to your witness statement and Paragraph 5. As you recall from before the break, we left off with the provision in the change request criterion document that says that change requests would be posted to ICANN's website.

And in response to the Chairman's question, you said that you had studied the rules to ensure that there were no changes that needed to be reported to ICANN.

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A. Redacted - Third-Party Designated Confidential Information

Q. Okay. Now, let's turn back to Section 4.1.3 of the AGB. So that's Tab 4 at Page 95.

Are you there, sir?

A. Is that in what you sent me or is this another document that's not in the binder you sent?

Q. No, it is there. It is Tab 4, Page 95.

A. Oh, 95, okay. Got it here.

Q. This rule is titled "Self-Resolution of String Contention" and only concerns transactions among contention set members themselves; is that correct?

A. It appears to be the case, yeah.

Q. Okay. Please turn to Page 124 of this document behind Tab 4, and I direct your attention to what is the last line of Paragraph 10 of Module 6, the terms and conditions.

A. Yep.

Q. What it says here is that, "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application."

Now, this provision is not limited to transactions among contention set members, correct?

A. I am not sure -- say that again.

Q. So where this provision says, "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application," my question to you, sir, is that this provision is not limited to transactions among contention set members?

A. As I read the sentence, it applies to applicant. So I am not really sure what you're

saying about other contention sets. As I read this, it is a restriction on an applicant.

Q. It is a restriction on an applicant that provides that the, "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application" to any third party, correct?

A. I guess. It doesn't say that limitation. The limitation is on the applicant.

Q. I --

A. You're asking me to read something in there that's not there. I mean, maybe you are -- I am not really sure what you're asking me to read into that. It says, "Applicant may not resell, assign, or transfer any of the applicant's rights or obligations." That seems very straightforward.

Q. Any -- sorry, Mr. Chairman.

ARBITRATOR BIENVENU: First of all, can we, just in fairness to the witness, go to Page 120 of that document, just to situate that provision. So this is part of the terms and conditions of Module 6.

You are familiar with that document?

THE WITNESS: I recall reviewing it at great length back in the day. I did not review it

again in advance of this testimony.

ARBITRATOR BIENVENU: Right. Now, focusing back on the text on which Mr. Litwin drew your attention --

THE WITNESS: Yep.

ARBITRATOR BIENVENU: -- do you understand that provision as targeting transactions within a contention set or as targeting transactions generally, whether they involve contention set members or not? I think that's the question that is being asked of you.

THE WITNESS: I see. I don't read that sentence that's highlighted as limited to just within a contention set. It seems to apply to an applicant both inside and outside a contention set. The applicant cannot resell, assign or transfer in and outside of a contention set. That's the way I read it. Is that the clarification you were asking for?

ARBITRATOR BIENVENU: I was just trying to rephrase the question that was asked of you.

THE WITNESS: Got it.

ARBITRATOR BIENVENU: Back to you, Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

Q. In addition to your review of the guidebook and other rules governing the new gTLD Program, Redacted - Third-Party Designated Confidential Information

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Q. Redacted - Third-Party Designated Confidential Information

A. In the sense -- how do you mean, special-purpose vehicles -- go ahead. I am listening.

Q. Perhaps I should just orient you to your witness statement, sir. It is behind Tab 1. If you look at Page 5, Paragraph 9.

A. Oh, correct, right, in terms of special. Like in this example I found that sometimes an entity would have a shell company for each individual company, sometimes held by a parent, or sometimes all the applications were held by one entity, such as the way Google did it with Redacted - Third-Party Designated Confidential Information Charleston Road Registry.

Q. And we can look down at Paragraph 10, where you continue your discussion about the special purpose entities. You write, "For example, Google is identified as the owner of Charleston Road Registry, Inc.," correct?

A. Correct.

Q. And when you say "is identified," you mean identified in the application, correct?

A. Correct. I have not looked at it, but if I recall correctly, you can look at the applications and it will show for each string who the applicant is.

In this case it would show up as Charleston Road Registry. If you then click on it, it will show you the public portion of the application, which would then show who the actual party is, or the contact, I should say.

For instance, if I recall, if I looked up this, it would have said -- on the applicant it would have said Charleston Road Registry, but it would have a contact name, and that contact name I think was a Google address, for example, email, that is.

Q. Yes. In fact, in Section 11 Google is identified in each of Charleston Road Registry's

applications as the owner of Charleston Road Registry.

Do you recall that?

A. I believe so, yeah. Let me see where you're highlighting. Yep.

Q. Now, you also go on to write that, "In other instances, the requirement for a disclosure of the real party in interest was avoided by forming another entity to be the parent of the application, so the real parties in interest were not disclosed as part of the parent entity in the application." And you give an example. You say "Donuts formed 'Covered TLD, LLC,' for example, and made that entity the disclosed parent on many of its applications."

A. Correct.

Q. You see that, sir?

A. Yep.

Q. And in Paragraph 9 you refer to Ruby Glen LLC as a Donuts applicant entity, correct?

A. Correct.

Q. So what you're saying is that the application would have been made on behalf of Ruby Glen, and when you look at the ownership information, it would say, "Covered TLD LLC,"

another shell, in your words, correct?

A. I believe that's correct.

Q. Now, are you aware that the primary contact listed at Section 6 of Ruby Glen's applications was identified as an executive vice president of Donuts?

A. I believe I may recall it might have been a Donuts address, perhaps, the email, perhaps, I think you're talking about.

Q. Well, they give his title as the executive vice president of Donuts, and as you say, there was a Donuts email address associated with that contact person. Does that sound familiar?

A. I don't recall seeing his title on the application, but likely seeing the email.

Q. Do you also recall that at Section 11(b), Ruby Glen identified Donuts' CEO and the chairman of Donuts' Board of Directors as the two people who had legal and executive responsibility for Ruby Glen?

A. I'm sure at some point I looked at who the individuals listed in the application were. I don't recall specifically their names now.

Q. So it wasn't exactly a secret that Ruby Glen was a Donuts special purpose entity, correct?

A. I don't think it was a secret, no.

Q. In the course of your research you learned about an arrangement between Donuts and Demand Media, correct?

A. Correct.

Q. If you could take a look at Page 18 of Tab 1. This is Exhibit A to your witness statement, a press release by Demand Media. I am just going to read what it says in the fourth paragraph.

It says, "As part of this initiative, Demand Media has applied for 26 names on a stand-alone basis. In addition, Demand Media has entered into a strategic arrangement with Donuts, an Internet domain registry founded by industry veterans, through which it" -- meaning Demand Media -- "may acquire rights in certain gTLDs after they have been awarded to Donuts by ICANN. These rights are shared equally with Donuts and are associated with 107 gTLDs for which Donuts is the applicant."

Do you see that?

A. I am reading along with you, yes.

Q. And this is one of the examples that informed your research in advance of negotiating the DAA, correct?

A. It was an example, yes.

Q. Now, if you look at the date of the press release, you'll see it's from June 11th, 2012.

Do you see that?

A. Yep.

Q. So that was -- the press release was issued shortly after the application window had closed in April of 2012, as you testified earlier, correct?

A. The dates look correct.

Q. And, therefore, this press release was issued during the period for public comment and evaluation by ICANN, correct?

A. That would be the case, yeah.

Q. Are you aware that Demand Media was disclosed as Donuts's, quote, "partner in these 107 applications"?

A. I am not aware that they were listed as a co-owner or partner, no.

Q. Are you aware that the public portions of these applications are available on ICANN's website?

A. The public portion of the applications would naturally be available on ICANN's website.

Q. Did you review these 107 applications by

Donuts that you refer to at Paragraph 8 of your witness statement?

A. I do not recall looking at all those applications, no.

Q. So, for example, if I represented to you that Demand Media is listed as Donuts's partner in its applications for .CITY, .ASSOCIATES, .CAMERA, .CHURCH, .CLOTHING, .COACH, .ECO, .ENERGY, .HELP, .INVESTMENTS, .SALON, .SINGLES, .VENTURE and .VOYAGE, among others, would you have any knowledge as to whether or not Demand Media is, in fact, listed as Donuts' partner in those applications?

MR. JOHNSTON: I'll object on grounds of lack of foundation. Perhaps counsel could put just one of those in front of the witness.

MR. LITWIN: Well, I am asking him for his knowledge about this. I don't believe these are in the record. I'd be happy to show him one if you would consent to that.

MR. JOHNSTON: I would consent to showing him the limited part you're representing to him is in the application.

MR. LITWIN: Very good.

For my team that's on the phone, can you send to Chuck the .CITY application, please.

Chuck, let me know when you get it.

I have just been told .CITY is on the record, and they are pulling it up right now.

Chuck, when you get that, if you can just put it up on the screen for everyone to see, please.

MR. JOHNSTON: I'm sorry to have provoked this delay. I had a specific reason, which I won't explain with the witness on camera, but I had a specific reason for wanting the witness to see the application as opposed to rely on the representation as made.

Again, I am sorry for the delay.

ARBITRATOR BIENVENU: That's fine. Let's see if we can get the document up quickly, otherwise we can put this in abeyance and come back to it.

MR. LITWIN: There we go. Actually, while we go through this, if you can just stop right there, Chuck, don't move any further. If you can blow up the full legal name at one, please?

MR. VAUGHAN: I don't have the ability to blow anything up on this.

MR. LITWIN: Got it.

Q. Can you see that, Mr. Livesay?

A. I see it says, "Snow Sky, LLC."

MR. LITWIN: If we can go down to 6, please, Chuck.

Q. You'll see the gentleman there is identified as the executive vice president of Donuts?

A. Yep, yep.

Q. And under 6(f), that's the Donuts email address that you recall.

Do you see that, sir?

A. Yep, yep.

Q. Now, if you can go down to Paragraph 23. Boy, this is incredibly small on my computer. What it says in the second paragraph there is, "The following response describes our registry services as implemented by Donuts and our partners. Such partners include Demand Media Europe Limited for back-end registry services."

Do you see that, sir?

A. I see that.

Q. So Demand Media was disclosed in the .CITY application submitted by Donuts to ICANN. So there was no secret that Donuts and Demand Media had a partnership, correct?

A. Well, I think the word "partnership" goes

to what you mean by partnership. In the press release it doesn't describe the nature of that partnership. In this it seems to limit Demand Media, at least in the application, to being a BERS provider, not necessarily a co-owner of the application. Maybe you need to describe what "partner" means in the relationship of the press release.

When I read this, it looks like Demand Media is simply, at the stage that this is made, not represented as a co-owner, but a back-end registry provider, which is a different matter, at least as I read it.

Q. So let me see if I can break this down a little bit.

In Paragraph 23 of the .CITY application, Demand Media is identified as a partner for Donuts to provide back-end registry services, correct?

A. Correct.

Q. So there was no secret that Demand Media had at least some role here as a back-end registry service provider associated with the .CITY application, correct?

A. It appears in the .CITY application they are the BERS, back-end provider. That doesn't

represent them as a co-owner or having an interest in possibly obtaining the domain after its delegation. It doesn't suggest they have any of that kind of right in it.

Q. In the application --

A. In the public portion that you are having me read, I am only saying that it lists them only as a BERS provider, not a co-owner.

Q. Sir --

A. Which is what you mean to imply.

Q. Sir, I am not implying anything, and I would appreciate it if you would let me finish my question --

A. Go ahead.

Q. -- as well as I will let you finish your answer.

My question is simply that Demand Media is identified as a partner for Donuts at Paragraph 23 of the .CITY application for the purpose of providing back-end registry services, correct?

A. They are identified as the back-end registry service provider for this application.

Q. So there was no secret that Demand Media was involved with Donuts in at least some capacity in its application itself, correct?

A. As a back-end registry provider. I don't see that as an owner.

Q. Now, we also looked at the press release that was issued on June 11th, 2012, where Demand Media publicly disclosed that its relationship with Donuts was broader; is that correct?

A. I don't know what you mean by "broader." If you mean -- as I read the article, it seems to state that they had an arrangement whereby Donuts would obtain certain TLDs and in some situations postdelegation request assignment and transfer for Demand Media, up to 107 of them. It looks like you pointed me to one in which Demand Media is listed as the BERS provider, okay.

Q. Okay. All I am saying, Mr. Livesay, is that Demand Media was identified as having some role in all of the 107 applications of which I am showing you one?

A. And I am only able to confirm the one. The one you're showing me shows them as a BERS provider, nothing more.

Q. I will represent to you, sir, that the same language is in each of those 107 different applications.

A. Based on the --

MR. JOHNSTON: Excuse me, Mr. Livesay.

Objection; lack of foundation.

ARBITRATOR BIENVENU: Before I address the objection, it is very important for us, in order to have a clean record, that only one person speak at a time. I understand it is difficult, especially when we are proceeding by remote video, but let the question be asked and then proceed with your answer. And Mr. Litwin will not cut you off. He will let you finish your answer.

Now, what is the nature of your objection, Mr. Johnston? Lack of foundation as to what?

MR. JOHNSTON: Well, counsel was representing what was present in 107 applications the witness said he wasn't familiar with. The question was only, "Take my representation; is that true," as I heard the question. I think that's pretty obviously a question that has no foundation in the witness' knowledge.

ARBITRATOR BIENVENU: Mr. Litwin?

MR. LITWIN: I can rephrase.

Q. Is it fair to say, Mr. Livesay, that Demand Media was disclosed as a partner of Donuts for the purposes of back-end registry services in its application submitted to ICANN?

A. The one you have shown me, it looks like their limited nature as a partner is that of being a BERS provider.

Q. Is it also fair that Demand Media issued a public press release during the comment period and the time at which ICANN was evaluating the application to disclose its broader role regarding those applications?

A. From the time and the dates of things, that appears to be the case, yeah.

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agreement would have provided --

A. It is not an agreement, and so it is hypothetical. Would have provided. This is a first draft of something --

ARBITRATOR BIENVENU: Mr. Livesay.

THE WITNESS: Yes, sir.

ARBITRATOR BIENVENU: I'm sorry, I have to -- I instruct you again to not cut off Mr. Litwin in the middle of a question because we are not going to get a clean record.

THE WITNESS: I am trying to -- sometimes I think he's finished with a statement or a question, and I am making a presumption -- I will try to stop and hold back.

ARBITRATOR BIENVENU: Don't take this as a reproach, Mr. Livesay, but just as a direction so that in everybody's interest, we have a clean record.

THE WITNESS: Understood.

ARBITRATOR BIENVENU: Very well.

So -- well, do you want to finish what you were saying, Mr. Livesay, and then Mr. Litwin.

THE WITNESS: We can go back -- I am fine with him asking or reasking questions. That's fine.

ARBITRATOR BIENVENU: Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

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Q. Mr. Livesay, when we were talking about the change request criteria, you noted that you had received draft agreements and these were, in your view, precedents for the DAA.

Do you recall that testimony, sir?

A. Right. These were some examples of that, yeah.

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MR. LITWIN: Excuse me for one minute. I just need to look at the transcript for a second.

Q. You testified a moment ago, and I am referring to Page 81, line -- Lines 17, 18, 19, 20 and 21, you say, "To be honest, I don't recall reviewing this document at depth really at the time, because it presented a situation, in my view, and the way they presented it, is we would buy the entity."

So I'm a little confused because I think you just said that you did review the document at the time. So which is it?

A. First of all, like I said, I did review it at the time. But at a basic level I saw that it was trying to set up an acquisition of the entity. I am sure my recollection back then is better now, but I did not rereview or reexamine the documents in preparation for this, is my point. I can assure you I had a much better understanding of all this five years ago than I do right now.

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ARBITRATOR BIENVENU: Mr. Livesay, I'm sorry to interrupt.

THE WITNESS: He asked me a question, and I am trying to answer it and then he jumps in and tries to tell me to correct it. If he doesn't like my answer, he can not like my answer. That's fine.

ARBITRATOR BIENVENU: Mr. Litwin, you are not there to argue with the witness.

MR. LITWIN: Understood, your Honor.

ARBITRATOR BIENVENU: I would ask both of you to sit back for a moment.

And, Mr. Livesay, let the questions come and answer them in the best of your ability.

And please, I am addressing this to both of you, don't cut each other off. It just creates an unworkable record.

Mr. Litwin, please pose your question.

Q. BY MR. LITWIN: Mr. Livesay, I am going to try and lay some foundation for what I'm asking you here. Redacted - Third-Party Designated Confidential Information

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You see, this is my difficulty, Mr. Head of the Tribunal, is he's quoting it and adding different language as he's reading it, and I am left trying to figure out is he asking for me to affirm his interpretation of it or my reading of it when I have not read these details.

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And if Mr. Litwin wants to read it and ask if I can confirm what it says, I can do that. If he's going to read it and add different words in, how am I supposed to respond?

ARBITRATOR BIENVENU: So I may suggest, Mr. Livesay, that you take a minute to look at the language on which you are questioned and perhaps refer back to terms that are defined in that language. And once you have familiarized yourself with that language, then Mr. Litwin can ask his question. All he can ask for is your understanding

of that document as you sit here today and read the language. Fair enough?

THE WITNESS: Well, I don't know. Is the Tribunal willing to give me an hour to look at a document that I haven't looked at in five years?

ARBITRATOR BIENVENU: You think you need an hour?

THE WITNESS: I assure you that when we went through this in 2015, it was a lot more than a few hours to look at these documents and settle this out. I am perfectly fine reviewing these documents that never iterated, we didn't sign, but if he's going to ask me to interpret documents that have defined terms, I tend to read documents thoroughly.

ARBITRATOR BIENVENU: Mr. Livesay, you chose to append this document to your witness statement.

THE WITNESS: I did. And I appended it as an example of something I received. If he's going to ask me to read it and interpret it as an attorney, I should do that.

ARBITRATOR BIENVENU: You appended it in order to make a point, and you are being questioned about your evidence.

THE WITNESS: Fair enough.

ARBITRATOR BIENVENU: I think it is a fair line of inquiry for Mr. Litwin in order to understand your evidence.

THE WITNESS: Fair enough.

ARBITRATOR BIENVENU: Now, I fully understand your concern that you don't want to be trapped into giving a legal interpretation to a document you have not recently reviewed. We appreciate that, and we are sensitive to that.

Now you're being questioned on one subparagraph of the agreement. I take your point that they are defined terms, but please take the time to read that one paragraph. If you want to refer to the defined terms, do that, and then we'll see the question and we'll step in if we find the answer -- the question puts you in an unfair position, but I don't think that it does. If you take the time to review that paragraph, review the defined terms, you should be able to answer his question.

THE WITNESS: Fair enough.

I think it is back to you, Mr. Litwin, to pick up wherever I interrupted.

MR. LITWIN: Thank you.

Q. Mr. Livesay, I just wanted to ask a couple of questions. You executed your witness statement on June 1st of this year, correct?

A. Correct.

Q. And did you review the attachments to your witness statement when you signed it or before you -- in the preparation of your witness statement?

A. I reviewed that it was the document that I received. I did not go through and reread the document.

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Q. Are you aware that Dot Tech the entity did, in fact, prevail at the ICANN auction for .TECH the gTLD?

A. I believe I may have heard that, yeah.

Q. Are you also aware that Dot Tech the entity submitted a revised application after the auction identifying Radix as the new owner of the applicant Dot Tech the entity?

A. I don't have any specific memory of that, but sounds accurate, I guess.

Q. And are you aware that as a result of submitting that revised application, ICANN commenced a reevaluation of that application?

A. I was not aware of that, that I can recall.

Q. Are you aware that Dot Tech the entity, in fact, submitted a further revised application in response to a change request that it had submitted to ICANN?

A. Nope, not aware of that.

Q. You also refer in your witness statement to a transaction between Automattic and Primer Nivel regarding .BLOG; is that correct?

A. I think I refer to maybe a press release or something about that, yeah.

Q. Now, you state that in May 2016 it was reported that Primer Nivel's bid for .BLOG had been, quote, "financed by Automattic," correct?

A. I think I'm citing a news source about that, yeah.

Q. So the answer to my question is yes?

A. Correct.

Q. And those reports postdate your August 2015 Domain Acquisition Agreement with NDC, correct?

A. I'd have to relook at the dates. Do we have that as an attachment?

Q. Yes. It is an attachment to your witness statement, sir.

A. Let me make sure I am remembering the correct press releases here.

Q. They begin, sir, at Exhibit E, which is on Page 95 of Tab 1, and continue on to Page 111.

A. Yeah. So your question is what?

Q. Let me ask my question again.

A. Yeah.

Q. These reports regarding .BLOG postdate the August 2015 DAA, correct?

A. Yes. That appears to be the case, correct.

Q. So it's fair to say that you did not discover information concerning the Automattic-Primer Nivel transaction as part of your research prior to the execution of the DAA, correct?

A. That would seem to be the case, yeah.

Q. Therefore, it's also fair to say that you were not relying on the Automattic-Primer Nivel transaction as a precedent for the DAA, correct?

A. Certainly not in advance of the DAA, but it certainly seemed to give some credibility heading up to the auction.

Q. Now, .BLOG was auctioned in February of 2015, correct?

A. I believe that sounds right.

Q. And in March of 2014, Primer Nivel had submitted a change request to ICANN regarding Paragraph 11 of its application, correct?

A. I am not aware that that's the case.

Q. I direct your attention to Page 96 of Exhibit E, and at the bottom, last paragraph, it says, "ICANN processed the change request to the Question 11 answer in March of 2014."

Do you see that?

A. I do.

Q. And, in fact, Question 11 asks about ownership information, correct?

A. I believe that's correct.

Q. And, in fact, in Section 11 is where Ruby Glen disclosed that Donuts' CEO and chairman had legal or executive authority over it, right?

A. I'm sorry, what's the reference to Donuts? What?

Q. Sorry. I'll move on. I was trying to refer to something earlier in the testimony, but it is not important.

At the .BLOG auction, the winning bidder was a company called Knock Knock Whois There LLC, correct?

A. Sounds correct.

Q. And that entity was controlled by Automattic, correct?

A. I believe that's the case.

Q. And you don't know any of the details about how Automattic and the Primer Nivel deal was structured, do you?

A. No, I don't have any window into that.

Q. Now, finally, sir, I'll represent to you in his opening statement Mr. Johnston, counsel for VeriSign, referred to several transactions that

were entered into by Afilias, these concerned .MEET, .PROMO, .ARCHI, .SKI and .BIO. And for each of these gTLDs, isn't it true that Afilias entered into an agreement to acquire these Registry Agreements after those Registry Agreements had been fully executed?

A. I don't -- you had a list there. I don't recall any of those specifically. Was that a list of TLDs that had changed hands when?

Q. Correct. So this is .MEET, .PROMO, .ARCHI, .SKI and .BIO.

Sitting here today, do you have any information to suggest that any of those deals were struck prior to the Registry Agreement being fully executed between the registry operator and ICANN.

A. I don't have any special information on that, no.

MR. LITWIN: Okay. Mr. Chairman, I think it is a good opportunity to take a second break.

ARBITRATOR BIENVENU: Very well.

Can you give us -- without holding you to it, but can you give us a sense of how much longer you plan to go?

MR. LITWIN: It's a little difficult to say, Mr. Chairman. I would have thought I would

have gone through the first part a bit faster than I did. I estimate I have about an hour and a half left, maybe a little bit more. Depends how quickly we can move through these subjects.

ARBITRATOR BIENVENU: Very well. So let's take a second break now.

So, Mr. Livesay, with the same instructions, you'll be brought to another room. Thank you for your cooperation, and we resume in 15 minutes.

THE WITNESS: All right. Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Thank you, Mr. Livesay. So under the same solemn affirmation, we continue with your cross-examination.

THE WITNESS: True, correct.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Mr. Livesay, I would like to direct your attention to Paragraph 18 of your witness statement that appears on Pages 7 and 8, and there you write, "The DAA is a conditional agreement pursuant to which VeriSign agreed to provide the funds to NDC to participate in the auction for the .WEB gTLD.

"In the event NDC prevailed at the auction and entered into a Registry Agreement with .WEB

with ICANN -- upon application to ICANN and with ICANN's consent -- NDC would assign the .WEB Registry Agreement to VeriSign."

Sitting here today, do you still agree with that statement?

A. Yes.

Q. And looking at Paragraph 20, further down the page, you write, "The DAA is compliant with all terms of the Guidebook and consistent with transactions by others with respect to the new gTLD Program."

You close that paragraph by saying, "The structure of the agreement was also consistent with industry practices in the secondary market for new gTLD applications of which I became aware in my research of the new gTLD Program, as explained above and further documented below."

Sitting here today, do you agree with those statements?

A. I do, yes.

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financing an opportunity.

Q. Did VeriSign provide financing to NDC?

A. We provided the funds so they could participate in an auction. How you define "finance," I am not sure. We did not finance their entity. We financed their bid in the auction, which I think are two different things.

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Q. You say that, "The DAA is a conditional agreement pursuant to which VeriSign agreed to provide the funds to NDC to participate in the auction for the .WEB gTLD," correct?

A. Correct.

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Q. Well, let's talk about -- let's step back and talk generally, Mr. Livesay.

In a financing arrangement, generally the entity that provides the financing defines the principal amount of that financing.

A. So let me correct again. I did not say this is a financing. I said elements analogous to financing in the following sentence, we are providing a lot of funds for a third party we are arm's length with who I don't know very well. I like Jose, seems like a trustworthy guy, but when I say it is analogous to a financing, I mean from the standpoint, whether it is a home financing or a business financing or a small loan, an unsecured financing, you might look for ways to secure your

interest in that money so it is not misused, used for things it was not intended to, making sure it is returned if something goes awry.

So when I say "analogous to a financing," I mean from the standpoint of putting protections into the one providing the funds. I did not mean to suggest it was a financing with a fixed principal or interest rate or this or that.

That's why I am trying to make sure you don't step over the word "analogous" and start going into financing, because it is not that. It is analogous to that from the sense of providing protections for the funds we were providing.

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Q. So, Mr. Livesay, you testified earlier that VeriSign funded the $135 million that was eventually paid as the winning bid at the .WEB auction, correct?

A. Correct.

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A. Correct.

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Q. And are you aware, sir, that in a financing agreement, when a financier secures a security interest, that is limited to the amount of investment that they have made, the amount of funding they have provided; isn't that true?

A. I wouldn't know because this isn't a financing agreement in the common sense. Even in the highlighted part, it says it serves like a security interest. I am not saying it is a security interest in the terms that you would have, like, mortgage interest, for instance. We don't have any -- we are trying to, like I said, analogize, when you put a lot of money on the table, how do you ensure that those moneys are used the way you and this other third party agreed.

Like I said, as much as I like Jose, they were a new party to us. They were working in the

secondary market of TLDs. They had been in private auction along with all of these folks in this cohort.

To me, as I am looking at this, it looks a bit swampy, and I am thinking, how would we go about preserving our interests so we don't get hosed one way or another. And so we started looking at ways to do that.

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In fact, you talked about a mortgage. So maybe we could use that as a paradigm to compare

how this worked here.

In a mortgage, the borrower wants to buy some real estate, and the bank loans, let's say, $500,000 to the borrower to enable them to do that. And in exchange, they take a security interest in the property; is that your understanding of how a mortgage works?

A. Yeah, that's why I think comparing this to a mortgage is totally inappropriate. Because the thing about mortgages is, you're right, the lender actually has an interest that's filed in states with the Secretary of State or whoever, regarding the particular property.

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Q. Right.

A. I don't think a mortgage is a fair comparison because of that.

Q. I agree with you, Mr. Livesay. In fact,

when a bank has to foreclose, it recoups its security interest up to the amount, in my example, of the $500,000 principal. Anything that the auction of the property achieves above that goes to the borrower, because the borrower is the owner.

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Q. I'm sorry, you're using the term "nth-order possibility"?

A. Yeah.

Q. What does that mean?

A. Another word for saying seems like a very

remote possibility, right? You look at a tree of potential outcomes. We simply ran through a lot of them, some seemed a lot more remote than others, so we tried to develop an outcome for it. Some of them, we just said, "This seems like the way," and we shook hands and signed the deal.

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Q. Now, the .WEB auction was comprised of several rounds over two days; is that right?

A. Yes.

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Q. Now, each round of this auction had a start-of-round price and an end-of-round price; is that correct?

A. That sounds correct, yeah.

Q. So as Mr. Rasco explained it on Friday, if bidders did not want to continue bidding, they put in a bid at the start-of-round price, correct, and that would be treated as an exit-round bid?

A. I believe so.

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Q. So if a bidder wanted to continue to the

next round, they submitted the end-of-round price, which was the top price in that range, to ensure that they continued to the next round; is that right?

A. That's my recollection, correct.

Q. And, of course, they could bid anything between the start- and the end-of-round price, right?

A. That's my understanding, or recollection, yeah.

Q. So let's see how that worked in practice.

I will represent to you that during the sixteenth round of the .WEB auction the start-of-round price was $57.5 million and the end-of-round price was 71.9 million, okay?

A. Okay.

Q. Now, if that is correct --

Actually, Chuck, why don't you put up Exhibit R-10, please. If you could just highlight the sixteenth round.

A. This is not in the binder?

Q. It is not.

A. I will just look at the screen, then.

Q. If you just highlight the row information and then the sixteenth row, please. So there you

see, sir, Round 16, the start-of-round price was 57.5 million and the end-of-round price was 71.9 million, right?

A. That's correct.

Q. Now, NDC entered a bid of -- I'm sorry, did someone say something? I'm sorry.

NDC entered a bid of 71.9 million, correct?

A. I would assume so if we went to the next round.

Q. Well, you testified that the final bid you submitted was 142 million?

A. I know. I know. I am just saying you're providing me this. I am assuming this is the accurate document, right? Naturally, to get to the next round, I have to assume we bid at the end-of-round price. I don't have any specific recollection of the start-of-round price and the end-of-round price. I am taking you at your word that these are the actual amounts.

Q. From the ICANN website I represent to you it is a fair and accurate information of the information related to the .WEB auction.

A. From that standpoint, I would say we must have entered the end-of-round price if we got to

the next round.

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Q. Now, I would like you to assume a situation where Mr. Rasco believed that .WEB was not worth more than $65 million.

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A. I don't know. I have no way to assume what Mr. Rasco is thinking or why he would think like that. So you're creating a hypothetical, but go ahead.

Q. I am asking you to assume that that factual situation took place.

A. However improbable, but okay.

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Q. And Mr. Rasco, I think you said it is highly implausible, or words to that effect, because, in fact, as we established earlier,

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Q. I will move on, Mr. Livesay.

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Q. Are you aware that Afilias has claimed in this IRP that NDC was obligated to disclose the existence and terms of the DAA to ICANN upon the execution of the DAA?

A. I am aware that Afilias has claimed that, yes.

Q. Now, the DAA provided that the existence and terms of the agreement were confidential, right?

A. Correct.

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Q. I am just wondering, is that a typo, should it be October 20th, 2016?

A. No, I don't think it is a typo. I don't recall -- there was a reason for that date. I believe it was on -- I don't remember. I don't remember, but there was a reason for that date. I don't recall what it is now.

Q. Okay. If you turn to Page 78, you will see that the DAA was executed on October -- excuse me, on August 25th, 2015, but NDC did not disclose the existence or terms of the DAA to ICANN in 2015, did it?

A. 2015, I don't believe that they did, but I believe -- pretty sure we provided a copy, but I don't know about NU DOT CO.

Q. You provided -- sorry.

A. I said I don't recall whether NU DOT CO provided them a copy in 2015.

Q. Did VeriSign provide ICANN with a copy of the DAA in 2015?

A. I believe -- I am pretty sure that they provided them a copy not too long after the auction, but it's been a while. Whether it was '15 or '16, I thought it was '15, but that's my recollection. That could be off.

Q. Maybe I can help you with the dates. The ICANN auction for .WEB took place in July of 2016. So did VeriSign disclose --

A. Okay. Fair enough. It would have been after the auction. So that's correct.

Q. Okay.

A. My years are flipping in my head right now. Sorry about that.

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Q. So your view was that -- strike that.

I am going to move on.

I'd like to direct your attention to your witness statement where you write that,

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ARBITRATOR BIENVENU: Which paragraph?

Q. BY MR. LITWIN: Do you agree with that statement?

ARBITRATOR BIENVENU: Which paragraph?

MR. LITWIN: If you just give me a second, Mr. Chairman.

MR. VAUGHAN: It is on Page 8.

MR. LITWIN: Yes, Page 8 at Paragraph 21.

ARBITRATOR BIENVENU: Thank you.

THE WITNESS: I am reading that.

Q. BY MR. LITWIN: Now, this is a representation that NDC made to VeriSign in the context of a contract, correct?

A. Correct.

Q. It is fair to say that just because a party represents something is true in an agreement, that does not, in fact, prove that it is true, right?

A. That's the nature of contracts, right.

Q. It is, indeed. That's why we have misrepresentation suits, right.

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Q. In fact, that's what VeriSign requested NDC to do in July of 2016, correct?

A. Correct.

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Q. Now, this confirmation was signed two days

prior to the .WEB auction; is that right?

A. I think the auction started on the 27th, so maybe one day before.

Q. I'm sorry, one day before.

A. Two days before conclusion. So you win that one. I'm with you on that one.

Q. There you go. Okay.

Now, following execution of this confirmation of understanding, NDC did not disclose the DAA to ICANN prior to the .WEB auction, correct?

A. Correct.

Q. In fact, NDC never disclosed the DAA to ICANN, right? It was only after Afilias had complained to ICANN, after ICANN's external counsel had called VeriSign's external counsel, did VeriSign cause its external counsel to produce the DAA, correct?

A. That's how I understand it was delivered to them, yes.

Q. And when the DAA was finally disclosed, VeriSign designated it as confidential, which precluded ICANN from even informing Afilias or anyone else that it received the agreement between VeriSign and NDC, correct?

MR. JOHNSTON: Excuse me. I'd like to just caution the witness not to disclose communications with counsel or information he only possesses because of a communication with counsel.

MR. LITWIN: I will accept a yes-or-no answer to my question.

THE WITNESS: Could you restate it real quick?

Q. BY MR. LITWIN: Sure. And when the DAA was finally disclosed, VeriSign designated it as confidential, which precluded ICANN from even informing Afilias or anyone else that it had received the agreement between VeriSign and NDC, correct?

A. I can only confirm having been informed that a copy was sent to them from our outside counsel. Anything beyond that, I wasn't involved.

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Q. Okay. Let me step back. Is it fair to

say -- is it fair to say that in agreements, there are certain things that are confidential and certain things that are not?

A. I guess it would vary on the agreement. Some make all the terms confidential, some make some terms confidential. I think it would vary on the agreement.

Q. So is your testimony here that VeriSign considered the entirety of the DAA to be confidential?

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Q. I'd like to direct your attention to Page 15 of your witness statement, and there to Paragraph 38.

There you write, "I was responsible for this transaction. I did not have communications with ICANN before or following the auction process.

Do you see that, sir?

A. Yes, yes.

Q. Okay. I'd like to place this with the context of some of the context that we heard previously. Are you aware that Mr. Rasco called Ms. Willett of ICANN on July 31st and told her that someone from VeriSign would be reaching out to call Mr. Atallah at ICANN?

A. I may have been told that at the time. I don't recall specifically.

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A. I'm sorry, I don't know.

MR. De GRAMONT: I think you said, "Someone did, in fact, call VeriSign."

MR. LITWIN: I'm sorry. Let me rephrase.

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Q. Well, I can refer you, sir, to Tab 10 of your binder.

A. There it is.

Q. Does that help refresh your recollection that the DAA was produced on August 23rd?

A. It is not refreshing my recollection because I don't think I have ever actually seen this document. I only know that it was sent. I don't know the context. This is the first time I recall seeing this particular letter.

Q. And the DAA was only produced after Afilias had complained to ICANN; isn't that right, as you've said earlier?

A. I mean, sadly, Afilias had already been complaining since before the auction. So everything happens after Afilias starts complaining, right.

Q. Mr. Livesay, what evidence do you have that Afilias made any complaints before the .WEB auction?

A. I am not following your question about -- you asked about whether I knew when this -- when the letter and the DAA went from our counsel to ICANN's counsel, and then you said -- then you asked, "Was this after or before Afilias" something or other.

So I am trying to make sense of your question.

Q. My question was --

A. Yep.

Q. -- that the DAA was finally produced to ICANN only after Afilias had complained following the conclusion of the .WEB auction?

A. That I can't be sure because I don't know when Afilias first complained. I am not certain if you mean when they made their first complaint to ICANN or -- I don't know.

MR. LITWIN: Mr. Chairman, I'd like to take a few minutes to confer with my colleagues, please.

ARBITRATOR BIENVENU: Very well.

(Whereupon a recess was taken.)

MR. LITWIN: Thank you, Mr. Chairman.

ARBITRATOR KESSEDJIAN: Just a minute. Mr. Chernick is not back.

MR. LITWIN: Oh, I see him now. May I proceed, Mr. Chairman?

ARBITRATOR KESSEDJIAN: Indeed, he's back.

ARBITRATOR BIENVENU: Yes, go ahead.

Q. BY MR. LITWIN: Mr. Livesay, right before we went to break -- and I am going to read the question and answer back to you -- I asked, "And the DAA was only produced after Afilias had

complained to ICANN; isn't that right?"

You responded, "I mean, sadly Afilias had been complaining since before the auction."

Do you know how -- what the -- when Afilias first complained to ICANN?

A. I don't. In fact, even when I say "before the auction," I may be confusing it with some of the activities of Donuts, who I believe filed some case in trying to prevent the auction. I might have been misspeaking about who was complaining.

The question about when did Afilias complain, I don't know specifically when they made any first formal complaint to ICANN. I don't know what date that would be.

Q. Okay. But it's fair to say that you were aware that complaints were made to ICANN regarding the .WEB auction prior to the .WEB auction taking place, correct?

A. There was definitely stuff circulating in the swamp about that, yeah.

MR. LITWIN: Okay. Mr. Chairman, I have no further questions. Thank you.

ARBITRATOR BIENVENU: Thank you very much, Mr. Litwin.

Do my colleagues have questions for

Mr. Livesay?

ARBITRATOR KESSEDJIAN: I may have some. Do you have any questions, Mr. Chairman?

ARBITRATOR BIENVENU: I have a few questions, yes.

ARBITRATOR KESSEDJIAN: Perhaps you can go ahead, and then I can ask if there are some unanswered of my questions.

ARBITRATOR BIENVENU: Very well.

Mr. Chernick?

ARBITRATOR CHERNICK: I do not. Thank you.

ARBITRATOR BIENVENU: Thank you.

Mr. Livesay, were you and the executives you were working with on this initiative surprised by the amount that NDC had to bid to win the auction for .WEB?

THE WITNESS: I don't know if "surprised" is the right word. I think we had been watching a lot of TLDs go for higher prices right before then, and I may get the numbers wrong, but I think .APP went for 25, if I recall, something like that. We were just watching this and looking and saying, well, .WEB may have more potential than .APP. Maybe .WEB's broader, maybe it goes for more than

that. 135, yeah, maybe higher than I thought, but, yeah, not crazily surprised, I guess.

ARBITRATOR BIENVENU: When you say "higher prices," you mean increasingly high prices? Nothing was higher than what was bid for .WEB, as we understand.

THE WITNESS: Yeah, I am not aware of anything higher than .WEB. I am simply saying we had seen some TLDs going for tens of million dollars, at least in that area.

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ARBITRATOR BIENVENU: I think you mentioned at the beginning of your evidence, but I could be wrong, but I think you mentioned that among the documents that you reviewed for the preparation of your testimony today were the filings that the parties made in the IRP; is that correct?

THE WITNESS: Some of them. I don't believe all of them. I read Afilias' document

from -- I think it was May, in which I then -- that was kind of some of the background of creating my written testimony. And then I read the filings that came in after that.

MR. BIENVENU: Oh, you did. So I was going to ask you a question about --

THE WITNESS: Let me clarify. When I say "read," I just breezed through to kind of understand what was going on. I wasn't trying to take up any of the legal arguments. I just want to give you a heads-up on that.

ARBITRATOR BIENVENU: I would just invite you to comment on a paragraph from the rejoinder memorial of ICANN. This is not something you would have reviewed before signing your witness statement because it was filed on the same day as your witness statement. It was filed on June 1st. But perhaps you have read it since.

THE WITNESS: Do you have it there to show?

ARBITRATOR BIENVENU: Yes. Perhaps somebody could display on the screen the first page. It is called "ICANN's Rejoinder Memorial."

Mr. Litwin, is Chuck available?

MR. LITWIN: Do you have a copy of the

rejoinder? My team is sending it to him right now. I would send my copy, but it has quite a bit of handwritten notes on it.

MR. VAUGHAN: All I need is an exhibit number.

MR. LITWIN: It is not an exhibit. It is a pleading. So someone is going to have to send it to you.

MR. JOHNSTON: Or, Mr. Chairman, if it is short enough and integrated itself, you might read it to the witness. He might be able to answer the question without actually seeing it. If he needs to see it, he can ask.

ARBITRATOR BIENVENU: I'd like to invite him to comment on three sentences in the middle of a paragraph, and I think it would be more fair if a witness could see the whole paragraph. So I would prefer -- I don't want to read the whole paragraph. Let's see if we can display it.

MR. LITWIN: It will be only one more minute, Mr. Chairman.

(Discussion off the record.)

ARBITRATOR BIENVENU: The cover doesn't look like my cover. Is this the one dated June 1st?

MR. LITWIN: I believe it is.

ARBITRATOR BIENVENU: Okay. Very well.

So this is the document, Mr. Livesay. Do you remember seeing this document?

THE WITNESS: Not necessarily by the pleading cover. I definitely read one of ICANN's -- I don't know if it was this one because I read one that must have been filed later than this because it had my name in it. I don't know if I read this ICANN paper.

ARBITRATOR BIENVENU: Anyway, the paragraph on which I would like to invite you to comment is Paragraph 82, if Chuck would display that.

Mr. Livesay, you are welcome to read the whole paragraph. My questions will concern the third, fourth and fifth sentence in that paragraph.

THE WITNESS: All right. Paragraph 82, just give me a second to read it.

Okay. I have read it. What's the questions?

ARBITRATOR BIENVENU: So I'd like you to comment on the statement, the fourth line, "Determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of

the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA."

So I stop there for a minute. Do you agree with these statements?

THE WITNESS: As to the first highlighted one, whether it is easy or difficult to determine if it's been violated, I mean, that's ICANN's perspective. I think they may be using some information I'm not aware of.

Because, again, I don't believe that what we did changed the ownership or would have required any type of request for reevaluation. So I don't know that I necessarily agree that it is not a simple analysis.

And then the second statement, I think that's probably true. There is no guidebook that squarely addresses this anymore than there's one that squarely addresses the way Google constructed its document or the way that -- I forget -- the Dot Tech, that's not expressly addressed either, I don't think.

ARBITRATOR BIENVENU: And what about the next sentence, "A true determination of whether there was a breach of the Guidebook requires an

in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA."

THE WITNESS: I think it is certainly fair to say that some analysis needs to be had between the guidebook and the DAA. How in-depth that is, I think, is a matter of opinion, I suppose.

ARBITRATOR BIENVENU: In your experience, Mr. Livesay, and those you were working with at VeriSign, but, you know, exclude conversations with counsel, is there a mechanism for an applicant or someone interesting in conceiving deals in what you describe as the secondary market, to ask on a confidential basis sort of advisory opinion from ICANN as to the compliant nature of a possible transaction with the applicable program rules?

THE WITNESS: I think maybe you are getting at the question of -- maybe that was so long that I didn't understand your question exactly.

MR. BIENVENU: Let me rephrase it. It was a long question.

Is there a mechanism for someone who, like

VeriSign when it was looking at the DAA, to ask ICANN -- suppose you had a doubt as to whether the DAA was permissible or not. Was there a mechanism to ask on a confidential basis for an advisory opinion on --

THE WITNESS: Okay. I was confused by your use of the term "mechanism." It made it sound like there was some fixed process within the company that I am not aware of.

There was, however, a communication made after the auction. Actually, I don't know specifically a date, but I believe there was a generic question asked by someone from our naming group to someone at ICANN about what would happen if -- you know, in a request for assignment and what's looked at and what types of disqualifications might affect that. I believe a call like that was made, because the intent from our standpoint was to -- at the request for assignment, after NU DOT CO had executed the Registry Agreement, we wanted to feel comfortable that -- I don't want to use the word "perfunctory," but given our history in running TLDs, VeriSign, that is, both financially and technically, we were interested in making sure, is there any other

reason why an assignment would not be approved to us as a potential assignee. Sorry.

ARBITRATOR BIENVENU: I think I know what you're referring to in terms of asking what is the practice of ICANN when it is to approve an assignment.

But I meant to situate my question at another point in time, an earlier point in time, when you and your colleagues were engaged or approaching the point where you would engage with potential counterparties to strike a deal like the one you made in the DAA.

Did you consider asking ICANN whether the time of the transaction, the way you proposed to structure it, complied with the guidebook?

THE WITNESS: I don't recall having a discussion specifically. I think you're asking why did we -- we could have just asked ICANN ahead of the auction, or maybe that's what you're asking. I am not really sure.

ARBITRATOR BIENVENU: I am asking whether when you were contemplating entering into the DAA --

THE WITNESS: Right.

ARBITRATOR BIENVENU: -- whether you

discussed seeking an advisory opinion from ICANN as to the -- as to the compliant nature of the agreement you were looking at with the program rules?

THE WITNESS:

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ARBITRATOR BIENVENU: Very well. Thank you, Mr. Livesay.

Mr. Johnston, any redirect, and do you want to take --

ARBITRATOR KESSEDJIAN: Mr. Chairman --

ARBITRATOR BIENVENU: Oh, sorry. Excuse me.

ARBITRATOR KESSEDJIAN: Everybody's tired, but I think I can still survive. It is 9:38 p.m. for me. So it is starting to be dinnertime in the Spanish way.

Mr. Livesay, I still have a few questions for you. This is Catherine Kessedjian. I am speaking from Paris, and I'd like to come back to one question that was asked by the Chair.

THE WITNESS: Yeah.

ARBITRATOR KESSEDJIAN: About the relationship, the business and, I would say, financial and whatever you want to call it, relationship between the .WEB and the .COM and the other gTLDs that we have there.

Am I correct to think that you were a vice president of VeriSign for strategy and management in 2009 and 2010?

THE WITNESS: Correct.

ARBITRATOR KESSEDJIAN: Thank you. So you must have a sense of the business?

THE WITNESS: No, not the naming business. At that time, the company was predominantly two businesses. The certificate business, digital

certificates. In fact, at that time the digital certificate business was about 50 percent larger than the DNS business. I believe it was about 60/40, I want to say, out of a billion, roughly.

I come from the history of the certificate business. When I was hired in, I worked directly for the chairman, Jim Bidzos, at the time, to help look at the splitting of the two businesses, but I come from that half of the world.

ARBITRATOR KESSEDJIAN: Okay. Very good. So it was only later in 2014 that you had to become aware, if you will, of the business of the gTLDs?

THE WITNESS: A lot of rapid learning, yes.

ARBITRATOR KESSEDJIAN: Yes. I am absolutely confident that you are capable of that.

Now, we read in several reports and particularly a report by J.P. Morgan that it was the understanding of the business that, in fact, .WEB was going to be a competitor for almost every single gTLD because of the nature of the word "WEB."

Now, what is your reaction to those reports? Could you tell us a bit more about that?

THE WITNESS: I don't know that I am

familiar with the report you're referring to. I read a lot of things back then. I definitely recall hearing both, you know, that .WEB looked like a great potential true generic. That certainly played into reasons why VeriSign might be interested in it, which is selling domains and broadening the availability of domains is what VeriSign does, and this looked like a good opportunity for that.

ARBITRATOR KESSEDJIAN: Okay. Thank you very much.

Now, I want to understand another point that was not asked within the cross or by the Chair. We heard since the beginning of the hearing -- so last week we have been at this hearing -- that, in fact, ICANN has always favored what they call a private auction. In fact, ICANN favors that the contention set people, entities that are in the contention set, basically do it by themselves. ICANN would much prefer not to have the public auction.

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Could you explain to us why is it that VeriSign was so adamant to actually have a public auction and not making it private?

THE WITNESS: Sure, sure. One of the things that, as I got more into looking at how the contention sets were resolved, in any string that has more than one, how do you resolve it? I definitely read and familiarized myself, and it was definitely made clear that ICANN prefers a private resolution.

But as I talked to people in different contention sets, both in .WEB and some others that we looked at, what became curious to me was I appreciated why ICANN would want the contention set to resolve itself, because at that point in theory all the potential antagonists have agreed, great solution.

The thing that looked unusual to me is that whether it is a private auction or other private resolution, in the private auction case, the winner is paying or -- another way to look at it is buying off the losers. That has a weird

collusive look to it for someone like VeriSign.

So to have a situation where we are going to somehow bid and pay off all the losers seemed troubling, and that's one.

And then in the other private resolution, in fact, where it is not necessarily auction, but just contention set members are, I don't know, resolving through agreement and having postauction transfers, it just -- the lack of transparency in the conduct between the contention set members seemed unusual, and the fact that it was paying off people to lose was troubling.

I think this even came back to prove itself in reality.

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Some of those things seem to have come back in play the following year leading up to the auction. For example, I was surprised to see that the other contention members were still trying to contact NDC during the blackout period. That kind of behavior is kind of the weird behavior we didn't want to be a part of in a private resolution. I realize the blackout period doesn't authorize that,

but it was happening anyway.

I also recall that Afilias made not one, but two offers to somehow promise NU DOT CO an amount. At one point I believe it was 16.8 and then they came back and raised the number to 17.02 or something like that. I'm like, wow, this is kind of weird stuff we were wondering about. How is one contention set member able to simply offer money to someone else? It just seemed weird to me.

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ARBITRATOR KESSEDJIAN: You are not mentioning one point, which may be important, which is the fact that VeriSign being secretly involved, there was less of a possibility to control the auction and the price.

THE WITNESS: I don't know if that's the case. In a private auction, one could see -- that's the thing, the way privates are resolved was kind of a bit of a black box.

ARBITRATOR KESSEDJIAN: Okay.

THE WITNESS: That was kind of -- the unknowns just seemed -- let's go with something

that's straight and open.

ARBITRATOR KESSEDJIAN: Okay. Thank you. Now, you said that at some stage in your testimony tonight -- tonight for me -- that VeriSign didn't want -- or VeriSign had the confidentiality clauses in the DAA because without them, it would be concerned that it would -- and I use your terms, at least the ones that I have noted. I don't have the real live feed. I didn't sign up for that -- upsetting the path. That's your words, at least from what I have taken as notes.

Now, do you refer to that as a concern that VeriSign, that if it were discovered by anybody that VeriSign was behind one of the contention set applicants, it would really be a problem? Could you explore more what you meant by upsetting the path?

THE WITNESS: I guess the only way I can say it is all the alleged claims we are hearing now from Afilias, however wrong I think they are, we would have heard. But that wasn't really the main drive. The main drive was we figured we'd be reviewed and have to take that when it came out.

The point was there looked like a path, that there's a specific point where it would be

evaluated, whether we were an appropriate assignee or not of the RA. So I think we just looked at a particular path that looked like it would work, and it still required disclosure, eventually, and that's the path we are on.

ARBITRATOR KESSEDJIAN: Thank you, Mr. Livesay.

No more questions, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you. And apologies for forgetting to ask you for your questions.

Mr. Chernick, any questions?

ARBITRATOR CHERNICK: No thank you.

ARBITRATOR BIENVENU: Mr. Johnston, do you want to take a few minutes before you start your redirect or do you want to start right away?

MR. JOHNSTON: I think two minutes would be helpful, but I think it will only take two minutes.

ARBITRATOR BIENVENU: Very well. Let us know when you're ready.

MR. JOHNSTON: Can we have a room, JD?

MR. ENGLISH: Sure. Give me one second.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. Johnston, are we

ready to go?

MR. JOHNSTON: Yes, and no. We have no questions, and we just thank Mr. Livesay for his testimony.

ARBITRATOR BIENVENU: Very well. Mr. Livesay, I would like to say the very same thing on behalf of the members of the Panel. Thank you very much for your evidence and thank you for your time today.

THE WITNESS: Thank you all for clocking in from all different parts of the world. I have it easy here in California time. My apologies to France. It is past my dinnertime there. Okay. Great.

ARBITRATOR BIENVENU: Thank you, sir.

JD, we'll remove the witness from the room.

MR. ENGLISH: The witness is gone from the room and the meeting.

ARBITRATOR BIENVENU: Very good. I think this concludes the evidentiary portion of this hearing. Perhaps I can begin by reverting to the question foreshadowed in my opening remarks this morning and ask whether the parties are satisfied in the manner in which this hearing is being

conducted and whether there is any concern in this regard that either party would wish to raise.

I'll begin with directing the question to Mr. Ali on behalf of the claimant.

MR. ALI: Thank you, Mr. Chairman.

As I indicated last week and, I must say, somewhat emotionally, for which I apologize to the Panel, we on our side did not believe, do not feel that the prehearing phase was handled very well by the Panel, putting unnecessary, undue pressure on counsel in a matter that is evidently extremely complicated and one which we had a very significant record to deal with and a number of witnesses.

With that having been said, I think I speak on behalf of the client and our entire team to say that the hearing has been handled extremely well, of course with great help from our technologists and the support, but so far as the hearing itself is concerned, from Afilias' side, we have no concerns. Thank you for managing such a good hearing and for very incisive and very well-formed questions.

ARBITRATOR BIENVENU: Thank you, Mr. Ali.

Mr. LeVee, can I ask the same question to the respondent?

MR. LeVEE: ICANN has no objections to how any of these past several weeks have been handled. Certainly the parties have had -- I said certainly the parties have had vigorous exchanges and the last several weeks have been extraordinarily busy for everyone.

I think the Panel handled it extremely well, given that we had set specific deadlines and that we had last week scheduled in Chicago and the Panel made it work and then added these days. And ICANN is extraordinarily appreciative of the Panel's efforts, its dedication, its questions and, candidly, its patience. Because I think patience was required over the course of the last seven days of this hearing.

And may I say, it may well be that virtual proceedings like this are here to stay for some unknown and perhaps long periods of time.

I think these seven days showed that it can work and that we can put together people in multiple locations, including time zones that are nine hours from mine. And I think, candidly, I did not expect it would work as well as it did. And yes, we had a little bit of technology issues come across, but people will get better at that as time

goes by. Even in a thunderstorm, Paris didn't lose its Wi-Fi connection tonight.

So we are very pleased, and we would like to thank not only the members of the Panel, but opposing counsel, obviously, our client, folks from the VeriSign side.

We thank you. This has been seven very challenging but ultimately days that made sense. And we thank you, and we don't want to do it again any time soon, but we think it worked.

So thank you, Mr. Chairman, for allowing me to say that.

ARBITRATOR BIENVENU: Thank you, Mr. LeVee.

May I then ask of the Amici, beginning with Mr. Marenberg on behalf of NDC?

MR. MARENBERG: Thank you, Mr. Chairman. Can you all hear me clearly?

ARBITRATOR BIENVENU: Very clearly.

MR. MARENBERG: Thank you.

First I would like to thank the Panel for your hard work and your diligence, your patience and, frankly, your graciousness in handling the seven days of testimony that we've had.

And I also express agreement with

Mr. LeVee that I think that the virtual nature of this proceeding has been relatively seamless.

And I think if I were a hotel or an airline, I would worry because I think we are demonstrating here that these trials -- or at least trials that do not involve juries, can be undertaken and undertaken well with the technology available now.

On those grounds, I have nothing but praise for the Panel and praise for TRIALanywhere and the proceedings and the technology.

I do have some concerns that I want to raise on behalf of Amici, and I want to preface it by saying that I have no intention of relitigating Procedural Order 1 here that limited the role of Amici in this instance. That's not what I am saying now.

I do want to express concerns, concerns that are particularly acute to me in light of the testimony of -- I think it was Mr. Disspain, where he suggested that ICANN would give, I think -- I don't know whether he used "deference" or whether he would take into consideration and give serious consideration to whatever recommendations this Panel made.

Here's why I have concerns about that. This has not been a true adversarial proceeding from NDC's -- I'll let VeriSign speak for itself, but certainly from NDC's point of view.

We do not have the ability to put on any witnesses of our own. We have not had the ability to demand that Afilias stop playing games with this Panel and not withdraw the witnesses that it withdrew so that we couldn't cross-examine those witnesses and explain to the Panel that what they are accusing NDC of doing and VeriSign of doing is functionally and substantively no different from what they do every day.

If we had their witnesses here, we could have -- well, I could still not have cross-examined them, but perhaps someone could have. But the fact that I couldn't cross-examine them and my client's rights are at issue or potentially at issue is a problem with the proceeding, not a problem with the Panel, but it is a problem that suggests that the Panel needs to be very careful, I'll just say it that way, with the, quote, "recommendation that it is making," because it is doing so on the basis of a somewhat one-sided presentation.

By the way, and I think Mr. Ali will

object to this, but I believe that the Panel should be taking and making adverse inferences from the fact that Afilias withdrew all its witnesses. That is, as I understand it, a traditional prerogative of the Panel when witnesses are under control of a party and they are withdrawn for no reason at all.

Now, I am going to guess that Mr. Ali is going to object to my suggesting that because, after all, I am only an Amici and not a party, and I have no right to make that suggestion.

But if that's true, that goes to, again, the limitations of this proceeding as reflected from the perspective of my client, NDC, whose rights are at issue here.

There was another instance, and, again, I take no umbrage of it, and I think that the Chair was quite patient with me when I interrupted the proceedings at a time where I thought a witness who was commenting on the actions of my client was interrupted by counsel and not able to give a full explanation of the answer.

Now, I think the Panel quite rightly said, "Under the rules, you're an Amici, you have no right to do that under the rules we set up. And, Mr. Marenberg, please be quiet." I think I was

after that.

But it goes again to the limitations of the proceedings from the perspective of NDC. Again, I suspect VeriSign feels similarly to this.

This is, in a sense, an unbalanced proceeding. I think the evidence -- and I am not going to say a lot about this. The evidence has come out quite favorably to the positions that were taken, but it has come out despite the fact that this is an uneven proceeding and unbalanced proceeding.

Therefore, those are the comments I want to make. It is no criticism of the Panel at all. It is the nature of the process that we are engaged in.

ARBITRATOR BIENVENU: Thank you, Mr. Marenberg.

We'll hear from the parties in a minute as to what was -- what is going to be proposed in terms of posthearing submissions, but you will have an opportunity in the course of posthearing submissions of making representations of the sort that you have made now, about what should or should not be our recommendations.

As you know, the question I'm posing has a

narrower objective. But anyway, your concerns and comments are reflected in the record.

Mr. Johnston.

MR. JOHNSTON: Yes. I would agree with what Mr. Marenberg says. I am going to make my comments very pointed and brief.

I thought the Panel has been thoughtful, prepared, courteous. I don't know most of the Panel members. I haven't had experience with most of you before, so I can tell you that I was surprised and impressed.

I have been an arbitrator before, and I don't think I have ever been more prepared or courteous than the Panel has demonstrated during this hearing.

My concern has nothing to do with the Panel. My concern is the combination of the system, IRP system, and the way, in my view -- and I am not going to repeat my opening statement -- the way it's been misused here to try and bring claims asking for resolution of issues and relief directly against parties who cannot be parties by virtue of the rules, an ambiguity that lasted throughout this hearing as to what the jurisdiction would be that the Panel would rule on.

So we have on the one hand a system that did not allow Amici to appear as parties, including, for the reasons Mr. Marenberg pointed out, while at the same time we had a claimant asking for relief directly against unrepresented parties, and then from day one objecting to participation by Amici, trying to keep us out of the proceeding in virtually every way. Ultimately there was some relenting on that, but as Mr. Marenberg summarized, it has created a one-sided proceeding.

So my concern is basically were the Panel to go beyond what we believe the Panel's jurisdiction is and either in their findings regarding such matters as to whether the DAA is consistent with the guidebook or awards relief, such as undoing an auction and setting a price for Afilias to walk off with .WEB, which is what Afilias has asked the Panel to do.

I don't know that there's a way that the Panel can remedy the system, but one step that would remedy, I guess, our concerns is if the Panel adopted our notion of its jurisdiction and stayed within it.

Because once it goes beyond that

definition of jurisdiction, it directly impacts our interests without an equal or fair representation.

But in terms of what the Panel's done as opposed to the way the rules are attempted to be used here, I only have compliments to offer.

ARBITRATOR BIENVENU: Thank you very much, Mr. Johnston.

Can I ask, then, for the parties' thoughts about posthearing submissions? I assume you have had time over the past 24 hours to discuss that.

Mr. Ali, do you want to?

MR. ALI: Yes, we have, Mr. Chairman. I think we agreed on a date for the filing -- the first round filing of the posthearing submissions, which is October 8th; is that correct, Jeff?

MR. LeVEE: Yes. I don't know that the Amici have confirmed their agreement to that date, but ICANN and Afilias have agreed that we will submit our posthearing brief on 8 October of 2020.

If I might add, just so there's no ambiguity, I would propose that we do so at 8:00 p.m. Pacific so that everyone knows exactly what time they should be submitting their briefs.

MR. ALI: That's fine. Of course, this is subject to your comments earlier, Mr. Chairman,

about the Panel having -- needing time to define the questions and consider the evidence that you have received over the course of the past seven days.

ARBITRATOR BIENVENU: Did you discuss with your colleagues, Mr. Ali, the question of the length of the posthearing submissions?

MR. ALI: We did, and as you can imagine, we had lengthy emails about the length, and we couldn't reach agreement.

Our basic question is that --

ARBITRATOR BIENVENU: I am glad everyone's sense of humor remains intact.

MR. ALI: Hopefully the posthearing briefs will be shorter than the length of the emails.

In any event, our position is that we should have the same number of pages as ICANN and Amici put together, so that if each of the ICANN and Amici have 50 pages each, we get 150 pages simply because we need to respond to all of the various arguments.

As we have seen, you have got a very developed and large evidentiary record now based on this hearing, and as we have seen previously, particularly with the Amici, they cross-refer to

each other. So certainly it would be extremely imbalanced if we were to be given the same number of pages as each of ICANN and the Amici individually.

So that's the starting -- that's the discussion that we had, and ultimately I think we would have to leave it with the Panel.

I would just make one other point, is that the evidence that's been elicited here has been through our cross-examination. So we would need to have the opportunity to put all of that evidence in context.

The other point is that insofar as simultaneous submissions are concerned, it doesn't really matter what the page limits are because at this point, we don't have any further proceedings. What we are trying to do is to put the evidence in context and to help you, the panelists, by bringing all of the various points, to crystallize them, to put them in the context for you.

At the end of the day, it doesn't -- it is not to our client's benefit to deluge you with paper, but rather to present the case as clearly as we can now that we have a full evidentiary record.

So that's where we are coming from, sir.

MR. LeVEE: May I?

ARBITRATOR BIENVENU: Yes. I thought he was paving the way for the number, and you would give us the number.

MR. LeVEE: Well, we did have a number of discussions. Mr. Ali started, as he just indicated, off the discussion by indicating that he did not --

MR. ALI: Jeff, may I just interrupt you for a second? Vice President Biden has just nominated Kamala Harris for vice president. Historic moment. Not to interrupt this historic moment that we ourselves are engaged in here.

MR. LeVEE: So Mr. Ali did initially suggest that the page limit -- that there not be a page limit. ICANN strongly opposes that. I think there should be limitations.

And then the issue was, well, should Afilias have some additional pages because they are responding to more briefs, but we only are going to file one brief. So Afilias -- we have simultaneous briefs, so Afilias isn't going to be responding to briefs. They are going to be submitting their briefs just as ICANN is submitting its brief, just as the Amici are submitting theirs.

So under the equality of treatment principle, ICANN very much would like to have the same number of pages as Afilias. I understand, but the Amici can confirm separately, that they have agreed that whatever the page limit ICANN and Afilias are given, that they would have that number of pages combined. So by way of example, if ICANN and Afilias each had 75 pages, then the Amici combined would submit 75 pages.

I will tell you that ICANN proposed that we submit a brief of 50 pages because we think 50 would be sufficient, and we're not looking to have the Panel have another set of briefs that are literally hundreds of pages long.

I think it is ultimately up to the Panel to determine the length, but I do think that this is a situation where ICANN and Afilias should have the same number of pages. If we don't use the number that we are given, that's our prerogative, and if the Amici are willing to -- still willing to have collectively the number of pages that ICANN and Afilias have, I think that that would be extraordinarily fair. It would be consistent with the ICDR arbitration rules.

So that would be our proposal. I'll be

candid, Mr. Ali said he wanted 150 pages. We have no interest in giving the Panel 450 pages or 350 pages, whatever that would work out with the Amici. We think it is too much. There has been a lot of ink provided to the Panel already, positions that have been taken, and now the parties need to comment on the what the evidence was.

And while it is true that Afilias did most of the cross-examining, some of that was because they withdrew witnesses. So the parties are where we are, and I think ICANN's proposal is extraordinarily reasonable and consistent with the rules.

MR. ALI: Chairman, may I make a suggestion here?

ARBITRATOR BIENVENU: Sure.

MR. ALI: Insofar as the responses to the Amici is concerned, the Panel, of course, will be aware of the page limits. There the parties have agreed that the Amici shall each be permitted to file separate briefs of 50 pages in length and that the parties shall each be permitted to file briefs 100 pages in length.

As Mr. LeVee says, if we choose not to use 100 pages, that's, of course, our respective

prerogatives. That would be, I think, a good way of resolving this matter, given the fact that that's what we agreed, and that's what the Panel accepted previously. So 50 pages for VeriSign, 50 pages for NDC, and 100 pages each for ICANN and Afilias would be my suggestion.

ARBITRATOR BIENVENU: Very well. You will leave it with us.

MR. JOHNSTON: Can Amici be heard on this, please?

ARBITRATOR BIENVENU: Yes, of course.

MR. JOHNSTON: At least I -- I am not sure about Mr. Marenberg, but two months to prepare postclosing briefs in a seven-day trial is extraordinary in our view, and -- my view, it's a lot of time.

As one of my colleagues said, memories fade, and we just had this trial and hundreds of pages of briefing immediately before the trial. It seems to me that this could be pushed along more quickly, which might be easier on everybody because they will have this fresh in mind and not have to reinvent the wheel in starting to think about their posthearing briefs.

I am very cognizant that the Panel would

like time to pose some questions, and I think that's a superb idea because it will hopefully guide the briefs in the right direction as opposed to, again, going over the whole history as though this trial never took place.

So we started off proposing two weeks and then went up to a month. But in terms of our position, two months is a bit long.

So we would ask that it be a little bit shorter and that the briefs not, again, be in the hundreds of pages of length. There are -- you know, it sometimes gets lost there that there are people with other rights and interests in moving this forward than just Afilias and ICANN.

These are people who went in and paid their money at the auction and would like to see this resolved and back to the Board to follow the proper processes, at least as we see those processes.

So we have some concern about the length of time that's been set, and we have concerns about the size of the briefs that Afilias wants because, again, we have just had this trial. We are not going to retry everything, hopefully, again based on briefs, although I have no doubt that the

Afilias briefs will be excellent. We have seen quite a few of them already.

ARBITRATOR CHERNICK: Mr. Chairman, is it contemplated that upon the submission of the posthearing briefs, the matter will be submitted for decision to the Panel without necessity of further argument?

ARBITRATOR BIENVENU: Well, that was the next point I was going to raise. You recall that in the charts -- the chart, singular, entitled "Topics for Prehearing Conference" that was delivered to the Panel after the prehearing conference of 29 July, there was a box for closing argument. There was disagreement -- sorry.

I think everybody agreed that it would be at the discretion of the Panel, and the way we put it was that we would decide after receiving posthearing briefs, but that in the event that we considered that closing argument would be helpful, we would agree today or in the ensuing days on a date for that purpose. It would be penciled into everybody's agenda, and if ever we need to use it, the date will be reserved.

So that was the last topic I was going to cover.

I think normally we should not need closing argument in addition to a prehearing -- sorry, posthearing briefs, but, you know, the question having been raised by the parties, I am happy to leave it aside as a possibility. But we should fix the date right away so that everybody is available if that is to happen.

I don't foresee it as needed at the present time, but --

MR. ALI: Has the Panel discussed potential dates so that we can consider?

ARBITRATOR BIENVENU: We have not. We have not. That's a good suggestion, Mr. Ali. Maybe we should send you a list of dates and the parties can let us know what works for everybody.

MR. ALI: If I may just comment on what Mr. Johnston said regarding the timing of the posthearing briefs. Number one, state the obvious, the parties agreed on a date.

Number two, harkening back to the comment I made regarding the prehearing stage of this arbitration, there is -- there are commercial interests, of course, at play, but there are also human frailties and human abilities. And my team members are all taking a much-deserved break.

And then we have commitments as well that in the way -- I had initially started out with Mr. LeVee asking for October 15th or 16th, and we compromised. I think I said October 9th, and ICANN wanted October 8 because of other commitments that ICANN has. So I think that that is fairly reasonable, and I think a customary length of time in international arbitration.

Certainly we are not intending to regurgitate everything, but you do have an ample evidentiary record from this hearing, and we do feel that the Amici submission allowances of page numbers is very reasonable and fits with what has already been agreed by the parties.

MR. LeVEE: If I can just clarify one thing? ICANN had originally proposed late September. Mr. Ali had come back and said that they had commitments, so we did go back and forth. On that basis, we landed on October 8. So that is what Afilias and ICANN agreed to following negotiation. It is the case that Amici did express concern.

ARBITRATOR BIENVENU: Very well. Leave it with us.

I will mention, insofar as the list of

questions from the Panel is concerned, these will be targeted questions on issues about which we would like further assistance from the parties.

For the rest, we leave it to counsel to structure their posthearing brief in the way that they consider most useful to bring it all together, knowing that we have the evidence of witnesses.

ARBITRATOR KESSEDJIAN: Please remember our request for a common list of exhibits and a common chronology, factual chronology.

(Discussion off the record.)

ARBITRATOR KESSEDJIAN: Please remember our request of -- and then the two things.

(Discussion off the record.)

ARBITRATOR KESSEDJIAN: The first one is a common list of exhibits chronologically ordered, and then a factual common chronology so that we can actually have common paths to what happened. Factual, all the essential facts in this case.

By the way, if you do that, and we really require that you do it, it will be easier for your posthearing briefs because you would not have to spend too much time on the facts.

MR. ALI: If I may, Professor Kessedjian, we will do our best. My experience, it is not easy

to agree on certain facts.

ARBITRATOR KESSEDJIAN: I am not saying it is easy.

MR. ALI: But I would -- I think we will exercise our best efforts to provide the facts that we can agree on.

I was just going to ask if the Panel has a date in mind by which you would like that, or is this to be submitted simultaneously with the posthearing briefing?

ARBITRATOR KESSEDJIAN: We didn't discuss that, but from my part, I would be happy to have it with the posthearing brief.

ARBITRATOR BIENVENU: Yes, that would be good.

All right. Anything else from the parties or the Amici?

MR. ALI: If I may just take a quick -- just peek over my computer screen to my other colleagues to see if they have anything.

Ethan, if there's anything, just text me.

Just one second, Mr. Chairman.

A very good question has been raised by one of my colleagues, which is insofar as the facts, the common list of facts are concerned, is

that also to be agreed with the Amici?

ARBITRATOR BIENVENU: Well, I think it would be useful to submit it to the Amici for comments once a first agreed chronology has been generated between the parties, yes.

MR. ALI: Okay. We will try and work that out, and hopefully we don't have to revert to the Panel, but we'll do our best to achieve the objective and fully understood what you're looking for.

That having been said, from my side, again, I would like to thank my colleagues on all the other screens insofar as Amici and ICANN are concerned. Of course, the Panel, for all of your incredible work. I've certainly been extremely impressed, as has already been expressed, with the precision of your questions. It is not an easy matter to grapple with.

I have to particularly let Mr. Chernick know that since I was a little boy, I have always loved Charlie Chaplin but have been petrified by clowns. So spending seven days looking at the clown has, I think, perhaps cured me of my phobia.

ARBITRATOR CHERNICK: So something has been gained by this proceeding.

MR. ALI: Yes, absolutely.

And, of course, to TRIALanywhere. To Balinda, to all of those who have not appeared on the screens who have helped to make this production happen, my deep gratitude.

I hope people do get some time to rest and recover before we get into the -- into the rigors of the fall. My thanks to all.

ARBITRATOR BIENVENU: Mr. LeVee, nothing else on your part?

MR. LeVEE: I am not going to repeat what I said before. I thank everyone. I hope in an unusual summer that everyone has the opportunity to have a nice vacation or holiday someplace. I wish everyone well and thank you all.

ARBITRATOR BIENVENU: Thanks.

Mr. Johnston, Mr. Marenberg, no other matter to --

MR. MARENBERG: In the area where I do a lot of work, which is entertainment, they'd be cuing the music at the Oscars by now.

ARBITRATOR BIENVENU: We have gone through our agenda, so it remains to me to bring this hearing to a close.

But before I do so, I would like to

express the Panel's gratitude to each and every member of the teams of lawyers and support staff that contributed to the representation of the parties and the Amici in this IRP.

I would say, if I may say so, the parties and Amici are extremely well-represented in this case, and it truly is a pleasure for my colleagues and I to work with professionals of such high caliber.

We also appreciate the exemplary courtesy and cooperation displayed among counsel throughout the hearing. It makes it very easy for the Panel when that happens.

We also wish to thank JD and his team for their excellent services throughout the hearing. Everything went very smoothly.

And last but not least, thank you to our court reporter and those who support her for their services in connection with this hearing.

So I know that on this note, my colleagues join me in wishing everyone well. Stay safe, in good health, and if I may end on a positive note, we will get through this pandemic, and we will meet in person again once we get to the end of this tunnel.

So thank you all and have a good end of day.

MR. MARENBERG: Thank you.

ARBITRATOR KESSEDJIAN: Good-bye, everyone.

MR. ENGLISH: Good-bye. Thanks everyone.

(Whereupon the proceedings were concluded at 1:38 p.m.)

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REPORTER'S CERTIFICATE

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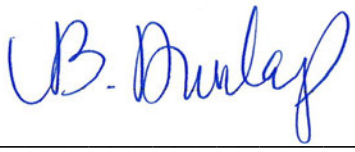
STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 20th day of August, 2020.



BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

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EXHIBIT Altanovo-9

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

REPORT OF GEORGE SADOWSKY

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20 March 2019

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I. Introduction

1. In December 2018, I was contacted by Dechert LLP, who have asked me to examine the performance of ICANN in fulfilling its mandate and core value to introduce and promote competition in the domain name industry in connection with the proposed acquisition of .web by Verisign, Inc. ("**Verisign**"). In this report, I: (i) describe my October 2018 interactions with the ICANN Board of Directors regarding the delegation of .web to Verisign; (ii) briefly summarize the origins and development of the Domain Name System ("**DNS**"); (iii) explain how the domain name industry operates; (iv) describe Verisign's dominant position in the DNS; (v) analyze the competitive significance of the .web domain and of the likely effect on competition if it were to be acquired by Verisign; and (vi) provide examples of actions taken by regulators to limit the ability of dominant firms like Verisign to acquire additional resources to possibly increase their dominant positions.[1]

2. In sum, and as discussed in detail below, it is my opinion that:

    1. ICANN's competition mandate requires it to introduce and promote competition for registry services. The competition mandate is both the *raison d'être* of ICANN's creation and an essential element in its administration of the domain name industry. ICANN must do more than simply comply with antitrust and competition laws. It must affirmatively take steps to create a competitive environment within the domain name industry.

    2. The delegation of .web to Verisign, a firm that already dominates in the provision of registry services, would result in the loss of a unique opportunity to introduce significant new competition to Verisign's current registries, .com and .net. It would be a direct and significant attack on the competitiveness of the registry services industry, with predictable results for the future of the industry. Indeed, a transfer of .web to Verisign would be a repudiation of ICANN's bylaws and its overall mandate to introduce and promote competition for registry services.

[1] My views do not depend in any way on information provided to me as an ICANN Board member and considered confidential as such.

3. It is my view that ICANN may not approve any action that would result in Verisign's exercising any degree of control or influence over .web. ICANN must consider the effects of its actions and their consequences within the context of its overall mandate. By not considering the competitive effects of the delegation of .web to Verisign, ICANN would be acting in a manner that is directly contrary to its competition mandate and would lose a unique opportunity to significantly increase the degree of competition in the registry services industry.

II. Education and Professional Qualifications

3. I received an A.B. degree with honors in Mathematics from Harvard College and M.A. and Ph.D. degrees in Economics from Yale University. I taught mathematics at Harvard during a year of advanced graduate study. After spending 1958-1962 as an applied mathematician and programmer, I began working on applying computers to economic and social policy, leading academic computing and networking organizations, and making information and communication technologies (ICTs) useful throughout the world. In 1963-64, I introduced the first use of computer-based microsimulation for tax analysis purposes in the United States Department of Treasury.

4. In 1964, I worked with a Special Master to the Connecticut Supreme Court to apply computers to creating Congressional redistricting plans for the State. During 1966-1970, I founded and directed the Computer Center at the Brookings Institution in Washington, DC and, in parallel, launched the Social Science Computing Special Interest Group of the ACM (Association for Computing Machinery). From 1970-73, I worked as an economic researcher at the Urban Institute, which culminated in my Ph.D. dissertation that described the creation and application of micro-analytic simulation models of the household sector for social and economic policy analysis.

5. From 1973 to 1986, I worked at the United Nations, where I directed both the evolution of the use of computing technology for the UN Statistical Office and the transfer of

information technology to developing countries. In that regard, I have worked in the field in about 50 developing countries and continue to do so. Among other things, I introduced the use of microcomputers for census data processing in Africa in 1979 and worked with China between 1982-1986 to support the computing activities of its 1982 Census of Population and Housing. In 1999-2000, I designed and implemented for Chinese technical staff one of the first CIO (Chief Information Officer) training courses in Shanghai and the U.S.

6. From 1986 to 2000, I directed academic computing and networking activities, first at Northwestern University and then at New York University. I have been a consultant to the United States Department of Treasury, the United States Congressional Budget Office, UNDP (United Nations Development Program), the Canadian and Swiss Governments, the Inter-American Development Bank, and a number of foundations. I was a Board member of AppliedTheory Corporation (Nasdaq: ATHY) and was a Trustee of the Corporation for Research and Educational Networking (CREN) and the New York State Educational and Research Network (NYSERNet). I was also actively involved in World Bank activities between 1996-2002 as a member and Coordinator of the Technical Advisory Panel for the infoDev program, as well as in UNDP and USAID activities. In 1994, I participated in the formulation of USAID's Leland Initiative for providing initial Internet connectivity for 20 African countries.

7. I was a member of the Internet Society Board of Trustees from 1996 to 2004 and served as its Vice President for Conferences (1996-1998) and Vice-President for Education (1998-2001). I also headed a group of ISOC volunteers that defined and conducted the ISOC Developing Country Network Training Workshops during 1993-2001. I have headed ICT projects for NATO that resulted in regional Internet training projects in Eastern Europe, Latin America, and West Africa, as well as aiding NATO ICT projects in Central Asia.

8. Between 2001-2006, I served as the Executive Director of the Global Internet Policy Initiative (GIPI), which had active ongoing Internet policy reform projects in 17 emerging economies. I also served as Senior Technical Adviser within USAID's dot-GOV program executed by Internews Network, providing ICT technical and policy assistance to the developing world. I am the editor of and lead contributor to the World Bank's Information Technology Security Handbook as well as the editor and lead author of the World Wide Web Foundation's seminal publication, Accelerating Development Using the Web: Empowering Poor and Marginalized Populations.

9. I have served as an expert witness for litigation in the United Kingdom and the United States and as a special adviser to Nitin Desai, the Chair of the UN Secretary-General's Internet Governance Forum, as well as to the Chair of UN G@ID. I have also served as a member of the PIR (Public Internet Registry) Advisory Board and, from September 2009 to October 2018, I served as a member of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors.

10. In recognition of my work, I was inducted into the Internet Hall of Fame in 2013.

11. My *curriculum vitae* is annexed hereto as **Exhibit GS-1**.

12. I am being compensated for my participation in this case. However, the views expressed in this report are my own and do not necessarily represent those of any organization or institution. My compensation is in no way affected by any opinions that I provide, by my conclusions, or by the outcome of this case. I reserve the right to supplement or amend this report based on additional evidence brought to my attention.

13. Prior to December 2018, I had never worked for Afilias. I have never done any work for Verisign, Nu Dotco LLC ("**NDC**"), or any other company that was a member of the

.web contention set. Prior to October 2018, I was in discussions with Neustar, Inc., which had been identified in NDC's .web application as its back-end registry provider, regarding a potential consulting project. Although that project was wholly unrelated to any of the issues discussed herein, I voluntarily recused myself from the ICANN Board's discussions of .web. Ultimately, the project did not proceed and I subsequently rejoined the Board's discussions regarding .web in October 2018.

III. My October 2018 Interactions With the ICANN Board of Directors

14. My views on the issues discussed in this report were formed well before I was ever contacted by Afilias. On 3 October 2018, I participated in an ICANN Board of Directors meeting at which the decision to deny Afilias' 'DIDP request' for the production of documents was discussed.[2] At the time of that meeting, I had no knowledge of, or reason to believe that I would be involved in, this Independent Review Process in any manner.

15. I was, of course, aware from reports in the industry press that Verisign intended to acquire .web pursuant to an agreement that it had entered into with one of the .web applicants.[3]

Confidential Information Redacted

[2] Since I had recused myself from all Board discussions regarding .web prior to this date, my views did not reflect in any way information provided to me as an ICANN Board member.

[3] See, e.g., A. Allemann, "Verisign Releases Statement About .Web," *Domain News Wire* (August 1, 2016), available at https://domainnamewire.com/2016/08/01/verisign-releases-statement-web/, **[Ex. GS-2]**; K. Murphy, "Verisign and Afilias in open war over $135m .web," *Domain Incite* (November 11, 2016), available at http://domainincite.com/21254-verisign-and-afilias-in-open-war-over-135m-web, **[Ex. GS-3]**; and D. Strizhakov, "Afilias asks ICANN to investigate winning bid for .web," *Trademarks & Brands Online* (August 16, 2016), available at https://www.trademarksandbrandsonline.com/news/afilias-asks-icann-to-investigate-winning-bid-for-web-4796, **[Ex. GS-4]**.

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16. Confidential Information Redacted

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17. Confidential Information Redacted

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[4] See Stimmel, Stimmel & Smith, Basic Duties of a Director in a California Non-Public Corporation, available at https://www.stimmel-law.com/en/articles/basic-duties-director-california-non-public-corporation, **[Ex. GS-5]**.

IV. The Domain Name System

18. The DNS was created in 1984 to permit Internet users to refer to Internet sites by human readable names instead of numeric IP addresses that are difficult to remember. Basically, the DNS is a distributed data base system whose principal function is to translate a domain name such as 'washingtonpost.com' to an Internet Protocol numeric address such as 157.74.108.17, which is then used by the routing apparatus of the Internet to make a connection between the requesting client and the goods and services that are offered by the entity that is being addressed. The history and basic workings of the DNS are described in greater detail in Jonathan Zittrain's Expert Report.[5]

19. The introduction of the World Wide Web in the early 1990s enhanced the importance of the DNS by incorporating domain names into the web's addressing structure. The Uniform Resource Locator ("**URL**") of almost every web page uses a domain name as a principal part of its structure.

20. The DNS is absolutely critical to the effective and productive use of the Internet. In the early days of the Internet, users had to employ numeric addresses to reach resources connected to the Internet and, although this is still possible, the introduction of names with useful

[5] Expert Report of Jonathan Zittrain (September 26, 2018) ("**Zittrain Report**"), Sec. 4.

semantic content has made the Internet usable by almost everyone.[6] The integrity of the DNS is essential for the operation of the Internet and the structure, conduct, and performance of the industry that controls its implementation and operation have major implications for the trust in, and the utility of, the network.

21. Recognition of the importance of this burgeoning industry occurred in the mid-1990s and sparked the process that eventually led to the establishment of ICANN in late 1998. With an evolving perception of the rapid growth and importance of the incipient domain name industry, the competitive structure of the industry took on special importance, as documented in the Zittrain Report.[7] Because .com was the most generic of the three "open" domains, it became the standard for websites, leading to the so-called "**dot-com boom**."[8]

22. In turn, the rapid popularity of .com names led to very substantial speculation and increasing exhaustion of its available name space, to the point where almost all words in the English language as well as many two-word combinations were registered in .com. By the late 1990s, Network Solutions, which at the time controlled .com, was charging $100 for a two-year registration in its .com registry and $50 per year for a renewal.[9] These developments contributed

[6] Based upon work within the Internet Engineering Task Force (ietf.org) and ICANN (icann.org), as well as on the codification efforts of the UNICODE Consortium (unicode.org), internationalized domain names can now be created and processed in almost any script that exists today. More than 100 internationalized gTLDs now can be addressed in their native scripts. The Universal Acceptance Steering Group (uasg.tech), supported in part by ICANN, has as its goal the ability to use any properly formed domain name anywhere and obtain the intended result.

[7] Zittrain Report, Sec. 6.

[8] Each of the "legacy" open domains had been established and promoted by the early Internet technical community for discrete purposes: .com, for commercial applications, .net, for network organizations, and .org, for non-profit organizations. Other domains established at the time were reserved for specific entities, such as .gov (United States government), .edu (universities), and .mil (United States military). The legacy domains retain to this day strong associations with their original purposes.

[9] U.S Department of Commerce, "Statement of Policy on the Management of Internet Names and addresses," Docket no. 980212036-8146-2 (June 5, 1998), **[Ex. GS-7]**.

to awareness that competition was needed in the registry business and to the creation of ICANN to oversee and promote those efforts.

23. Verisign acquired Network Solutions in 2000 for $21 billion.[10] Even taking into account the excessive exuberance of the years of the dot-com boom, the magnitude of this price illustrates the explosive growth and rapidly increasing importance of the domain name industry in the evolution of the Internet.

24. As documented in Dr. Zittrain's Report, ICANN and its founders regarded the introduction of meaningful competition in the domain name industry as not only the most important immediate goal for the newly created organization but as its primary *raison d'être*.[11]

V. The Domain Name Industry

25. The two major sets of actors in the domain name industry are registries and registrars. Registries operate the specific top-level domains (TLDs), which they sell on a wholesale level to registrars. Registrars, in turn, serve as retail 'front ends' for registrants that want to obtain rights to use specific second level names in a given TLD.[12] The entry of a new

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[10] "VeriSign buys domain firm," *CNNMoney* (March 7, 2000), available at https://money.cnn.com/2000/03/07/deals/verisign/, **[Ex. GS-8]**. Verisign later transferred the .org registry to the Public Interest Registry. See P. Festa, "VeriSign Transfers Control of .org," *C/Net* (January 2, 2003), available at https://www.cnet.com/news/home-security-drone-could-help-you-tell-possums-from-prowlers/, **[Ex. GS-9]**.

[11] Zittrain Report, ¶¶ 22-24.

[12] This IRP concerns generic top level domains ("**gTLDs**"). Another class of top level domains, country code top level domains ("**ccTLDs**"), are administered by national governments instead of by ICANN. ICANN processes, which are relatively open, transparent, and predictable, do not apply to ccTLDs. Rather, a sovereign government has absolute authority to set the rules of the operation of the ccTLD and to change them, as it wishes. A significant number of ccTLDs have registration requirements that include presence, residence, or citizenship in the country in order to register a name in the domain. Further, ccTLDs are strongly associated with a specific geography and/or language. Firms that operate in more than a single country could, in principle, register their names in multiple ccTLDs, or they could opt for a generic global name, or both.

Moreover, maximum stability and predictability are essential if the goal of obtaining a domain name is to have long lasting web page to build a customer base and brand loyalty. Using a ccTLD puts a domain name under the control of a government over which registrants may have no recourse in the case of a dispute, where policy, pricing, and/or control could change significantly and unpredictably. With some exceptions, ccTLDs are more likely to concern

generic TLD (gTLD) registry occurs through a contract between its operator and ICANN. Pursuant to ICANN rules, registries must contract with any accredited registrar that requests access to the registry's gTLD. In contrast, registrars have no obligation to contract with all registries to provide retail services for them.

26. Individuals and organizations acquire domain names for a variety of reasons. The most common reason is for the purpose of creating a web site that has a name that is specially selected by, and identifies, the registrant. Domain names that are chosen by companies generally identify the company names, brands, and/or trademarks, while domain names that are selected by individuals may relate to their own names or to other identifying characteristics or interests. Such names often advertise the identity of the name holder and can be used to advantage in both business and personal affairs. One could characterize this class of registrations, meant to be publicly distributed and actively used, as 'operational' registrations.

27. Domain names are also acquired by individuals and organizations that plan to start a business, enter a profession, or introduce a brand, for which the name may be useful in the future. The first claimant for a name can deny its use by others indefinitely. Therefore, if a specific name may be desired in the future, it is very important to register it as soon as it becomes available.[13] These names are acquired because of their 'option values;' they insure that the option to use the names will be available to the registrant if and when they are ever wanted for operational purposes.

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themselves with national issues and linguistic requirements and, as a result, registrations in ccTLDs are imperfect substitutes for registrations in gTLDs, if they are even substitutes at all. While having only a national domain may be sufficient if only national visibility is sufficient, the world is becoming more and more globalized and having an international presence is growing in importance for both organizations and individuals.

[13] Registrants that successfully obtain domain names have perpetual presumptive renewal rights as long as they do not violate the terms of service in their registrar agreements.

28. Domain names can be transferred among registrants in private transactions with no restrictions. Because of this, speculation in domain names has existed since they became available for registration in the 1990s. One could characterize this class of registrations as 'speculative,' since they are acquired not to be used by the initial registrant but rather to be held for subsequent sales to buyers for whom they have additional value.

29. Desirable domain names are generally short, have meaning in the language of the registrant, are easy to remember, and are identified with the registrant.[14] Since there is a limited supply of short and meaningful names that are not protected by trademarks in any given registry, these names command high prices. Speculators generally acquire a large number of such names in popular new gTLDs.

30. Registrants that choose domain names for operational purposes generally make choices that reflect meaningful personal or organizational identifiers. They publish their names widely as a part of their email addresses, in the URLs of their web sites, and through more traditional outlets such as business cards, letterheads, advertisements, and signs. Registrants want their domain names to be as widely distributed as possible, for awareness, commercial, and recognition purposes. Moreover, once a domain name is launched on the Internet, references containing it may be forwarded, copied, posted, or otherwise advertised anywhere on the global Internet without the registrant's knowledge or permission. These links are often essential to driving traffic to a registrant's website. Collectively, the dissemination of a domain name creates a certain 'stickiness,' creating both real and opportunity cost barriers to switching to a name in another domain. The longer that a domain name has been actively used by a registrant, the more

[14] See A. Rowland, "10 trips for choosing the perfect domain name," *GoDaddy* (updated November 5, 2018), available at https://www.godaddy.com/garage/10-tips-for-choosing-the-perfect-domain-name/, **[Ex. GS-10]**, and D. Pinsky, "8 Smart Tips for Choosing A Winning Domain Name," *Forbes* (April 10, 2017), available at https://www.forbes.com/sites/denispinsky/2017/04/10/domain/#3bc445774b4f, **[Ex. GS-11]**.

'sticky' it is likely to be. Registrants therefore overwhelmingly prefer to renew their domain names, even possibly at a significantly higher price than registering their names in a new domain. Accordingly, for renewals, all registries enjoy some degree of market power.

31. In addition to competing for new registrants,[15] new gTLDs also have the capability to erode the customer bases of existing registries, albeit slowly because of 'stickiness' in the use of existing domain names. If an existing registrant wants to change its domain name, it can register the new name in the new gTLD and forward e-mail traffic and redirect web queries destined for the old name to the email address and web site that are associated with the new name. For example, if the registrant of mycompany.old wants to register as mycompany.new for the future, it simply needs to register mycompany.new and select forwarding and redirection options to send all mail and queries to the new address. This is not difficult and services exist to help the registrant do so without loss of the information that search engines have generated for it.[16] Over time, as the .new domain becomes broadly associated with mycompany, mycompany may choose not to renew the .old domain. Thus, while the registrant must have already acquired the name that it wants in .new, and must continue to maintain its registration in .old, at least for some time, switching between domains is feasible. However, the decision to acquire the desired name must be made when .new is launched, in order to assure that the name is available in that domain. Thus, for example, if mycompany wants be known by the

[15] The extent to which any new gTLD appeals to new registrants is determined by the characteristics of the gTLD itself. As discussed below, most new gTLDs have been aimed at niche groups and do not compete with generic gTLDs that are implicitly global in scope and have broad general appeal, such as .com and .net.

[16] For example, Google has tools that allow a web site to maintain its list ranking when traffic to that site is redirected. See, e.g., Google Webmaster Central Blog, "Google's handling of new top level domains" (July 21, 2015), available at https://webmasters.googleblog.com/2015/07/googles-handling-of-new-top-level.html, **[Ex. GS-12]**.

same domain name, i.e. by 'mycompany' in .new, it must act promptly when registrations open in .new.

VI. Verisign's Dominant Position

32. Verisign has had a dominant position since it acquired Network Solutions in 2000. For example, CENTR[17] reports that, in October 2018, there were 191.9 million domains registered in all gTLDs of which 135.9 million, 70.8%, were registered in .com and 13.9 million, 7.2%, were registered in .net.[18] CENTR also reports that, in October 2015, there were 161.2 million domains registered in gTLDs of which 120.0 million, 74.4%, were registered in .com and 15.1 million, 9.3%, were registered in .net.[19] Thus, the share of registrations in gTLDs that are held by Verisign, the registry for both .com and .net, declined by only about 5 percentage points over this period, and remains very high, despite the introduction during the past several years of a very large number of new gTLDs.

33. Industry data suggest that the share of 'permanent' registrations in new gTLDs may be less than than even their small reported share. According to ntldstats.com, registrations in new gTLDs, which collectively rose to a peak of just under 30 million names in April 2017, stood at 26.6 million registrations at the end of 2018.[20] This represents only about 14% of

[17] CENTR, the Council of European National Top-Level Domain Registries, publishes quarterly reports covering the status of and trends in registrations in all top-level domains.

[18] CENTR, *CENTRstats Global TLD Report* (Q3 2018 – Edition 25), available at https://centr.org/statistics-centr/quarterly-reports.html, **[Ex. GS-13]**. Verisign reports that, at the end of Q3 2018, there were 193.1 million domains registered in gTLDs of which 137.6 million, 71.2% were registered in .com and 14.1 million, 7.3%, were registered in .net. Verisign, *The Domain Name Industry Brief*, Volume 14 - Issue 1 (February 2017), **[Ex. GS-14].**

[19] ENTR, *CENTRstats Global TLD Report* (Q3 2015 – Edition 13), available at https://centr.org/statistics-centr/quarterly-reports.html, **[Ex. GS-15]**.

[20] See nTLDStats, new gTLD Summary, available at https://ntldstats.com. It is likely that at least some, and perhaps a large percentage, of these registrations are duplicates of registrations in legacy gTLDs, such as .com and .net.

registrations in all gTLDs, most of which are accounted for by registrations in a handful of new gTLDs.[21] Moreover, Domain Name Stat reports that registrants are choosing *not* to renew domains that are registered in new gTLDs at a far higher rate (7.4%) than domains that are registered in legacy gTLDs (2.9%).[22] A combination of factors contributes to this difference: newness of the new gTLDs, promotional activities by some new gTLDs, including providing free or very low cost initial registrations, and exploitation of new gTLDs by spammers.

34. History helps to explain how Verisign achieved its current dominant position. In the 1990s, only a few gTLDs were available for registrations. Of these, .com was the most generic and the most global and was regarded as the only viable choice for most registrants. The others were either restricted for use by certain entities or otherwise marketed to niche actors.[23] As the Internet expanded and became better known, there was an explosion of .com registrations. The dot-com boom was spurred by powerful 'network effects': the more users that were already registered in.com, the more that new users wanted to do the same.[24] As a result, registrations in .com grew rapidly while registrations in the other 'legacy' domains lagged far behind.

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[21] At the beginning of February 2019, the ten new gTLDs having the largest number of registrants were .top, .xyz, .loan, .club, .online, .site, .vip, .shop, ,work, and .ltd. (nTLDStats, new gTLD Summary, *op. cit.* note 20).

[22] Domain Name Stat, "Domain name registration's statistics," available at https://domainnamestat.com/, **[Ex. GS-16]**. Domain Name Stat refers to legacy gTLDs as Generic TLDs and reports data for them separately from data for New gTLDs.

[23] The 'rules' for .com, .org, and .net were, in fact, strong informal guidelines that were put into place by the early Internet community in an attempt to provide some logical categorization for registrations, but the guidelines were not enforced. It was therefore possible to register a name in .net even if the registrant had nothing to do with networks and, based upon the large number of registrations in .net, many registrants did take advantage of the opportunity. .Net was not actively promoted as an alternative to .com, however, and .net names never achieved the penetration of .com names. As noted above, there are currently about 10 times as many registrations in .com as there are in .net, which remains the second most popular gTLD, and is also controlled by Verisign.

[24] The earliest formal analysis of network effects is J. Rohlfs, "A Theory of Interdependent Demand for a Communications Service," 5(1) *The Bell Journal of Economics and Management Science* (Spring 1974), **[Ex. GS-17]**. An earlier analysis, which labeled these "bandwagon" effects, is H. Leibenstein, "Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand," 64 *The Quarterly Journal of Economics* (May 1950), **[Ex. GS-18]**.

35. Software developers unwittingly contributed to enhancing the perceived exclusivity of .com registrations. Some made the assumption that TLDs would always be three characters long and most assumed that the characters would come from the core Latin alphabet.[25] In an attempt to simplify access to the web, these browsers would automatically attach a .com suffix to any presumed domain name that was entered, allowing for example, a user to enter just 'amazon' instead of 'amazon.com.'[26] This had the effect of conditioning prospective registrants to believe that .com was either the only gTLD or the default gTLD.

36. The United States Government has required ICANN to impose caps on the prices charged for registrations in .com ever since Verisign acquired Network Solutions in 2000. The reason for this is obvious. In their survey of price cap regulation in the telecommunications industry, economists David Sappington and Dennis Weisman observed that, "When competition is unable to impose meaningful discipline on incumbent suppliers of essential services, regulation can be employed as an imperfect substitute for the missing market discipline."[27] This is the exactly the approach adopted by the United States Government in the case of Verisign, which maintains a dominant position in the supply of registry services. Specifically, in recognition of Verisign's continuing dominance, the Government requires that the prices being charged for registrations in .com be subject to a cap that is administered by ICANN.

[25] The appropriate standard for domain names, RFC 1035, and updates to it, specify that names must be composed of some combination of the 26 Latin letters, digits 0-9, and a hyphen, and that the name must be less than 64 characters long. See Domain Names – Implementation and Specification (November 1987), available at https://tools.ietf.org/html/rfc1035, **[Ex. GS-19]**.

[26] Zittrain Report, ¶ 17.

[27] D. Sappington and D. Weisman, "Price cap regulation: what have we learned from 25 years of experience in the telecommunications industry?," 38 *Journal of Regulatory Economics* (2010), **[Ex. GS-20]**, p. 229 (footnote omitted).

VII. The Introduction of New gTLDs and the Competitive Significance of .Web

37. As Professor Zittrain observes, ICANN's competition mandate was explicitly recognized as a primary driver behind the development of ICANN's New gTLD Program.[28] ICANN observed in 2009 that "New gTLDs are expected to bring innovative services and greater choice to Internet users through increased competition…."[29] Indeed, one of the criteria for assessing proposals to operate new registries in the most recent 'round' was the extent to which they would lead to "the enhancement of competition for registration services."[30] ICANN noted specifically that:

> … market mechanisms that support competition and consumer choice should, where possible, drive the management of the DNS. One of ICANN's core principles is the encouragement of competition at both the registry and registrar levels…. Proposals will be evaluated to determine whether they are responsive to the general goal of enhancing competition for registration services.

38. Although the new gTLD program has increased considerably the number of gTLDs that are available to registrants, Verisign continues to command a dominant position in the domain name industry.

39. In my opinion, the only new domain that is likely to compete strongly with .com is .web, due to properties inherent in its name. Rather than stressing commercialism, .web stresses affinity. Rather than stressing business, .web stresses community, which is more

[28] Zittrain Report, Sec. 6. As Zittrain notes, "ICANN's Competition Mandate represents an obligation by ICANN to do more than just comply with applicable competition and antitrust laws. Rather, it is an affirmative undertaking by ICANN to ensure that its decisions and actions are consistent with its mission to create a competitive environment within the DNS in which market forces can operate without restraint." *Id.*, ¶ 2. This means that ICANN cannot abdicate its responsibilities in this regard by referring to the fact that antitrust authorities may also have responsibilities in this area.

[29] ICAN Announces Important Milestone in Making the Internet More Accessible to All (October 4, 2009), available at https://www.icann.org/news/announcement-2009-10-04-en, **[Ex. GS-21]**.

[30] ICANN, Criteria for Assessing TLD Proposals (August 15, 2000), available at https://archive.icann.org/en/tlds/tld-criteria-15aug00.htm, **[Ex. GS-22]**.

attractive to social networkers. The current population of Internet users is less technically savvy and more recreationally oriented than the users of the 1990's and many consider 'the web' to be the Internet. Thus, they are likely to think in terms of 'web addresses' rather than domain name addresses or URLs, and they may feel greater affinity with the Internet if they see or have a .web than a .com address.

40. Industry observers largely agree with this assessment. There is, generally, an expectation in the industry that there will be significant demand for registration of domain names in .web — the issue is not one of 'if' but rather of 'how much'. Moreover, once a name is registered in a new domain, it is potentially unavailable forever and, as a result, I would expect to see very considerable early demand for .web registrations that offer value to specific registrants, demand that would greatly exceed that for registrations in any other new gTLD.

41. My opinion regarding the attraction of .web for future registrants is based on the following observations:

1. ***Universality.*** Perhaps the greatest attraction of .web is the result of a constellation of features that it uniquely possesses. In particular, .web satisfies four essential requirements for broad adoption by users: (1) it consists of three letters; (2) it is a purely generic label with no semantic limitations of scope; (3) it has a very strong link to the Internet as a whole, meaningful for anyone using the Internet; and (4) it is memorable and easily pronounced. No other new gTLD has all four of these characteristics.

2. ***Availability of names.*** In contrast to .com, .web names have yet to be claimed.[31] Desirable domain names will, therefore, be much more likely to be available in .web than in .com because so many names have already been taken by .com registrants. After delegation of .web, almost all of the 130+

[31] Premium names and trademark-related names registered during the sunrise period account for only a very small part of the name space of any gTLD. Thus, at the beginning of the public registration period for a new domain, potential registrants effectively have their choice of a virtually unlimited number of second level names.

million or so domain names that are now registered in .com will become available for registration in .web.[32]

3. ***Identity and Affinity.*** In the early days of using domain names, .com was the unchallenged choice for nearly every use that did not satisfy one of the niche categories of the other legacy gTLDs, e.g., .mil or .edu. The perceived lack of alternatives led users and consumers to believe that .com was the best, most prestigious, and safest domain in which to register. New registrants were most likely to want a .com domain name because most others had a .com domain name.

   Today's Internet users have a different qualitative profile from that of Internet users in the 1990s. Today's Internet culture is expanding beyond its focus on commercial activity to making available a digital electronic agent to assist individuals in engaging in many forms of human activity. Having a .com address is more associated with the past and carries less importance now than it once did.

   .Web is different. In addition to being new, .web is more directly and strongly associated with use of the Internet for a wide range of purposes, consistent with a multifaceted relationship and use of the Internet. .Web is a better fit for today's users than is .com because they are more likely to want a presence on the Internet, to communicate via email, to participate in social networks such as Facebook and Twitter, and to manage multiple aspects of their personal lives.[33]

   Because of the shift in Internet culture for many people, the Internet *is* the web, and for them, registering a name in .web would be a natural and logical choice, especially given the availability of millions of meaningful names in .web that are currently unavailable in .com. Moreover, just as .com initially benefitted from the fact that later registrants wanted to 'follow' the choices of early registrants, once .web acquires a significant number of registrants, others are likely to want to follow suit.[34]

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[32] In addition, .web is 'suffix-friendly'. Some TLD names, including .web, can be attached as suffixes to words to make combinations that are memorable phrases. Examples of such names for .web are surfthe.web and futureofthe.web. By contrast, .com does not readily lend itself to naming of this sort.

[33] Significant examples of the new uses include getting health care information, making appointments, using search engines for finding information, participating in social networks, communicating with family, friends, and colleagues, taking educational courses and engaging in other self-help activities, gambling, finding partners, reading books and newspapers, as well as buying and selling goods and services.

[34] In an article written more than fifty years ago, Harvey Leibenstein refers to "…the desire of people to wear, buy, do, consume, and behave like their fellows; the desire to join the crowd, be 'one of the boys,' etc. -- phenomena of mob motivations and mass psychology either in their grosser or more delicate aspects. This is the type of behaviour involved in what we call the bandwagon effect.'" H. Leibenstein, "Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand," 64 *The Quarterly Journal of Economics* (May 1950), **[Ex. GS-18]**, p. 184.

42. Three kinds of evidence support my belief that .web would be a competitive threat to .com if it were owned by an entity other than Verisign: (1) similar statements made by applicants for the .web domain about its competitive potential; (2) statements made by analysts of the domain name industry about the competitive significance of .web; and (3) the record amounts of the bids made by participants in the .web auction, I regard the record winning bid in the auction as highly persuasive evidence of the competitive significance of .web, since it reflects the actual bids that auction participants were willing to make to operate the .web domain and the amount that Verisign that was willing to pay to prevent .web from falling into the hands of a competitor.

43. Statements made by applicants for .web characterize it as a strong competitor to .com. For example:

> Web.com knows from years of experience that the .com gTLD has played a revolutionary role in the advancement of global commerce and culture. In addition, the .com gTLD has had a powerful and democratizing impact, providing avenues for anyone to participate in online discourse and a growing market. There are, however, a finite number of useful second-level domains that can be applied for in .com, as ICANN knows and understands. Often other gTLDs, such as .org, .info, .biz and others either are unavailable or are not a good fit for a potential second-level domain. … In looking to expand the gTLD landscape beyond the existing robustness of gTLD offerings, an easy-to-remember and intuitively logical gTLD such as .web is a relevant addition. ***Consumers will instantly understand that a .web domain is an Internet website thereby ensuring quick adoption by users***.[35]

> The mission/purpose of .web is first choice. Domain name first choice, once again - globally. Some registrants got their first choice of a .com name. Many did not. When the .com registry gained its momentum selling names early on, the North

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Although many of the new gTLD names were chosen to attract registrants that have a particular affinity with a sport, hobby, activity, profession, or other aspect of life, over the period in which new gTLDs have become available, the number of additional registrations in .com have almost equaled the number of new registrations in all of the new gTLDs combined. This demonstrates that there is still a very strong demand for registrations in gTLDs with broad general appeal, a demand that .web will be well-positioned to satisfy.

[35] New gTLD Application submitted to ICANN by Web.com Group, Inc., Application ID 1-1009-97005 (June 13, 2012), **[Ex. GS-23]**, Sec. 18(a).

> American market and particularly the United States were the first and primary purchasers of .com names. They got their first choice. And many global registrants who came after did not. ***Other generic top level domains have been introduced: .info, .biz, .net, .org – but none of those names have the true global generic appeal of the .com brand***.[36]
>
> The proposed gTLD will provide the marketplace with a new all-purpose gTLD for second-level domain names, .web. The mission of this gTLD is to act as an alternative to current gTLDs, in particular .com and .net. This mission will enhance consumer choice by providing new availability in the second-level domain space and increasing competition amongst generic gTLDs. Charleston Road Registry believes that registrants will find value in associating with this gTLD, which could have a vast array of purposes for enterprises, small businesses, groups or individuals seeking a second-level domain name already registered in .com or .net, or those simply seeking a competitive alternative to existing gTLDs….[37]

44. Statements from analysts of the domain name industry also characterize .web as a potentially significant competitor to .com. These statements include:

> .Web is ***both generic and pronounceable,*** not to mention that to everyone who's been on the Net for the past 20+ years, the 'web' is almost synonymous with the internet.[38]
>
> .WEB is what we call a 'super generic' and arguably the best new TLD alternative to .COM. It is a word that is commonly used with intuitive meaning. ***WEB could make a serious dent to .COM over the long run***.[39]
>
> .web has been seen, over the years, as the string that is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to ***provide a real challenge to .com***.[40]

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[36] New gTLD Application submitted to ICANN by DotWeb, Inc., Application ID 1-956-26846 (June 27, 2014), **[Ex. GS-24]**, Sec. 18(a).

[37] New gTLD Application submitted to ICANN by Charleston Road Registry, Inc., Application ID 1-1681-58699 (June 13, 2012), **[Ex. GS-25]**, Sec. 18(a).

[38] DomainGang, "Editorial: The domain future is on the .Web" (August 1, 2016), available at http://domaingang.com/editorial/editorial-the-domain-future-is-on-the-web/, **[Ex. GS-26]** (emphasis in original).

[39] Authentic Web, ".WEB Acquired for $135 Million. Too much? How does it compare?," available at https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/, **[Ex. GS-27]** (emphasis added).

[40] K. Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (August 1, 2016), available at http://domainincite.com/20820-verisign-likely-135-million-winner-of-web-gtld, **[Ex. GS-28]** (emphasis added).

> .web is widely considered the gTLD with the most potential out of 1,930 applications for new domain extensions ICANN received to battle .com and .net for widespread adoption.[41]
>
> …a handful of industry watchers and top level domain companies said that ***.web is the one domain that could unseat .com***. While that's open to debate, Verisign might have viewed this as an opportunity to take the greatest threat from the new TLD program off the table.[42]
>
> Is it likely that .web will be a standout among new TLDs? Here are a few points that may indicate ***.web is poised to gain traction relative to other recently introduced TLDs***….We're already used to using the term 'web' for internet-related activities….Web is short and memorable…..Dictionary names and short phrases are still available on .web.[43]

These statements are consistent with my own analysis of the characteristics of .web that are likely to make it a significant competitor to .com.

45. Finally, ICANN reports that the proceeds from the .web auction were $135,000,001. As a point of comparison, the proceeds from the auction with the second largest proceeds, which was completed in January 2016, were $41,501,000, or only about 31% as large, and the proceeds from the auction with the third largest proceeds, which was completed in February 2015, were $25,001,000, or only about 19% as large. The amount paid for .web represents about 56% of the total proceeds from all ICANN gTLD auctions.

46. The magnitude of the winning bid for .web provides strong evidence that Verisign regarded it as a significant competitive threat if were controlled by another registry operator. As Professor Paul Klemperer has noted, "since firms' joint profits in a market are generally greater *if fewer competitors are in the market*, it is worth more to any group of firms *to prevent entry of*

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[41] C. Negris, "How a $135 million auction affects the domain name industry and your business" (August 10, 2016), available at https://biv.com/article/2016/08/how-135-million-auction-affects-domain-name-industry, **[Ex. GS-29]**.

[42] Supremacy, "The Next Big Domain Extension," available at https://supremacyseo.com/TWS60, **[Ex. GS-30]** (emphasis added).

[43] TheHostingFinders, "Inside the High Stakes Auction for .Web" (July 25, 2016), available at http://www.thehostingfinders.com/inside-the-high-stakes-auction-for-web/, **[Ex. GS-31]** (emphasis added).

an additional firm than the additional firm is willing to pay to enter."[44] Professor Klemperer's observation is consistent with J.P. Morgan's, which characterizes Verisign's behavior as "a very good defensive strategic move keeping .web out of the hands of the potential competitor as we believe .web could be the closest thing to .com in the minds of customers looking for domain names."[45]

47. Verisign had good reason to make a bid that was high enough to keep .web out of the hands of a competitor. As economist Dennis Carlton stated in a report that he prepared for ICANN: "…entry is recognized to play a central role in maintaining competitive markets. Hence, to the extent that *.com* and other TLDs have any market power today, expansion of the number of TLDs would help dissipate it in the future."[46] Verisign moved decisively to acquire .web, the new gTLD that industry observers generally agree would be the most significant competitive threat to .com, in order to keep it out of the hands of a rival.

48. It is also significant to note that Verisign would have only a limited incentive to promote .web, because its success would come, at least in part, at the expense of .com and .net. Another owner would not have the same concern and would, therefore, promote .web more aggressively. This is readily observable in Verisign's management of .net. .Net shares many of the attributes that make .com successful, yet it is only about 1/10th its size. Verisign has not marketed .net aggressively and the perception that .net is a registry for technical, networking, and 'nerdy' concerns endures. Indeed, Verisign has done little to discourage that perception,

[44] P. Klemperer, "What Really Matters in Auction Design," 16 *The Journal of Economic Perspectives* (2002), **[Ex. GS-32]**, p. 177 (emphasis added).

[45] J.P. Morgan, *VeriSign (VRSN US), DoJ Clears Way for VRSN to Close .web Purchase* (January 10, 2018) [**Ex. JZ-3**], p. 1.

[46] Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf, **[Ex. GS-33]**.

suggesting informally that .com names are useful to companies for their public facing websites and .net names are useful for their internal networking purposes.[47] This is not surprising. Since many new registrations in .net would likely have been at the expense of registrations in .com, increasing registrations in .net would not produce an equivalent increase in registrations for Verisign. As a result, Verisign did not have had a strong economic incentive to promote .net. Of course, Verisign would have the same economic incentive – the desire *not* to promote one of its domains at the expense of another — if it were to control .web. This anti-competitive risk would would not be present if .web had an owner different from the owner of .com and .net.[48]

49. Finally, even if ICANN were to conclude that there is uncertainty about the magnitude of the competitive threat posed by .web to .com, ICANN should, nevertheless, take whatever steps are necessary to prevent the transfer of .web to Verisign because of Verisign's dominant position and ICANN's mandate to promote competition. The potential of the competitive threat that would result from .web's entry would be irrevocably lost if it were (mistakenly) placed in Verisign's hands.

VIII. Relevant Precedents

50. ICANN is not the first regulator or administrator that has had to deal with a dominant player. Here, ICANN cannot refrain from acting to prevent Verisign from acquiring

[47] See, e.g., VeriSign, Leverage Your .Net Domain Name: DocuSign Promotional Video, available at https://www.verisign.com/en_US/domain-names/net-domain-names/net-domain/index.xhtml, **[Ex. GS-34]**.

[48] It is well known that a firm that sells two competing products has an incentive to take into account the effect of a change in the sales of one of the products on the sales of the other. See, e.g., J. Farrell and C. Shapiro, "Upward Pricing Pressure in Horizontal Merger Analysis: Reply to Epstein and Rubinfeld," 10(1) *The B.E. Journal of Theoretical Economics* (2010), **[Ex. GS-35]**, Art. 41 ("...when a firm sells substitute Products 1 and 2, sales of Product 1 cannibalize to some degree the sales and profits of Product 2; …multi-product firms…recognize such cannibalization as a pecuniary (opportunity) cost of selling incremental units of Product 1"). In the present context, this means that, if Verisign owned .web, it would recognize that additional .web registrations would, to some extent, occur at the expense of .com. As a result, it would have a smaller incentive to promote .web than would a registry that did not also own .com.

.web while also satisfying its obligation to introduce and promote competition in the provision of domain names services. ICANN has historically controlled Verisign's exploitation of its dominant position through the imposition of price caps on .com. In analogous markets, the United States Federal Communications Commission (FCC) has noted that "price caps act as a transitional regulatory scheme *until the advent of actual competition makes price cap regulation unnecessary*."[49] The FCC stated specifically that "It anticipated creating…a mechanism whereby it would lessen, and eventually eliminate, rate regulation *as competition developed*."[50] One way in which the FCC has sought to promote such competition is to limit the amount of *newly licensed* spectrum that could be acquired by dominant wireless carriers in spectrum auctions.[51] ICANN could promote competition in the supply of registry services in the same manner, by limiting the ability of the dominant industry player, Verisign, to acquire .web.

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[49] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, FCC, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking (Adopted January 19, 2005; Released January 31, 2005), **[Ex. GS-36]**, ¶ 11 (emphasis added, footnote omitted).

[50] *Id.*, ¶ 13 (emphasis added, footnote omitted). Similarly, UK telecommunications regulator Oftel noted that "Price controls have been used to restrict [British Telecom] from excessive pricing *that its dominance would otherwise allow*…." Protecting consumers by promoting competition: Oftel's conclusions (June 20, 2002), Statement issued by the Dirctor General of Telecommunications, available at https://webarchive.nationalarchives.gov.uk/20140702142545/http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/2002/pcr0602.htm, **[Ex. GS-37]**, Sec. 1.1 (emphasis added); and Ofcom, a successor to Oftel, noted that its subsequent removal of these price controls was "enabled by - and reflects - *the rapid growth of competition*…." Ofcom, "Ofcom removes retail price controls on BT line rental and calls" (July 19, 2006), available at https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2006/ofcom-removes-retail-price-controls-on-bt-line-rental-and-calls, **[Ex. GS-38]**, p. 1 (emphasis added).

[51] The FCC expressed concern that a "class of entities that, though their substantial existing holdings of below-1-GHz spectrum and potential acquisition of a significant portion of the 600 MHz Band in a particular geographic area, *could hamper competition* in the mobile wireless service market …" and thus found it "necessary *to apply a limit* on the amount of 600 MHz spectrum that can be acquired in the forward auction" by such an entity. *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, FCC, GN Docket No. 12-268, Report and Order (Adopted May 15, 2014; Released June 2, 2014), **[Ex. GS-39]**, ¶ 752. The FCC has not been alone in placing limits on the amount of a newly licensed spectrum resource that can be acquired by incumbent wireless carriers. Cave and Webb observe that "The use of spectrum-aggregation limits is widespread around the world and appears to be becoming an increasing feature of spectrum auctions …." They also note that "[t]he regulators' common goal has been to ensure that a sufficient number of operators have enough spectrum of the right kind *to generate effective infrastructure competition*." M. Cave and W. Webb, *Spectrum Limits and Auction Revenue: the European Experience* (July 29, 2013), **[Ex. GS-40]**, p. 5 (emphasis added).

51. Professor Peter Cramton provides a useful summary of the economic benefits of imposing limits on the ability of dominant firms to acquire resources that are being newly introduced into an industry through an auction: "More societal value may come from awarding a small bidder, rather than a large bidder, a spectrum lot. Yet in an auction without limits, the large bidder may nevertheless win. The reason is that the large bidder's value is inflated by *the benefits the large bidder enjoys from reduced competition* in the wireless market in the event the small bidder fails to acquire spectrum."[52]

52. My purpose in recounting these actions is to illustrate the fact that regulators often face competitive concerns that are analogous to those faced by ICANN in this matter and to describe the kinds of actions that regulators have taken, and that ICANN could take, to address such concerns. In particular, it is a common practice to place limits on the amounts of resources that can be accumulated by dominant firms and, especially, to constrain their ability to acquire additional resources when new potential sources of competition are being introduced. Preventing the transfer of .web to Verisign is precisely the type of action that would promote competition among gTLDs.

IX. Summary and Conclusions

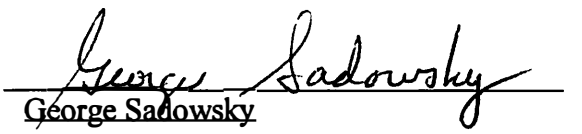
53. The New gTLD Program has led to an expansion of the domain name address space but it has had only a modest effect on Verisign's dominance. Verisign controls two TLDs, .com and .net, that together continue to have a very large share of registrations in all gTLDs. Indeed, the U.S. government and ICANN expressly recognize and seek to control Verisign's dominance by continuing to impose and enforce caps on the prices that Verisign can charge for

[52] P. Cramton, *The Rationale for Spectrum Limits and Their Impact on Auction Outcomes* (September 2013), **[Ex. GS-41]**, pp. 1-2 (emphasis added).

domain names in its .com registry. Without such controls, it is likely that Verisign would be able substantially to raise the prices that it charges for registrations in .com.

54. The evidence cited above supports the belief that a .web TLD would have a degree of attraction similar to .com and would attract a very large number of registrations. Verisign's motives in wanting to control .web are thus easy to understand. No gTLD other than .web has the potential to challenge Verisign's dominance. Control of .web by Verisign would prevent another industry participant from seriously challenging its dominance for many years to come.

55. Because one of ICANN's core values is to encourage competition in the provision of domain names, it is absolutely essential that it take actions to address Verisign's dominance. If it were to delegate .web to Verisign, ICANN would be abandoning one of the fundamental goals for which it was created and would go directly against ICANN's competition mandate.



George Sadowsky

Date: 20 March 2019

LIST OF EXHIBITS

Exhibit No.	Description
GS-1	*Curriculum Vitae*
GS-2	A. Allemann, "Verisign Releases Statement About .Web," *Domain News Wire* (August 1, 2016), available at https://domainnamewire.com/2016/08/01/verisign-releases-statement-web/
GS-3	K. Murphy, "Verisign and Afilias in open war over $135m .web," *Domain Incite* (November 11, 2016), available at http://domainincite.com/21254-verisign-and-afilias-in-open-war-over-135m-web
GS-4	D. Strizhakov, "Afilias asks ICANN to investigate winning bid for .web," *Trademarks & Brands Online* (August 16, 2016), available at https://www.trademarksandbrandsonline.com/news/afilias-asks-icann-to-investigate-winning-bid-for-web-4796
GS-5	Stimmel, Stimmel & Smith, Basic Duties of a Director in a California Non-Public Corporation, available at https://www.stimmel-law.com/en/articles/basic-duties-director-california-non-public-corporation
GS-6	Confidential Information Redacted
GS-7	U.S Department of Commerce, "Statement of Policy on the Management of Internet Names and addresses," Docket no. 980212036-8146-2 (June 5, 1998)
GS-8	"VeriSign buys domain firm," *CNNMoney* (March 7, 2000), available at https://money.cnn.com/2000/03/07/deals/verisign/
GS-9	P. Festa, "VeriSign Transfers Control of .org," *C/Net* (January 2, 2003), available at https://www.cnet.com/news/home-security-drone-could-help-you-tell-possums-from-prowlers/
GS-10	A. Rowland, "10 trips for choosing the perfect domain name," *GoDaddy* (updated November 5, 2018), available at https://www.godaddy.com/garage/10-tips-for-choosing-the-perfect-domain-name/
GS-11	D. Pinsky, "8 Smart Tips for Choosing A Winning Domain Name," *Forbes* (April 10, 2017), available at https://www.forbes.com/sites/denispinsky/2017/04/10/domain/#3bc445774b4f
GS-12	Google Webmaster Central Blog, "Google's handling of new top level domains" (July 21, 2015), available at https://webmasters.googleblog.com/2015/07/googles-handling-of-new-top-level.html
GS-13	CENTR, *CENTRstats Global TLD Report* (Q3 2018 – Edition 25), available at https://centr.org/statistics-centr/quarterly-reports.html
GS-14	Verisign, *The Domain Name Industry Brief*, Volume 14 - Issue 1 (February 2017)

Exhibit No.	Description
GS-15	ENTR, *CENTRstats Global TLD Report* (Q3 2015 – Edition 13), available at https://centr.org/statistics-centr/quarterly-reports.html
GS-16	Domain Name Stat, "Domain name registration's statistics," available at https://domainnamestat.com/
GS-17	J. Rohlfs, "A Theory of Interdependent Demand for a Communications Service," 5(1) *The Bell Journal of Economics and Management Science* (Spring 1974)
GS-18	H. Leibenstein, "Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand," 64 *The Quarterly Journal of Economics* (May 1950)
GS-19	Domain Names – Implementation and Specification (November 1987), available at https://tools.ietf.org/html/rfc1035
GS-20	D. Sappington and D. Weisman, "Price cap regulation: what have we learned from 25 years of experience in the telecommunications industry?," 38 *Journal of Regulatory Economics* (2010)
GS-21	ICAN Announces Important Milestone in Making the Internet More Accessible to All (October 4, 2009), available at https://www.icann.org/news/announcement-2009-10-04-en
GS-22	ICANN, Criteria for Assessing TLD Proposals (August 15, 2000), available at https://archive.icann.org/en/tlds/tld-criteria-15aug00.htm
GS-23	New gTLD Application submitted to ICANN by Web.com Group, Inc., Application ID 1-1009-97005 (June 13, 2012)
GS-24	New gTLD Application submitted to ICANN by DotWeb, Inc., Application ID 1-956-26846 (June 27, 2014)
GS-25	New gTLD Application submitted to ICANN by Charleston Road Registry, Inc., Application ID 1-1681-58699 (June 13, 2012)
GS-26	DomainGang, "Editorial: The domain future is on the .Web" (August 1, 2016), available at http://domaingang.com/editorial/editorial-the-domain-future-is-on-the-web/
GS-27	Authentic Web, ".WEB Acquired for $135 Million. Too much? How does it compare?," available at https://authenticweb.com/brand-tlds-digital-strategies/dot-web-acquired-for-135-million/
GS-28	K. Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (August 1, 2016), available at http://domainincite.com/20820-verisign-likely-135-million-winner-of-web-gtld
GS-29	C. Negris, "How a $135 million auction affects the domain name industry and your business" (August 10, 2016), available at https://biv.com/article/2016/08/how-135-million-auction-affects-domain-name-industry

Exhibit No.	Description
GS-30	Supremacy, "The Next Big Domain Extension," available at https://supremacyseo.com/TWS60
GS-31	TheHostingFinders, "Inside the High Stakes Auction for .Web" (July 25, 2016), available at http://www.thehostingfinders.com/inside-the-high-stakes-auction-for-web/
GS-32	P. Klemperer, "What Really Matters in Auction Design," 16 *The Journal of Economic Perspectives* (2002)
GS-33	Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf
GS-34	VeriSign, Leverage Your .Net Domain Name: DocuSign Promotional Video, available at https://www.verisign.com/en_US/domain-names/net-domain-names/net-domain/index.xhtml
GS-35	J. Farrell and C. Shapiro, "Upward Pricing Pressure in Horizontal Merger Analysis: Reply to Epstein and Rubinfeld," 10(1) *The B.E. Journal of Theoretical Economics* (2010)
GS-36	*In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, FCC, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking (Adopted January 19, 2005; Released January 31, 2005)
GS-37	Protecting consumers by promoting competition: Oftel's conclusions (June 20, 2002), Statement issued by the Dirctor General of Telecommunications, available at https://webarchive.nationalarchives.gov.uk/20140702142545/http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/2002/pcr0602.htm
GS-38	Ofcom, "Ofcom removes retail price controls on BT line rental and calls" (July 19, 2006), available at https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2006/ofcom-removes-retail-price-controls-on-bt-line-rental-and-calls
GS-39	*In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, FCC, GN Docket No. 12-268, Report and Order (Adopted May 15, 2014; Released June 2, 2014)
GS-40	M. Cave and W. Webb, *Spectrum Limits and Auction Revenue: the European Experience* (July 29, 2013)
GS-41	P. Cramton, *The Rationale for Spectrum Limits and Their Impact on Auction Outcomes* (September 2013)

EXHIBIT Altanovo-10

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS

BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LIMITED,

Claimants

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. _____

EXPERT REPORT BY JONATHAN ZITTRAIN

ICANN INDEPENDENT REVIEW PROCESS

September 26, 2018

Table of Contents

1. OBJECTIVE AND SUMMARY OF OPINIONS

1. I have been asked by Dechert LLP, counsel to the Claimants, to describe the history of the Internet Corporation for Assigned Names and Numbers ("**ICANN**"), its mandate to introduce and promote competition in the provision and supply of generic domain names (ICANN's "**Competition Mandate**"),[1] and the unique importance that the .WEB registry plays in achieving ICANN's Competition Mandate in the context of ICANN's New gTLD Program. Although this expert opinion has been requested by Claimants' counsel, I understand that my duty is to the IRP Panel.

2. As set forth in greater detail below, ICANN was conceived with objectives to, and has operated to, expand the Internet namespace and to introduce and promote competition in the provision and supply of generic domain names, which are fundamental to the architecture of the Internet. Competition in fundamental Internet naming provisioning, while maintaining interoperability, has been a touchstone for the Internet technical community, digital entrepreneurs, telecommunications regulators, and end-users—those who formed and remain stakeholders of ICANN—since the commercialization of the Internet in the early 1990s. ICANN's Competition Mandate represents an obligation by ICANN to do more than just comply with applicable antitrust and competition laws. Rather, it is an affirmative undertaking by ICANN to

[1] "The launch of the new gTLD program was part of ICANN's founding mandate when it was formed by the U.S. Government over 12 years ago. That ***mandate is to introduce competition*** and choice into the domain name system in a stable and secure manner". Statement of Kurt Pritz (ICANN Senior Vice President for Shareholder Relations) ("**Pritz Statement**"), S. Hrg. 112-394, ICANN's Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session, December 8, 2011, *available at* https://www.gpo.gov/fdsys/pkg/CHRG-112shrg74251/html/CHRG-112shrg74251.htm ("**December 2011 Senate Hearing**"), **[Ex. JZ-2]**, at 8 (emphasis added). Herein, I refer to the "mandate" identified by Mr. Pritz as ICANN's "**Competition Mandate**".

ensure that its decisions and actions are consistent with its mission to create a competitive environment within the DNS in which market forces can operate without restraint.

3. In the late 1990s, when ICANN was formed, the mandate to introduce and promote competition for the provision and supply of domain names meant creating competition for Network Solutions, Inc. ("**NSI**"), which controlled the .COM registry among others, and which was acquired in 2000 by VeriSign, Inc. ("**VeriSign**").

4. To realize its Competition Mandate, ICANN launched a program that would allow for the formation of new registries (the "**New gTLD Program**") to compete with NSI/VeriSign. Since the first round of the New gTLD Program in 2000, the industry has recognized that the most important new registry could be .WEB, which, of all existing and potential new gTLDs, is the closest and best potential competitor to VeriSign.

5. VeriSign's presumptive acquisition of .WEB runs counter to ICANN's Competition Mandate, is inapposite to the intent and purpose of the New gTLD Program, and is contrary to ICANN's fundamental objective of adopting and acting pursuant to processes that are transparent, fair, and non-discriminatory. A recent analyst report from JP Morgan described the current situation thusly:

> Verisign is paying $135M for the ownership rights to be the registry operator of .web. This could offer a new growth opportunity for the company into the future, but just as important, we think it is a very good defensive strategic move keeping .web out of the hands of the potential competitor as we believe .web could be the closest thing to .com in the minds of customers looking for domain names.[2]

[2] J.P.Morgan, *VeriSign (VRSN US): DoJ Clears Way for VRSN to Close .web Purchase*, January 10, 2018, **[Ex. JZ-3]**, at 1.

2. QUALIFICATIONS AND EXPERIENCE

6. I am the George Bemis Professor of International Law and Professor of Computer Science at Harvard University, holding faculty appointments at Harvard Law School, the Harvard John F. Kennedy School of Government, and the Harvard John A. Paulson School of Engineering and Applied Sciences. I co-founded and served as executive director of the Berkman Center for Internet and Society at Harvard Law School from 1996 to 2000. I was an assistant professor of law at Harvard Law School from 2000 to 2005, the Professor of Internet Governance and Regulation at the University of Oxford from 2005 to 2008, when I rejoined the Harvard Law School faculty as professor of law.

7. I write and teach about the impact of the Internet on society and on law. Some of my relevant works include *The Future of the Internet and How to Stop It*[3] and numerous articles, such as "The Generative Internet,"[4] published in the *Harvard Law Review*; "A History of Online Gatekeeping,"[5] published in the *Harvard Journal of Law & Technology*; "Better Data for a Better Internet,"[6] published in *Science*; and "ICANN: Between the Public and the Private,"[7] published in *The Best in E-Commerce Law*.

8. In addition to my academic appointments, I was the Distinguished Scholar in Residence at the Federal Communications Commission ("**FCC**") in 2011 and chaired the FCC's Open Internet Advisory Committee from 2012 to 2014. In July 1999, I testified before the United

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[3] Jonathan Zittrain, *The Future of the Internet: and How to Stop It* (2009).

[4] Jonathan Zittrain, "The Generative Internet," *Harvard Law Review* 1974 (2006).

[5] Jonathan Zittrain, "A History of Online Gatekeeping," *Harvard Journal of Law and Technology* 253 (2005).

[6] Jonathan Zittrain, "Better Data for a Better Internet," *Science* 1210 (2011).

[7] Jonathan Zittrain, "ICANN: Between the Public and the Private," in *The Best in E-Commerce Law* (2001).

States House of Representatives Subcommittee on Investigations and Oversight about ICANN's role in domain name system privatization. I testified before the United States House of Representatives Subcommittee on Courts and Intellectual Property in June 2000 about issues and obstacles relating to the Internet and federal courts. In April 2000, I testified before the United States Senate Committee on Commerce, Science, and Technology about the Internet Tax Freedom Act, and in October 2006 I testified before the British House of Lords Select Committee on Science and Technology on cybersecurity. I served on the board of trustees of The Internet Society, which facilitates the development of Internet standards, from 2009 through 2012, and I am currently a board member of the Electronic Frontier Foundation, which advances digital rights in the public interest.

9. I was a member of ICANN's Membership Advisory Committee, which advised the ICANN board on the creation of its membership framework in the organization's early years. I participated in the discussions that gave rise to ICANN, and the Berkman Klein Center (then the Berkman Center) hosted ICANN's first public meeting in 1998.

10. A copy of my *curriculum vitae* is attached as **Exhibit JZ-1**.

11. Although I am participating in this case on a paid basis, the views expressed in this report are my own, and do not represent any organization or institution. I reserve the right to supplement or amend this report if additional evidence comes to my attention.

3. INTRODUCTION

12. Competition is a recurring concern in the communications space. When the goal of a system is to ensure the ability of any person to communicate with any other person, the easiest way to do that often entails assigning the coordination of that system to a single entity.

With a single party at the reins, the argument goes, we could be sure that everybody will be properly interconnected. For decades this was the argument made by AT&T in its insistent defense of its monopoly for U.S. telephonic communication. And it's true that calls from California to Connecticut did go through reliably. But those calls, made on universally-rented, company-issued telephones, were expensive. Innovation was limited, and, when companies like Hush-A-Phone tried to make things better, AT&T would use its dominant position to ensure that nothing happened on its system without its consent.[8]

13. Looking back from a world with dozens of smartphone makers and four major wireless networks in the U.S. alone, it is clear that there are alternatives to centralized proprietary coordination. And it seemed that way as well in the mid- to late 1990s, when the community that created the modern Internet was rapidly building a governance infrastructure for the most significant digital communications platform in history. At nearly every step of the process of developing our current Internet governance infrastructure, ensuring competition has not just been a factor but a primary objective when making decisions, including the design of technical architectures. Stakeholders remain vigilant regarding anticompetitive behavior in the context of major Internet infrastructure issues like the assignment of new generic Top Level Domains ("**gTLDs**").

4. ORIGIN AND DEVELOPMENT OF THE DOMAIN NAME SYSTEM

14. The Internet started out as an academic experiment aimed at connecting geographically separated computer networks. In these early days, it was easy to connect to other

[8] Matthew Lasar, "Any lawful device: Revisiting Carterfone on the eve of the Net Neutrality vote", *Ars Technica*, December 13, 2017, *available at* https://arstechnica.com/tech-policy/2017/12/carterfone-40-years/, **[Ex. JZ-4]**.

Internet users because there were so few people on the network. However, as the Internet began to expand, users developed ways to make navigation on the Internet more straightforward. As a result, the domain name system ("**DNS**") was created by a handful of researchers, including Paul Mockapetris.[9] In short, the DNS is a hierarchical distributed database that serves as a "directory" for points of presence on the Internet.[10] Every website has a numeric "**IP address**" that corresponds to its location on the Internet. IP addresses are usually represented in dot-decimal notation, consisting of four decimal numbers, each ranging from 0 to 255, separated by dots, *e.g.*, 172.16.254.1. Because IP addresses are difficult to remember, the DNS uses human-friendly "**domain names**" such as www.google.com. The DNS translates these domain names into IP addresses and directs us to the website we have requested.[11]

15. DNS records are stored on servers all over the world that are organized in a hierarchical structure. At the very top of the DNS hierarchy are thirteen "**root**" servers that store DNS information about all top-level domains ("**TLDs**").[12] Top-level domains are found at the far right end of any given domain name. For example, the TLD of www.google.com is .COM. Next in the DNS chain of command are top-level domain nameservers which keep DNS records for all subdomains within that TLD. For example, the .COM domain nameserver contains all DNS records for www.google.com, while the .EDU domain name server contains DNS records for

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[9] *See* Cricket Liu and Paul Albitz, *DNS and BIND* (5th ed. 2006), **[Ex. JZ-5]**, Ch. 1, Secs. 1-2, 4 ("A (Very) Brief History of the Internet", "On the Internet and Internets", and "The History of BIND").

[10] The DNS performs a variety of functions, but for the purposes of this document, we focus on its role as a directory. For example, in addition to translating domain names into IP addresses, DNS servers can also be used to direct and balance Internet traffic so that no individual server is burdened by too many requests. These types of functions are called load balancing and traffic steering. *See id.*, Ch. 10, Sec. 7 ("Round-Robin Load Distribution").

[11] Keith Shaw, "What is DNS and how does it work?", *Network World*, April 11, 2018, *available at* https://www.networkworld.com/article/3268449/internet/what-is-dns-and-how-does-it-work.html, **[Ex. JZ-6]**.

[12] Cricket Liu and Paul Albitz, *DNS and BIND*, **[Ex. JZ-5]**, Ch. 2, Sec. 6 ("Resolution").

www.harvard.edu and www.berkeley.edu. These second level domains store the DNS records for websites within that second level domain and so on and so forth.[13]

16. At the dawn of TLD creation and assignment in 1984, the Internet community thought of TLDs in terms of general purpose categories: commercial, education, government, etc. The seven original TLDs (.COM, NET, .ORG, .EDU, .MIL, .INT, .GOV) reflect this approach. .COM was designated for commercial businesses, .EDU was reserved for education institutions like universities, .GOV was set aside for U.S. government organizations, .MIL was created for U.S. military groups, .NET was designated for "organizations providing network infrastructure," .ORG was created for non-profits, and the seventh TLD, .INT, was set aside for international organizations.[14] These seven were the original members of a set of TLDs which would later become known as gTLDs. .COM, .NET, and .ORG were open gTLDs, meaning that anyone could register a second-level domain in one or more of these gTLDs, while .INT, .MIL, .EDU, and .GOV were closed gTLDs, meaning that only registrants meeting certain criteria could own a second-level domain in that gTLD.

17. .COM emerged as the dominant gTLD even for non-commercial use. From the outset, gTLDs were confusing to most users. They were too technical for the general public to fully understand. The difference between .COM and .NET, for instance, was lost on many. Many early users did not understand how to use domain names and URLs to navigate the Web. Instead,

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[13] Keith Shaw, "What is DNS and how does it work?", **[Ex. JZ-6]**; Cricket Liu and Paul Albitz, *DNS and BIND*, **[Ex. JZ-5]**, Ch. 1, Sec. 3 ("The Domain Name System, in a Nutshell").

[14] Cricket Liu and Paul Albitz, *DNS and BIND*, **[Ex. JZ-5]**, Ch. 2, Sec. 2 ("The Internet Domain Namespace"). *See also* Jon Postel and J. Reynolds, Network Working Group, Request for Comments: 920, Domain Requirements, October 1984, *available at* https://tools.ietf.org/pdf/rfc920.pdf, **[Ex. JZ-7]**, at 2. Note that .net was eventually opened to commercial traffic as well.

they treated their browsers' URL bars as search engines and simply typed in the name of the entity they were looking for. In an attempt to make their browsers more user-friendly, developers designed browsers to append ".COM" to any non-URL the user typed into the browser window. This increased the commercial value of .COM domains and further cemented .COM's status in the hierarchy of gTLDs in this formative era of the Web in the 1990s.[15]

18. .COM continues to be the dominant gTLD today, but in many ways it is an imperfect flag-bearer for the general-purpose Internet. Colloquially, when we think of .COM, we think of businesses, start-ups, and the "dot com bubble". Though .COM is semantically associated as a commercial gTLD, many .COM domains are not commercial, and no test for commercial use is applied for acquisition or renewal of a domain.

5. THE BIRTH OF NSI/VERISIGN

19. In the beginning of the Internet age, gTLDs were managed and domain names were assigned by one man, Jon Postel, acting in a non-commercial capacity. The fact that there was just one man responsible for managing gTLDs and acting as the root may seem bewildering today, and it was remarkable even back then. In an effort to become more formal, Postel's work was formalized under an entity known as **IANA**—the Internet Assigned Number Authority—(informally, he was sometimes referred to as the "Internet Main Man"[16] or even the "God" of the Internet[17]). Postel did not wish to be the "owner" of the franchise, but rather saw himself as

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[15] Milton L. Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* (2006), **[Ex. JZ-8]**, Sec. 6.1.2.

[16] "Fallout over Unsanctioned DNS Test", *Wired News Report*, May 2, 1999, *available at* https://www.wired.com/1998/02/fallout-over-unsanctioned-dns-test/, **[Ex. JZ-9]**.

[17] "The Internet: A peace of sorts", *The Economist*, November 17, 2005, *available at* https://www.economist.com/node/5178973, **[Ex. JZ-10]**.

performing a task that was necessary for the greater community. IANA was not merely a formalization but also a recognition that this essential function existed independently of Postel as an individual.

20. Despite having a more formal-sounding moniker, Postel could not scale his work at the rate of the Internet, and eventually the task of managing gTLDs and assigning domain names became too burdensome for one person to manage. Postel's insufficient scale became acutely evident in 1991, when the United States government officially opened the Internet to commercial traffic. The commercialization of the Internet resulted in a massive spike in demand for domains.[18] To help manage the increased demand, the National Science Foundation ("**NSF**") in 1993 entered into a five year, $5.2 million agreement with NSI to manage its gTLD registries.[19]

21. In 1995, NSI was acquired by defense contractor Science Applications International Corporation ("**SAIC**") for $4.7 million.[20] Shortly thereafter, NSF agreed to arrange for the company to charge a domain registration fee rather than have the government pay for domain name management services.[21] As a result of being the sole source of generic domain names, NSI started earning a significant amount of money from registration fees (NSI charged $100 for the initial registration and a $50 annual renewal fee after the first two years). Over a period of a few years, NSI's income from registration fees would escalate from tens to hundreds

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[18] Heather N. Mewes, "Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System", 13(1) *Berkeley Technology Law Journal* 235 (1998), **[Ex. JZ-11]**, at 236.

[19] ICANN, Cooperative Agreement between NSI and U.S. Government, Agreement No. NCR-9218742, January 1, 1993, *available at* https://archive.icann.org/en/nsi/coopagmt-01jan93.htm, **[Ex. JZ-12]**.

[20] Craig Simon, The Technical Construction of Globalism: Internet Governance and the DNS Crisis, A case study for *Bandwidth Rules*, October 1998, *available at* https://web.archive.org/web/20000815211830/http://www.flywheel.com/ircw/dnsdraft.html, **[Ex. JZ-13]**, at 8.

[21] ICANN's Early Days, *ICANN History Project*, *available at* https://www.icann.org/en/history/early-days, **[Ex. JZ-14]**.

of millions of dollars.[22] Five short years after its acquisition by SAIC, VeriSign would acquire NSI for $21 billion.[23]

22. The shift from free to paid domain registration marks the point at which Internet stakeholders started to think critically about the importance of competition in the domain assignment space. Given that NSI was the sole source of generic domain names, Internet stakeholders became concerned that the company could and would adopt aggressive and predatory behavior. Jon Postel himself said:

> I think this introduction of charging . . . for domain registrations is sufficient cause to take steps to set up a small number of alternate top level domains managed by other registration centers. I'd like to see some competition between registration services to encourage good service at low prices.[24]

As NSI's five-year contract with the NSF was running out, calls were made to break the NSI monopoly and introduce meaningful competition into the domain name space.[25]

23. NSI, however, resisted efforts to force it to relinquish its control of domain registration at the end of its contract. The company argued that it owned its registry of domains and should be allowed to continue its registration business unencumbered.[26] Ultimately,

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[22] David S. Hilzenrath, "Network Solutions Dropped as Registrar of Internet Domains", *The Washington Post*, April 24, 1997, *available at* https://www.washingtonpost.com/archive/business/1997/04/24/network-solutions-dropped-as-registrar-of-internet-domains/dafcf9ef-e875-4d68-83b1-232823d8aadf/?utm_term=.a645a444e70a, **[Ex. JZ-15]**, at 1.

[23] "VeriSign buys Network Solutions in $21 billion deal", *CNet*, January 2, 2002, *available at* https://www.cnet.com/news/verisign-buys-network-solutions-in-21-billion-deal/, **[Ex. JZ-16]**.

[24] Postel Note, September 15, 1995, *available at* https://web.archive.org/web/20020624231348/https://wia.org/pub/postel-iana-draft13.htm, **[Ex. JZ-17]**.

[25] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 6.3.2; David S. Hilzenrath, "Network Solutions Dropped as Registrar of Internet Domains", **[Ex. JZ-15]**.

[26] David S. Hilzenrath, "Network Solutions Dropped as Registrar of Internet Domains", **[Ex. JZ-15]**.

however, NSI did endorse the basic concept of introducing competition by adding new gTLDs to the root.

24. The urgent need for competition in the gTLD space was a position also endorsed by Jon Postel, who saw competition as a necessary step to prevent an abuse of monopolistic market power by NSI. Writing in 1996, he said:

> What are the priorities here? My list is:
>
> 1. Introduce competition in the domain name registry business.
>
> 2. Everything else.
>
> So lets [sic] focus on how to accomplish the top priority.
>
> General observation: Changing things is hard, introducing separate new things is easier.[27]

Postel's comment reflected his frustration with the development of how the DNS was being managed: NSI had leveraged its position as the sole source of generic domain names for private gain whereas Postel had managed the DNS as an academic in the public interest. Postel's concerns were reflected throughout the Internet community and NSI encountered a significant amount of criticism.[28] Notably, the president of the Internet Society ("**ISOC**"), Donald Heath, accused NSI of "tak[ing] the low road" and valuing its market position above what was in "the

[27] Postel Priorities, July 3, 1996, *available at* https://web.archive.org/web/19970227141952/Http://www.iiia.org/lists/newdom/current/0233.html, **[Ex. JZ-18]**, at 1-2.

[28] According to *Ruling the Root*, "[a] rift was growing between Network Solutions and the Internet technical community. The community had reacted uncomfortably to the acquisition of the InterNIC registry by a multibillion-dollar defense contractor in March 1996. Many of its participants did not approve of the commercialization of domain names generally". Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 6.3.2 (citation omitted).

best interest of the Internet".[29] By 1997, the Internet community and the U.S. government were starting to consider proposals to break NSI's monopoly.[30]

6. THE ORIGIN OF THE NEW GTLD PROGRAM: DRAFT-POSTEL, THE GTLD-MOU, THE GREEN PAPER, AND THE WHITE PAPER

25. As noted above, Jon Postel was one of the first to suggest expanding the number of gTLDs as a mechanism to promote competition among registries. In 1996, Postel submitted a draft Request for Comment titled, "New Registries and the Delegation of International Top-Level Domains," that became popularly known as the "**draft-postel**".[31] The draft proposed to create fifty new registries to compete with NSI and allow each to control three new gTLDs.[32] Every year, ten new registries would be designated to manage new gTLDs in order to keep up with the demand for domain names.[33] Although the draft-postel was never adopted, it was the first of many proposals that suggested adding new gTLDs to the root as a means of introducing competition in the provision and supply of generic domain names.[34]

26. Soon after the draft-postel was issued, eleven representatives from several Internet governance groups, led by ISOC and including Postel, formed the International Ad Hoc Committee ("**IAHC**") to create a "global governance structure for the domain name system" as

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[29] David S. Hilzenrath, "Network Solutions Dropped as Registrar of Internet Domains", **[Ex. JZ-15]**, at 2, "They've taken the low road and tried to protect their monopoly instead of taking a leadership role in the best interest of the Internet," quoting Donald Heath.

[30] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 7.3.1.

[31] Jon Postel, New Registries and the Delegation of International Top Level Domains, June 1996, *available at* https://tools.ietf.org/html/draft-postel-iana-itld-admin-01, **[Ex. JZ-19]**, at 6.

[32] *Id.*, at 13.

[33] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 6.3.2.

[34] *Id.*, Sec. 6.4.3.

an alternative to NSI.[35] The Committee's ultimate proposal (the "**gTLD-MOU**") differed from the draft-postel in that it planned to initially add only seven new gTLDs rather than hundreds and to create a "global monopoly registry" that would operate as a non-profit.[36] This registry would be owned by a group of registrars (the Council of Registrars ("**CORE**"))[37] that would share control over all of the gTLDs instead of dividing exclusive control of different gTLDs among various registries.[38]

27. The gTLD-MOU was an important step for the Internet community. Before the gTLD-MOU, Internet governance groups had focused on developing technical standards, not policymaking. But it had become increasingly clear to members of the IAHC that the commercialization of Internet infrastructure, and NSI, in particular, posed a challenge to a free and open Internet. With the gTLD-MOU, the leaders of the Internet community recognized that policy neutrality was no longer a viable model and that they had to take a position that directly opposed NSI's *existing* business model.[39] This should not be understood to reflect an opposition

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[35] Other members of the IAHC were from the International Trademark Association, the World Intellectual Property Association, Intellectual property attorney, Keio University, Japan, WIDE Project, Telstra, Australia education and research Internet, IBM Israel, International Telecommunication Union, Internet Engineering Task Force, and the National Science Foundation. *See id.*, Sec. 7.1 (citation omitted).

[36] The gTLD-MoU defined a new role in the domain name registration process called a registrar in an attempt to separate the "wholesale" function of operating the registry database from the "retail" function of selling second-level domains to consumers. *Id.* A TLD's registry is responsible for maintaining databases of all of the domain names allocated under that TLD. Registrars facilitate the process of selling domains within a TLD's namespace to companies and individuals. A registry can serve as the registrar for the TLDs under its control, or it may delegate that function to other registrars (GoDaddy, etc.). In effect, registries function as domain name wholesalers whereas registrars function as consumer-facing retailers. *See* GoDaddy, *Domain Help: What is the difference between a registry, registrar and registrant?, available at* https://www.godaddy.com/help/what-is-the-difference-between-a-registry-registrar-and-registrant-8039, **[Ex. JZ-20]**.

[37] Domain Names, *gTLD-MoU, available at* https://cs.stanford.edu/people/eroberts/cs201/projects/1997-98/domain-names/proposals/gtldmou.html, **[Ex. JZ-21]**.

[38] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 7.1.

[39] *Id.*, Sec. 7.2.

to NSI in general. In fact, the IAHC publicly encouraged NSI to join the Council of Registrars so that it could fully participate in a new, more evenly distributed world of gTLD administration.[40]

28. NSI, however, refused to participate in this effort to democratize the Internet's infrastructure.[41] NSI thus walked away from the position of its former partner, the U.S. government. Up until the gTLD-MoU, the U.S. government had remained silent on struggles over domain name registration. However, the controversy over the gTLD-MoU, as well as the looming expiration of the NSF-NSI agreement, pushed a change of course.[42] In 1997, the NSF announced that it did not intend to renew its agreement with NSI.

29. In a congressional subcommittee hearing, the deputy director of NSF, Joseph Bordogna, told the committee, "Today, the vast majority of domain name registrants are commercial interests whose activities go far beyond the research and education community that NSF is chartered to serve".[43] Bordogna later went on to emphasize that "the Internet community and others will eventually develop mechanisms to handle Internet registration without NSF's involvement".[44] In the same statement, Bordogna spoke highly of IAHC as one entity in the community that could address the domain name controversy, which IAHC Chair Donald Heath interpreted as support for IAHC's gTLD-MoU. "This is NSF's way of saying that domain names

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[40] *Id.*, Sec. 7.1.

[41] *Id.*, Sec. 7.2.1.

[42] *Id.*, Sec. 7.4.

[43] Peyman Pejman, "NSF is tired of the name game", *GCN*, October 20, 1997, *available at* https://gcn.com/articles/1997/10/20/nsf-is-tired-of-the-name-game.aspx, **[Ex. JZ-22]**, at 1, quoting Joseph Bordogna.

[44] "NSF bows out of domain names", *CNet*, April 23, 1997, *available at* https://www.cnet.com/news/nsf-bows-out-of-domain-names/, **[Ex. JZ-23]**, at 1, quoting Joseph Bordogna.

should be handled by the IAHC," said Heath.[45] Even without officially endorsing the gTLD-MoU, Bordogna made clear that NSF would no longer play a role in domain name assignment.

30. Once NSF decided against renewing the NSF-NSI agreement, Ira Magaziner, President Clinton's chief Internet Policy Advisor, assumed responsibility to set policy regarding domain name assignment moving forward. Magaziner formed the Interagency Working Group ("**IWG**") on domain names in March 1997. When NSF officially bowed out of its role overseeing management of the DNS, the working group, with the help of the U.S. Department of Commerce, designated the National Telecommunications and Information Administration ("**NTIA**") to take NSF's place and assist in determining what role the government should play in domain registration.[46]

31. For Magaziner, NSI's market dominance was a serious problem. He said in 1998 that for whatever solution was ultimately reached,

> The goal should be to get NSI to a competitive playing field. I would welcome suggestions on how to create this competitive playing field, whereby other registries can compete and commence.[47]

Magaziner further commented:

> Right now, there already seems to be some consensus i.e. 1) people want the US government to move aside, 2) most agree that it should be a private not-for-profit organization and 3) most agree that NSI is a monopoly that should be ended and competition be introduced.[48]

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[45] *Id.*, quoting Donald Heath.

[46] ICANN, *ICANN History Project: Interview with Ira Magaziner*, October 19, 2017, *video available at* https://www.icann.org/news/multimedia/3219; Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 7.4.2.

[47] Senki, ICANN History – Transcript of an open meeting, APRICOT 98, Manila, Philippines (Part One), February 17, 1998, *available at* http://www.senki.org/icann-history-apricot-98-part-1/, **[Ex. JZ-24]**, at 5.

[48] *Id.*, at 8.

Magaziner's IWG on domain names and the NTIA did not have any alternative solutions. The NTIA issued a "Request for Comment on the Registration and Administration of Internet Domain Names" that asked "for comment on the appropriate principles to use to guide the transition and on the proper organizational framework, and for suggestions on specific issues such as new TLD creation, shared vs. exclusive top-level domains, and trademark protection".[49] The NITA received over 430 comments between July and August of 1997,[50] which were incorporated into a Notice of Proposed Rulemaking, technically called "A Proposal to Improve the Technical Management of Internet Names and Addresses" but more commonly known as the "**Green Paper**".[51]

32. The Green Paper, released in 1998, officially rejected the draft-postel and the gTLD-MoU, proposing instead that a new, private, non-profit organization be established and take on domain registration responsibility, gTLD creation, and management of the root. To the disappointment of the IAHC, the Green Paper firmly established U.S. government control over the DNS and the transfer of responsibility to the to-be-determined new entity. However, like the IAHC and Jon Postel, the Green Paper emphasized the need for competition in the new system.

33. The Green Paper expressly stated, "we believe that consumers will benefit from competition among market oriented registries. . .";[52] however, some of the comments received in response to the Green Paper indicated some disagreement about what form competition

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[49] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 7.4.2.

[50] NTIA, Registration and Administration of Internet Domain Names -- Summary of Comments [Docket No. 97061337-7137-01], August 18, 1997, *available at* https://www.ntia.doc.gov/other-publication/1997/registration-and-administration-internet-domain-names-summary-comments-docket, **[Ex. JZ-25]**, at 1-2.

[51] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 7.5.

[52] NTIA, Improvement of Technical Management of Internet Names and Addresses; Proposed Rule [Docket No. 980212036-8036-01], February 20, 1998, *available at* https://www.ntia.doc.gov/federal-register-notice/1998/improvement-technical-management-internet-names-and-addresses-proposed-, **[Ex. JZ-26]**, at 7.

among registries should take.[53] Specifically, there was a debate as to whether competitive registries should be made non-profit, in order to avoid the type of price-gouging and domain price bait-and-switch that made people concerned about NSI's business model in the first place.[54] In an effort to recognize that there was a lack of consensus and to gather more information, the Green Paper proposal planned to create five new gTLDs and assign each to a new registry. By adding only a small number of gTLDs and authorizing a limited number of new registries, the Green Paper authors hoped to conduct a low-risk experiment in registry competition.[55]

34. The process of transitioning from the "God of the Internet" model to one with robust competition was inevitably going to be messy. Businesses, governments, and the public at large had all witnessed the Internet's growth and wanted to have a say.[56] As a result, the volume and variety of stakeholders was extraordinary, and there was no way that the Green Paper would be able to satisfy all or even most of them, as many stakeholder positions seemed to be directly at odds with one another. Some groups lamented the slight drift from the

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[53] *Id.*: "Some have made a strong case for establishing a market-driven registry system. Competition among registries would allow registrants to choose among TLDs rather than face a single option. Competing TLDs would seek to heighten their efficiency, lower their prices, and provide additional value-added services. Investments in registries could be recouped through branding and marketing. The efficiency, convenience, and service levels associated with the assignment of names could ultimately differ from one TLD registry to another. Without these types of market pressures, they argue, registries will have very little incentive to innovate. Others feel strongly, however, that if multiple registries are to exist, they should be undertaken on a not-for-profit basis. They argue that lack of portability among registries (that is, the fact that users cannot change registries without adjusting at least part of their domain name string) could create lock-in problems and harm consumers. For example, a registry could induce users to register in a top-level domain by charging very low prices initially and then raise prices dramatically, knowing that name holders will be reluctant to risk established business by moving to a different top-level domain".

[54] *Id.*

[55] *Id.*: "On balance, we believe that consumers will benefit from competition among market oriented registries, and we thus support limited experimentation with competing registries during the transition to private sector administration of the domain name system".

[56] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Table 8.1.

theoretically more egalitarian, simple gTLD-MOU approach. Others simply resented the U.S. government's continued outsized role in the proposed processes.[57]

35. The response to the Green Paper demonstrated to the U.S. government that it would better serve the cause by remaining in the background rather than leading the charge for change. In June 1998, after a series of negotiations with members of the Internet community and telecommunications companies, the Clinton Administration released a non-binding statement of policy titled, "The Management of Internet Names and Addresses," also known as the "**White Paper**".[58] Unlike the Green Paper, the White Paper did not dictate exactly how the new entity would function. Rather it left all major decisions, such as gTLD creation and the authorization of new registries, up to the yet-to-be-created organization.[59] Although the White Paper set general guidelines regarding the structure of the new organization, the authors refrained from establishing any set policy. Instead, the paper directed the private sector to produce a consensus-based proposal by the time that the NSI-NSF contract expired on September 30, 1998.[60] This approach largely removed the U.S. government from the process of creating what would become ICANN and pushed various stakeholders in the Internet community to come to some resolution on their own.

36. The release of the White Paper started conversations in the Internet community about the nature and policies of the new domain name registration entity. There were several

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[57] *Id.*, Sec. 8.1.

[58] *Id.*

[59] NTIA, Statement of Policy on the Management of Internet Names and Addresses [Docket No. 980212036-8146.02], June 5, 1998, *available at* https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses, **[Ex. JZ-27]**, at 23.

[60] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 8.1.3.

groups working on different proposals in parallel: The International Forum on the White Paper, IANA and ISOC, the Boston Working Group (an offshoot of the International Forum on the White Paper), Network Solutions (which later teamed up with IANA),[61] and the Open Root Server Confederation. The lack of collaboration among these groups generated considerable tension and meant that the government's expectation that it would receive exactly one consensus-based proposal failed.[62] Instead, the government received multiple proposals, each produced by a different group within the community.

37. One of these groups, IANA-NSI led by Jon Postel, had moved forward with its proposed bylaws and articles of incorporation and had formed an initial board of directors for an organization called a "new IANA," which was later renamed the Internet Corporation for Assigned Names and Numbers ("**ICANN**").[63] Because there was no consensus on any proposal, the government solicited comments from the community on all the proposals it received in an attempt to make the process as inclusive as possible.

38. In the end, the government chose Postel's plan with NSI for the "new IANA" called ICANN.[64] On November 25, 1998, ICANN signed a MoU with the Department of Commerce in

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[61] "New Internet Government Forged", *Wired*, September 17, 1998, *available at* https://www.wired.com/1998/09/new-internet-government-forged/, **[Ex. JZ-28]**.

[62] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 8.2.2.

[63] *Id.*, Sec. 8.2.

[64] *See id.*

which it agreed to take over DNS maintenance and name/number assignment functions.[65] And on December 24, 1998, ICANN officially assumed responsibility for the IANA function.[66]

7. ICANN EMERGES, AND PROPOSES TO INTRODUCE NEW gTLDS AS A MEANS FOR CREATING COMPETITION

39. Once ICANN assumed responsibility, subject to its agreement with the NTIA, for performing the IANA functions, it quickly turned its attention to developing policies and programs that would introduce and promote competition for the provision and supply of generic domain names. Concerns about NSI specifically dominated the conversation. Mere months after ICANN's formation, Esther Dyson, the first Chairman of ICANN, accused NSI of attempting to thwart ICANN's initial efforts to introduce competition:

> Of course, 'I want to protect my monopoly' is hardly an attractive slogan, and so NSI uses the language of democracy instead. In addition, [NSI] encourages and supports others who have a variety of reasons[,] economic, philosophical or political to be unhappy with the way the community consensus has formed.[67]

40. Following the lead of its Chairman, ICANN took steps to reduce the influence of NSI on issues related to competition. These efforts took a variety of forms, but the first was to designate NSI as an accredited ICANN registry. Due to a renegotiation between the Department

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[65] ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, November 25, 1998, *available at* https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en, **[Ex. JZ-29]**.

[66] ICANN, Transition Agreement between University of Southern California and Internet Corporation for Assigned Names and Numbers, February 25, 2012, *available at* https://www.icann.org/resources/unthemed-pages/usc-icann-transition-2012-02-25-en, **[Ex. JZ-30]**.

[67] ICANN, Esther Dyson's Response to Ralph Nader's Questions, June 15, 1999, *available at* https://www.icann.org/resources/unthemed-pages/dyson-response-to-nader-1999-06-15-en, **[Ex. JZ-31]**, at 2.

of Commerce and NSI, NSI remained the official gTLD registry. But as part of the new agreement, NSI was now required to allow nascent competing registrars to sell domain registrations.[68]

41. Despite the entry of dozens of registrars, consumer choice at the retail registrar level did not create a competitive environment consistent with ICANN's Competition Mandate. Indeed, although ICANN's policies had greatly increased consumer choice at the registrar (retail) level, ICANN leadership continued to express concerns about the lack of competition at the registry (that is, wholesale) level. NSI was still the only gTLD registry and, in the growing consensus that was forming in the broader Internet community, the best way to introduce competition to NSI at the registry level was to create new gTLDs.[69]

42. There was disagreement, however, about the number of new domains that should be created. Some argued that adding as many as 500 gTLDs would do more to increase competition whereas others worried that adding more than just a few domains would trigger trademark disputes and cause regulatory problems.[70] In response to the debate, the Domain

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[68] As part of the new contract, NSI agreed to become an ICANN accredited registry and adhere to ICANN's policies and fees in exchange for continued operation as the registry for the .COM, .NET, and .ORG TLDs for four years. If NSI also separated its registry and registrar functions within the first 18 months of the arrangement, which would further break up its monopoly, NSI could extend its control of .COM, .NET, and .ORG for an additional four years or until ICANN designated a Successor Registry to assume NSI's responsibilities. Both parties also agreed not to "unreasonably restrain competition" and to re-evaluate the agreement if ICANN failed to recruit competing accredited registries or if NSI was "adversely affected from a competitive perspective". *See* ICANN, Registry Agreement between Internet Corporation for Assigned Names and Numbers and Network Solutions, Inc., November 10, 1999, *available at* https://archive.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm, **[Ex. JZ-32]**, at 4, 9; Prepared Testimony of Esther Dyson (Interim Chairman of the Board of Directors, ICANN), U.S. House of Representatives, Committee on Commerce, Subcommittee on Oversight and Investigations, July 22, 1999, *available at* https://www.icann.org/resources/unthemed-pages/dyson-testimony-1999-07-22-en, **[Ex. JZ-33]**; Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 9.3.

[69] ICANN, ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, June 13, 2000, *available at* https://archive.icann.org/en/meetings/yokohama/new-tld-topic.htm, **[Ex. JZ-34]**, II(C) (at 5-8).

[70] ICANN, Report (Part One) of Working Group C (New gTLDs) Presented to Names Council, March 21, 2000, *available at* https://archive.icann.org/en/dnso/wgc-report-21mar00.htm, **[Ex. JZ-35]**, at 3.

Name Supporting Organization ("**DNSO**"), a supporting organization of ICANN,[71] created a working group to devise a compromise. The working group suggested "that a limited number of new top-level domains be introduced initially and that the future introduction of additional top-level domains be done only after careful evaluation of the initial introduction".[72] The group also proposed creating several different types of new domains including "fully open top-level domains, restricted and chartered top-level domains with limited scope, non-commercial domains and personal domains".[73] The DNSO proposal proved persuasive to the larger ICANN Board, which ultimately "invite[d] expressions of interest from parties seeking to operate and/or sponsor any new TLD registry".[74]

43. In August 2000, ICANN began accepting applications from registries to operate new gTLDs. Throughout the application process, ICANN leadership emphasized that the introduction of new gTLDs was "a proof of concept" intended to explore the technical, business, and legal impact of adding new gTLDs to the root. The criteria for evaluating applications clearly indicated that ICANN was not only intent on introducing competition for NSI: evaluators were instructed to consider how likely it was that the proposed gTLD and registry would be competitive with existing gTLDs given their "proposed pricing and service levels".[75] They were also

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[71] ICANN has three supporting organizations that were formed to advise the ICANN board of directors on issues directly related to their area of expertise. The three supporting organizations include: the Generic Names Supporting Organization (the successor to the DNSO), the Country Code Names Supporting Organization, and the Address Supporting Organization. *See* ICANN, *Groups*, February 6, 2012, *available at* https://www.icann.org/resources/pages/groups-2012-02-06-en, **[Ex. JZ-36]**.

[72] DNSO Names Council Statement on new gTLDs, April 19, 2000, *available at* http://www.dnso.org/dnso/notes/20000419.NCgtlds-statement.html, **[Ex. JZ-37]**.

[73] *Id.*

[74] ICANN, ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains, **[Ex. JZ-34]**, at 13.

[75] ICANN, Criteria for Assessing TLD Proposals, August 15, 2000, *available at* https://archive.icann.org/en/tlds/tld-criteria-15aug00.htm, **[Ex. JZ-38]**, at 3.

encouraged to think about whether the proposed gTLD would meet a consumer need not currently addressed by existing gTLDs, how it might impact competition among registrars, and whether the new gTLD could have a broader negative impact on competition by, for example, "lead[ing] to lock-in of domain-name holders[] so that inter-TLD competition is constrained".[76]

44. ICANN received 47 applications for over 200 different gTLD strings by the deadline in October 2000.[77] The application review team prepared a report explaining their evaluation of each application given the aforementioned criteria. It is apparent from the report that the evaluators were most concerned with a given applicant's ability to compete with .COM. For that reason, the evaluators favored more established entities such as Afilias, LLC and NeuStar, Inc. that could show that they had the resources to operate a larger, more competitive gTLD and were willing to charge a registration price that was comparable to fees[78] charged by VeriSign, which, as mentioned earlier, had recently agreed to acquire NSI.[79] Smaller entities were therefore less likely to be granted a gTLD because their limited resources made it less likely that they would be able to compete with VeriSign.

45. After careful consideration of all of the proposals, on November 16, 2000, ICANN announced seven new gTLDs and their registries:[80]

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[76] *Id.*

[77] ICANN, TLD Applications Lodged, October 2, 2000 (corrected through October 10, 2000), *available at* https://archive.icann.org/en/tlds/tld-applications-lodged-02oct00.htm, **[Ex. JZ-39]**.

[78] VeriSign charged $6 per year to register a .COM domain. *See* ICANN, Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group, November 9, 2000, *available at* https://archive.icann.org/en/tlds/report/report-iiib1a-09nov00.htm, **[Ex. JZ-40]**, at 12.

[79] *Id.*; "VeriSign buys Network Solutions in $21 billion deal", **[Ex. JZ-16]**.

[80] ICANN, *Announcements: ICANN Announces Selections for New Top-Level Domains*, November 16, 2000, *available at* https://www.icann.org/news/icann-pr-2000-11-16-en, **[Ex. JZ-41]**.

TLD	Operator(s)
.AERO	Societe Int'l de Telecommunications Aeronautiques SC, (SITA)
.BIZ	JVTeam, LLC
.COOP	National Cooperative Bus. Assn, (NCBA)
.INFO	Afilias, LLC
.MUSEUM	Museum Domain Management Association, (MDMA)
.NAME	Global Name Registry, Ltd.
.PRO	RegistryPro, Ltd.

8. .WEB IS THE BEST AND CLOSEST POTENTIAL COMPETITOR FOR VERISIGN

46. In addition to its high brand awareness, there are other reasons why .WEB is the strongest potential competitor of all new gTLDs: .WEB has a unique association with the Internet. The explosion in the mid 1990s of the World Wide Web[81] lent massive semantic weight to the word "web". As the public increasingly adopted web-based technology, "web" came to be something of a catch-all term for the services and technologies constituting the Internet as a whole.[82] In the minds of many in the 1990s, everything from AOL to Compuserve was "on the web," even if it had nothing to do with the web. It is worth noting, therefore, that the terminological power of "web" had and continues to have the potential to meaningfully compete with .COM as a standard-bearer for web-based entities.

[81] While it is difficult to pinpoint the exact moment at which the World Wide Web was invented, it is the product of research and development originally conducted by Tim Berners Lee at CERN in the early 1990s. CERN, *Topic: The birth of the web, available at* https://home.cern/topics/birth-web, **[Ex. JZ-42]**.

[82] Milton L. Mueller, *Ruling the Root*, **[Ex. JZ-8]**, Sec. 6.1.2.

47. At the time of the 2000 trial round, there was a lot of discussion about the purpose of .WEB. Many believed that .WEB would serve as an alternative to .COM because .COM still had a commercial connotation and .WEB could be used more broadly. On the message board where public commenters debated the merits of .WEB, one commenter listed eight reasons why the .WEB gTLD should be chosen:

> Why .WEB ?
>
> 1. All inclusive (unlike .Mall, .Biz, .news, et)
> 2. Non controversial (Unlike .Sex, .XXX, .Aids, et)
> 3. Most recognized and well known prefix (unlike .nom, .wap, .ypi, .svc, etc)
> 4. Poses as a serious contender to the already depleted .com, .net, .org suffixes
> 5. .WEB registry has been in continuous operation since July 31, 1996
> 6. .WEB already holds a strong following and tremendous support all over the world, from Internet and non-Internet users
> 7. Image Online Design's .WEB application meets all of ICANN's criteria
> 8. Over 20,000 registrants have approved of .WEB a their TLD selection[83]

Not only was .WEB thought to be one of the most generic of all potential gTLDs, its name was intrinsically related to the Internet, which, following the invention of the World Wide Web, was now commonly referred to as "**the Web**," built around a series of "websites," each with its own unique "web address". As many argued at the time, and continue to do so today, .WEB, because

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[83] ICANN, *Forum: Why IOD? Over 20,025 Reasons Why*, October 30, 2000, *available at* https://forum.icann.org/tldapps/39FDEC9100000D1C.html, **[Ex. JZ-43]**, at 1. .WEB was created in 1996 by Christopher Ambler of Image Online Design ("IOD") specifically to compete with .COM. Ambler had launched a .WEB registry on an alternative root, and despite the limited appeal of that platform, had registered over 20,000 .WEB domains by 2000. Although IOD had applied for .WEB in 2000, ICANN had rejected IOD's application on the grounds that IOD was not equipped to operate a major registry that would be "a vigorous competitor with .com." *See* ICANN, Report on TLD Applications: Application of the August 15 Criteria to Each Category or Group, November 9, 2000, *available at* https://archive.icann.org/en/tlds/report/report-iiib1a-09nov00.htm, **[Ex. JZ-40]**.

of its strong association with the Web, would be a natural choice for users seeking to register a web address for their website, competing on equal footing with .COM.

48. Although Afilias had applied for and had been initially awarded .WEB in 2000, ICANN ultimately chose not award .WEB to Afilias, in part due to concerns about VeriSign's non-controlling ownership stake in Afilias. Indeed, certain Board members, including Chairman Dyson, had expressed some "queasiness" about awarding .WEB to an entity that was associated with VeriSign, the very entity that the .WEB registry was supposed to compete with.[84] Afilias was instead awarded .INFO, its second choice. Since that time, however, VeriSign has sold all of its equity in Afilias and there is no longer any ownership link between the two companies.

49. WEB would not be available for acquisition for another 12 years. In 2012, .WEB again attracted the most applications and the greatest interest from the community. Indeed, the strong association between .WEB and the Web was cited by multiple applicants for .WEB in 2012 as a reason why the proposed gTLD would be a strong competitor for VeriSign. For example, Web.com wrote:

> In looking to expand the gTLD landscape beyond the existing robustness of gTLD offerings, an easy-to-remember and intuitively logical gTLD such as .web is a relevant addition. Consumers will instantly understand that a .web domain is an Internet website thereby ensuring quick adoption by users. Due to its ubiquitous nature, .web will compete directly with all gTLDs, both existing

[84] Patrick Thibodeau, ".com gets company; controversy flares," *Computer World*, November 20, 2000, *available at* https://www.computerworld.com/article/2589104/enterprise-applications/-com-gets-company---controversy-flares.html, **[Ex. JZ-49]**, at 3 ("Particularly controversial was a proposal by Afilias LLC, an organization that includes 19 registrars, including Herndon, Va.-based Network Solutions Inc., the domain registration unit of VeriSign Inc., to run the registry for a .web domain. Dyson said the formation of the Afilias consortium could potentially impede competition among domain names. "The whole thing gives me a queasy feeling, is the short way to say it," she said.").

ones and others to be approved by ICANN. It has universal appeal to anyone looking to operate on the World Wide Web.[85]

9. VERISIGN'S PRESUMPTIVE ACQUISITION OF .WEB RUNS COUNTER TO ICANN'S COMPETITION MANDATE AND IS INCONSISTENT WITH THE INTENT OF THE NEW GTLD PROGRAM

9.1 The Meaning of ICANN's Competition Mandate

50. As a U.S. government official testified in 2011, "[s]ince its inception in 1998, ICANN has been charged with promoting competition in the registration of domain names while ensuring the security and stability of the DNS".[86] As former ICANN Chairwoman Esther Dyson would later recall during her Senate testimony at the same hearing: "***our primary mission was to break the monopoly of Network Solutions*** (which managed .com among other registries), first by separating the functions of registry (which manages the list of names in a particular top-level domain) and registrar (which resells second-level domain names to the public)".[87] Yet, as Dyson conceded, even following ICANN's separation of registry and registrar functions and two trial rounds of the New gTLD Program, "it's fair to say that .com retained its first-mover advantage as by far the leading TLD".[88] This view was shared by ICANN institutionally. In approving the New gTLD Program, the ICANN Board conceded that, "[t]o date, ICANN has not created meaningful competition at the registry level".[89]

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[85] ICANN, New gTLD Application Submitted to ICANN by Web.com Group, Inc., Application ID: 1-1009-97005, June 13, 2012, **[Ex. JZ-44]**, at 7.

[86] Statement of Fiona M. Alexander (Associate Administrator Office of International Affairs, National Telecommunications and Information Administration, U.S. Department of Commerce) at December 2011 Senate Hearing, **[Ex. JZ-2]**, at 4. *See also* fn. 1, *supra*.

[87] Statement of Esther Dyson (Founding Chairman of ICANN, 1998-2000) ("**Dyson Statement**") at December 2011 Senate Hearing, **[Ex. JZ-2]**, at 46 (emphasis added).

[88] *Id.*

[89] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, June 21, 2011, **[Ex. JZ-45]**, at 27.

51. For this reason, ICANN's Competition Mandate required, and indeed envisioned, that ICANN must do more. Kurt Pritz, ICANN Senior Vice-President, testified at the U.S. Senate's hearing on the New gTLD Program that the New gTLD Program was intrinsically intertwined with ICANN's Competition Mandate: "The launch of the new gTLD program was part of ICANN's founding mandate when it was formed by the U.S. Government over 12 years ago. That mandate is to introduce competition and choice into the domain name system in a stable and secure manner".[90] Pritz would go on to specifically testify that the "founding mandate for ICANN, included within the United States Government's 'White Paper' . . . is to create competition in the domain name market and specifically[] to 'oversee policy for determining the circumstances under which new TLDs are added to the root system.'"[91] ICANN's Board agreed. In explaining its rationale to approve the launch of the New gTLD Program, the Board wrote:

> The launch of the new gTLD program is in fulfillment of a core part of ICANN's Bylaws: the introduction of competition and consumer choice in the DNS. . . . This decision represents ICANN's continued adherence to its mandate to introduce competition in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved.[92]

52. ICANN's Board was crystal clear that the purpose of the New gTLD Program was to create competition for VeriSign. As the ICANN Board wrote in approving the launch of the full round of the New gTLD Program in 2011:

- "When ICANN was formed in 1998 . . . [its] purpose was to promote competition in the DNS marketplace, including by developing a process for the introduction of new generic top-level domains. . . . The introduction of new top-level domains into the DNS has thus been a fundamental part of ICANN's mission from its

[90] Pritz Statement at December 2011 Senate Hearing, **[Ex. JZ-2]**, at 8.

[91] *Id.*, at 11.

[92] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, **[Ex. JZ-45]**, at 7.

inception, and was specified in ICANN's [MOU] with the U.S. Department of Commerce".[93]

- "ICANN's Bylaws and other foundational documents articulate that the promotion of competition in the registration of domain names is one of ICANN's core missions. See ICANN Bylaws, Article 1, Section 2.6. One part of this mission is fostering competition by allowing additional Top Level Domains ("TLDs") to be created".[94]

- "ICANN's mission statement and one of its founding principles is to promote competition. The expansion of gTLDs will allow for more innovation and choice in the Internet's addressing system".[95]

- ICANN's "economic studies indicated that . . . the introduction of new gTLDs will bring benefits in the form of increased competition, choice and new services to Internet users".[96]

- "A broad consensus was achieved [within the GNSO] that new gTLDs should be added to the root in order to stimulate competition further . . .".[97]

- "[A]n important objective of the new [g]TLD process is to diversify the namespace, with different registry . . . models . . .".[98]

- "[T]he addition of new gTLDs to the root in order to stimulate competition at the registry level[]".[99]

- "The launch of the new gTLD program is anticipated to result in improvements to consumer choice and competition in the DNS".[100]

- "New gTLDs would promote consumer welfare".[101]

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[93] *Id.*, at 4.

[94] *Id.*, at 79.

[95] *Id.*, at 114.

[96] *Id.*, at 4.

[97] *Id.*, at 9.

[98] *Id.*, at 12.

[99] *Id.*, at 14.

[100] *Id.*, at 17.

[101] *Id.*, at 119.

53. In its planning process for the New gTLD Program, ICANN retained Dennis Carlton, the former Deputy Attorney General for Economic Analysis for the Antitrust Division of the U.S. Department of Justice, to study ICANN's proposal to introduce new gTLDs as a means to "promote competition".[102] Dr. Carlton opined that: "ICANN's plan to introduce new gTLDs is likely to benefit consumers by facilitating entry which would be expected to both bring new services to consumers and ***mitigate market power associated with .com*** and the other major TLDs and to increase competition".[103] Dr. Carlton's views are consistent with Ms. Dyson's interpretation of ICANN's Competition Mandate, namely that ICANN's "primary mission was to break the monopoly of Network Solutions".[104]

54. ICANN's Competition Mandate, which is intrinsic to ICANN's mission, must therefore be considered and reflected in all significant decisions and actions taken by ICANN: given the choice, ICANN must pursue the option that "promotes" competition as opposed to an option that lessens competition or even simply preserves the status quo. As the ICANN Board observed:

> ICANN's "default" position should be for creating more competition as opposed to having rules that restrict the ability of Internet stakeholders to innovate. New gTLDs offer new and innovative opportunities to Internet stakeholders.[105]

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[102] ICANN, *Rationale for Board Decision on Economic Studies Associated with the New gTLD Program*, March 21, 2011, *available at* https://www.icann.org/en/system/files/bm/rationale-economic-studies-21mar11-en.pdf, **[Ex. JZ-46]**, at 8.

[103] Dennis Carlton (Compass Lexecon), Report regarding ICANN's Proposed Mechanism for Introducing New gTLDs, June 5, 2009, *available at* https://archive.icann.org/en/topics/new-gtlds/carlton-re-proposed-mechanism-05jun09-en.pdf, **[Ex. JZ-47]**, at ¶ 23 (emphasis added).

[104] Dyson Statement at December 2011 Senate Hearing, **[Ex. JZ-2]**, at 46 (emphasis added).

[105] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, **[Ex. JZ-45]**, at 62.

9.2 VeriSign's Presumptive Acquisition of .WEB Violates ICANN's Competition Mandate

55. As Esther Dyson succinctly summarized in her Senate testimony, ICANN's mission to promote competition has been specifically tied to breaking the NSI/VeriSign monopoly—with so far mixed results. Further to and as an intrinsic element of its Competition Mandate, ICANN created a process to add new gTLDs to the root: the New gTLD Program. The primary purpose of the New gTLD Program was create "meaningful competition at the registry level".[106] By VeriSign's own survey, from the end of 2017, .COM had 131.9 million registrations. The next most popular gTLD is VeriSign's .NET at 14.5 million registrations or 11% of the size of the .COM registry.[107] The third most popular gTLD is .ORG, still predominately used by non-profits in accordance with its original purpose, with only 10.3 million registrations.[108]

56. ICANN's procedures, decisions and actions taken in connection with its New gTLD Program therefore must be evaluated in the broader context of ICANN's Competition Mandate. In that regard, ICANN's decision to award the exclusive license to operate the .WEB registry to NDC/VeriSign is inconsistent with ICANN's obligations under its Competition Mandate. .WEB is the best and closest potential competitor to VeriSign. Allowing this unique asset to fall under VeriSign's control does nothing to promote competition. If anything, ICANN's proposed course of conduct will only strengthen VeriSign's market position, contrary to the objectives of the New gTLD Program.

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[106] *Id.*, at 27.

[107] Verisign, Fourth Quarter 2017 Domain Report, *The Domain Name Industry Brief*, Vol. 15, Issue 1, February 2018, **[Ex. JZ-48]**, at 2.

[108] *Id.*

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Date: September 26, 2018

GLOSSARY

CORE – Council of Registries. An association of domain name registries originating from the gTLD-MoU.

DNS – Domain Name System. A distributed hierarchical database that functions as a directory for the Internet, mapping human-readable domain names to computer-readable numerical IP addresses. For example, an IP address for the Google search website at www.google.com is 216.58.193.196.

Domain name – A string of characters which defines a section of the Internet namespace. A domain name comprises a top level domain (TLD) (e.g., .com) and a unique second level domain (SLD) (e.g., google). Thus, "google.com" is the domain name for the Google search website.

DNSO – Domain Name Supporting Organization. An ICANN supporting organization which, among other activities, generated early proposals for gTLD expansion.

GNSO – Generic Names Supporting Organization. Successor to the DNSO. ICANN supporting organization responsible for monitoring and developing proposals for ICANN's management of gTLDs.

gTLD – Generic Top-Level Domain (e.g., .COM, .NET, .WEB). Only gTLDs may be used by all users, regardless of geography and purpose. Some gTLDs may be less "generic" than others, such as location-specific gTLDs (e.g., .NYC); sponsored gTLDs made on behalf of a specific community (e.g., .EDU) or otherwise have limited relevance beyond a particular industry or subject (e.g., .WINE).

gTLD-MOU – Generic Top-Level Domain Memorandum of Understanding. A document prepared by the IAHC that proposed the introduction of new gTLDs as a mechanism for introducing competition for the provision and supply of generic domain names. Many of the principles and policies outlined in gTLD-MOU were formally embraced by the U.S. government in the Green Paper and the White Paper, as well as by ICANN in its New gTLD Program.

IAHC – International Ad Hoc Committee. A group formed from a wide range of Internet stakeholders including ISOC, IANA, and WIPO to create proposals for the introduction of new TLDs. While it was initially largely dismissed by the U.S. government, the group's ultimate proposal (the gTLD-MoU) contained many of the principles that would later find a place in the Green Paper and White Paper, and, ultimately, the New gTLD Program.

IANA – Internet Assigned Numbers Authority. An ICANN affiliate responsible for the allocation of several key numerical identification and addressing systems, including IP addresses. Originally administered by Jon Postel, IANA traces its history to the early days of the pre-ICANN Internet.

ICANN – Internet Corporation for Assigned Names and Numbers. A non-profit founded in 1998 which, among other responsibilities, coordinates numerous aspects of the DNS. ICANN is also responsible for authorizing and managing the introduction of new gTLDs.

IETF – Internet Engineering Task Force. A group under the umbrella of the ISOC that develops Internet standards.

IOD – Image Online Design. A private company which has repeatedly claimed the rights to .WEB, running its own .WEB registry on an alternate root not approved by ICANN. It has repeatedly and unsuccessfully applied for ownership of the .WEB gTLD.

IP address – Internet Protocol address. A number assigned to a networked device which serves as its address on the Internet, allowing it to be identified and to send and receive web traffic.

ISOC – Internet Society. A group formed in 1992 to contribute to the development and governance of the Internet. Umbrella for the unincorporated Internet Engineering Task Force (IETF), which develops Internet standards.

IWG - Interagency working group. The government working group created by the U.S. Clinton Administration to set policy for domain name assignment.

Nameserver – A server within the DNS hierarchy which either provides the IP address corresponding to a domain name or otherwise points to another nameserver at a lower level of the hierarchy.

NSF – National Science Foundation. A U.S. government agency tasked with supporting scientific research and development efforts. Supported the development of the early Internet through grants and logistical coordination but abdicated its central role in Internet governance prior to the rise of ICANN.

NSI – Network Solutions, Inc. A technology company which held an NSF-sanctioned monopoly over domain name registration services from 1993 to 1998. Became the target of significant criticism from the Internet community and was acquired by VeriSign in 2000 for $21 billion.

NTIA – National Telecommunications and Information Administration. A U.S. government agency tasked by the Clinton Administration with developing a plan for scalable and competition-friendly Internet governance. Its work led to the publication of the Green Paper and White Paper, which laid the groundwork for the introduction of ICANN.

Registry – The registry operator (such as VeriSign or Afilias) for a gTLD is responsible for maintaining a database of all domains allocated under that gTLD.

Registrar – A registrar contracts with one or more registries to sell domains within gTLD namespaces to individuals and organizations. A registry may act as its own registrar, or it may empower other registrars to sell domains within its namespace in exchange for compensation.

Registrant – A registrant is an individual or organization which contracts with a registrar to purchase control of a domain name for its use.

RFC – Request for Comment. A type of document published by the Internet Engineering Task Force to foster public discussion and deliberation on proposed changes or additions to the structures and protocols governing the Internet.

Root – The authoritative "root" of the Internet is a collection of mirrored servers administered by a range of governmental and civilian organizations. Root servers provide authoritative nameserver listings for gTLDs, pointing to the uppermost rung of the DNS hierarchy and allowing users to access domains within the namespaces of those gTLDs. In other words, an authoritative root nameserver would provide a user looking to access the Google search home page with instructions for accessing the ".com" nameservers, which would in turn provide instructions for accessing "google.com". ICANN is responsible for managing the list of gTLDs in the root zone.

SLD – Second-Level Domain. The second highest rung in the DNS hierarchy, located to the left of the TLD string (e.g., the "example" in https://www.example.com).

TLD – Top-Level Domain. The uppermost rung in the DNS hierarchy, TLDs can be found at the rightmost end of a URL (e.g., the "com" in https://www.example.com). So that the DNS can function, the manager of a TLD's registry is responsible for maintaining a database of the domains (such as "example," in this case) registered under that TLD.

URL – Uniform Resource Locator. A structured identifier for referencing the location of a resource on the Internet (e.g., https://www.example.com/page.html). URLs can be used to retrieve web pages, files, and other types of content.

WIPO – World Intellectual Property Organization. A specialized agency of the United Nations tasked with supporting intellectual property rights on a global level. Participated as a stakeholder in debates surrounding Internet governance.

LIST OF EXHIBITS

Exhibit No.	Description
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EXHIBIT Altanovo-11

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

AMENDED REQUEST BY AFILIAS DOMAINS NO. 3 LIMITED FOR INDEPENDENT REVIEW

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21 March 2019

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GLOSSARY OF DEFINED TERMS

Afilias	Afilias Domains No. 3 Limited
AGB	ICANN's New gTLD Applicant Guidebook[1]
Articles	ICANN's Articles of Incorporation[2]
Auction Rules	ICANN's Auction Rules for New gTLDs: Indirect Contention Edition[3]
Bidder	A "Qualified Applicant" or a "Designated Bidder" under the New gTLD Program Rules
Bidder Agreement	New gTLD Auctions Bidder Agreement; the agreement between members of the .WEB contention set and ICANN's third-party auction manager, Power Auctions LLC[4]
Bylaws	ICANN's Bylaws, as amended 18 June 2018[5]
CEP	ICANN's Cooperative Engagement Process, described in Bylaws Art. 4, Sec. 4.3(e)
Change Request Criteria	ICANN's New gTLD Application Change Request Process and Criteria[6]
DAA or Domain Acquisition Agreement	NDC's Domain Acquisition Agreement with VeriSign Third Party Designated Confidential Information Redacted 7
Designated Bidder	"A party designated by a Qualified Applicant to bid on its behalf in an Auction"[8]
DIDP	ICANN's Documentary Information Disclosure Policy
DNS or Domain Name System	The Internet's addressing system
GNSO	ICANN's Generic Names Supporting Organization, ICANN's policy-making body
GNSO Report	The GNSO's Final Report, Part A: Introduction of New Generic Top-Level Domains dated 8 August 2017[9]
gTLD	Generic Top-Level Domain
ICANN	The Internet Corporation for Assigned Names and Numbers
ICDR	The International Centre for Dispute Resolution
Interim Procedures	The Interim Supplementary Procedures for ICANN IRP
IRP	ICANN's Independent Review Process[10]
NDC	Nu Dotco LLC
New gTLD Program Rules, or Rules	The AGB, the Auction Rules, and other rules related to the New gTLD Program
Procedures Officer Decision	Declaration of the Procedures Officer dated 28 February 2019[11]
Qualified Applicant	"An entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction."[12]
Rationales	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program dated 20 June 2011[13]
Request	Afilias' Amended Request for Independent Review dated 20 March 2019

Ruby Glen	Ruby Glen, LLC
VeriSign	VeriSign, Inc.
.WEB	The .WEB gTLD registry
.WEB Auction	The ICANN-administered Auction for .WEB

1. Afilias submits this Request[14] pursuant to Section 4.3 of the Bylaws,[15] the International Arbitration Rules of the ICDR, and the Interim Procedures. Afilias has suffered direct harm as a result of ICANN's breaches of its Articles and Bylaws.[16]

2. This IRP arises out of ICANN's breaches of its Articles and Bylaws as a result of the ICANN Board's and Staff's failure to faithfully enforce the rules for, and underlying policies of, ICANN's New gTLD Program, including the rules, procedures, and policies set out in the AGB[17] and the Auction Rules.[18] This IRP also encompasses the ICANN Board's breach of its Bylaws in connection with its adoption of Rule 7 of the Interim Procedures.[19]

3. Afilias was one of seven entities that applied for .WEB.[20] Under the New gTLD Program Rules, unless it is resolved voluntarily, ICANN 'breaks the tie' among the applicants by administering an auction. The proceeds of the auction are paid to ICANN.

4. As Afilias learned after commencing this IRP,[21] nearly a year prior to the .WEB Auction, another applicant, NDC, secretly entered into a "domain acquisition agreement" with VeriSign, the registry market's dominant player.[22] VeriSign had not applied for .WEB. Pursuant to this DAA, Third Party Designated Confidential Information Redacted .[23] At the time, neither NDC nor VeriSign discloses the DAA to ICANN or and NDC did not modify its .WEB application as required by the New gTLD Program Rules to reflect that it had entered into the DAA with VeriSign or to account for the implications of the agreement's terms for its application. NDC won the .WEB Auction on VeriSign's behalf with a bid exceeding USD 135 million; Afilias presented the second-highest bid. VeriSign has paid the exit bid amount to ICANN.

5. Based on the terms of the DAA, it is evident that NDC violated the New gTLD Program Rules. ICANN, however, has refused to disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB Auction. Specifically, ICANN has breached the obligation contained in its Bylaws to make decisions by applying its documented policies "neutrally, objectively, and fairly."[24] ICANN has also breached its obligations

under international and California law to act in good faith. Furthermore, by failing to implement faithfully the New gTLD Program Rules and thereby enabling VeriSign eventually to acquire the .WEB gTLD, ICANN has eviscerated one of the central pillars of the New gTLD Program and one of ICANN's founding principles: to introduce and promote competition in the Internet namespace in order to break VeriSign's monopoly.[25]

1. THE PARTIES

1.1 Afilias

6. Afilias is organized under the laws of the Republic of Ireland, with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several TLD registries.[26]

1.2 ICANN

7. ICANN is a not-for-profit corporation organized under the laws of the State of California. As multiple IRP panels have stated, ICANN functions as the global regulator[27] of the Domain Name System, or DNS. Although a private organization in form, ICANN has extraordinary powers and regulatory responsibilities to governments and Internet stakeholders worldwide.

8. ICANN's Articles stipulate that it must "operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole[.]"[28] ICANN is required to carry out its activities "in conformity with relevant principles of international law and international conventions and applicable local law[.]"[29] As determined by the first-ever IRP panel (Schwebel, Paulsson, Trevizian), this includes the obligation of good faith.[30] ICANN must also adhere to the "Core Values" and "Commitments" expressed in its Bylaws, which require it to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly[.]"[31] The version of the Bylaws in effect when the AGB was published and when the .WEB Auction occurred also included the requirement that ICANN apply documented policies "with integrity and fairness."[32] The Bylaws expressly prohibit ICANN from "apply[ing] its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion

of effective competition."[33] ICANN is also required to operate "through open and transparent processes that enable competition and open entry in Internet-related markets[,]"[34] and "[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest[.]"[35] The Bylaws "are intended to apply in the broadest possible range of circumstances" and "are intended to apply consistently and comprehensively to ICANN's activities."[36]

2. SUMMARY OF SALIENT FACTS

2.1 The New gTLD Program and the AGB

9. As presented more fully in the accompanying Expert Report of Jonathan Zittrain, ICANN was created in 1998 to promote competition in the DNS by introducing new gTLDs and encouraging new registries to compete with VeriSign.[37] The ICANN Board's Rationales for the Approval of the Launch of the New gTLD Program emphasized that the New gTLD Program "represents ICANN's continued adherence to its mandate to introduce competition in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved."[38]

10. In June 2011, ICANN's Board of Directors approved the AGB, describing it as "the implementation of [a] Board-approved consensus policy concerning the introduction of new gTLDs."[39] The AGB is a detailed 338-page set of policies, rules, and procedures that provides a "step-by-step procedure for new gTLD applicants."[40] ICANN is required to interpret and enforce the New gTLD Program Rules strictly in accordance with its Articles and Bylaws, which, pursuant to the requirement that ICANN "carry[] out its activities in conformity with relevant principles of international law[,]"[41] requires ICANN to interpret and apply them in good faith.[42]

2.2 Overview of Relevant New gTLD Program Rules

2.2.1 Applicants' Required Disclosures and Public Review of Applications

11. Transparency is a central policy of the AGB. To that end, the AGB requires applicants to answer a series of detailed questions describing their business plan for the proposed gTLD; to demonstrate the requisite financial, technical, and operational capabilities needed to operate a registry; and to provide documentation

substantiating the claims made in the application.[43] Further, the AGB requires "applicant[s] (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on [their] behalf)" to provide extensive background information, including the identity of all persons responsible for managing and operating each applicant.[44] Applicants are required to maintain the accuracy and truthfulness of their applications at all times.[45]

12. Save for confidential financial and technical details, applications are published for public review and comment on ICANN's website. This allows the public (including other applicants) to know who is applying for which gTLDs and why. All complete applications are subject to a 60-day public comment period, during which ICANN's Government Advisory Committee, the public, and other interested parties may review and comment on the applications. The AGB's public comment mechanisms are designed to comply with ICANN's Commitments and Core Values to "promot[e] competition," "achiev[e] broad representation of global Internet communities," and "develop[] policy appropriate to [ICANN's] mission through bottom-up, consensus-based processes."[46]

2.2.2 Applicants' Obligation to Amend Their Applications

13. To ensure ongoing transparency into the application process, the AGB requires applicants to notify ICANN ***promptly*** of any change in circumstances that would cause any information in an application to become untrue or inaccurate, including by omission of material information.

14. AGB Section 1.2.7 states that:

> If at ***any time*** during the evaluation process information previously submitted by an applicant becomes ***untrue or inaccurate***, the applicant must ***promptly notify ICANN*** via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant. ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. *Failure to notify ICANN of* ***any change in circumstances*** *that would render* ***any information*** *provided in the application* ***false or misleading*** *may result in* ***denial of the application***.[47]

15. AGB Module 6 (Terms and Conditions) further clarifies the scope of this obligation, providing that:

> Applicant warrants that the ***statements and representations*** contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are ***true*** and ***accurate*** and ***complete*** in ***all material***

> ***respects***, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that ***any material misstatement or misrepresentation (or omission of material information***) may cause ICANN and the evaluators to ***reject the application*** without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of **any *change in circumstances*** that would render any information provided in the application ***false or misleading***.[48]

16. The obligation to ensure the completeness, truthfulness, and accuracy of the disclosures provided in the application extends throughout the process and is ultimately reflected in the Registry Agreement between ICANN and the prospective registry operator. ICANN's standard form Registry Agreement, which is incorporated into the AGB, states as follows:

> Registry Operator represents and warrants to ICANN … [that] ***all material information*** provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and ***such information or statements continue to be true and correct in all material respects*** as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN[.][49]

17. The above requirements of completeness, truthfulness, and accuracy throughout the AGB process are intended to (i) protect the interests of other stakeholders, in particular other members of a contention set, and (ii) ensure a fair and transparent application and evaluation process by which registry rights are awarded—as originally envisioned by the GNSO.[50] These objectives are also reflected in ICANN's published criteria for determining whether to accept or reject an applicant's request to amend an application, assuming that such a request is made in the first place.[51] According to ICANN, the "criteria were carefully developed to enable applicants to make necessary changes to their applications ***while ensuring a fair and equitable process for all applicants***."[52] The criteria therefore recommend rejection of change requests that would "***affect other third parties materially***," "***particularly other applicants***," or put the applicant filing the change request in a position of advantage or disadvantage compared to other applicants.[53] They state that if a change request would "***materially impact other third parties***, it will likely be found to cause issues of unfairness," therefore weighing in favor of denial.[54] The relevant focus of the criteria is to assess whether "the change [would] affect ***string contention***."[55] As ICANN's explanatory notes state: "This criterion assesses how the change request will impact

the status of the application and ***its competing applications***, the string, [and] ***the contention set***[.]"[56]

18. In short, the fundamental premise underlying ICANN's Change Request Criteria is that applicants must disclose any information that could potentially impact string contention or the interests of other applicants. The focus is less on the nature or effects of the new circumstances on the applicant, but rather on the impact of the new circumstances on other applicants in the contention set and the fairness of the process.

2.2.3 Anti-Assignment Rules

19. The AGB's Terms and Conditions strictly prohibit an applicant from reselling, assigning, or transferring any of its rights in connection with its ***application***:

> Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. … ***Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application***.[57]

20. Here, too, the terms and purpose of the AGB and Auction Rules are clear: if an applicant is permitted to act secretly on behalf of a non-applicant, the result is that the public and other applicants are deceived about the identity of the true party in interest. [58] The anti-assignment provision is therefore necessary to ensure that all interested parties in each application are publicly disclosed, furthering ICANN's policy of transparency.

2.2.4 Multiple Applicants and Contention Set Resolution

21. Where multiple applicants seeking the same gTLD are approved, as was the case with .WEB,[59] all approved applicants are placed into a "contention set" for resolution.[60] The AGB "encourage[s]" contention set members to negotiate and resolve their competing claims without the need for ICANN's intervention,[61] such as through joint ventures or royalty or revenue sharing agreements.[62] Alternatively, contention set members can resolve their competing claims by an auction administered by the contention set, provided that all members agree to do so. The vast majority of contention sets have been resolved through such private auctions.

22. If a contention set is not privately resolved by an ICANN-set deadline, the AGB provides that ICANN 'break the tie' by administering an auction of last resort.[63] The ICANN Board adopted the mechanism of contention set resolution via auction because it considered an auction to be "an objective test; other means are

subjective and might give unfair results, are unpredictable, and might be subject to abuses."[64] Further, according to the Board, resolution via auction "provide[s] objectivity and transparency: 'Auctions rely on relatively simple and transparent rules that apply to all participants. As such they are fair and transparent.…'"[65] In selecting an auction mechanism, ICANN sought to *avoid* scenarios where winners "flipped" or "resold" the acquired gTLD to "larger entities at substantial profit without ever delivering service to a single customer."[66] For this reason, ICANN stressed that it "intend[ed] to use auctions in the new gTLD process as a tie-breaking mechanism ... for the resolution of string contention ***among competing new gTLD applicants*** for identical or similar strings."[67] The Rules thus made it clear that the ICANN-administered auction was not open for all comers, but only for bona fide approved applicants for the same new gTLD.

23. The AGB and the Auction Rules provide a detailed set of rules that govern ICANN-administered auctions. The AGB provides that, during the auction, "[t]he auctioneer [will] successively increase[] the prices associated with applications within the contention set, and the respective ***applicants*** [will] indicate their willingness to pay these prices. As the prices rise, ***applicants*** will successively choose to exit from the auction."[68] The AGB further provides that "***[o]nly bids that comply with all aspects of the auction rules will be considered valid***."[69] If a Bidder submits an invalid bid during a round of the auction, "***the bid is taken to be an exit bid at the start-of-round price for the current auction round***."[70] In other words, Bidders that submit invalid bids cannot progress to the next round of the auction.

24. Under the Auction Rules, participation in an ICANN-administered auction is limited to Bidders,[71] defined as either: (i) a Qualified Applicant ("[a]n entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction")[72] or (ii) a Designated Bidder (an entity that a Qualified Applicant designates "to bid on its behalf").[73]

25. The Auction Rules provide that a Bidder may only "***bid on its behalf***," not on behalf of a third party. For example, Auction Rule 13 provides that prior to an ICANN-administered Auction, "each Bidder shall nominate up to two people ('Authorized Individuals') ***to bid on its behalf*** in the Auction."[74] Pursuant to Auction

Rule 15, the actions of Authorized Individuals are attributable "to the Bidder that nominated the Authorized Individual ***to bid on its behalf***."[75] Consistent with these rules, the standard Bidder Agreement provides that "the Qualified Applicant will ***place bids in the Auction on its own behalf*** or may designate an agent ('Designated Bidder') to enter bids at the Auction ***on the Qualified Applicant's behalf***."[76]

2.3 .WEB and the .WEB Auction

26. The .WEB gTLD is one of the—if not the—crown jewels of the New gTLD Program. As set out in greater detail in Dr. George Sadowsky's Expert Report,[77] .WEB is a unique gTLD because of properties inherent in its name, and it is widely viewed as the one potential new gTLD with a sufficiently broad and global appeal to compete with VeriSign's .COM.[78]

27. Some of the largest players in the domain name business applied for .WEB. ICANN ultimately included seven applicants in the .WEB contention set: Afilias; Google, Inc. (through Charleston Road Registry Inc.); Donuts, Inc. (through Ruby Glen); Radix FZC (through DotWeb Inc.); InterNetX GmbH (Schlund Technologies GmbH); Web.com Group, Inc.; and NDC.[79]

28. NDC was established as a special purpose vehicle to acquire gTLDs in the New gTLD Program. NDC applied for twelve other gTLDs, but lost every auction it entered other than the .WEB Auction. NDC's application did not identify or include any information about VeriSign. To the contrary, NDC represented that it would itself aggressively market .WEB as an alternative to .COM in order to increase competition and fight "congestion" in a market for "commercial TLD names [that] fundamentally advantages older incumbent players," and that its partner Neustar, Inc. would provide the back-end support necessary to operate the registry.[80]

29. ICANN set a 27 July 2016 date for the .WEB Auction if the contention set had not voluntarily resolved itself beforehand.[81] By mid-May 2016, it seemed that all of the contention set members had agreed to participate in a private auction.[82] An auction vendor was retained to administer the private auction on 15-16 June 2016.[83] NDC, however, failed to meet the deadline to submit its application to participate in this private auction. Because voluntary resolution of contention sets must be unanimous, NDC's refusal meant that the contention set

would have to be resolved at the ICANN-administered auction scheduled for the following month.

30. On 1 June 2016, Afilias' John Kane contacted Jose Ignacio Rasco III—who is one of NDC's three founders, one of its three managers, its CFO, and the primary contact identified in its .WEB application—to ascertain why NDC had failed to submit its application.[84] Rasco told him that his "***board [had] instructed [him]*** to skip [the private auction] and proceed to [the] ICANN [auction]."[85] Other contention set members received similar responses from Rasco. For example, Rasco informed contention set member Ruby Glen:

> The three of us are still technically the managers of the LLC, but ***the decision goes beyond just us***. … I'm still running our program and Juan sits on the board with me and several others. Based on your request, ***I went back to check with all the powers that be*** and there was no change in the response….[86]

31. In submitting Rasco's reply to ICANN, Ruby Glen complained that a third party was likely controlling NDC. ICANN thereupon undertook to investigate the matter, writing to NDC's Rasco:[87]

> We would like to confirm that there have not been ***changes to your application or*** the [NDC] organization that need to be reported to ICANN. ***This may include any information that is no longer true and accurate in the application***, including changes that occur as part of regular business operations (e.g., changes to officers or directors, application contacts).[88]

Rasco's response was carefully crafted and answered only part of ICANN's inquiry: "I can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN."[89] Notably missing was a response to ICANN's request that NDC "confirm that there have not been changes to your application … that need to be reported to ICANN."[90]

32. On 8 July 2016, ICANN's Christine Willett (Vice President, gTLD Operations, Global Domains Division) followed up with Rasco by phone, but does not appear to have pressed Rasco on his response to ICANN's query, which is surprising—if not incredible—given that there were abundant rumors circulating at the time (which were known to ICANN) that VeriSign was somehow involved with NDC. In a summary of that conversation provided to the ICANN Ombudsman later that day, Willett wrote that Rasco had represented to her that, in responding to Ruby Glen and Afilias:

> [H]e used language to give the impression that the decision to not resolve contention privately was not entirely his. However, ***this decision was in fact his***.[91]

33. In short, either Rasco had lied to Willett, or the two of them had their conversation on a "don't ask, don't tell" understanding. Indeed, as of Third Party Designated Confidential Information Redacted . Thus, the decision whether or not to participate in the private auction was not "in fact his" (i.e., Rasco's). Third Party Designated Confidential Information Redacted

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34. On 13 July 2016, Willett wrote to the contention set, stating that ICANN intended to proceed with the .WEB Auction, as scheduled, on Wednesday 27 July 2016. She stated: "in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request or postpone this auction."[93]

35. At the .WEB Auction, several contention set members dropped out early, with four bidders passing the prior record and through the round ending at USD 71.9 million. Thereafter, only Afilias and one other bidder continued to bid. Under the terms of its bank financing agreements, Afilias was able to bid up to USD 135 million for .WEB, which was more than three times the record bid in any previous ICANN auction.[94] In the final round, Afilias submitted a bid of USD 135 million, short of the USD 142 million needed to progress to the next round. ICANN subsequently announced that NDC had won the auction.

2.4 How VeriSign Sought to Acquire .WEB.

2.4.1 VeriSign Pursues .WEB Secretly as it Negotiates with ICANN for .COM

36. When the New gTLD Program application window opened in 2012, VeriSign had applied only for non-Latin character versions of .COM and .NET, as well as two gTLDs associated with its trademarks. VeriSign did not apply for .WEB. Instead, Third Party Designated Confidential Information , VeriSign entered into the DAA.[95] VeriSign and NDC kept

the existence of the DAA a secret from the public, and apparently from ICANN, until after the auction results were announced. (As discussed below, the *terms* of the DAA remain a secret from the public; Afilias' counsel first learned of the terms pursuant to a Confidentiality Agreement in December 2018, as a result of discovery granted in this IRP.)

37. Following the .WEB Auction, VeriSign filed a 10-Q statement with the SEC. A footnote in that statement obliquely referred to the result of the .WEB Auction:

> Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to third-party consent.[96]

VeriSign's disclosure was not accurate: Third Party Designated Confidential Information Redacted

A flurry of media reports immediately appeared, speculating that VeriSign had acquired .WEB.[97]

38. On 1 August 2016, and in response to the speculation in the marketplace, VeriSign issued a press release, stating that it had "entered into an agreement with [NDC] wherein [VeriSign] provided funds for [NDC's] bid for the .web TLD …. We anticipate that [NDC] will execute the .web Registry Agreement with [ICANN] and will then seek to assign the Registry Agreement to Verisign upon consent from ICANN."[98] As shown below, VeriSign's press release did not accurately describe the terms of the DAA.

39. Following complaints by Afilias, ICANN requested VeriSign and NDC to provide a copy of their agreement. Third Party Designated Confidential Information Redacted Afilias, however, did not become aware of the DAA or when it was provided to ICANN until it received the DAA on 18 December 2018, when it was produced to Afilias by ICANN based on a production order from the Emergency Panelist (and under a Confidentiality Agreement in which only Afilias' General Counsel, outside counsel, and experts assisting in this case may see it). Prior to this, ICANN had refused to provide the DAA (or even confirm its existence), or otherwise provide any other .WEB-related documents that Afilias had requested pursuant to ICANN's Documentary Information Disclosure Policy.[99]

2.4.2 The Terms of the Domain Acquisition Agreement

40. By agreeing to the DAA, Third Party Designated Confidential Information Redacted

.[100] Third Party Designated Confidential Information Redacted

41. Third Party Designated Confidential Information Redacted

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42. By entering into the DAA, Third Party Designated Confidential Information Redacted

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43. Reflecting its total control over NDC's .WEB application, VeriSign has reported that it is involved in the delegation process for .WEB. During an earnings call on 8 February 2018, VeriSign CEO D. James Bidzos reported that "[w]e are now engaged in ICANN's process to move the delegation of .web forward."[113] Bidzos made similar comments on 23 April 2018 and 26 July 2018.[114]

2.5 Afilias Complains to ICANN

44. On 8 August 2016, Afilias wrote to ICANN, stating that VeriSign's arrangement with NDC violated the New gTLD Program Rules and demanding that ICANN disqualify NDC's bid and, in accordance with the Rules,

award .WEB to the next highest bidder, Afilias.[115] Afilias also lodged a complaint with the ICANN Ombudsman.[116]

45. Having received no response to its letter, on 9 September 2016, Afilias again wrote to ICANN, requesting that ICANN specify what steps it had taken to disqualify NDC's bid and to confirm that ICANN would not enter into a Registry Agreement with NDC for .WEB until the Ombudsman had completed its investigation, the ICANN Board had reviewed the matter, and any ICANN accountability mechanisms had been completed.[117]

Third Party Designated Confidential Information Redacted

46. On 16 September 2016, ICANN sent Afilias, VeriSign, NDC, and Ruby Glen a questionnaire to "facilitate informed resolution" of questions regarding, among other things, whether NDC should have participated in the 27-28 July 2016 .WEB Auction and whether NDC's application for the .WEB gTLD should be rejected.[118]

Third Party Designated Confidential Information Redacted

47. On 30 September 2016, Mr. Akram Atallah (President, ICANN's Global Domains Division) wrote to Afilias and stated: "As an applicant in the contention set, the primary contact for the Afilias's application ***will be notified of [any] future changes to the contention set status or updates regarding the status of [.WEB]***…. We will continue to take Afilias's comments, and other inputs that we have sought, into consideration ***as we consider this matter***."[119]

48. Afilias responded to ICANN's request on 7 October 2016.[120] Afilias does not know what ICANN did with the information it received, including presumably from VeriSign, NDC, and Ruby Glen.

49. Throughout 2017, ICANN did not—as Mr. Atallah had promised—notify Afilias of ***any*** "changes to the contentions set status" or ***any*** "updates regarding the status of .WEB." However, Afilias had no reason to believe that ICANN was not investigating and considering the issues raised by Afilias – which, again, is what ICANN said it would do.

50. Beginning in February 2018, Afilias' counsel at Dechert made repeated requests to ICANN for updates on whether it had reached any decision on how it intended to proceed with .WEB. On 28 April 2018, ICANN's counsel at Jones Day responded to Afilias' counsel that "***the .WEB contention set is on hold***. When

the contention set is updated, your client – along with all other members of the contention set – will be notified promptly[.]"[121]

51. Without providing any reasons for its decision, on 7 June 2018, ICANN notified Afilias that it had decided to take the .WEB contention set off hold status—signaling that it intended to proceed with delegation of .WEB to NDC;[122] and, of course, in light of the terms of the DAA, of which ICANN was now fully aware, to VeriSign.

52. In response to ICANN's notification, on 18 June 2018 Afilias initiated a CEP—an ICANN accountability mechanism intended to allow the parties to amicably resolve or narrow the issues in dispute.[123] In response, on 20 June 2018, ICANN once again placed the .WEB contention set "on-hold."[124] ICANN terminated the CEP on 13 November 2018.[125] Afilias commenced this IRP the following day on 14 November 2018. The .WEB contention set is still on-hold.

3. NDC VIOLATED THE NEW GTLD PROGRAM RULES

53. Below we set out how NDC violated the AGB by (i) omitting material information from and failing to correct material misleading information in its .WEB application, (ii) assigning its rights and obligations in its .WEB application to VeriSign, and, (iii) agreeing to submit bids on VeriSign's behalf at the .WEB Auction.

3.1 NDC Failed to Amend its Application

54. The information that NDC failed to disclose— Third Party Designated Confidential Information Redacted —was material to its application, to the fairness and integrity of the resolution-by-auction process, and ultimately to the objectives of the New gTLD Program itself. NDC's failures to disclose these facts and to amend its application following its agreement with VeriSign constitute breaches of the AGB requiring NDC's disqualification.

55. NDC's failure to disclose the terms of its agreement with VeriSign was an omission of material information, as its obligations assumed under the DAA fundamentally changed the nature of NDC's application. VeriSign has long enjoyed a monopoly, by virtue of its control over the .COM and .NET gTLDs, and a fundamental purpose of the New gTLD Program was to break this monopoly. Afilias and the other applicants sought to acquire

.WEB for exactly this purpose: to compete with VeriSign. It would be absurd to suggest that NDC believed that its agreement with VeriSign would not be materially relevant to the other applicants, the Internet community, and, indeed, to ICANN. Indeed, the lengths to which it went to conceal VeriSign's involvement suggests that it was well aware how material this involvement was.

56. As discussed previously, the AGB requires applicants to answer a series of detailed "mandatory" questions concerning, *inter alia*, the specific entity applying for a given gTLD; the primary individuals at the entity responsible for the application; the names and positions of the directors, officers, and/or partners of the entity; the names and positions of all shareholders holding at least 15% of the entity; the "mission/purpose" of the proposed gTLD; and how the applicant expected to use the gTLD to "benefit registrants, Internet users, and others."[126] The information that NDC provided in response to several of these mandatory questions became untrue, inaccurate, false, and/or misleading when NDC entered into the DAA (*i.e.*, a "change in circumstance").

57. However, NDC ignored the AGB's rules and procedures for amending its application. Instead, NDC concealed that VeriSign—a non-applicant that had not been through the public comment or evaluation processes and whose monopoly the New gTLD Program was designed to challenge—had now become the real party-in-interest behind its application. By concealing VeriSign's "indirect participation in the Contention Set," NDC misled ICANN, the other members of the .WEB contention set, and indeed the entire Internet community, into believing that it was seeking to obtain .WEB for itself in order to compete against .COM (as stated in the Mission/Purpose statement of NDC's application). Once NDC had sold its rights in its .WEB application to VeriSign, this representation was simply and entirely false.

58. Third Party Designated Confidential Information NDC's application was no longer true, accurate, or complete. For example, NDC was required, at Section 18 of its application, to describe the "Mission/Purpose" of its proposed .WEB registry. Here, ICANN required NDC to detail its business plan for .WEB, including how the .WEB registry would "benefit registrants" and "add to the current space, in terms of competition, differentiation, or innovation."[127] For NDC's "application to be considered complete, answers to this section must be fulsome and sufficiently

quantitative…."[128]

59. Answers provided in response to Section 18 are included in the non-confidential version of applications posted to ICANN's website, so that members of the public may understand who is applying for which gTLDs and for what purpose. NDC's application contained a detailed response to Section 18, repeatedly noting that .WEB would follow the marketing path that NDC's management used with .CO. For example, NDC wrote:

> Prospective users benefit from the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD's (e.g., .CO targeting innovative businesses and entrepreneurs). … The experienced team behind this application initially launched and currently operates the .CO ccTLD. The intention is for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's experience and expertise in marketing and branding TLD properties.[129]

60. Further, NDC justified its pursuit of .WEB on the basis, *inter alia*, that it was seeking to challenge the dominance of "older incumbent players" (*e.g.*, VeriSign—the oldest of such incumbent players).[130] The only possible reading of NDC's business plan was that NDC intended to acquire .WEB for itself, to operate .WEB itself, and to market .WEB itself. Third Party Designated Confidential Information none of these things were true: NDC's business plan for .WEB had been reduced to one singular objective: to secretly obtain the rights in .WEB for VeriSign, and then to assign .WEB to VeriSign.

61. Other parts of NDC's application were also, at best, misleading. For example, in Section 1 of its application, NDC continued to identify itself as the "applicant," that is, the "entity that would enter into a Registry Agreement with ICANN."[131] Third Party Designated Confidential Information this was all but fiction except in the most superficial sense:

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62. By failing to submit the necessary change requests to fully detail the operation and effect of the DAA on its application, NDC flouted both the letter and the spirit of the numerous transparency and disclosure requirements contained in the New gTLD Program Rules. ICANN's failure to disqualify NDC for these violations breaches its obligations under its Articles and Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the New gTLD Program and, specifically, of the .WEB Auction.

3.2 NDC Violated the AGB's Prohibition Against the Resale, Transfer, or Assignment of NDC's Application

63. In addition to its failure to disclose material information relevant to its application, NDC also breached the AGB's prohibition against an applicant reselling, transferring, or assigning its application. The AGB states in unambiguous terms that an "[a]pplicant may not resell, assign, or transfer ***any*** of the applicant's rights or obligations in connection with the application."[132]

64. Contrary to the AGB's anti-assignment clause, NDC transferred to VeriSign its obligations to take certain actions required of applicants under the AGB. For example, the AGB requires applicants "to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading."[133] Third Party Designated Confidential Information Redacted

."[134] NDC therefore impermissibly transferred its obligation to amend its application, as necessary, to VeriSign.

65. NDC also impermissibly transferred crucial rights as an applicant to VeriSign. For example, pursuant to the AGB, applicants "are encouraged to reach a settlement or agreement among themselves that resolves the contention."[135] An applicant therefore has the right to choose to "withdraw their application," "combin[e] in a way that does not materially affect the remaining application," or participate in a private auction.[136]

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[137] Third Party Designated Confidential Information Redacted

[138] Third Party Designated Confidential Information Redacted

[139] in direct violation of the AGB, which strictly limits participation in contention sets to applicants. Indeed, with the transfer of such rights, NDC was no longer an applicant for .WEB in any real sense; Third Party Designated Confidential Information Redacted

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66. Finally, VeriSign's control over NDC in all matters regarding its .WEB application is further demonstrated by the fact that VeriSign is "engaged in ICANN's process to move the delegation of .web forward."[140] As the purported winner of the .WEB Auction, it is NDC that has the obligation under the AGB to negotiate and execute a Registry Agreement for .WEB with ICANN. VeriSign has no standing to be at the negotiating table in any capacity regarding the delegation of .WEB. VeriSign's participation in the "ICANN process" for the delegation of .WEB reflects NDC's impermissible transfer of its obligation as the winning applicant to negotiate and conclude a Registry Agreement with ICANN and participate in the pre-delegation testing for .WEB.

67. Third Party Designated Confidential Information Redacted

68. NDC's sale, assignment, and/or transfer of its rights and obligations in its .WEB application to VeriSign violates the Terms and Conditions of the AGB. ICANN's failure to disqualify NDC constitutes a clear breach of ICANN's Articles and Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the New gTLD Program.

3.3 Each of NDC's Bids at the .WEB Auction Was Invalid

69. As set forth above, the AGB provides that "[o]nly bids that comply with ***all aspects*** of the auction rules will be considered valid."[141] In relevant part, the Auction Rules provide that a Bidder may only "bid on ***its*** behalf"[142] at an ICANN-administered Auction and that all such bids must reflect "a price which the ***Bidder*** is willing to pay to resolve string contention within a Contention Set in favor of its Application."[143] An invalid bid must be treated as "an exit bid at the start-of-round price for the current auction round."[144] Accordingly, any entity that

submits an invalid bid may not proceed to the next round of the auction.

70. NDC participated in the .WEB Auction as the Bidder for its Application. Although NDC was obligated under the Auction Rules to participate in the .WEB Auction "on its own behalf,"[145] Third Party Designated Confidential Information Redacted

[146] Third Party Designated Confidential Information Redacted

71. Moreover, although NDC was obligated to submit bids at the .WEB Auction that reflected the amount that ***it*** was willing to pay for .WEB, Third Party Designated Confidential Information Redacted

72. Third Party Designated Confidential Information Redacted

73. Thus, even though NDC mechanically entered bids during the .WEB Auction, it was ***VeriSign*** that was the true bidder-in-interest. Third Party Designated Confidential Information Redacted

[147] Third Party Designated Confidential Information Redacted

[148]

74. For these reasons, none of NDC's bids complied with "all aspects of the auction rules." ICANN's failure to deem NDC's initial bid at the .WEB Auction an exit bid constitutes a clear breach of ICANN's Articles and Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the .WEB Auction.

4. ICANN'S FAILURE TO DISQUALIFY NDC BREACHES ICANN'S OBLIGATION TO APPLY DOCUMENTED ICANN POLICIES NEUTRALLY, OBJECTIVELY, AND FAIRLY

75. The Bylaws obligate ICANN to "[m]ake decisions by applying its documented policies

consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment…."[149] ICANN is permitted to "single out [a] … party for disparate treatment" if it is "justified by substantial and reasonable cause, such as the promotion of effective competition."[150] Even where the AGB grants ICANN the discretion whether or not to take action, ICANN cannot refrain from acting where the neutral, objective, and fair application of its policies require it to act.

76. The GNSO, ICANN's policy making body, determined that the New gTLD Program must be administered pursuant to "a clear and pre-published application process using objective and measurable criteria."[151] This policy was cited in the ICANN Board's Resolutions that approved the New gTLD Program.[152] In so doing, the Board observed that the AGB satisfies the GNSO's policy by mapping out the various phases of the application process, from submission through transition to delegation.

77. Moreover, the ICANN Board determined that ICANN would administer an auction as a method of last resort for resolving contention where "contending applications have not resolved the contention among themselves."[153] In explaining its decision to adopt the auction method for this purpose, the ICANN Board explained that compared with other methods of resolution, auctions are "fair and transparent."[154] As the auction administrator, ICANN is further obligated to act in good faith.

78. ICANN failed to apply these policies "neutrally, objectively, and fairly" here:

- The AGB required ICANN to "disqualify" NDC because it "fail[ed] to provide ICANN with the identifying information necessary to confirm the identity" of the true applicant, namely VeriSign.[155]
- The AGB required ICANN to "reject" NDC's application for the omission of material information from its application, namely that it was obligated to assign .WEB to VeriSign.[156]
- The AGB required ICANN to "deny" NDC's application for "fail[ing] to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading."[157]
- ICANN failed to fully investigate rumors that NDC had reached an agreement with VeriSign prior to the .WEB Auction. Although ICANN specifically asked NDC to confirm that "there have not been changes to your application … that need to be reported to ICANN,"[158] NDC declined to do so and ICANN failed to pursue a response.
- ICANN failed to sanction NDC for lying to ICANN investigators about its decision not to participate in a .WEB private auction.

- ICANN further violated its policy of transparency by refusing to update Afilias as to the status of its investigation, the details of its findings, and its intentions in that regard for over 18 months. ICANN concealed the terms of the DAA and its decision to delegate .WEB to NDC (and hence to VeriSign).
- ICANN also failed administer the .WEB Auction "neutrally, objectively, and fairly[.]"[159] The AGB provides that bids are valid only if they comply with "all aspects of the auction rules."[160] None of NDC's bids were valid, as they were submitted on VeriSign's, not NDC's behalf, and reflected the amount that VeriSign, not NDC, was willing to pay for .WEB. Once the DAA was disclosed to ICANN, ICANN failed to disqualify NDC on the basis that its bids submitted at the .WEB Auction were all invalid.

5. ICANN'S DECISION TO FINALIZE A REGISTRY AGREEMENT WHILE KNOWING OF NDC'S ARRANGEMENT WITH VERISIGN VIOLATES ICANN'S MANDATE TO PROMOTE COMPETITION

79. The harm to Afilias caused by ICANN's failure to enforce its policies, rules, and procedures is compounded by the fact that NDC's and VeriSign's subterfuge subverts another one of ICANN's Core Values, and indeed, one of the principal purposes for the New gTLD Program's creation: to introduce and promote competition, including, specifically, competition that could break VeriSign's monopoly.

80. As discussed in the Expert Report of Dr. Zittrain, ICANN was founded to introduce competition in the domain name space. This Competition Mandate was reflected in ICANN's founding documents, its Bylaws, its policymaking, and in the New gTLD Program itself. When ICANN was established, its Memorandum of Understanding with the United States Government tasked ICANN with privatizing the management of the DNS "in a manner that increases competition" by adopting "market mechanisms to support competition and consumer choice … [to] promote innovation, [preserve diversity,] and enhance user choice and satisfaction."[161] ICANN's first generation of leaders understood plainly ICANN's purpose: as Esther Dyson, ICANN's first chairman, said in her testimony about the New gTLD Program, "***our … mission was to break the [NSI/VeriSign] monopoly***…."[162] Thus, one of the Core Values stated in ICANN's Bylaws is to introduce and promote competition.[163] Indeed, the Bylaws state at the outset that ICANN "must operate … through open and transparent processes ***that enable competition and open entry in Internet-related markets***."[164] ICANN's mandate to introduce and promote competition must inform all of its decision-making.

81. The ICANN Board launched the New gTLD Program "in fulfilment of a core part of ICANN's Bylaws: the introduction of competition and consumer choice in the DNS."[165] The Board's view reflects the

intentions of the GNSO, ICANN's primary policy-making organ, which stated that one of the "key drivers for the introduction of new top-level domains" is to "stimulate competition at the registry service level which is consistent with ICANN's Core Value 6."[166]

82. As discussed in the Expert Report of Dr. Sadowsky, .WEB is widely seen as the best potential competitor to .COM. In recognition of its competitive potential, the members of the .WEB contention set bid a record amount to secure the rights to .WEB. Afilias bid more than three times what any gTLD had publicly auctioned for in history to acquire .WEB to compete with VeriSign. VeriSign—bidding secretly through NDC—outbid Afilias in what was plainly an effort to protect its dominant market position.

83. ICANN's failure to apply its documented policies consistently, neutrally, objectively, and fairly—and its failure to carry out its activities through open and transparent processes—have also resulted in the violation of ICANN's mandate to introduce and promote competition. For reasons described in Dr. Sadowsky's Expert Report, .WEB remains the last, best hope of creating a competitive environment at the wholesale registry level of the DNS and ending VeriSign's market power, which, to date, has been regulated through price controls. By violating its Commitments and Core Values in its Bylaws, thereby enabling VeriSign to gain control over .WEB, ICANN has all but destroyed the last best chance to create a truly competitive environment within the DNS—*i.e.*, one of the principal purposes of the New gTLD Program, and indeed, of ICANN's existence.

6. ICANN VIOLATED ITS BYLAWS IN ADOPTING RULE 7 OF THE INTERIM PROCEDURES

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

85. Although the drafting committee had begun work on the Interim Procedures in 2016 and, in fact, had published a draft set of rules for public comment in November 2016, VeriSign connived to amend Rule 7

(Consolidation, Intervention and Joinder) in October 2018, just days before the Board voted to adopt the Interim Procedures on 25 October 2018.

86. The Board's adoption of Rule 7 violated ICANN's Bylaws in several respects:

- ***First***, the Bylaws require that the drafting committee be comprised of members of the global Internet community, but the committee wrongly included ICANN's internal and external counsel in quorum counts. Barring the inclusion of ICANN's lawyers, the committee would have lacked a quorum when changes to Rule 7 were discussed in October 2018.
- ***Second***, the Bylaws require that the Interim Procedures conform to "norms of international arbitration," but the final text of Rule 7 provides for rights of participation that are wholly foreign to all forms of international arbitration.
- ***Third,*** the Bylaws require that the Interim Procedures be published for public comment pursuant to ICANN's practices, which require public review of all "significant changes" to the rules. Rule 7 was not re-submitted for public comment, although the revised rule was certainly a "significant change" from the version that had been published for public comment in November 2016.
- ***Fourth*****,** the Bylaws provide that the Board may reasonably withhold approval of the Interim Procedures, yet the Board's approval was based on its understanding that certain drafting "principles" had been followed and that the 11th hour edits to Rule 7 reflected the committee's prior discussions. In fact, at least as regards Rule 7, each of the drafting principles that were to guide the committee's work had been materially violated and the text of Rule 7 admittedly did not reflect the committee's prior discussions.

87. The Procedures Officer found that "the issues raised [by Afilias] are of such importance to the global Internet community and Claimants that they should not be decided by a 'Procedures Officer'" and therefore referred the question of the enforceability of Rule 7 of the Interim Procedures to the Panel.

88. VeriSign and NDC, relying on the text of Rule 7 that had been added at the 11th hour, moved to participate in this IRP as *amicus curiae*.[167] As already evinced by the substantial briefing before the Procedures Officer, the wrongful adoption of Rule 7 has significantly increased Afilias' costs associated with prosecuting this IRP. Moreover, ICANN's effectuation of the rule changes in this manner for the benefit of VeriSign is part of a course of conduct Third Party Designated Confidential Information Redacted , when ICANN learned of but concealed from the public the terms of the DAA from the public, and falsely promised Afilias that it would investigate and consider Afilias' complaints. Since that time, ICANN has continually violated its commitments and core values of transparency, non-discrimination, promotion of competition, and decision-making through the consistent, neutral, objective, and fair application of document policies – all for the purpose of assisting VeriSign's efforts to obtain the rights in .WEB

for itself.

7. RELIEF REQUESTED

89. Reserving its rights to amend the relief requested below, inter alia, to reflect document production and further witness evidence, Afilias respectfully requests the IRP Panel to issue a binding Declaration:

(1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;

(2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;

(3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;

(4) specifying the bid price to be paid by Afilias;

(5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC;

(6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and

(7) granting such other relief as the Panel may consider appropriate in the circumstances.

Respectfully submitted,

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LIST OF EXHIBITS

Exhibit No.	Description
C-69	Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC Third Party Designated Confidential Information Redacted
C-70	Declaration of the Procedures Officer (29 Feb. 2019)
C-71	Emergency Panelist's Decision on Afilias' Request for Production of Documents in Support of Its Request for Interim Measures (2 Dec. 2018)
C-72	United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (26 Oct. 2018)
C-73	World Bank, Open Learning Center, *Beneficial Ownership Transparency*, *available at* https://olc.worldbank.org/print/content/beneficial-ownership-transparency (last accessed on 17 Mar. 2019)
C-74	ICANN, Contention Set Status, New Generic Top-Level Domains (as of 19 Feb. 2019), *available at* https://gtldresult.icann.org/applicationstatus/stringcontentionstatus (last accessed on 15 Mar. 2019)
C-75	*Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016)
C-76	ICANN New Generic Top-Level Domains, New gTLD Auction Results, *available at* https://gtldresult.icann.org/applicationstatus/auctionresults (last accessed on 15 Mar. 2019)
C-77	A. Allemann, "It looks like Verisign bought .Web domain for $135 million (SEC Filing)," *Domain Name Wire* (28 July 2016), *available at* https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/ (last accessed on 15 Mar. 2019)
C-78	Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018)
C-79	Letter from A. Ali (Counsel for Afilias) to ICANN Board of Directors (23 Apr. 2018)
C-80	Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afilias) (28 Apr. 2018)
C-81	VeriSign (VRSN) CEP Jim Bidzos on Q4 2018 Results – Earnings Call Transcript (7 Feb. 2019), *available at* https://seekingalpha.com/article/4239256-verisign-inc-vrsn-ceo-jim-bidzos-q4-2018-results-earnings-call-transcript?part=single (last accessed on 17 Mar. 2019)

LIST OF LEGAL AUTHORITY

Authority No.	Description
CA-11	*Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015)

[1] ICANN, *gTLD Applicant Guidebook* (4 June 2012) ("**AGB**"), **[Ex. C-3]**.

[2] ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016) ("**Articles**"), **[Ex. C-2]**.

[3] Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015) ("**Auction Rules**"), **[Ex. C-4]**.

[4] ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), **[Ex. C-5]**.

[5] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("**Bylaws**"), **[Ex. C-1]**.

[6] ICANN, New gTLD Application Change Request Process and Criteria ("**Change Request Criteria**"), **[Ex. C-56]**.

[7] Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC Third Party Designated Confidential Information Redacted ("**DAA**"), **[Ex. C-69]**.

[8] Auction Rules **[Ex. C-4]**, p. 17.

[9] ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017) ("**GNSO Report**"), **[Ex. C-20]**.

[10] Bylaws **[Ex. C-1]**, Art. 4, Sec. 4.3.

[11] Declaration of the Procedures Officer (29 Feb. 2019) ("**Procedures Officer Decision**"), **[Ex. C-70]**.

[12] Auction Rules **[Ex. C-4]**, p. 19.

[13] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011) ("**Rationales**"), **[Ex. C-9]**.

[14] On 9 January 2019 and 29 January 2019, respectively, Afilias notified counsel for ICANN and the ICDR of its intention to amend its original Request for IRP pending the decision by the Procedures Officer. In light of ICANN's disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC, Afilias withdraws the witness statements of Ram Mohan, Jonathan Robinson, and John Kane filed with the original Request for IRP.

[15] Bylaws **[Ex. C-1]**, Sec. 4.3. ICANN takes the position that the IRP is the only third-party dispute resolution process available to gTLD applicants for independent review of ICANN's actions. AGB **[Ex. C-3]**, p. 6-4. The enforceability of the "litigation waiver" ICANN imposed upon new gTLD applicants, however, is questionable under the laws of various jurisdictions. Afilias reserves its right to challenge ICANN's conduct in any court of competent jurisdiction worldwide.

[16] Afilias requests leave to supplement this submission to take into consideration ICANN's compliance with its DIDP, customary document production during these proceedings, further witness evidence, and ICANN's submissions.

[17] AGB **[Ex. C-3]**.

[18] Auction Rules **[Ex. C-4]**. The Auction Rules are binding upon bidders in an ICANN auction. ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), **[Ex. C-5]**.

[19] NDC and VeriSign have applied to participate in this IRP as *amicus curiae*. Afilias has objected to their participation, mainly based on the ICANN Board's improper approval of certain parts of Rule 7 of the Interim Procedures, and ICANN's Staff's conduct in connection therewith, as set out more fully in Afilias' submissions

to the Procedures Officer. These submissions are incorporated by reference herewith. This matter is now before the IRP Panel pursuant to the Procedures Officer Decision. Procedures Officer Decision **[Ex. C-70]**, p. 38. This Request also encompasses the ICANN Staff's improper refusal under ICANN's DIDP to disclose to Afilias documents relevant to the .WEB Auction, a decision that was upheld by the ICANN Board on 6 November 2011. ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board (6 Nov. 2018), **[Ex. C-7]**, pp. 1-12.

20 *See* ICANN, New gTLD Application Submitted to ICANN by Afilias Domains No. 3 Limited, Application ID: 1-1013-6638 (13 June 2012), **[Ex. C-8]**.

21 Third Party Designated Confidential Information Redacted

ICANN produced the DAA to Afilias, only after being required to do so by the Emergency Panelist. Emergency Panelist's Decision on Afilias' Request for Production of Documents in Support of Its Request for Interim Measures (2 Dec. 2018), **[Ex. C-71]**, pp. 5-6.

22 DAA **[Ex. C-69]**.

23 *Id.*, Ex. A, Sec. 1 (emphasis added).

24 Bylaws **[Ex. C-1]**, Sec 1.2(a)(v).

25 Since 2000, VeriSign has controlled the exclusive rights to the .COM and .NET registries. This market dominance has endured, leading the ICANN Board to opine in 2011 that "[t]o date, ICANN has not created meaningful competition at the registry level." Rationales **[Ex. C-9]**, p. 27. Members of the United States Senate opined in 2016 that "Verisign's government-approved control of the .com registry allows it to operate as a monopoly—a fact that has not gone unnoticed in the financial services industry and the stock market." Letter from Senators T. Cruz, M. Lee and S. Duffy (United States Senate) to R. Hesse (Acting Assistant Attorney General, United States Department of Justice) (12 Aug. 2016), **[Ex. C-10]**, p. 2. Financial analysts who have studied VeriSign agree, describing it as having "a virtual monopoly on Internet domains" that gives it "unrivalled power" in "the fastest-growing industry in the world -- the Internet." M. Hargrave, "Profit from a 'Monopoly on the Internet' with 45% Upside," *StreetAuthority* (6 Nov. 2013), **[Ex. C-11]**, p. 1. Industry observers have likewise concluded that VeriSign "holds a legal monopoly on the DNS industry" (B. Katz, "VeriSign Is Brian Katz's Highest Conviction Holding - Here's Why," *Seeking Alpha* (29 Dec. 2009), **[Ex. C-12]**, p. 2) and that its "exclusive contract with [ICANN] gives the company a significant barrier to entry for competitors." "Verisign: Time To Make Some Real Money," *Seeking Alpha* (29 June 2016), **[Ex. C-13]**, p. 1. Today, VeriSign continues to control more than 78% of all gTLD registrations. Verisign, "Fourth Quarter 2017 Domain Report," 15(1) *The Domain Name Industry Brief* (Feb. 2018), **[Ex. C-14]**, p. 2. To protect consumers, the U.S. government has required that ICANN contractually impose price caps on the wholesale prices of .COM registrations. VeriSign, *Verisign Statement on .com Registry Agreement Renewal* (1 Nov. 2012), **[Ex. C-15]**, p. 1; United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (29 Nov. 2012), **[Ex. C-16]**, p. 3. The U.S. government, however, recently permitted an amendment to the .COM registry agreement that lets VeriSign increase the price of .COM registrations by seven percent in the last four years of every six-year contract period. United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (26 Oct. 2018), **[Ex. C-72]**. Price controls had scant effect on VeriSign's profitability before the amendment: VeriSign's operating margin had exceeded 60%, among the highest of any S&P 500 company, before the amendment. VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), **[Ex. C-18]**; D. Dayen, "Special Investigation: The Dirty Secret Behind Warren Buffett's Billions," *The Nation*, **[Ex. C-17]**, p. 10. If its margins continue to grow at the current rate, within the next decade VeriSign will "post the highest rate of profitability of any public company on earth." *Id.*

26 Afilias, *About Us*, **[Ex. C-19]** ("Afilias is the ICANN Designated Registry Operator for a wide range of gTLDs, including the following: .INFO, .MOBI, .PRO, .PINK, .BLUE, .BLACK, .RED, .KIM, .SHIKSHA, .ORGANIC,

.dotCHINESEMobile, .LGBT, .VOTE, .VOTO, .GREEN .POKER, .PROMO, .BET, .PET, .BIO, .SKI, .ARCHI, and .LLC.").

[27] *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), **[Ex. CA-1]**, ¶¶ 1-2, 10; *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), **[Ex. CA-2]**, ¶ 125.

[28] Articles **[Ex. C-27]**, ¶ 2(III); *see* Bylaws **[Ex. C-1]**, Sec. 1.2(a).

[29] Bylaws **[Ex. C-1]**, Sec. 1.2(a); Articles **[Ex. C-2]**, ¶ 2(III).

[30] *ICM Registry v. ICANN*, Declaration of the Independent Review Panel **[Ex. CA-1]**, ¶ 152 ("the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN 'shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law,' requires ICANN to operate in conformity with relevant general principles of law (***such as good faith***) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.") (emphasis added).

[31] Bylaws **[Ex. C-1]**, Sec 1.2(a)(v).

[32] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), **[Ex. C-23]**, Art. I, Sec. 2(8).

[33] Bylaws **[Ex. C-1]**, Sec. 2.3.

[34] Articles **[Ex. C-2]**, ¶ 2(III); Bylaws **[Ex. C-1]**, Sec. 1.2(a).

[35] Bylaws **[Ex. C-1]**, Sec. 1.2(b)(iv).

[36] *Id.*, Sec 1.2(c).

[37] Expert Report by Jonathan Zittrain (26 Sep. 2018), ¶¶ 21-24, 41-45.

[38] Rationales **[Ex. C-9]**, p. 7.

[39] AGB **[Ex. C-3]**, p. 1-2.

[40] ICANN, *News & Media: New gTLD Frequently Asked Questions*, **[Ex. C-22]**, p. 9; *see also Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), **[Ex. CA-11]**, ¶ 17 (describing the AGB as the "crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.") (internal citation omitted).

[41] Bylaws **[Ex. C-1]**, Sec. 1.2(a); Articles **[Ex. C-2]**, ¶ 2(III).

[42] *See also* B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), **[Ex. CA-3]**, p. 107 ("In short, good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances.").

[43] AGB **[Ex. C-3]**, pp. 1-4, 1-25, A-5 – A-46.

[44] *Id.*, p. 6-2.

[45] *Id.*, pp. 1-30, 6-2.

[46] *Id.*, p. 1-5.

[47] *Id.*, Sec. 1.2.7 (at p. 1-11) (emphasis added).

[48] *Id.*, p. 6-2 (emphasis added).

[49] ICANN, Registry Agreement (as of 31 July 2017), **[Ex. C-26]**, Sec. 1.3(a)(i) (emphasis added).

[50] GNSO Report **[Ex. C-20]**, p. 13 (ICANN's "evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.").

[51] Change Request Criteria **[Ex. C-56]**, pp. 1-3.

[52] *Id.* (emphasis added).

[53] *Id.* (emphasis added).

[54] *Id.* (emphasis added).

[55] *Id.* (emphasis added).

[56] *Id.* (emphasis added).

[57] AGB **[Ex. C-3]**, p. 6-6 (emphasis added).

[58] As observed by the World Bank: "Transparency of beneficial ownership will help ensure that the puppet masters and their associates and facilitators are not able to operate in secrecy and impede development." *See* World Bank, Open Learning Center, *Beneficial Ownership Transparency*, *available at* https://olc.worldbank.org/print/content/beneficial-ownership-transparency (last accessed on 17 Mar. 2019), **[Ex. C-73]**.

[59] AGB **[Ex. C-3]**, p. 1-15 (identifying the lifecycle timeline for an uncomplicated gTLD application).

[60] *Id.*, p. 1-13.

[61] *Id.*, p. 1-28.

[62] *Id.*, p. 4-6.

[63] *Id.*, p. 4-19.

[64] Rationales **[Ex. C-9]**, p. 104.

[65] ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), **[Ex. C-27]**, p. 2.

[66] *Id.*, pp. 5, 6 ("Winners [of lotteries] would often 'flip' or resell their licenses to larger entities at substantial profit without ever delivering service to a single customer. … The disadvantages of comparative evaluations [include] … [i]f other than the highest-value applicant wins the comparative evaluation, the winner is likely to 'flip' the rights for speculative profits[.]").

[67] *Id.*, p. 1 (emphasis added).

[68] AGB **[Ex. C-3]**, p. 4-20 (emphasis added). Reflecting the AGB, the Auction Rules also provide that "[a] Bid represents a price, ***which the Bidder is willing to pay*** to resolve string contention within a Contention Set in favor of its Application." Auction Rules **[Ex. C-4]**, p. 5 (emphasis added).

[69] AGB **[Ex. C-3]**, p. 4-22 (emphasis added).

[70] *Id.*, p. 4-23 (emphasis added).

[71] *Id.*, p. 2.

[72] Auction Rules **[Ex. C-4]**, p. 19.

[73] *Id.*, p. 17.

[74] *Id.*, p. 3 (emphasis added).

[75] *Id.* (emphasis added).

[76] New gTLD Auctions Bidder Agreement **[Ex. C-5]**, p. 1 (emphasis added).

[77] Report of George Sadowsky (20 Mar. 2019), ¶¶ 39-46.

[78] P. Lamantia, ".WEB Acquired for $135 Million. Too much? How does it compare?," *Authentic Web* (*undated*), **[Ex. C-29]**, p. 2 ("***WEB is a different animal. … WEB is what we call a 'super generic' and arguably the best new TLD alternative to .COM. It is a word that is commonly used with intuitive meaning. .WEB could make a serious dent to .COM over the long run.***") (emphasis added); K. Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), **[Ex. C-30]**, p. 2 ("***[.WEB] is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide a real challenge to .com***.") (emphasis added); C. Negris, "How a $135 million auction affects the domain name industry and your business," *BIV* (10 Aug. 2016), **[Ex. C-31]**, p. 2 ("***.web is widely considered [to be] the gTLD with the most potential out of 1,930 applications for new domain extensions ICANN received to battle .com and .net for widespread adoption***.") (emphasis added); "The Next Big Domain Extension," *Supremacy SEO* (*undated*), **[Ex. C-32]**, p. 2 ("***.web is the one domain that could unseat .com***.") (emphasis added).

[79] ICANN, Contention Set Status, New Generic Top-Level Domains (as of 19 Feb. 2019), *available at* https://gtldresult.icann.org/applicationstatus/stringcontentionstatus (last accessed on 15 Mar. 2019), **[Ex. C-74]**.

[80] ICANN, New gTLD Application Submitted to ICANN by NU DOTCO LLC, Application ID: 1-1296-36138 (13 June 2012) ("**NDC App.**"), **[Ex. C-24]**, p. 6. Neustar Inc. accordingly provided copious technical disclosures in the NDC App. *Id.*, pp. 13-18.

[81] Email Communications between .WEB Applicants (*various dates*), **[Ex. C-33]**, p. 3 (email from J. Kane dated 28 Apr. 2016).

[82] *Id.*, p. 2.

[83] *Id.*

[84] Email from J. Kane (Vice President, Afilias' Corporate Services) to H. Lubsen (CEO, Afilias) (7 July 2016), **[Ex. C-34]**.

[85] *Id.* (emphasis added).

[86] Email communications between J. Nevett (CEO, Donuts, Inc.) and J. I. Rasco (CFO, NDC) (6 & 7 June 2016), **[Ex. C-35]**.

[87] Ruby Glen's complaint was also investigated by ICANN's Ombudsman. *See Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit B to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016) ("**Willett Decl., Ex. B**"), **[Ex. C-38]**.

[88] *Id.*, [PDF] p. 3 (emphasis added).

[89] *Id.*

[90] *Id.*

[91] *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016), **[Ex. C-75]**, [PDF] p. 4 (emphasis added).

[92] DAA **[Ex. C-69]**, Ex. A, Secs. 1(a), 1(i) (emphasis added).

[93] Letter from A. Willett (ICANN) to Members of the .WEB/.WEBS Contention Set (13 July 2017), **[Ex. C-44]**, p. 1.

[94] ICANN New Generic Top-Level Domains, New gTLD Auction Results, *available at* https://gtldresult.icann.org/applicationstatus/auctionresults (last accessed on 15 Mar. 2019), **[Ex. C-76]**.

[95] DAA **[Ex. C-69]**, p. 15.

[96] Verisign Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), **[Ex. C-45]**, Note 11 (at p. 13).

[97] A. Allemann, "It looks like Verisign bought .Web domain for $135 million (SEC Filing)," *Domain Name Wire* (28 July 2016), *available at* https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/ (last accessed on 15 Mar. 2019), **[Ex. C-77]**; K. McCarthy, "Someone (cough, cough VeriSign) just gave ICANN $135m for the rights to .web," *The Register* (28 July 2016), **[Ex. C-43]**; K. Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), **[Ex. C-30]**.

[98] VeriSign, *VeriSign Statement Regarding .Web Auction Results* (1 Aug. 2016), **[Ex. C-46]**.

[99] Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), **[Ex. C-78]**; Letter from A. Ali (Counsel for Afilias) to ICANN Board of Directors (23 Apr. 2018), **[Ex. C-79]**.

[100] DAA **[Ex. C-69]**, Sec. 1; Ex. A, Secs. 4(b), 4(d).

[101] *Id.*, Sec. 10(a) (emphasis added).

[102] *Id.*, Sec. 4(f) (emphasis added).

[103] *Id.*, Sec. 4(j) (emphasis added).

[104] *Id.*, Ex. A, Sec. 1 (emphasis added).

[105] *Id.*, Ex. A, Sec. 1(i) (emphasis added).

[106] *Id.* (emphasis added).

[107] *Id.*, Ex. A, Sec. 8 (emphasis added).

[108] *Id.*, Ex. A, Sec. 1(h) (emphasis added).

[109] *Id.*, Ex. A, Sec. 2(e) (emphasis added).

[110] *Id.*, Ex. A, Sec. 1(f) (emphasis added).

[111] *Id.*, Ex. A, Sec. 3(g) (emphasis added).

[112] *Id.*, Ex. A, Sec. 10.

[113] Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), **[Ex. C-47]**, p. 4.

[114] VeriSign (VRSN) Q1 2018 Results - Earnings Call Transcript (26 Apr. 2018), **[Ex. C-48]**, p. 2 ("***And for those who weren't here or aren't familiar with what the status is, we're engaged in ICANN's process to move the delegation forward for .web.***") (emphasis added); VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), **[Ex. C-18]**, p. 6 ("***Well, we're engaged in ICANN's process on .web to move the delegation forward but this is ICANN's process so we can't say exactly when it will conclude***.") (emphasis added).

[115] Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (8 Aug. 2016), **[Ex. C-49]**.

[116] It should be noted at the time that Afilias took these actions, Afilias was relying on the limited public disclosures that had been made by VeriSign. Afilias' counsel did not know the extent of the violations until it obtained the DAA during the course of this IRP.

[117] Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (9 Sep. 2016), **[Ex. RE-12]**.

[118] Letter from C. Willett (Vice President, ICANN's gTLD Operations) to J. Kane (Vice President, Afilias' Corporate Services) (16 Sep. 2016), **[Ex. C-50]**, p. 1.

[119] Letter from A. Atallah (President, ICANN's Global Domains Division) to S. Hemphill (General Counsel, Afilias) (30 Sep. 2016), **[Ex. C-61]**, p. 1 (emphasis added).

[120] Letter from J. Kane (Vice President, Afilias' Corporate Services) to C. Willett (Vice President, ICANN's gTLD Operations) (7 Oct. 2016), **[Ex. C-51]**.

[121] Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afilias) (28 Apr. 2018), **[Ex. C-80]**, p. 1.

[122] Email from ICANN Global Support to J. Kane (Vice President, Afilias' Corporate Services) (7 June 2018), **[Ex. C-62]**.

[123] *See* Letter from A. Ali (Counsel for Afilias) to ICANN (18 June 2018), **[Ex. C-52]**; Email from ICANN to A. Ali (Counsel for Afilias) (20 June 2018), **[Ex. C-53]**, p. 2.

[124] Email from ICANN to A. Ali (Counsel for Afilias) (20 June 2018), **[Ex. C-53]**, p. 2.

[125] Email from ICANN Independent Review to A. Ali and R. Wong (Counsel for Afilias) (13 Nov. 2018), **[Ex. C-54]**.

[126] AGB **[Ex. C-3]**, p. A-12.

[127] *Id.*

[128] *Id.*, p. A-11.

[129] NDC App. **[Ex. C-24]**, [PDF] pp. 6, 7.

[130] *Id.*, [PDF] p. 6.

[131] AGB **[Ex. C-3]**, p. A-5; *see* NDC App. **[Ex. C-24]**, [PDF] p. 1. The final section of the public portions of NDC's application provide a "demonstration of technical and operational capability." *Id.*, p. 13. Virtually all of the information provided in this part of the application is based on information provided by a third party that, following the execution of the DAA, ceased to have any role regarding the operation of .WEB.

[132] AGB **[Ex. C-3]**, p. 6-6 (emphasis added).

[133] *Id.*, p. 6-2.

[134] DAA **[Ex. C-69]**, Sec. 4(f).

[135] AGB **[Ex. C-3]**, p. 4-6.

[136] *Id.*

[137] DAA **[Ex. C-69]**, Sec. 4(j).

[138] *Id.*, Ex. A, Sec. 1(i).

[139] *Id.*, Sec. 10(a).

[140] Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), **[Ex. C-47]**, p. 4.

[141] AGB **[Ex. C-3]**, p. 4-22 (emphasis added).

[142] Auction Rules **[Ex. C-4]**, p. 3 (emphasis added).

[143] *Id.*, p. 5 (emphasis added).

[144] AGB **[Ex. C-3]**, p. 4-23.

[145] New gTLD Auctions Bidder Agreement **[Ex. C-5]**, p. 1.

[146] DAA **[Ex. C-69]**, Ex. A, Sec. 1.

[147] *Id.*, Sec. 1, Ex. A, Secs. 4(b), 4(d).

[148] *Id.*, Sec. 1, Ex. A, Sec. 2(d).

[149] Bylaws **[Ex. C-1]**, Sec. 1.2(a)(v).

[150] *Id.*, Sec. 2.3.

[151] GNSO Report **[Ex. C-20]**, pp. 7, 26.

[152] Rationales **[Ex. C-9]**, p. 12.

[153] *Id.*, p. 101.

[154] Economic Case for Auctions in New gTLDs **[Ex. C-27]**, p. 2.

[155] AGB **[Ex. C-3]**, p. 1-24.

[156] *Id.*, p. 6-2.

[157] *Id.*, p. 1-30.

[158] Willett Decl., Ex. B **[Ex. C-38]**, [PDF] p. 3.

[159] Bylaws **[Ex. C-1]**, Art. 1, Sec. 1.2(a)(v).

[160] AGB **[Ex. C-3]**, p. 4-22.

[161] ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1999), **[Ex. C-57]**, Secs. II(A), II(C)(2).

[162] Statement of Esther Dyson (Founding Chair of ICANN), S. Hrg. 112-394, ICANN's Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session (8 Dec. 2011), **[Ex. C-58]**, p. 46 (emphasis added).

[163] Bylaws **[Ex. C-1]**, Art. 1, Sec. 1.2(b)(iii).

[164] *Id.*, Sec. 1.2(a) (emphasis added).

[165] Rationales **[Ex. C-9]**, p. 7.

[166] GNSO Report **[Ex. C-20]**, ¶¶ 13, 13(iv). In the then-current Bylaws, Core Value 6 was identical to Art. 1, Sec. 1.2(b)(iii) of today's Bylaws.

[167] VeriSign's CEO confirms that his company seeks to do more than simply submit a "friend of the court" type of brief. In a recent analyst call, he stated that: "We are not a parties to that arbitration yet BUT we are actively seeking to join and participate in it." VeriSign (VRSN) CEP Jim Bidzos on Q4 2018 Results – Earnings Call Transcript (7 Feb. 2019), *available at* https://seekingalpha.com/article/4239256-verisign-inc-vrsn-ceo-jim-bidzos-q4-2018-results-earnings-call-transcript?part=single (last accessed on 17 Mar. 2019), **[Ex. C-81]**.

EXHIBIT Altanovo-12

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July 18, 2020

VIA E-MAIL

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Re: Afilias Domains No. 3 Limited v. ICANN, ICDR Case No. 01-18-0004-2702

Dear Mr. Chairman and Members of the Panel:

This letter responds to the Panel's instruction in Procedural Order No. 5 at Paragraph 24, in which "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,[1] 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." Yesterday, ICANN submitted its response to the expert reports of the Honorable John Kneuer and Dr. Kevin Murphy.[2]

Witness Statement of Jose Rasco

The witness statement of Jose Rasco (the chief financial officer of Nu Dotco, LLC ("NDC")) consists mostly of testimony regarding the witness's and his employer's strategies, conduct, understandings, intent and beliefs, as well as his perception of the activities of third parties in the gTLD marketplace. For example, Mr. Rasco's witness statement addresses the following topics:

[1] The Panel agreed to provide ICANN one additional day to provide this response.

[2] ICANN notes that Afilias apparently continues to include as a possible witness for the Phase 2 hearing Todd Strubbe, a Verisign employee who provided a declaration, dated 17 December 2018, in support of ICANN's opposition to Afilias' Request for Emergency Panelist and Interim Measures of Protection. Mr. Strubbe addressed the question of whether Verisign would be irreparably injured by a delay in the delegation of .WEB. Inasmuch as this issue is now moot and Mr. Strubbe's statement has not been cited in the parties' recent briefing to the Panel, ICANN hereby withdraws Mr. Strubbe's statement, and ICANN understands that Verisign concurs.

- Paragraphs 1-8 concern Mr. Rasco's professional background and background information on NDC, including its ownership and business;
- Paragraphs 9-28 discusses specific aspects of NDC's application for .WEB, including descriptions of NDC's ownership, its mission/purpose for .WEB, its claimed technical capabilities and its financial resources;
- Paragraphs 29-40 provide Mr. Rasco's observations on the evolution of the gTLD marketplace, NDC's changing strategies and those of other market participants, such as Schlund, Afilias and Donuts;
- Paragraphs 41-52 provide Mr. Rasco's views regarding the Domain Acquisition Agreement ("DAA"), and other arrangements that gTLD applicants have entered into in the secondary market for gTLDs;
- Paragraph 53 addresses NDC's decision to negotiate the DAA with Verisign and Mr. Rasco's understanding of the terms of that agreement and how, in his view, they comply with the Guidebook and are consistent with his understanding of practices and strategies employed by other companies;
- Paragraphs 54-57 provide a similar account of Mr. Rasco's views of why NDC and Verisign agreed to the Confirmation of Understandings and his interpretation of its terms;
- Paragraphs 58-62 provide Mr. Rasco's understanding as to why there was no need to revise NDC's application for .WEB in light of NDC's agreements with Verisign;
- Paragraphs 63-74 describe Mr. Rasco's communications with other .WEB contention set members, prior to the auction for .WEB, regarding private arrangements to resolve the contention, including how he intended certain of his communications to be received;
- Paragraphs 75-91 provide Mr. Rasco's recollection of his involvement in the investigation by ICANN into allegations that there had been a change in ownership or control of NDC, as well as his views regarding why no such change had occurred and why no update to NDC's application was necessary;
- Paragraphs 92-97 provide Mr. Rasco's account of his communications with Afilias prior to the auction and the reasons why he believed them to be in violation of ICANN's Auction Rules and Bidder Agreement;
- Paragraphs 98-103 describe Verisign and NDC's participation in the .WEB auction and Mr. Rasco's views on why Verisign's involvement was reasonable and the parties' arrangement in compliance with applicable procedures; and
- Paragraphs 109-110 describe Mr. Rasco's view of NDC's purported injuries and Afilias' alleged motives.

ICANN has no independent knowledge regarding these and similar matters addressed in Mr. Rasco's witness statement, and therefore cannot formally endorse them. ICANN has not met with Mr. Rasco, and ICANN has not independently verified the accuracy of his testimony on these matters. Having said this, ICANN has no reason to doubt the witness's veracity and

ICANN has no reason to disagree with the witness's recounting of his conduct, beliefs, intentions and findings, or his testimony regarding the strategies, actions and intent of NDC.

In addition to providing the witness's recounting of his conduct, beliefs, understandings, intentions and findings, and the strategies, actions and intent of NDC, Mr. Rasco's statement also includes a limited number of assertions concerning the policies, practices or conduct of ICANN, and the meaning of contracts and documents at issue in this IRP. These assertions appear in certain of the paragraphs noted above as well as in certain of the remaining paragraphs of the witness statement. Because Paragraph 23 of the Panel's Procedural Order No. 5 specifically references the Guidebook and the Auction Rules, ICANN provides its additional positions on those portions of Mr. Rasco's witness statement that address these matters. In many instances, ICANN agrees with the overall concept of the assertion but cannot endorse the statement as written due to discrepancies with the language used to convey the concept. As such, ICANN has identified below the necessary modifications and/or clarifications to those sentences that would allow ICANN to endorse them. Any portions of the witness statement not identified and addressed above (categorically) or below (specifically) are endorsed by ICANN.

- Paragraph 15, sentence 3 – As written, ICANN cannot endorse the following sentence: "In fact, as described in more detail below, I understand that ICANN does not use Section 18 to evaluate gTLD applications and does not take any interest in any distinctions that might arise between statements made in Section 18 of a gTLD application and how a domain is ultimately operated."

  While it is true that ICANN generally does not evaluate Section 18 as part of the scoring of an application, it is relevant to the Program as it allows the community to comment on the application (during the public comment period) based on the applicant's statement of the mission and purpose and how the gTLD is intended to be operated. It is accurate, however, that ICANN has exercised its discretion to generally not require applicants to update and revise statements made in Section 18 of their applications except to the extent those statements are of a nature that they are to be incorporated into a registry agreement.

- Paragraph 15, sentence 5 – As written, ICANN cannot endorse the following sentence: "And, also to the best of my knowledge, ICANN has never policed any distinctions between Section 18 statements and such subsequent actions."

  It is accurate that ICANN has exercised its discretion to generally not require applicants to update and revise statements made in Section 18 of their applications except to the extent those statements are of a nature that they are to be incorporated into a registry agreement, but ICANN is uncertain what the witness means by "policed."

- Paragraph 18, sentences 1-2 – As written, ICANN cannot endorse the following sentences: "Moreover, as stated above, it has always been my understanding that the Section 18 "mission/purpose" inquiry is intended to provide ICANN with certain New gTLD Program statistics and is not part of the evaluation criteria. Rather, when evaluating whether an applicant is qualified to participate in a new gTLD contention set, ICANN has always been most concerned with whether that applicant has the financial ability and technical infrastructure to successfully operate the gTLD registry."

  The information provided in response to Section 18 is not used to produce statistics, as Mr. Rasco seems to indicate, but was intended to inform the post launch review of the New gTLD Program. However, it is correct that responses to Section 18 are not part of the scored application criteria. Per the attachment to Module 2 of the Guidebook, at A-11 – A-12, responses to Section 18 are "not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored." While ICANN's scoring is mostly related to the applicant's financial and technical ability to operate a registry, these are just two components of the overall evaluation. For example, ICANN is also concerned with the results of background checks, among other things. Further, contrary to Mr. Rasco's statement, ICANN does not evaluate whether an applicant is qualified to participate in a new gTLD contention set. First, it is applications, not applicants, that are placed into contention sets. Second, applications for the same or similar strings are placed into contention sets when there is more than one qualified applicant for the same or a similar string.

- Paragraph 20, sentence 1 – As written, ICANN cannot endorse the following sentence: "As a result, while helpful for ICANN to assess the New gTLD Program in general, Section 18 responses are not a material part of evaluating a particular application and, moreover, are not subject to subsequent enforcement by ICANN in the event those responses differ from how or by whom a domain is ultimately operated."

  Attachment to Module 2 of the Guidebook, at A-11 – A-12 states that responses to Section 18 are "not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored." While it is true that ICANN generally does not evaluate Section 18 as part of the scoring of an application, it is relevant to the Program as it allows the community to comment on the application (during the public comment period) based on the applicant's statement of the mission and purpose and how the gTLD is intended to be operated. It is accurate, however, that ICANN has exercised its discretion to generally not require

applicants to update and revise statements made in Section 18 of their applications except to the extent those statements are of a nature that they are to be incorporated into a registry agreement.

- Paragraph 22, sentences 4-5 – As written, ICANN cannot endorse the following sentences: "Therefore, only ICANN would have had access to this information about NDC's financial ability to operate the .WEB gTLD. Other members of the Contention Set, including those who might bid at auction for .WEB, would not have had access to such financial information."

  Attachment to Module 2 of the Guidebook, at A-37 – A-46 states that responses to Questions 45-50 are not included in the public posting. It is correct that ICANN does not share or disclose applicant financial information to other applicants or members of the public because it is confidential. But ICANN has no way of knowing whether others, including those involved in a particular contention set, had access through other means to various information regarding another applicant's financial ability to operate the gTLD in contention.

- Paragraph 25, sentence 1 – As written, ICANN cannot endorse the use of the term "public auction" in the following sentence: "Pursuant to the ICANN Guidebook, if more than one applicant applies for a gTLD, then the approved applicants are grouped together into a "Contention Set," with the competing applications resolved either through (i) a private auction or other negotiated settlement conducted by agreement of the applicants or, if all members of the Contention Set do not agree to a private auction, (ii) a public auction conducted under the auspices of ICANN."

  Mr. Rasco has misclassified the ICANN auction as a "public auction" throughout his statement. While this is an auction conducted by ICANN, the process is not public and information about bids is not generally public except as it relates to the amount paid by the prevailing applicant. Further, Mr. Rasco references applicants being place in contention sets, but it is applications, not applicants, that are placed in contention sets. In addition, it is unclear what Mr. Rasco means by "approved applicants."

- Paragraph 32, sentences 1-2 – As written, ICANN cannot endorse the following sentences: "To the contrary, once ICANN has determined that a gTLD application satisfies the requirements of the Guidebook and placed the various applicants into a Contention Set, to the best of my knowledge, ICANN has effectively fulfilled any gatekeeping function that it might undertake: ICANN has determined that the applicant is qualified and capable of operating the gTLD if that applicant emerges from the

Contention Set and secures the rights to operate the domain. Beyond that, to the best of my knowledge, ICANN takes no position on which applicant in a Contention Set subsequently becomes eligible to sign a registry agreement with ICANN for the domain in question ***or how*** they do so."

It is not always the case that ICANN has fulfilled "any gatekeeping function that it might undertake" once the applications are placed in a contention set. For example, accountability mechanisms, advice from ICANN's Governmental Advisory Committee, or string similarity objections (among others) may change the eligibility of an application, and ICANN may respond by placing or removing an application into or from the contention set. And, as noted above, applications, not applicants, are placed in a contention set; and applications for the same or similar strings are placed into contention sets when there is more than one qualified applicant for the same or a similar string. Moreover, ICANN is unsure what Mr. Rasco means by "satisfies the requirements of the Guidebook."

- Paragraph 33, sentences 2-3 – As written, ICANN cannot endorse the following sentences: "For example, when NDC first considered participating in the New gTLD Program, we researched the program rules and considered various means of resolving Contention Sets, including trading domains with other applicants who might have a greater interest in a particular domain string than NDC, cross-selling percentage interests in different domains, and buying various applicants out of their applications before any auction was held. Although NDC has never used these means in practice, I have never considered, and am not aware of anyone who does consider, such means of resolving Contention Sets to be prohibited by the ICANN rules."

  ICANN does not dictate any method of private resolution so any suggestion that Mr. Rasco makes of "various means of resolving Contention Set" are not established by ICANN. Further, it is clear under the Guidebook that applications cannot be transferred to any other party. (Guidebook, 6-6 at ¶ 10.)

- Paragraph 37, sentences 3-4 – As written, ICANN cannot endorse the following sentences: "I believe that ICANN was aware of these practices and, to my knowledge, did not object to them. I believed that these practices were acceptable to ICANN, which sought only to ensure that the ultimate operator was qualified and technically and financially capable of operating each respective gTLD."

  It is accurate that ICANN has never formally objected to applicants conducting private auctions, but ICANN also has not formally endorsed any particular practices. ICANN

was aware of various private resolutions, and generally encouraged parties to reach a private resolution of a contention set, but ICANN is not involved in how applicants chose to privately resolve a contention set.

- Paragraph 42, sentences 2-3 – As written, ICANN cannot endorse the following sentences: "In addition to private auctions, it was common knowledge that interested parties had monetized successful gTLD applications by assigning interests in domain strings after securing the rights from ICANN. And it was commonly understood that ICANN approved of these assignments."

  ICANN is uncertain what Mr. Rasco means by "common knowledge," although it is correct that applicants did ask ICANN for approval to assign a registry agreement to another party before pre-delegation testing and after delegation; ICANN reviewed such requests for assignment and, in many cases, granted the assignment request. But, as is made clear in the Guidebook, applications could not be transferred to any other party. (Guidebook, 6-6 at ¶ 10.)

- Paragraph 43, sentence 2 – As written, ICANN cannot endorse the following sentence: "To the best of my knowledge, more than twenty (20) domains have been assigned under this arrangement without any update to ICANN applications disclosing the underlying arrangement."

  ICANN does not doubt that this is Mr. Rasco's knowledge, but given the limited time available, ICANN is not in a position to do the analysis that would be necessary to confirm this statement. However, it is accurate that ICANN has exercised its discretion to generally not require applicants to update and revise statements made in Section 18 of their applications except to the extent those statements are of a nature that they are to be incorporated into a registry agreement.

- Paragraph 47 – As written, ICANN cannot endorse the following paragraph:

Redacted - Third Party Designated Confidential Information

The conclusions made by Mr. Rasco in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But according to ICANN's records NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 48, sentence 1 – As written, ICANN cannot endorse the following sentence:
  Redacted - Third Party Designated Confidential Information

The conclusions made by Mr. Rasco in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But according to ICANN's records NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 49, sentence 1 – As written, ICANN cannot endorse the following sentence:
  Redacted - Third Party Designated Confidential Information

The conclusions made by Mr. Rasco in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But according to ICANN's records NDC, not Verisign, was and remains the applicant for .WEB pursuant the application for .WEB that NDC submitted in 2012.

- Paragraph 50 – As written, ICANN cannot endorse the following paragraph:
  Redacted - Third Party Designated Confidential Information

Redacted - Third Party Designated Confidential Information

The conclusions made by Mr. Rasco in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But according to ICANN's records NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 51, sentence 2 – As written, ICANN cannot endorse the following sentence:
  Redacted - Third Party Designated Confidential Information

  ICANN does not agree with this statement because it appears to be a hypothetical and its premise – that an application may be assigned – is prohibited by the Guidebook. (Guidebook, 6-6 at ¶ 10.)

- Paragraph 53, sentence 9 – As written, ICANN cannot endorse the following sentence:
  Redacted - Third Party Designated Confidential Information

  The conclusions made by Mr. Rasco in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But according to ICANN's records NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 56, subsections b and c – As written, ICANN cannot endorse the subsections:
  Redacted - Third Party Designated Confidential Information

The conclusions made by Mr. Rasco in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But according to ICANN's records NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 59, sentence 4 – As written, ICANN cannot endorse the following sentence:
Redacted - Third Party Designated Confidential Information

ICANN does not approve the transfer of a gTLD. If asked, ICANN might approve the assignment of a registry agreement for a gTLD. Thus, if NDC requested a transfer of the .WEB registry agreement to Verisign, ICANN would then evaluate the request and determine whether to approve it.

- Paragraph 67, sentence 4 – As written, ICANN cannot endorse the following sentence: "In contrast, in a public auction, the winning bid is retained by ICANN (for investment in the Internet infrastructure) and the losing bidders recover nothing."

  Mr. Rasco has misclassified the ICANN auction as a "public auction." An auction conducted by ICANN is not public and information about bids is not generally public except as it relates to the amount paid by the prevailing applicant. While the remainder of the noted sentence is consistent with Footnote 1 at Section 4.3 of the Guidebook, that footnote does not identify "Internet infrastructure" as a possible use of the funds. Instead, the Guidebook reads: "Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission."

- Paragraph 106 – ICANN cannot endorse the statements made in Exhibit T because they relate to the merits of the underlying dispute regarding the DAA and whether NDC's

conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But ICANN notes that Exhibit T is true, accurate and authentic, and speaks for itself.

Witness Statement of Paul Livesay

The witness statement of Paul Livesay (a lawyer previously employed by Verisign, Inc.) consists mostly of testimony regarding the witness's and his employer's strategies, conduct, understandings, intent and beliefs, as well as his perception of the activities of third parties in the gTLD marketplace. For example, Mr. Livesay's witness statement addresses the following topics:

- Paragraphs 1-3 concern Mr. Livesay's professional background;
- Paragraphs 4 and 5 address the reasons that Verisign decided to pursue .WEB;
- Paragraphs 11 and 12 recount Mr. Livesay's conduct in contacting various applicants for .WEB;
- Paragraphs 15-17 address Verisign's negotiations with NDC;
- Paragraphs 8-10, 13, 14, and 26 recount Mr. Livesay's research and findings with respect to the secondary market for new gTLDs, the types of transfer arrangements in which applicants have engaged, and the special purpose entities that are formed to submit new gTLD applications;
- Paragraphs 18-25 describe Mr. Livesay's understanding of the DAA and why, in his view, it is consistent with the Guidebook;
- Paragraphs 27-28 describe Verisign's reasons for entering the Confirmation of Understandings;
- Paragraphs 29-35 provide Mr. Livesay's view on why Afilias' claims lack merit and the reasons that certain provisions were included in the DAA; and
- Paragraphs 36-37 describe Verisign's and NDC's conduct during the .WEB auction.

ICANN has no independent knowledge regarding these and similar matters addressed in Mr. Livesay's witness statement, and therefore cannot formally endorse them. ICANN has not met with Mr. Livesay, and ICANN has not independently verified the accuracy of his testimony on these matters. Having said this, ICANN has no reason to doubt the witness's veracity and has no reason to disagree with the witness's recounting of his conduct, beliefs, intentions and findings, or his testimony regarding the strategies, actions and intent of Verisign.

In addition to providing the witness's recounting of his conduct, beliefs, understandings, intentions and findings, and the strategies, actions and intent of Verisign, Mr. Livesay's statement also includes a limited number of assertions concerning the policies, practices or

conduct of ICANN, and the meaning of contracts and documents at issue in this IRP. These assertions appear in certain of the paragraphs noted above as well as in certain of the remaining paragraphs of the witness statement. Because Paragraph 23 of the Panel's Procedural Order No. 5 specifically references the Guidebook and the Auction Rules, ICANN provides its additional positions on those portions of Mr. Livesay's witness statement that address these matters. In many instances, ICANN agrees with the overall concept of the assertion but cannot endorse the statement as written due to discrepancies with the language used to convey the concept. As such, ICANN has identified below the necessary modifications and/or clarifications to those sentences that would allow ICANN to endorse them. Any portions of the witness statement not identified and addressed above (categorically) or below (specifically) are endorsed by ICANN.

- Paragraph 6, sentence 2 – As written, ICANN cannot endorse the following sentence: "Based on the Guidebook, it is apparent that ICANN's concern with respect to such transactions is whether a transaction would require re-evaluation of the applicant, which could result in a delay in the resolution of a contention set."

  It is true that one of ICANN's concerns is whether certain business transactions that result in a change of control of an applicant might require re-evaluation of the application. However, that is not ICANN's only concern.

- Paragraph 7 – As written, ICANN cannot endorse the following sentence: "Similarly, Clause 68 of the Auction Rules recognizes that applicants may enter into 'settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction'; although once within an active auction timeline, these activities are prohibited during a 'Blackout Period' extending from the deposit deadline for an auction through full payment of the winning auction bid, but permitted both for the period prior to and after the Blackout Period."

  The conclusions made by Mr. Livesay in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP.

- Paragraph 16, sentences 3 and 4 – As written, ICANN cannot endorse the following sentences: "In private auctions, which may have been the most common form of resolving contention sets, there are no Guidebook requirements, and commonly no other requirements, with respect to how a participant conducts its bid, disclosure of financing terms, disclosure of interested parties, or post award intentions of the participants. Indeed, some applicants seem to have made a lucrative business out of losing private

auctions. In a public auction, by contrast, the terms are not privately negotiated among the participants/competitors, and the proceeds of the auction are placed in a fund to be set up by ICANN for investment benefitting the Internet community as a whole rather than benefitting the losing bidders in a private auction."

ICANN does not participate, and is not involved, in private auctions to resolve contention sets and therefore has no knowledge of the requirements that may or may not exist in such auctions. In addition, ICANN cannot endorse the second sentence to the extent it is inconsistent with the Guidebook, Module 4, Sec. 4.3 n.1 ("Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status. Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.") In addition, Mr. Livesay has misclassified the ICANN auction as a "public auction"; an auction conducted by ICANN is not public and information about bids is not generally public except as it relates to the amount paid by the prevailing applicant.

- Paragraph 19, sentences 1-3 – As written, ICANN cannot endorse these first three sentences: Redacted - Third Party Designated Confidential Information

The conclusions made by Mr. Livesay in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But it is ICANN's view that NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 20, sentences 1-3 – As written, ICANN cannot endorse these first three sentences: "The DAA is compliant with all terms of the Guidebook and consistent with

transactions by others with respect to the new gTLD Program. Verisign did not acquire any interest in or control over NDC. The application for .WEB was not transferred to Verisign."

The conclusions made by Mr. Livesay in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But it is ICANN's view that NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 22, sentences 1 and 5 – As written, ICANN cannot endorse the first and last sentences: "The express terms of the DAA establish that it does not transfer NDC's application for .WEB and that any transfer to Verisign would be in the future and contingent on ICANN's normal processes for such transfers, including application to ICANN for consent to an assignment of the registry agreement and ICANN's consent." "Thus, a transfer or assignment would only take place after a registry agreement was signed between ICANN and NDC, ICANN's subsequent consent to an assignment of the registry agreement to Verisign, and the subsequent execution and delivery of the Transfer Agreement."

  The conclusions made by Mr. Livesay in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But it is ICANN's view that NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 23, sentences 1, 6 and 7 – As written, ICANN cannot endorse the first sentence and last two sentences: "The lack of any transfer of rights in NDC's Application or assignment of a registry agreement is further confirmed by the terms of the DAA that permitted a termination of Redacted - Third Party Designated Confidential Information

  The conclusions made by Mr. Livesay in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But it is ICANN's view that

NDC, not Verisign, was and remains the applicant for .WEB pursuant the application for .WEB that NDC submitted in 2012.

- Paragraph 25 – As written, ICANN cannot endorse the following sentences: "It is further my understanding that financial information submitted as part of a gTLD application also is designated confidential by ICANN and not disclosed to other applicants or the public. Accordingly, under the terms of the new gTLD Program, even if the sources or terms of their funding for participation in the auction were subject to disclosure to ICANN, which they were not, other members of the contention set would never have access to that information."

  Attachment to Module 2, at A-37–A-46 states that responses to Questions 45-50 are not included in the public posting. While ICANN does not share or disclose applicant financial information to other applicants or members of the public because it is confidential, ICANN has no way of knowing whether others, including those involved in a particular contention set, had access through other means to information through other means regarding another applicant's financial ability to operate the gTLD in contention.

- Paragraph 29, sentence 2 – As written, ICANN cannot endorse the following sentence: "Such an argument [*i.e.,* Afilias' argument "in this IRP that the DAA constitutes an impermissible transfer by NDC of rights in its new gTLD application."] is inconsistent with the express terms of the DAA and Confirmation of Understandings described above."

  The conclusions made by Mr. Livesay in this paragraph relate to the merits of the underlying dispute regarding the DAA and whether NDC's conduct complied with the Guidebook and Auction Rules. ICANN has not made a determination with respect to these issues, as ICANN has explained throughout this IRP. But it is ICANN's view that NDC, not Verisign, was and remains the applicant for .WEB pursuant to the application for .WEB that NDC submitted in 2012.

- Paragraph 31, sentences 2 and 3 – As written, ICANN cannot endorse the following sentences: "A public auction is specifically provided for in the Guidebook, is fair and conducted under ICANN's oversight, and I am not aware of any requirement under the Guidebook that an applicant agree to a private auction. To the contrary, the Guidebook provides a private auction may only be conducted if all members of the Contention Set agree to have a private auction."

  It is accurate that the Guidebook provides for an ICANN auction as a method of last

resort to resolve a string contention. Such an auction is conducted by a third-party provider engaged by ICANN. Other than engaging the provider, however, ICANN does not exercise oversight over the auction process. It is correct that the Guidebook encourages members of a contention set to resolve string contention amongst themselves, but the Guidebook does not include any reference to a "private auction." In addition, Mr. Livesay has misclassified the ICANN auction as a "public auction"; an auction conducted by ICANN is not public and information about bids is not generally public except as it relates to the amount paid by the prevailing applicant.

Very truly yours,

/s/ Steven L. Smith

Steven L. Smith

cc: Counsel for Afilias and the *Amici*

EXHIBIT Altanovo-13

material, *adj.*, *n.*, and *adv.*

Pronunciation: Brit. /məˈtɪərɪəl/, U.S. /məˈtɪriəl/

Forms: Middle English **marterial** (transmission error), Middle English **materal** (transmission error), Middle English **materiale**, Middle English **materialle**, Middle English **materiel**, Middle English **materiele**, Middle English **matryal** (transmission error), Middle English–1500s **materyal**, Middle English–1600s **materiall**, Middle English–1600s **materyall**, Middle English– **material**, 1600s **matterial**, 1600s **meterial**, 1600s **meteryall**; *Scottish* pre-1700 **materiall**, pre-1700 **materialle**, pre-1700 **materiell**, pre-1700 **materyalle**, pre-1700 **matterial**, pre-1700 1700s– **material**.

Frequency (in current use):

Origin: A borrowing from Latin. **Etymon:** Latin *materialis*.

Etymology: < post-classical Latin *materialis* formed of matter (early 3rd cent. in Tertullian; also used as noun in neuter singular, *materiale* , or plural, *materialia*), material rather than spiritual (4th cent., in St Augustine) < classical Latin *māteria* MATTER *n.*[1] + *-ālis* -AL *suffix*[1]. (The post-classical Latin word probably shows no continuity of use with classical Latin *māteriālis* of or concerned with subject matter (attested only in a single minor author).) Post-classical Latin *materialis* > Old French, Middle French, French *matériel* (*a*1270 as adjective, *c*1300 as noun, originally in scholastic contexts); compare MATÉRIEL *n.* Many of the English senses are paralleled in French, e.g. ‘relating to the matter or material aspect of something’ (1270; compare sense A. 4a), ‘formed or consisting of matter’ (beginning of the 14th cent.; compare sense A. 1a), ‘concerned with worldly things, unspiritual’ (*c*1350–78; compare sense A. 2a), ‘concerned with physical needs, bodily comfort, materialistic’ (1672; compare sense A. 2c). French also has *matériaux* , plural, ‘the materials used in the construction of a building’ (1510 in Middle French as *materiaulx* ; compare sense B. 2a), ‘facts, ideas, etc., used in creating a literary work’ (17th cent.; compare sense B. 4).

In addition to the senses mentioned above, post-classical Latin *materialis* is attested as a term in logic and as a term in medicine (*c*1260 and *a*1294 respectively in British sources; compare senses A. 5 and A. 1b).

Post-classical Latin *materialis* also > Spanish *material* (1220–50 as adjective, 1633 as noun), Italian *materiale* (*c*1308 as adjective, *a*1537 as noun), Portuguese *material* (15th cent. as adjective in form *matereall*, 16th cent. as noun in plural form *materiaes*). The corresponding forms in Germanic languages are partly from Latin, partly from French: German *materiell*, adjective (18th cent., < French), *Material*, noun (18th cent., < Latin; compare Middle High German *materialien*, plural (15th cent.; from Latin *materialia*, use as noun of neuter plural of adjective), Middle Low German *māteriālia* household articles, spices, medicaments); Dutch *materieel*, adjective (from French), Middle Dutch *materiael*, adjective (Dutch *materiaal*, adjective (obsolete) and noun; from Latin or French); Swedish *materiell*, adjective (18th cent.; from French or German), Swedish *material* noun (16th cent.; from Latin or French).

A. *adj.*

I. Senses relating to physical substance.

1.

a. Of or relating to matter or substance; formed or consisting of matter. In early use: †earthly (*obsolete*).

▸ *c*1390 G. CHAUCER *Parson's Tale* 182 He that is in helle hath defaute of light material.

▸ *a*1398 J. TREVISA tr. Bartholomaeus Anglicus *De Proprietatibus Rerum* (BL Add.) f. 114 Þicnesse & boistousnesse of material parties is cause and welle of heuynesse.

?*c*1450 (▸ ?*a*1400) J. WYCLIF *Eng. Wks.* (1880) 376 Whan he [*sc.* Christ] was sou3te to be a kynge & to haue taake up-on hym þe material swerde.

1483 (▸ 1413) tr. G. Deguileville *Pilgrimage of Soul* (Caxton) (1859) v. i. 73 Mundus is the material world, but seculum is taken for the endurynge of the world.

*a*1500 (▸ *c*1340) R. Rolle *Psalter* (Univ. Oxf. 64) (1884) xlix. 4 Fire materiel, or of ill consciens, sall bren.

*a*1500 (▸ *?a*1450) *Gesta Romanorum* (Harl. 7333) (1879) xix. 66 Þere beth two maner of medycyns, þat is to sey, material, and spiritual.

?1531 J. Frith *Disput. Purgatorye* To Rdr. sig. a5ᵛ I meane not his materyal crosse that he him silfe died on, but a spretuall crosse.

1563 *2nd Tome Homelyes* Place & Time of Prayer I, in J. Griffiths *Two Bks. Homilies* (1859) II. 344 God doth allow the material temple made of lime and stone..to be his house.

1657 R. Austen *Spirituall Use of Orchard* (new ed.) 166 Wild materiall fruit-trees have no power to engraft themselves... This is another Similitude of the state of Mysticall Fruit-trees..: That Unregenerate persons (of themselves) cannot come to Christ.

*a*1684 J. Evelyn *Diary* anno 1655 (1955) III. 158 He believed the Sunn to be a material fire.

1736 Bp. J. Butler *Analogy of Relig.* I. iii. 63 The material World appears to be, in a manner, boundless and immense.

1828 N. Hawthorne *Fanshawe* vi As soon as the pair discovered that they had sustained no material injury by their contact, they began eagerly to explain.

*a*1862 H. T. Buckle *Hist. Civilisation Eng.* (1869) III. v. 365 While heat was supposed to be material it could not be conceived as a force.

1957 I. Asimov *Naked Sun* iv. 50 What might have been the shower stall, a large one, was shielded off by nothing that seemed material.

1991 C. A. Ronan *Nat. Hist. Universe* 28/1 The great goal of modern physics is to create a unified theory of the four fundamental interactions that govern the material world.

†**b.** *Medicine*. Of a disease: (perhaps) corporeal, as opposed to spiritual or mental. *Obsolete*.

1528 T. Paynell tr. Arnaldus de Villa Nova in Joannes de Mediolano *Regimen Sanitatis Salerni* sig. iv If they..eyther incline to materiall sickenes or to vnmateriall.

1528 T. Paynell tr. Arnaldus de Villa Nova in Joannes de Mediolano *Regimen Sanitatis Salerni* sig. iv If the sickenes be materiall one maye eate the more at diner.

?1541 R. Copland *Guy de Chauliac's Questyonary Cyrurgyens* iv. sig. Oiv They [*sc.* cauteres] be necessary..to be gyuen in all dysposycyons of maladyes, and specyall in materyal maladyes.

1612 J. Cotta *Short Discouerie Dangers Ignorant Practisers Physicke* 20 There are no materiall diseases wherein the common remedies are not requisite.

†**c.** Denoting the terrestrial sphere. *Obsolete*.

1551 R. Record (*title*) The Castle of Knowledge... Containing the explication of the sphere bothe celestiall and materiall.

1657 tr. A. Thevet *Prosopographia* 6 in T. North tr. Plutarch *Lives* (new ed.) The Mathematicians and Astrologers attribute the invention of the Materiall Sphere to this subtill Philosopher [*sc.* Archimedes].

†**d.** Forming the substance of a thing. *Obsolete*. *rare*.

1608 W. Shakespeare *King Lear* xvi. 35 She that her selfe will sliuer and disbranch From her materiall sap.

2.

a. Concerned with worldly things; unspiritual. *depreciative* (frequently in conjunction with *gross*).

Now passing into sense A. 2c.

1588 T. Kyd tr. T. Tasso *Housholders Philos.* f. 17ᵛ Not of seruile or materiall witt, but..apt to studie or contemplat.

1700 J. Dryden tr. G. Boccaccio *Cymon & Iphigenia* in *Fables* 546 His gross material Soul at once could find Somewhat in her excelling all her Kind.

1850 F. W. Robertson *Serm.* (1863) 4th Ser. vii. 101 The Romish doctrine contains a truth which it is of importance to disengage from the gross and material form with which it has been overlaid.

1853 C. Brontë *Villette* III. xxxviii. 200 What I saw struck me..as grossly material, not poetically spiritual.

1875 H. E. Manning *Internal Mission of Holy Ghost* ix. 257 The gross heavy material love of the world.

b. Concerned with matter or the physical world; involving the presence, use, or action of matter. Now *rare*.

1649 Bp. J. Taylor *Great Exemplar* I. v. 149 These temptations are crasse and material, and soon discernable; it will require some greater observation to arm against such as are more spiritual and immaterial.

1821 *New Monthly Mag.* **1** 16 When Science from Creation's face Enchantment's veil withdraws, What lovely visions yield their place To cold material laws.

1867 H. Macmillan *Bible Teachings* (1870) Pref. 14 Agriculture, though the most material of all our pursuits, is teaching us truths beyond its own direct province.

1874 J. R. Green *Short Hist. Eng. People* ix. §1. 590 The attempt to secure spiritual results by material force.

1877 M. Oliphant *Makers of Florence* (ed. 2) iv. 94 The painter's art is at once ethereal and material.

1882 T. H. Green in *Mind* No. 25. 19 The material atomism of popular science.

c. Relating to the physical as opposed to the intellectual or spiritual aspect of things; concerned with physical needs, bodily comfort, etc.; materialistic.

1843 W. H. Prescott *Hist. Conquest Mexico* I. i. iii. 57 The Mexican heaven may remind one of Dante's in its material enjoyments; which, in both, are made up of light, music, and motion.

1858 J. W. Carlyle *Lett.* II. 379 Better material accommodation you could have nowhere.

1873–4 W. H. Dixon *Hist. Two Queens* IV. xix. iv. 25 When the fury ceased, the city was a moral and material wreck.

1879 M. Arnold *Equality* in *Mixed Ess.* 70 France..is the country where material well-being is most widely spread.

1919 E. Wharton *French Ways* v. iv. 93 They want only enough leisure and freedom from material anxiety to enjoy what life and the arts of life offer.

1965 I. Murdoch *Red & Green* vii. 109 The irrevocable and tedious nature of the marriage bond which linked him to a material, cheated him of a spiritual, destiny.

1991 *European Sociol. Rev.* **7** 273/1 For testing the hypotheses on the material life-style, household income is not just a control variable, but a key variable.

†**3.** Of physical objects: bulky, massive, solid. *Obsolete*.

1715 N. Dubois & G. Leoni tr. A. Palladio *Architecture* I. xii. 17 The Tuscan is so rude and material, that it is seldom used above ground.

1735 in *Pope's Lett.* I. Suppl. 30 This was only *in ordine ad*, to another more material Volume.

II. Opposed to *formal*.

4.

a. *Philosophy*. Of, designating, or relating to the matter or material aspect of something, as opposed to the form or formal aspect. Formerly also in *Mathematics*: †designating number or a number as applied to a specific set of objects rather than treated abstractly or formally in itself (cf. CONCRETE *adj.* 4a) (*obsolete*). Cf. FORMAL *adj.* 1a.

material cause: see CAUSE *n.* 5.

▸ *c*1390 G. Chaucer *Melibeus* B. 2589 The cause material been the fyve woundes of thy doghter. The cause formal is the manere of hir werkinge.

1447 O. Bokenham *Lives of Saints* (Arun.) (1938) 11 The fyrst is clepyd cause efficyent, The secunde they clepe cause materyal.

*c*1450 *Art Nombryng* in R. Steele *Earliest Arithm. in Eng.* (1922) 33 Sothely .2. manere of nombres ben notifiede; Formalle, as nombre is vnitees gadrede to-gedres; Materialle, as nombre is a colleccioune of vnitees.

1550 R. Sherry *Treat. Schemes & Tropes* sig. Fii And fyrste of euerye thinge there be foure causes, efficient, materiall, formall and finall.

1588 T. Kyd tr. T. Tasso *Housholders Philos.* f. 25 Formall number, may infinitly encrease, but the Materiall cannot multiply so much.

1660 Bp. J. Taylor *Worthy Communicant* i. §3. 52 Not the sound, or the letters and syllables, that is, not the material part, but the formal.

1669 W. Holder *Elem. Speech* 22 Of Letters the Material part is Breath and Voice; the Formal is constituted by the Motions and Figure of the Organs of Speech affecting Breath with a peculiar sound, by which each Letter is discriminated.

1697 tr. F. Burgersdijck *Monitio Logica* I. xvi. 56 Form is..divided..into Material and Immaterial. Material Form is that which is produced out of the Power of Matter, or which dependeth upon Matter in that self same Moment and Act, by which it is made.

1726 J. Ayliffe *Parergon Juris Canonici Anglicani* 147 There are seven Causes consider'd in Judgment, viz. the Material, Efficient, and Formal Cause; and likewise a Natural, Substantial, and Accidental Cause; and lastly a Final Cause.

1827 R. Whately *Elem. Logic* II. v. §3 Whatever Term can be affirmed of several things, must express either their whole essence..or a part of their essence, (viz. either the material part, which is called the Genus, or the formal and distinguishing part, which is called Differentia).

1958 W. Willetts *Chinese Art* II. vii. 586 Corresponding to this formal cause of each existence was its material cause.

1997 D. Park *Fire within Eye* iv. 110 Aristotle's four causes: the object in which a species originates is its formal cause, the medium through which it propagates is its material cause, and the process of multiplication is the efficient cause.

b. Chiefly *Theology*. Designating an action, disposition, etc., as being of a specified kind from the point of view of external or observable behaviour, without regard to the intention or other factors which more fully determine its true nature. Now chiefly in *material sin n.* at Compounds 1.

1656 J. Bramhall *Replic. to Bishop of Chalcedon* ix. 341 They who separate actually without just cause, may doe it out of invincible ignorance, and consequently they are not formall, but only materiall Schismaticks.

1690 J. Norris *Christian Blessedness* 95 The desiring material Righteousness by a direct Act of the Will actually makes a Man formally Righteous.

1713 Bp. G. Smalridge *Serm.* (1724) 331 The heathen and the Christian may agree in the material acts of charity; but that which formally makes this a Christian grace, is the spring from which it flows.

1743 J. Ellis *Knowl. Divine Things* iv. 289 Whether..the entitative material Act of Sin be physically or morally good?

1884 W. E. Addis & T. Arnold *Catholic Dict.* 400/2 Such Protestants as are in good faith and sincerely desirous of knowing the truth are not heretics in the formal sense... Their heresy is material only.

1907 *Amer. Hist. Rev.* **12** 360 Heresy..included not only all conscious variance from the prescribed religion, but all accidental and unconscious as well. This was 'material' heresy, voluntary and pertinacious error being 'formal' heresy.

5. *Logic.* Concerned with the matter, not the form, of reasoning; (occasionally) contingently valid. Cf. formal *adj.* 1d.

1628 T. Spencer *Art of Logick* 232 A materiall Illation is when the consequent goes with the Antecedent: yet so as it followes the same, not by force thereof.

1685 tr. A. Arnauld & P. Nicole *Logic* iii. xiii. 65 The truth of a Consequence..is only propounded conditionally, and separated from the material Truth, as I may so say, of what it contains.

1697 tr. F. Burgersdijck *Monitio Logica* i. xxviii. 113 The Material Modes affect the Matter of the Enunciation, viz. either Subject or Predicate.

1728 E. Chambers *Cycl.* at *Object* Material Object..is the thing itself that is consider'd, or treated of... Formal Object, is the manner of considering it.

1850 R. Whately *Elem. Logic* (ed. 9) iii. §3 The remaining class (*viz.* where the Conclusion does follow from the Premises) may be called the Material, or Non-logical Fallacies.

1864 F. C. Bowen *Treat. Logic* vi. 149 The material truth of the Conclusion depends upon the material truth of the Premises.

1883 F. H. Bradley *Princ. Logic* 471 If 'material' is a name for what transcends mere 'concepts' and commits itself to truth, then of course all logic must be material.

1937 A. Smeaton tr. R. Carnap *Logical Syntax Lang.* iv. 237 We will..assign to the material mode of speech any sentence which is to be interpreted as attributing to an object a particular property.

1946 *Mind* **55** 321 If we follow the material logicians in holding that universal propositions are existential as to individuals also [etc.].

1975 *Jrnl. Philos.* **72** 93 Since the logic of ideas is a material logic, it can be characterized only with reference to, and is unintelligible independently of the subject matter..to which it is in a particular case addressed.

III. Having significance or relevance.

6.

a. Of serious or substantial import; significant, important, of consequence.

*c*1475 in *Archiv f. das Studium der Neueren Sprachen* (1900) **104** 308 (*MED*) The tyme approched of necessite To reherse the marterial sentence, Which afore althynges iust equite..To drede god by mannes providence.

?*a*1525 (▸ ?*a*1475) *Play Sacrament* l. 890 in N. Davis *Non-Cycle Plays & Fragm.* (1970) 85 As ye be materyall to owr degre, We put vs in yowr moderat ordynaunce, Yff yt lyke yowr hyghnes to here owr

greuaunce.

1529 T. More *Dialogue Heresyes* I, in *Wks.* 125/1 Sith this thing is much material, as wherupon many great thynges do depende.

*a*1616 W. Shakespeare *Macbeth* (1623) III. i. 137 Whose absence is no lesse materiall to me, Then is his Fathers.

1625 F. Bacon *Ess.* (new ed.) 130 He would put that which was most Materiall, in the Post-script.

1665 J. Glanvill *Sciri Tuum: Authors Defense* 23 in *Scepsis Scientifica* 'Tis a pertinent and material enquiry to ask, whence the Soul is?

1667 A. Marvell *Let.* 26 Jan. in *Poems & Lett.* (1971) II. 54 The Poll bill is printed, but with so materiall errors that we must make an explanatory Act.

1709 J. Swift *Project Advancem. Relig.* 58 That is no material Objection against the Design it self.

1719 D. Defoe *Farther Adventures Robinson Crusoe* 347 I have nothing material to say.

1769 E. Burke *Let. to Marq. Rockingham* in *Corr.* (1844) I. 211 His consequence in the India House is much more material to him than his rank in parliament.

1827 H. Hallam *Constit. Hist. Eng.* I. v. 297 In one point more material,..the commons successfully vindicated their privilege.

1896 *Cent. Mag.* Nov. 22 [He] seldom interlined a word or made a material correction.

1957 *Encycl. Brit.* I. 842/1 They made no material change in its composition.

1990 R. Izhar *Accounting, Costing, & Managem.* I. ii. 31 The accountant should concern himself only with items material in relation to the size of the business.

b. Used predicatively, with infinitive or clause as subject. Now *literary* and *formal*.

1547 J. Harrison *Exhort. Scottes* b viij Whether he came out of Italy or not, is not muche materiall.

1590 E. Spenser *Faerie Queene* II. x. sig. Y6^{v} That were too long their infinite contents Here to record, ne much materiall.

1622 J. Mabbe tr. M. Alemán *Rogue* II. 102 It is not much materiall which gate we goe out at.

1648 Bp. J. Wilkins *Math. Magick* I. vii. 50 'Tis not materiall to the force of this instrument, whether the rundles of it be big or little.

*a*1687 W. Petty *Polit. Arithm.* (1690) iv. 76 It is also material to examin, how many of them do get more than they spend, and how many less. In order whereunto it is to be considered, that [etc.].

1712 M. Henry *Daily Commun. God* in *Wks.* (1853) I. 205/2 It is essential to a letter that it be directed, and material that it be directed right.

1802 *Med. & Physical Jrnl.* **8** 256 It is very material to distinguish them with accuracy.

1890 Ld. Halsbury in *Law Times Rep.* **64** 3/2 Before dealing with the particular clauses..it is material to notice the problem which the Legislature had to solve.

c. Chiefly *Law*. Of evidence or a fact: significant or influential, esp. in having affected a person's decision-making; (*U.S. Law*) having a logical connection with the facts at issue. Formerly also with infinitive. Cf. *material witness n.* at Compounds 1.

1581 W. Lambarde *Eirenarcha* I. xxi. 205 To take..the Information..(or so much thereof as shall be materiall to proue the Felonie).

1603 R. Johnson tr. G. Botero *Hist. Descr. Worlde* 80 What they did one against another in the time of Charles the fift, is not much materiall to proue their courage.

1848 J. Arnould *Law Marine Insurance* I. II.i i. 492 Facts, the statement of which may reasonably be presumed likely to have such an influence on the judgment of the underwriter are called 'material

facts'; a statement of such facts is called a material representation.

1881 LD. COLERIDGE in *Times* 5 July 4/2 The alteration which vitiates a contract must be material—that is, one which alters the character of the instrument itself.

1946 *Criminal Appeal Rep.* **31** 146 Where the prosecution have taken a statement from a person who can give material evidence but decide not to call him as a witness, they are under a duty to make that person available as a witness for the defence.

1990 *Which?* Oct. 580/2 If you don't tell your insurance company any fact relevant to the risk they are insuring you against—called a 'material fact'—your policy can be declared invalid.

1995 B. A. GARNER *Dict. Mod. Legal Usage* (ed. 2) 550/2 *Material,..relevant*, the distinction between these terms..is counterintuitive and therefore sometimes confusing. Relevant = tending to prove or disprove a matter in issue. Material = having some logical connection with the consequential facts.

d. Pertinent, relevant; essential. With *to*, †*for*.

1603 P. HOLLAND tr. Plutarch *Morals* 232 Those [things] that be most materiall and necessarie for mans felicitie.

1665 T. MANLEY tr. H. Grotius *De Rebus Belgicis* 121 Nor was it a little material, to their advantage, if [etc.].

1697 J. DRYDEN tr. Virgil *Georgics* II, in tr. Virgil *Wks.* 75 I pass the rest, whose ev'ry Race and Name, And Kinds, are less material to my Theme.

1749 H. FIELDING *Tom Jones* V. XIII. iv. 30 It may be material to our History to mention an Observation of Lady Bellaston, who took her Leave in a few Minutes after him.

1819 W. SCOTT *Ivanhoe* II. xiv. 254 Certain passages material to his understanding the rest of this important narrative.

*a*1834 S. T. COLERIDGE *Specimens of Table Talk* (1835) I. 55 A slight contrast of character is very material to happiness in marriage.

1876 W. E. GLADSTONE *Homeric Synchronism* 145 The point material to the present inquiry is that [etc.].

1987 *Ecologist* Mar.–June 103/2 The Minister accepted this advice..and concluded 'that the Chernobyl accident is not material to my decision'.

†**7.** Full of sense, meaning, or pertinent information. *Obsolete*.

1602 B. JONSON *Poetaster* v. i. sig. K2^{v} What thinks, Materiall Horace, of his learning?

?1611 G. CHAPMAN tr. Homer *Iliads* XXIV. 338 His speech euen charm'd his eares: So orderd; so materiall.

1612 F. BACON *Ess.* (new ed.) 73 Beware of being too materiall, when there is any impediment, or obstruction in mens will.

*a*1616 W. SHAKESPEARE *As you like It* (1623) III. iii. 28 A materiall foole.

1665 J. LIVINGSTON *Mem. Char.* in W. K. Tweedie *Select Biogr.* (1845) I. 335 Mr. James Simson, a very able and materiall preacher.

1685 J. EVELYN *Mem.* (1857) II. 224 Her discourse, which was always material, not trifling.

B. *n.*

1.

a. Matter (not precisely characterized); that which constitutes the substance of a thing (physical or non-physical); a physical substance; a material thing. Frequently with distinguishing adjective. Cf. MATTER *n.*[1] 19a.

?*a*1425 (▸ *c*1380) G. Chaucer tr. Boethius *De Consol. Philos.* v. pr. iv. 210 For it knoweth the universite of resoun, and the figure of ymaginacioun, and the sensible material [L. *materiale sensibile*] conceyved by wit.

1587 Sir P. Sidney & A. Golding tr. P. de Mornay *Trewnesse Christian Relig.* xiv. 239 What doth..matter [bring forth] but matter; and materiall but materialles?

1605 T. Tymme tr. J. Du Chesne *Pract. Chymicall & Hermeticall Physicke* I. iv. 14 Simples may be distinguished..into those things which are simply formals, and into those which are simply materials.

1622 E. Chaloner *Sixe Serm.* 348 And so I come from the *formale* of the Title, the *inscription*, to the *materiale* or substance of it.

1794 J. Hutton *Diss. Philos. Light* 247 The inflammable materials in closs vessels.

1822 J. M. Good *Study Med.* IV. 601 A dry furfuraceous or scaly skin, often oozing a calcareous material.

1850 *De Bow's Rev.* Aug. 244/1 Dr Nott, of Mobile, published a pamphlet denying the unity doctrine, which fell like a fire-brand in the midst of inflammable material.

1864 J. F. Kirk *Hist. Charles the Bold* (U.S. ed.) I. i. 11 The material of the character was coarser and more robust.

1938 R. Hum *Chem. for Engin. Students* xxvi. 736 The resinous material first formed dissolves in acetone and other solvents.

1952 J. A. Steers et al. *Lake's Physical Geogr.* (ed. 3) III. viii. 323 In the lower part the river spreads out the material that it carries.

1997 *Indianapolis Star* 5 June F8 (*advt.*) Free Mr. Yuk stickers, used to alert children of poisonous materials in the home.

†b. In *plural*. The constituent, intrinsic, or essential parts of something. *Obsolete*.

*a*1631 J. Donne *Lady Carey* 15 in *Poems* (1633) 112 They are your materials, not your ornament.

1642 D. Rogers *Naaman* To Rdr. sig. B4^{v} As they say of the materialls of the world, they would soone dissolve if [etc.].

1651 R. Baxter *Plain Script. Proof Infants Church-membership & Baptism* 59 If the very materials of the Church were a Ceremony, then the Church it self should be but a Ceremony.

1662 *Bk. Common Prayer* Pref. The Main Body and Essentials of it (as well in the chiefest materials, as in the frame and order thereof) have continued the same unto this day.

c. Text or images in printed or electronic form; also with distinguishing word, as *reading material*, etc. Also: the songs, jokes, or other items which make up a performer's act.

1885 *Overland Monthly* Apr. 494/1 I visited the library and reading room—comfortable, well-furnished apartments, with plenty of good reading material.

1932 *Amer. Jrnl. Sociol.* **37** 948 There has been a marked increase in sale of pornographic material during the year.

1977 J. Monaco *How to read Film* vi. 365 A newspaper publisher can afford to carry unpopular material.

1993 R. Walser *Running with Devil* 61 Performers who haven't composed their own material..have rarely won critical respect.

d. With distinguishing word, as *headmaster*, *star material*, etc. A person (or people) with the qualities and skills needed for a particular role or activity.

An extended use of sense B. 1, with mixture of sense B. 3.

1892 *College Index (*Auburn, Alabama*)* Nov. I. i. 23 He still kept a sharp lookout for football material.

1927 *Officers Training Corps Gaz.* Apr. 59/1 The sorely needed officer material caused by the early casualties.

1964 'E. PETERS' *Flight of Witch* i. 9 Tom Kenyon, confident, clever and ambitious, was obvious headmaster material.

1969 M. PUGH *Last Place Left* xxvii. 194 It was difficult recruiting men... 'Some of them, well, they're not leadership material.'

1971 D. EDEN *Afternoon Walk* viii. 109 Aren't all top executives ulcer material?

1985 M. GALLANT *Home Truths* 179 He told my father I wasn't college material.

2.

a. The matter or substance from which a thing is or may be made. (See also *raw material n.* at RAW *adj.* and *n.*[1] Compounds 2.)

(a) In *plural*.

*c*1475 (▸ 1392) *Surg. Treat.* in *MS Wellcome 564* f. 68 (*MED*) In siche placis where þat þese materials moun not be founden þat longiþ to þes emplastris aforseid, þanne þu schalt leye þerto þis oynement.

1511–12 in J. B. Paul *Accts. Treasurer Scotl.* (1902) IV. 354 For siklik powderis, confectionis, spiceri, ypothecary and materialez.

*a*1525 G. MYLL *Spectakle of Luf* in W. A. Craigie *Asloan MS* (1923) I. 278 The materialls quhar of thir drinkis are mad.

1556 in J. Stuart *Extracts Council Reg. Aberdeen* (1844) I. 294 To by stanis, lyme, and all materiallis neidfull thairto.

1612 B. JONSON *Alchemist* I. i. sig. B^{v} Your Stilles, your Glasses, your Materialls .

1622 T. DEKKER & P. MASSINGER *Virgin Martir* III. sig. F4 [He] Tooke from the Matrons necks the richest Iewels And purest gold, as the materialls To finish vp his worke [*sc.* an image].

1665 R. BOYLE *Occas. Refl.* VI. i. sig. Mm6^{v} This Child..despising meer Bread,..his Mother is fain to disguise the Materials of it into Cake.

1725 D. DEFOE *New Voy. round World* II. 173 Gun-powder..with other Materials for kindling Fire.

1726 J. SWIFT *Gulliver* II. III. iv. 58 A Palace may be built in a Week, of Materials so durable as to last for ever.

1865 J. LUBBOCK *Prehist. Times* i. 25 Considering how perishable are the materials out of which clothes are necessarily formed.

1954 F. L. WRIGHT *Natural House* I. 116 To use our new materials—concrete, steel and glass, and the old ones—stone and wood—in ways that were not only expedient but beautiful.

1988 *S. Afr. Panorama* Apr. 30/2 He has won acclaim for his graphics, and murals fashioned from a wide variety of materials.

(b) In *singular*. (In quot. ?*a*1425 at sense B. 1a = MATTER *n.*[1] 22a.)

1509–10 in J. D. Marwick *Extracts Rec. Burgh Edinb.* (1869) I. 125 [That] Maister Stephane, ypothegar..may..vse the samin with his materiall and spisery.

1638 F. JUNIUS *Painting of Ancients* 47 Art can doe nothing without the materiall; whereas the materiall without Art hath her own worthinesse.

1662 B. Gerbier *Brief Disc. Princ. Building* 25 When Builders see their Copings [etc.]..to decay they must have patience, since there is no Material but is subject thereunto.

1753 J. Warton tr. Virgil *Eclogues* iv, in J. Warton et al. tr. Virgil *Wks.* I. 92 Sandyx is spoken of by Pliny, as a cheap material for painting.

1758 A. Reid tr. P. J. Macquer *Elements Theory & Pract. Chym.* I. 389 The large refineries of Gold and Silver by the means of Lead furnish a great quantity of this material.

1828 T. Carlyle *Burns* in *Edinb. Rev.* Dec. 279 It is not the material but the workman that is wanting.

1835 A. Ure *Philos. Manuf.* v. 207 Flax..constitutes the material of linen cloth.

1849 T. B. Macaulay *Hist. Eng.* I. iii. 351 The ordinary material was brick.

1863 P. Barry *Dockyard Econ.* 100 £1,186 12*s*. 4¾*d*. for material, and £797 16*s*. 11*d*. for labour.

1929 W. F. Foshag in G. P. Merrill *Minerals from Earth & Sky* ii. iv. 256 The natives used this material, a true nephrite, for knife blades and the like.

1998 *Melody Maker* 28 Feb. 48/1 A man-made material..created specifically for electric instruments.

b. In *plural*. In Ireland: the ingredients for making whisky punch.

N.E.D. (1905) notes 'now "almost always shortened to *matts*, even in a bill" (H. C. Hart)'.

1842 S. Lover *Handy Andy* xxxviii. 304 She..set about getting 'the materials' for making punch.

1888 H. Smart *Master of Rathkelly* II. 53 Take my advice, leave the 'matarials' alone to-night and stick to the claret.

3. In *plural*. The tools, equipment, or other items needed for a particular activity. Frequently with distinguishing word, as *cleaning*, *writing materials*, etc.

*a*1600 *Edinb. Town Treasurer's Accts.* in A. J. Mill *Mediaeval Plays in Scotl.* (1927) 206 Follows the materiallis pertening to the ton [of Edinburgh].

1643 *Acts Parl. Scotl.* (1816) VI. i. 16/1 Sufficient store of pulder, spades, showles, pick axes, handrules and other materiallis.

1688 in *Bannatyne Misc.* (1836) II. 293 The heall bookis, paper, and uther materiellis in his choap.

1778 W. Pryce *Mineralogia Cornubiensis* 324 *Materials*, all tools and tackle, timber and implements, that belong to a Mine.

1855 W. H. Prescott *Hist. Reign Philip II of Spain* I. ii. iii. 433 De Seso called for writing materials.

1934 *Discovery* Nov. 323/2 From the artists' materials discovered at Pompeii Professor Pozzi was able to obtain a test-tube full of the mysterious colour *purpurissum*.

1975 J. Wood *North Kill* x. 139 The speaker kicked his bike into life... The others were storing their cleaning materials into side pannier bags.

1984 G. Jennings *Journeyer* 96 We passed a shop where an Arab khaja offered writing materials for sale.

4. Facts, information, evidence, etc., on which a conclusion is based, or from which an idea is developed, esp. in creating a work of literature or art. Originally in *plural*.

1624 J. Ussher in H. Ellis *Orig. Lett. Eminent Lit. Men* (1843) 131 To you I must be more beholding for furnishing me with materialls.

1625 F. Bacon *Ess.* (new ed.) 80 Concerning the Materialls of Seditions... The surest way to prevent Seditions..is to take away the Matter of them.

1690 J. Locke *Ess. Humane Understanding* ii. ii. 45 These simple Ideas, the Materials of all our Knowledge.

1713 T. HEARNE *Remarks & Coll.* (1898) IV. 205 I have read part of the B. of S^t^. Asaph's Life of S^t^. Winifrid, for w^ch^ I helped him to several Materials out of Bodley.

1783 W. COWPER *Let.* 7 Mar. (1981) II. 112 Were my Letters composed of materials worthy of your acceptance, they should be longer.

1830 I. D'ISRAELI *Comm. Life Charles I* III. Pref. 3 Research and Criticism, only furnish the materials of Meditation.

1877 S. J. OWEN in Marquess Wellesley *Select. Despatches* Introd. p. xlv Wellesley..was anxious to secure fresh and malleable 'material', rather than overformed or misformed agents.

1920 H. J. LASKI *Polit. Thought in Eng.* iii. 118 But the *Alliance between Church and State* (1736) set the temper of speculation until the advent of Newman, and is therefore material for something more than contempt.

1994 *N.Y. Times Bk. Rev.* 27 Nov. 23/1 The author..dug up much fresh material on the early days of basketball.

5. The matériel of an army. Cf. MATÉRIEL *n.* 2. *rare*.

1815 R. SOUTHEY in *Q. Rev.* **13** 521 Their [*sc.* the French army's] baggage, equipage, tumbrils, artillery, the whole of what is called the *material*, were taken.

1986 *N.Y. Times* 6 Mar. A1/1 We send money and material now so we'll never have to send our own American boys.

6. Cloth, woven fabric.

Sometimes (*Dressmaking*): cloth or woollen fabric as opposed to silks, etc.; see also *material dress n.* at Compounds 1.

1848 *Southern Literary Messenger* **14** 559/1 The best material for the cravat is satin or silk of a uniform color.

1860 C. DICKENS in *All Year Round* 25 Feb. 417/2 A cool material with a light glazed surface, being the covering of the seats.

1875 L. S. FLOYER *Plain Needlework* 10 The material used in the South to strain milk, called 'Cheese Cloth' in the trade.

1902 W. JAMES *Varieties Relig. Experience* iii. 61 I instantly recognized the gray-blue material of trousers he often wore.

1963 S. PLATH *Bell Jar* i. 5 Her college was so fashion-conscious..that all the girls had pocket-book covers made out of the same material as their dresses.

1988 M. MOORCOCK *Mother London* I. 16 She wears a dress of William Morris material.

7. With *the*: that which is material.

1850 O. WINSLOW *Inner Life* i. 6 The perishing of the material is not the annihilation of the immaterial.

1874 A. H. SAYCE *Princ. Compar. Philol.* vii. 263 The analysis of the material is not the same as the analysis of the mental.

1985 G. NAYLOR *Linden Hills* 169 There are so many forces that govern our lives beyond the material, the tangible.

†**C.** *adv.*

In an important degree. *Obsolete. rare*.

1653 H. HOLCROFT tr. Procopius *Hist. Warres Justinian* Pref. sig. A2 Procopius..was a very material concerned Agent in all these Wars.

Compounds

C1. Compounds of the adjective.

material aid *n.* aid in the form of money or practical goods, as opposed to effort, etc.; *spec.* food or other non-financial aid given to a developing nation, or to victims of war or natural disaster.

1853 G. Flagg *Let.* 30 Jan. in *Flagg Corr.* (1986) 194 Nothing from you this week either in the way of letters or 'material aid' both of which are very desirable.

1908 J. Davidson *Mammon & his Message* iv. iv. 106 The scorn of money and material aid Is still the ruin of immortal ends.

1991 *Marxism Today* Mar. 49 No one has asked me to contribute material aid for Iraqi civilians who have lost everything in the allied bombing.

material culture *n.* *Cultural Anthropology* and *Archaeology* the physical objects, such as tools, domestic articles, or religious objects, which give evidence of the type of culture developed by a society or group.

1907 *Amer. Anthropologist* **9** 288 Material culture has been well treated by C. C. Jones.

1931 *Encycl. Social Sci.* IV. 622/1 Material equipment of culture is not, however, a force in itself... Material culture requires a complement less simple, less easily catalogued or analyzed, consisting of the body of intellectual knowledge.

1995 *Inuit Art Q.* Spring 40/1 The Royal Ontario Museum..has assembeled a collection of kayaks and material culture that show a people connected with the land.

material dress *n.* now *rare* a dress made of woollen cloth.

1884 *Daily News* 27 Oct. 2/1 The increasing popularity of silks as opposed to what are known as 'material' dresses.

material equivalence *n.* *Logic* the truth-functional relationship which obtains between any two propositions having the same truth value (either both true or both false); a case in which such a relationship exists.

1892 *Mind* **1** 26 (*note*) The relations between *formal* equivalence, implication, or contradiction, and *material* equivalence, implication, or contradiction, will be treated in my next paper.

1932 C. I. Lewis & C. H. Langford *Symbolic Logic* iv. 88 Since the relation p≡q is a reciprocal implication, it shares the peculiarities of material implication and is called 'material equivalence'.

1962 *Jrnl. Philos.* **59** 100 Material equivalence is a very weak criterion for an analysis.

1993 *Philos. Perspectives* **7** 84 The extensionally valid inference pattern that fails here..is the one that sanctions inference from the material equivalence of *x*'s being human and *x*'s being a featherless biped to the identity of being human and being a featherless biped.

material girl *n.* [< the lyrics of a song originally performed by Madonna (born Madonna Louise Ciccone, 1958), U.S. singer and actress] a worldly or materialistic woman or girl.

1984 P. Brown & R. Rans *Living in Material World* (song) You know that we are living in a material world And I am a material girl.

1995 *Guardian* 26 Jan. II. 8/4 (*heading*) Tired of sugary fairy-tale heroines? Lindsay Kemp's Cinderella is a material girl wed to an inbred pervert.

material implication *n. Logic* the truth-functional relationship which obtains between the antecedent and the consequent of a conditional proposition except when the antecedent is true and the consequent false.

1903 B. Russell *Princ. Math.* ii. 14 How far formal implication is definable in terms of implication simply, or material implication as it may be called, is a difficult question.

1932 C. I. Lewis & C. H. Langford *Symbolic Logic* 101 The relation of formal implication is transitive, like material implication.

1992 *Mind* **101** 76 We are to think of the dyadic construction they feature as really monadic after all, with *Intend* (α/β) being an alternative notation for (3) *Intend* (β → *S*α) in which the arrow symbolizes (let's say) material implication, and the '*S*' is a subjunctivizing operator.

material noun *n. Grammar* a mass noun which denotes a physical substance.

1892 H. Sweet *New Eng. Gram.* I. 54 Common nouns..are subdivided into class-nouns, such as *man*, and material-nouns, such as *iron*.

1925 J. H. Grattan & P. Gurrey *Our Living Lang.* xviii. 110 A material-noun is a word which stands for the whole mass of matter possessing the qualities implied by the word, or for an indefinite quantity of that matter—for example, *water, iron, veal, butter*.

1969 R. Kingdon *Palmer's Gram. Spoken Eng.* (ed. 3) II. 61 Common nouns..are subdivided into Material nouns and Class nouns. Material nouns..name substances.

material object *n.* a thing made or consisting of matter, a physical object; (*Philosophy*) an object having a real physical existence independent of mind or consciousness.

*a*1651 N. Culverwell *Worth of Souls* in *Elegant Disc. Light of Nature* (1652) 201 For the soul of it self is more large and spacious, and scornes to be bounded by material objects.

1713 G. Berkeley *Three Dialogues Hylas & Philonous* I. 61 I wou'd, therefore, fain know, what Arguments you can draw from Reason, for the Existence of what you call *real Things*, or *material Objects*.

1846 J. Ruskin *Mod. Painters* II. 97 Any work of art which represents, not a material object, but the mental conception of a material object, is, in the primary sense of the word, ideal.

1912 B. Russell *Probl. Philos.* iv. 58 Common sense regards tables and chairs..and material objects generally as something radically different from minds.

1995 J. Shreeve *Neandertal Enigma* (1996) xi. 302 Messages borne by clothing and material objects are not limited to simple statements of affiliation.

material objectness *n.* the state or quality of existing as a material object.

1932 H. H. PRICE *Perception* ii. 52 'Material-objectness' cannot be defined without mention of it.

1941 *Mind* **50** 282 The puzzle is this: if sense-data are all that we are directly aware of in perception, how have we ever acquired the concept of 'material-objectness' at all?

material sin *n. Theology* a wrong action without regard to the evil intention that is necessary to constitute it a sin in the full sense of the word: see sense A. 4b.

1837 L. BEECHER *Views in Theol.* 231 We have often been much perplexed in the attempt to understand what is meant by certain men, when they declaim against physical depravity, material sin, [etc.].

1906 *Amer. Hist. Rev.* **11** 257 When he said that God sometimes wished sin, he meant material sin.

1952 R. A. KNOX *Hidden Stream* xviii. 165 If you wake up in the night and your watch says five minutes to twelve and you eat a slice of cake and go to Communion next morning and then find that your watch was really an hour slow, that is a material sin, because the Church tells you to fast from midnight.

material theory *n. rare* the theory that heat is a material substance (called 'caloric').

1863 J. TYNDALL *Heat* (1870) ii. §17. 23 Two rival theories..which are named respectively the *material theory*, and the *dynamical*, or *mechanical, theory* of heat.

material thing *n.* = *material object n.*

1583 A. GOLDING tr. J. Calvin *Serm. on Deuteronomie* clxxxii. 1130/1 They [*sc.* Papists] make men beleeue that the breade is no more a materiall thing.

1605 F. BACON *Of Aduancem. Learning* I. sig. B2^{v} View and enquiry into these sensible and material things .

1649 tr. R. Descartes *Disc. Method* 59 Imagination..is a particular manner of thinking on materiall things.

1733 A. BAXTER *Enq. Nature Human Soul* 277 He supposes that from the surfaces of all material things there are continually flying off thin membranes.

1899 W. JAMES *Talks to Teachers* vii. 58 The result of all this is that intimate familiarity with the physical environment, that acquaintance with the properties of material things, which is really the foundation of human consciousness.

2000 *Newsweek* 1 Jan. 68/3 A..nuclear missile is a merely material thing: its fuel goes bad, its space-age gyroscopes are hopelessly old-fashioned.

material witness *n. U.S. Law* a witness whose evidence is likely to be sufficiently important to influence the outcome of a trial.

1751 E. PUREFOY *Let.* 19 Feb. in *Purefoy Lett.* (1931) I. i. 16 Hee may be a materiall witnesse for us about his wive's settlement here.

1799 *Hull Advertiser* 14 Sept. 3/3 He has been twice examined, but a material witness was wanting.

1859 T. J. HENDERSON *Official Rep. Trial Albert Jackson* 334 Refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses.

1975 O. Sela *Bengali Inheritance* ix. 79 I can hold this taxi driver of yours as long as I like. Material witness in a murder case.

C2. Compounds of the noun, with the sense 'that deals with materials or material'.
a. In *singular*: see sense A. 2b.

material clerk *n.*

1900 *Engin. Mag.* **19** 707 It is the duty of the material clerk to see that sufficient material is in stock, or ordered, to provide for orders in hand.

1998 *Occup. Outlook Handbk.* (U. S. Dept. Labor) (Electronic ed.) Other workers who perform similar duties are stock clerks, material clerks, distributing clerks, [etc.].

material control *n.*

1918 C. E. Knoeppel *Organization & Admin.* xv. 252 The material control sheet takes care of pieces ordered, pieces rough, pieces in progress, and pieces finished.

1959 *Gloss. Terms Work Study* (B.S.I.) 33 *Material control*, procedures and means by which the correct quantity and quality of materials and components are made available to meet production plans.

material handling *n.*

1919 *Q. Jrnl. Econ.* **33** 479 Four-fifths of the current inconveniences and losses experienced in material handling can be eliminated by detailed knowledge and proper planning.

1921 E. T. Elbourne *Factory Admin. & Accts.* (new ed.) 807 A form of production service having special reference to material handling and custody.

material man *n.*

1778 W. Pryce *Mineralogia Cornubiensis* 324 *Materials*, all tools and tackle, timber and implements, that belong to a Mine; and in large Mines a person is appointed to take care of them, who is called the Material-Man.

1938 Ld. Horne in *Daily Tel.* 14 Feb. (Finance & Industr. Review) p. xvi/1 In the opinion of many prudent people, it only requires some adjustment in prices between the ship-builders and the material-men and the shipowners to set agoing again the demand for new merchant tonnage.

material testing *n.*

1969 R. F. Lang tr. F. A. Henglein *Chem. Technol.* 315 The so-called technical laboratories..carry out the routine analyses..as well as material testing.

material technology *n.*

1991 *Offshore Engineer* Sept. 121 (*advt.*) Our proven concept combines the latest design and material technology.

material yard *n.*

1901 J. Black *Illustr. Carpenter & Builder Ser.: Scaffolding* 89 The smaller builder, having..no material yard, has no convenient place to store poles when not in use.

b. In *plural*.

(a)

materials technology *n.*

1962 *Technology* June 129/1 The course on materials technology will draw on the methods of physics, chemistry, metallurgy and engineering.

materials testing *n.*

1924 *Trans. Amer. Soc. Mech. Engineers Index* 124/2 (*heading*) Materials testing.

1991 *Nucl. Energy* June 132/2 The PLUTO Materials Testing Reactor was used to look at the effects of contact between reactor coolant and UO_2 fuel pellets.

(b)

materials clerk *n.* a clerk who controls the supply of materials in a business.

1904 *Daily Chron.* 2 June 9/3 Timekeeper and Materials Clerk required by large West-end contractors.

materials control *n.* control of materials in order to meet the needs of a manufacturing or industrial process.

1962 A. Battersby *Guide to Stock Control* 123 The Materials Control office calculated that the increase in the first-grade stock would have to be 200 items to preserve the same risk level as before.

1980 C. S. French *Computer Sci.* xxxix. 297 Machine loading, materials control, batch size calculations, and machine utilisation are all things which a computer can make more efficient.

materials controller *n.* a person responsible for materials control.

1962 A. Battersby *Guide to Stock Control* x. 90 The subordinate would be the Materials Controller: this title is better than the more usual 'Stock Controller' because, as we have seen, he controls the *flow* of materials rather than the stocks themselves.

1998 *Managem. Accounting* (Electronic ed.) Sept. 38 It turned out I was talking to the factory manager. The other two were introduced to me as the production controller and the materials controller.

materials handling *n.* the movement and storage of materials in a factory, etc.

1932 S. J. Koshkin *Mod. Materials Handling* i. 2 It is of the greatest importance that the materials-handling methods and devices should be sufficiently worked out at the time the plant is designed so as to make them an integral part of the design.

1986 *Motor Transport* 14 Aug. 12/4 The Institute of Physical Distribution Management has also introduced a course in materials handling.

materials man *n.* a person responsible for materials required in building, manufacturing, etc. (in quot. 1778 for *material man n.* at Compounds 2a, for the equipment relating to a mine).

1832 C. BABBAGE *Econ. Machinery & Manuf.* (ed. 2) xx. 199 A Materials-man selects, purchases, receives and delivers all articles required.

materials yard *n.* a yard in which materials are stored.

1997 *Wisconsin State Jrnl.* (Electronic ed.) 29 July 1 A J.H. Findorff & Son..is..moving its construction equipment and materials yard to a location on Madison's East Side.

This entry has been updated (OED Third Edition, March 2001; most recently modified version published online June 2022).

EXHIBIT Altanovo-14

2013 WL 12123230
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

URICA, INC., Plaintiff,
v.
PHARMAPLAST S.A.E., and
Medline Industries, Inc., Defendants.
Medline Industries, Inc. Counter/crossclaimant,
v.
Urica, Inc., URI-Health & Beauty LLC,
Afshin Moghavem, and Pharmaplast
S.A.E., Counter/crossdefendants.
Pharmaplast S.A.E., Counterclaimant,
v.
Urica, Inc., et al., Counterdefendants.
Pharmaplast S.A.E., Counterclaimant,
v.
Medline Industries, Inc. and Jack
Bowser, Jr., Counterdefendants.

CASE NO. CV 11-02476 MMM (RZx)
|
Signed 05/06/2013

Attorneys and Law Firms

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ORDER GRANTING PHARMAPLAST'S MOTION FOR SUMMARY JUDGMENT AGAINST URICA; GRANTING MEDLINE'S MOTION FOR SUMMARY DENYING MEDLINE'S MOTION FOR SUMMARY JUDGMENT AGAINST PHARMAPLAST

NARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

***1** Urica commenced this action in Los Angeles Superior Court on February 24, 2011, against Medline Industries, Inc. [1] Medline removed the action to federal court on March 24, 2011, invoking the court's diversity jurisdiction. [2] On May 5, 2011, Urica filed an amended complaint that named Pharmaplast S.A.E. as an additional defendant. [3]

1 Notice of Removal Pursuant to 28 U.S.C. § 1441(b) ("Removal"), Docket No. 1 (Mar. 24, 2011), Exh. A ("Complaint").

2 Removal at 2.

3 First Amended Complaint for Damages for Breach of Contract and Inducing Breach of Contract ("First Amended Complaint"), Docket No. 9 (May 5, 2011).

On October 5, 2011, the court granted in part and denied in part defendants' motions to dismiss the amended complaint, and granted Urica leave to amend. [4] Urica filed a second amended complaint on October 20, 2011. [5] Medline filed an answer, counterclaim and cross-claim against Pharmaplast on November 21, 2011, which it subsequently moved to amend. The court granted the motion, which Urica and Pharmaplast did not oppose, [6] and Medline filed an amended answer, counterclaim and cross-claim on February 28, 2012. [7]

4 Order Granting in Part and Denying in Part Defendants' Motions to Dismiss ("MTD Order"), Docket No. 29 (Oct. 5, 2011).

5 Second Amended Complaint ("SAC"), Docket No. 32 (Oct. 20, 2011).

6 Plaintiff and Counterdefendant Urica, Inc.'s Notice of Non-Opposition to Motion by Defendant Medline Industries, Inc.'s for Leave to Amend Answer and Add Counterclaims, Docket No. 46 (Dec. 21, 2011); Notice by Defendant, Counterclaimant, and Cross-Defendant Pharmaplast, S.A.E. of Non-Opposition to Motion by Defendant Medline Industries, Inc. to Amend Answer and Add Counterclaims, Docket No. 47 (Feb. 17, 2012).

7 Amended Answer to Second Amended Complaint and Cross-Claim and Counterclaims of Defendant

Medline Industries ("Medline Cross-Claim"), Docket No. 49 (Feb. 28, 2012).

On January 24, 2013, Medline filed a motion for summary judgment on its claim against Pharmaplast and a separate motion for summary judgment on Urica's claims against it. [8] Each of Pharmaplast and Urica opposed the motion directed to it. [9] The, on February 17, 2013, Pharmaplast filed a motion for summary judgment on Urica's breach of contract claim, [10] which Urica opposed. [11] Finally, on February 19, 2013, Urica filed a motion for summary judgment on Medline's claims against it. [12] Medline and Urica subsequently filed a stipulation to dismiss Medline's counterclaims against Urica, however, mooting that motion. [13]

8 Motion for Summary Judgment on Claim for Indemnification from Pharmaplast ("Indemnity Motion"), Docket No. 104 (Jan. 24, 2013); Medline's Motion for Summary Judgment ("Medline Motion"), Docket No. 105 (Jan. 24, 2013).

9 Opposition to Motion for Summary Judgment on Claim for Indemnification ("Indemnity Opp."), Docket No. 115 (March 18, 2013); Opposition to Medline's Motion for Summary Judgment ("Medline Opp."), Docket No. 116 (March 18, 2013).

10 Pharmaplast's Motion for Summary Judgment ("Pharm. Motion"), Docket No. 109 (Feb. 17, 2013).

11 Opposition to Motion for Summary Judgment ("Pharm. Opp."), Docket No. 117 (Mar. 18, 2013).

12 Urica's Motion for Summary Judgment, Docket No. 110 (Feb. 19, 2013).

13 Stipulation to Dismiss Counterclaims, Docket No. 122 (Mar. 25, 2013).

I. FACTUAL BACKGROUND

***2** This case arises out of three contracts for the sale of adhesive bandages.

A. The 2004 Urica-Pharmaplast Agreement

Urica is a California corporation that was originally in the business of selling razor blades. [14] Afshin Moghavem is the president and a director of Urica. [15] Pharmaplast is an Egyptian company that manufacturers and sells wound care products, such as adhesive bandages. [16] In 2004, Urica sought to expand into the adhesive bandage market. As a result, on February 10, 2004, it entered into an exclusive dealing agreement with Pharmaplast. [17] Under the terms of the contract, Urica was to be the exclusive distributor of all Pharmaplast goods in North, Central, and South America—with the exception of hospital sales—for a period of ten years. [18] Between 2004 and 2011, Urica did not directly purchase product from Pharmaplast pursuant to the contract. [19] It did form a separate entity, however, named URI Health & Beauty ("URI"), which was also managed by Moghavem. [20] Although Urica never assigned its exclusive distribution rights under the contract to URI, [21] URI placed 104 orders with Parmaplast for goods to be sold in North America between 2004 and 2011. [22]

14 Pharmaplast's Statement of Undisputed Facts ("PSUF"), Docket No. 109 (Feb 17, 2013), ¶¶ 1, 3; Statement of Genuine Issues ("PSGI"), Docket No. 118 (March 20, 2013), ¶¶ 1, 3.

15 PSUF, ¶ 6; PSGI, ¶ 6.

16 PSUF, ¶ 14; PSGI, ¶ 14.

17 PSUF, ¶ 16; PSGI, ¶ 16.

18 SAC, Exh. 1 ("Pharmaplast Agreement") at 1.

19 PSUF, ¶ 26; PSGI, ¶ 26.

20 PSUF, ¶ 9; PSGI, ¶ 9.

21 PSUF, ¶ 24; PSGI, ¶ 24.

22 PSUF, ¶ 31; PSGI, ¶ 31.

URI's payments for the shipments were frequently late, and on at least two occasions, it refused to accept goods it had ordered. [23] Pharmaplast asserts that, as a result, it decided in late 2007 that it would no longer quote prices for new customers of URI, although it would continue to provide URI with the goods it needed to satisfy the needs of its current customers. [24] Urica, conversely, asserts that Pharmaplast stopped quoting prices for new URI customers

because it had begun negotiations with Medline, another medical supplies retailer. In March 2008, Pharmaplast entered into a contract with Medline, pursuant to which it agreed to sell certain products to Medline for distribution in North America.[25] Urica alleges that this was a breach of the exclusivity agreement. It also asserts that Medline knew of the exclusivity agreement and intentionally interfered with it by entering into a contract with Pharmaplast.

23 PSUF, ¶ 32; PSGI, ¶ 32. Urica does not dispute that URI was late on several payments or that it refused shipment of the goods. It asserts, however, that its payments conformed to industry standards, and that there was a genuine dispute regarding the shipments it refused to accept.

24 Declaration of Mamdouh Atteia ("Atteia Decl."), Docket No. 109 (Feb. 17, 2013), ¶ 9.

25 PSUF, ¶ 38; PSGI, ¶ 38.

B. The 2008 Medline-Urica Agreement

Medline is an Illinois company in the business of selling medical supplies.[26] In late 2007, Pharmaplast learned that one of Medline's factory sources for bandages had been sold to 3M, a Medline competitor, and notified its contacts at Urica so that Urica could solicit Medline as a potential customer.[27] Moghavem set up a meeting with Medline, which took place on October 31, 2007.[28] At the meeting, Moghavem offered either to act as a middleman, selling Pharmaplast bandages to Medline, or to sell URI to Medline.[29] Following the meeting, URI and Medline entered into a confidentiality agreement, which obligated them not to disclose or use certain confidential information exchanged during negotiations concerning the alternate proposals.[30]

26 Medline Statement of Undisputed Facts ("MSUF"), Docket No. 104 (Jan. 24, 2013), ¶ 8; Statement of Genuine Issues ("MSGI"), Docket No.116 (Mar. 18, 2013), ¶ 8.

27 MSUF, ¶ 17; MSGI, ¶ 17. The parties dispute whether the contacts Pharmaplast notified were representatives of Urica or URI; it is undisputed, however, that notification was given.

28 MSUF, ¶ 18; MSGI, ¶ 18.

29 MSUF, ¶ 20; MSGI, ¶ 20.

30 MSUF, ¶ 30; MSGI, ¶ 30. The contract states that it was executed on January 17, 2007. Urica, however, asserts that this is a typographical error, and that it is undisputed the contract was signed in January 2008.

***3** In January 2011, URI assigned its rights under the confidentiality agreement to Urica. Urica now contends that Medline used confidential information, such as its customer list, supplier list, pricing information, Pharmaplast's internal testing results and URI's Inventory Levels to negotiate and enter into an agreement with Pharmaplast to purchase goods.[31]

31 MSUF, ¶ 32; MSGI, ¶ 32.

C. The Medline-Pharmaplast Agreement

As noted, Pharmaplast suggested that Urica contact Medline once it became known that Medline had lost one of its suppliers for bandages. Urica approached Medline to gauge its level of interest in doing business with Urica and Pharmaplast. Thereafter, however, Jack Bowser, a Medline executive, traveled to Egypt to discuss a potential agreement between Medline and Pharmaplast; on March 3, 2008, Medline and Pharmaplast entered into a contract providing that Medline would purchase goods from Pharmaplast.[32] The contract contains a clear indemnity clause, which states that Pharmaplast will indemnify Medline for any losses "arising out of" or "relating to" the sale of Pharmaplast goods.[33] Medline seeks indemnification for the attorneys' fees and costs it has incurred defending Urica's claims, as well as indemnification for any judgment that may be entered against it. It contends that Urica's breach of contract and intentional interference with contract claims arise out of or relate to Medline's sale of Pharmaplast's goods and are covered by the indemnity provision.

32 Indemnity Statement of Undisputed Facts ("ISUF"), Docket No. 104 (January 24, 2013) ¶ 6; Statement of Genuine Issues ("ISGI"), Docket No. 115 (March 18, 2013), ¶ 6.

33 Cross-Claim, Exh. A ("Medline-Pharmaplast Agreement"), ¶ 9.

II. DISCUSSION

A. Standard Governing Motions For Summary Judgment

A motion for summary judgment must be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED.R.CIV.PROC. 56. A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue as to which the nonmoving party will have the burden of proof, however, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See *id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); FED.R.CIV.PROC. 56(e)(2). Evidence presented by the parties at the summary judgment stage must be admissible. FED.R.CIV.PROC. 56(e)(1). In reviewing the record, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. See *T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).

B. Whether Pharmaplast is Entitled to Summary Judgment on Urica's Breach of Contract Claim

***4** To succeed on a breach of contract claim, a plaintiff must prove: (1) the existence of a contract; (2) its performance of the contract, or a legally cognizable excuse for nonperformance; (3) defendant's breach; and (4) resulting damage. *In re Facebook Privacy Litig.*, 791 F.Supp.2d 705, 717 (N.D. Cal. 2011); *Greenwich Ins. Co. v. Rodgers,* 729 F.Supp.2d 1158, 1173 (C.D. Cal. 2010); *McKell v. Washington Mut., Inc.*, 142 Cal.App.4th 1457, 1489 (2006). Pharmaplast advances several arguments as to why it is entitled to summary judgment on Urica's breach of contract claim: (1) the contract is too indefinite to be enforced; (2) Urica abandoned the contract; (3) Urica materially breached the contract; and (4) Urica cannot prove that it suffered damage as a result of the alleged breach. The court addresses each argument in turn.

1. Whether the Contract is Too Indefinite to Enforce

Pharmaplast's first argument is that its contract with Urica is too indefinite to be a valid, enforceable agreement.[34] It contends that the contract fails to identify the Pharmaplast products that are the subject of the agreement and does not specify a territorial limitation.[35] The court previously rejected this argument in resolving Pharmaplast's motion to dismiss, and sees no reason to deviate from its prior holding.[36] The contract specifies the products within its scope by stating that it covers "all products manufactured by Pharmaplast."[37] It also specifies the geographic scope of the exclusivity agreement by stating that it covers "North, Central and South America."[38] This provides a clear, definite limit, and while it covers a large territory, it is neither ambiguous nor indefinite. The parties mutually agreed to this geographic limitation, and the court cannot conclude as a matter of law that the terms are too uncertain to enforce. See *Rutherford v. Standard Engineering Corp.*, 88 Cal.App.2d 554, 561 (1948) (rejecting an argument that a contract was too indefinite because "the territory [of exclusivity] was not specifically designated," and noting that "[t]he trend of recent decisions indicates a policy of upholding contracts if a reasonable construction may be reached that the intention of the parties was mutually understood and readily may be ascertained").

34 Pharm. Motion at 10.

35 *Id.*

36 MTD Order at 7-10.

37 SAC, Exh. 1 ("Pharmaplast Agreement") at 1.

38 *Id.*

Pharmaplast cites no authority for the proposition that a well-defined geographic restriction in an exclusive dealing contract renders a contract too indefinite to enforce simply because the territory covered is large. Nor could the court locate such authority. To the contrary, courts often enforce exclusive dealing contracts covering entire countries or continents. See, e.g., *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858

F.2d 509, 511 (9th Cir. 1988) (enforcing a contract that "designated Manetti–Farrow as the exclusive U.S. distributor of the Collection"); *Church & Dwight Co., Inc. v. Mayer Laboratories, Inc.*, No. C–10–4429 EMC, 2011 WL 1225912, *19 (N.D. Cal. Apr. 1, 2011) (denying a motion to dismiss a claim based on a contract that granted a distributor exclusive rights to the North American market). Accordingly, Pharmaplast's contention that the contract is not sufficiently definite provides no basis for entering summary judgment in its favor.

2. Whether the Contract was Abandoned

Pharmaplast next asserts that the contract cannot be enforced because the parties abandoned it. Generally, a contract terminates by its own terms or "through ... acts of the parties evidencing an abandonment." *Busch v. Globe Indus.*, 200 Cal.App.2d 315, 320 (1962). "Abandonment of a contract is a matter of intent and is to be ascertained from the facts and circumstances surrounding the transactions out of which the abandonment is claimed to have resulted." *Id.* (citing *Treadwell v. Nickel*, 194 Cal. 243, 259 (1924)). Abandonment cannot be accomplished unilaterally; rather, "[a]ll of the contracting parties must intend to disregard the contract before abandonment is established." *Cardenas v. Whittemore*, No. 10cv1808–LAB–KSC, 2013 WL 941634, *4 (S.D. Cal. Mar. 11, 2013). Mutual consent to abandon can be implied through actions, but such actions must demonstrate the parties' intent in a "positive" and "unequivocal" way. *Pennel v. Pond Union Sch. Dist.*, 29 Cal.App.3d 832, 838 (1973); see also *Honda v. Reed*, 156 Cal.App.2d 536, 539 (1958) ("Abandonment of a contract may be implied from the acts of the parties").

***5** Pharmaplast asserts that Urica evidenced an intent to abandon the contract, and thus that it had no obligation to comply with the agreement's terms. Pharmaplast focuses primarily on the fact that Urica did not directly place orders under the agreement; rather, all purchases were made by URI, a separate company.[39] It emphasizes that Urica never formally assigned its rights under the contract to URI.[40] Urica counters that it never consented to abandon the contract. It cites Moghavem's declaration, which states that Urica did not intend to abandon or rescind the agreement;[41] rather, Moghavem asserts, Urica exercised its rights under the agreement by designating URI as its purchasing agent and placed orders through that agent, rather than directly.[42]

39 Atteia Decl., ¶¶ 5-6.

40 Pharm. Motion at 10; SUF, ¶ 24; SGI, ¶ 24.

41 Declaration of Afshin Moghavem ("Moghavem Decl."), Docket No. 117 (Mar. 18, 2013), ¶ 22 ("Urica never intended to abandon or rescind the 2004 Agreement, and it never communicated to Pharmaplast, in words or actions, that it wanted to do so").

42 *Id.*, ¶ 9 ("To avoid confusion with Urica's razor blade business, URI Health & Beauty, LLC was formed and designated as Urica's agent to buy and sell bandages.... Urica unequivocally held URI H&B out as its agent for buying and selling Pharmaplast products. Urica and URI H&B shared office space, warehouse space, and support staff").

Urica has adduced evidence that URI was created solely for the purpose of placing adhesive bandages orders for Urica under its contract with Pharmaplast,[43] and it is undisputed that URI placed orders for Pharmaplast products.[44] Urica has also proffered evidence that Moghavem controlled both it and URI, and that Urica "unequivocally held URI ... out as its agent for buying and selling Pharmaplast products."[45] Pharmaplast did not object to the fact that URI was purchasing product rather than Urica; at no time did it claim that Urica had breached the contract by failing to make the purchases itself. Indeed, there is no evidence that Pharmaplast even questioned why URI was ordering product rather than Urica.[46] Pharmaplast, moreover, accepted URI's purchase orders, set prices, and shipped goods in a manner that conformed to its contract with Urica.[47] Urica has adduced evidence that when a dispute arose concerning payment for goods, Pharmaplast referred to the payment provisions contained in its contract with Urica, despite the fact that URI was the purchaser; eventually, Pharmaplast demanded a change in the contract's payment terms.[48] A Pharmaplast officer, Dr. Mamdouh Atteia, who was designated Pharmaplast's person-most-knowledgeable, testified that the company had "an exclusive relationship with URI Health & Beauty."[49] This supports the conclusion that both Urica and Pharmaplast understood URI was purchasing goods pursuant to the 2004 exclusive dealing agreement.

43 Moghavem Decl., ¶ 9.

44 SUF, ¶ 31; SGI, ¶ 31.

45 *Id.*

46 *Id.*, ¶ 10.

47 *Id.*, ¶ 10, 19.

48 *Id.*, ¶ 19 ("Urica's practice in paying Pharmaplast invoices was to comply with the "Payment Terms" paragraph of the 2004 Agreement"). This evidence is supported by a comparison of the contract's terms with evidence adduced by Pharmaplast regarding URI's late payments. The contract states that payments must be made within ninety days of the shipment date. (Pharmaplast Agreement at 1). Pharmaplast's accounting spreadsheet, which documents each purchase made by URI, reflects that payment for each order was due ninety days after shipment. (Atteia Decl., Exh. 2).

49 Declaration of Gary Ho ("Ho Decl."), Docket No. 117 (Mar. 18, 2013), Exh. P ("PMK Depo.") at 89:15-17.

At most, the evidence demonstrates that Urica and Pharmaplast mutually agreed to modify the 2004 contract by allowing purchase orders to be placed by Urica's affiliate, URI, rather than Urica itself. See *Garrison v. Edward Brown & Sons*, 25 Cal.2d 473, 479 (1944) (noting that a contract can be modified by post-agreement conduct if "the conduct of the parties according to the findings of the trial court [is] inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify the written contract"). There is clearly sufficient evidence to raise triable issues of fact as to whether Urica intended that the exclusive dealing provision would remain in effect. In addition to Moghavem's testimony that Urica did not intend to abandon the contract, URI placed orders under the contract from 2004 to 2010, and Pharmaplast fulfilled the orders without question. [50]

50 Pharmaplast contends that the fact that Urica acquiesced to a change in the agreement's payment terms demonstrates an intent to abandon the contract. (Pharm. Motion at 13). The court does not agree. This represents, at most, a *modification* of the contract terms based on the parties' course of conduct; it does not demonstrate as a matter of law that Urica intended to abandon all of its rights under the agreement.

***6** Ultimately, proving abandonment requires demonstrating that both parties intended that the contract would be void. Urica has adduced evidence that it did not intend to abandon the contract. When "ascertaining the intent of [contracting] parties ... depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." *City of Hope Nat. Medical Center v. Genentech, Inc.*, 43 Cal.4th 375, 395 (2008). The sole fact that Urica placed orders through URI, rather than placing orders itself, does not warrant the conclusion that Urica abandoned the contract as a matter of law, or render it unenforceable as a result. Pharmaplast, moreover, has adduced no evidence that *it* intended to abandon the contract. To the contrary, the undisputed facts show it continued to fill orders for URI, and requested a change in the payment terms of the contract to address URI's late payments. Even when it refused to fulfill orders for URI's new customers, moreover, Pharmaplast continued to fill orders for the company's existing customers. Because *both* parties must intend to disregard the contract before abandonment can be found, the absence of evidence that Pharmaplast intended to disregard the agreement also raises triable issues of fact that cannot be decided in the context of a summary judgment motion. Consequently, Pharmaplast's motion for summary judgment on this ground is denied. [51]

51 Pharmaplast asserts that, in the event URI is considered Urica's agent, it too demonstrated an intent to abandon the contract. (Pharm. Motion at 12-13). Specifically, it contends that URI was "repeatedly late" paying Pharmaplast invoices, and that this shows it wished to abandon the contract. It is more appropriate to address this argument, however, in assessing Pharmaplast's argument that it was relieved of its contractual obligations because Urica materially breached the contract. That issue is discussed *infra*.

3. Whether Urica Materially Breached the Contract Prior to Pharmaplast's Alleged Breach

" 'A party complaining of the breach of a contract is not entitled to recover therefor unless he has fulfilled his obligations.' " *Wiz Technology, Inc. v. Coopers & Lybrand*, 106 Cal.App.4th 1, 12 (2003) (quoting *Pry Corp. of America*

v. Leach, 177 Cal.App.2d 632, 639 (1960)). "It is elementary [that] a plaintiff suing for breach of contract must prove [he] has performed all conditions on [his] part or that [he] was excused from performance." *Consolidated World Investments, Inc. v. Lido Preferred Ltd.*, 9 Cal.App.4th 373, 380 (1992) (citing *Reichert v. General Ins. Co. of America*, 68 Cal.2d 822, 830 (1968)).

Generally, only a material breach of contract excuses further performance by the injured party and entitles that party to terminate the contract. See *Pry Corp. of America v. Leach*, 177 Cal.App.2d 632, 639 (1960) (" 'In promises for an agreed exchange, any *material* failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional,' " quoting RESTATEMENT (FIRST) OF CONTRACTS, § 274 (1932) (emphasis added)); 1 B. Witkin, SUMMARY OF CAL. LAW, Contracts, § 796 p. 719 (9th ed. 1990) ("The plaintiff must be free from *substantial* default in order to avail himself of the remedies for the defendant's breach").

A breach is material if it goes to the essence of the agreement. See *Federal Deposit Ins. Corp. v. Air Florida System, Inc.*, 822 F.2d 833, 840 (9th Cir. 1987) ("[A] partial failure of consideration justifies rescission only if the failure is "material," or go[es] to the 'essence' of the 'contract,' " citing *Wyler v. Feuer*, 85 Cal.App.3d 392, 404 (1978)); *Taylor v. Johnston*, 15 Cal.3d 130, 137 (1975) ("[R]epudiation must be either with respect to the entire performance that was promised or with respect to so material a part of it as to go to the essence. It must involve a total and not merely a partial breach"); *Taliaferro v. Davis*, 216 Cal.App.2d 398, 412 (1963) ("[W]here the consideration fails in whole or in part through the fault of a party whose duty it is to render it, the other party may invoke such failure as a basis for rescinding or terminating the contract, provided the failure or refusal to perform constitutes a breach in such an essential particular as to justify rescission or termination," citing *Crofoot Lumber v. Thompson*, 163 Cal.App.2d 324, 332-33 (1958) ("The right of the injured party to claim release from obligations [and] to elect to terminate the contract depends upon the gravity of the breach")); see also *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal.App.3d 1032, 1051 (1987) (a breach is material if it is "so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract," quoting *Jacob & Youngs v. Kent*, 230 N.Y. 239, 243 (1921) (Cardozo, J.)). [52]

52 California courts frequently cite the factors set forth in the Restatement of Contracts in deciding whether a particular breach is material. See, e.g., *Linden Partners v. Wilshire Linden Associates*, 62 Cal.App.4th 508, 531 (1998); *Sackett v. Spindler*, 248 Cal.App.2d 220, 229 (1967). These factors include: "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and] (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." RESTATEMENT (SECOND) OF CONTRACTS, § 241 (2005). The standard is necessarily flexible, and is to be applied "in such a way as to further the purpose of securing for each party his expectation of an exchange of performances." See *id.*, cmt. a.

***7** Whether an obligation or breach of an obligation is material is generally a question of fact. *Associated Lathing etc. Co. v. Louis C. Dunn, Inc.*, 135 Cal.App.2d 40, 49 (1955); see *Superior Motels*, 195 Cal.App.3d at 1051-52 (" 'Whether a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact,' " quoting *Whitney Inv. Co. v. Westview Dev. Co.*, 273 Cal.App.2d 594, 601 (1969)); see also *Bemis v. Whalen*, 341 F.Supp. 1289, 1291 (S.D. Cal. 1972) ("Whether a given breach is material or essential, or not, is a question of fact").

Pharmaplast argues that Urica materially breached the contract because URI repeatedly made late payments on purchase orders. [53] It has adduced evidence that URI missed the payment deadline on 56 of 104 purchase orders between 2004 and 2010. [54] Generally, in the absence of a "time is of the essence" provision, "the number and amount of late payments does not, by itself, decide the issue of materiality." *Sananap v. Cyfred, Ltd.*, No. CVA07-006, 2009 WL 4544805, *22 (Guam Terr. Nov. 25, 2009). Rather, the court must determine whether the late payments "frustrate[d] the purpose of the contract" at issue. *Superior Motels, Inc.*, 195 Cal.App.3d at 1051. In some circumstances, courts

have concluded that a delay in making payments is material as a matter of law. For example, in *Servicios Aereos del Centro S.A. de C.V. v. Honeywell Intern., Inc.*, 252 Fed. Appx. 849 (9th Cir. Oct. 31, 2007) (Unpub. Disp.), the court concluded that late payments constituted a material breach because "SACSA failed to make payments not only when those payments were initially due under the terms of the contract, but also by the deadline subsequently set by Honeywell for SACSA to avoid contractual termination," and because "Honeywell gave proper notice that it intended to strictly enforce the termination deadline." *Id.* at 849; see also *Placo Inv., LLC v. Ibarra*, No. B196846, 2008 WL 2347730, *5 (Cal. App. June 10, 2008) (Unpub. Disp.) (noting that "it is reasonable to infer any delay in the payment of money amounts to a substantial breach when the party now denying breach earlier acknowledges (in writing) that the delay would constitute an 'incurable' and 'material' breach as the appellants so recognized in the negotiated settlement agreement"). [55] In other circumstances, however, courts have determined that late payments are not material. See, e.g., *Adelphia Communications Corporation v. Pauley Construction, Inc.*, A131078, 2012 WL 5936538, *10 (Cal. App. Nov. 28, 2012) (Unpub. Disp.) ("When a party has failed to make progress payments within the time required by the contract, the court must determine whether such failure constitutes a material breach of the parties' contract; and that is a question of fact to be determined by the trial court"); *Korb v. Cutler Trucking, Inc.*, No. A099775, 2003 WL 21766238, *1 (Cal. App. July 30, 2003) (Unpub. Disp.) (affirming the trial court's conclusion that "neither Cutler's delay in paying the relatively small sum overdue for June 1998 nor its relatively short delay in paying Korb's earnings for July 1998 constituted a material breach of the oral agreement"); see also *Associated Builders, Inc. v. Coggins*, 722 A.2d 1278, 1280–81 (Me. 1999) (finding that a short delay in payment, absent any aggravating circumstances, was not a material breach).

53 Pharm. Motion at 14-15.

54 Atteia Decl., ¶ 6.

55 "Although the court is not bound by unpublished decisions of intermediate state courts, unpublished opinions that are supported by reasoned analysis may be treated as persuasive authority." *Scottsdale Ins. Co. v. OU Interests, Inc.*, No. C 05-313 VRW, 2005 WL 2893865, *3 (N.D. Cal. Nov. 2, 2005) (citing *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n. 8 (9th Cir. 2003) ("[W]e may consider unpublished state decisions, even though such opinions have no precedential value")).

***8** Here, there is insufficient evidence for the court to determine, *as a matter of law*, that Urica's late payments constituted a material breach of the contract. First, the contract does not contain a "time is of the essence" provision or any term that addresses late payments. Second, there is no evidence that Pharmaplast advised Urica that it would deem late payment a material breach. Rather, Urica has proffered uncontroverted evidence that Pharmaplast never expressed concern about URI's late payments and routinely accepted late payments for years. [56] Urica, moreover, has adduced evidence that some of the delayed payments resulted from "a serious dispute" regarding the early delivery of goods. [57] As to these shipments, there are triable issues of fact as to whether Urica acted in good faith in delaying payments.

56 Moghavem Decl., ¶ 20 ("At no time during the relationship between Urica and Pharmaplast, including the time where there was disagreement over payment of the goods in the containers at Charlotte, did Dr. Atteia or anyone else acting on behalf of Pharmaplast communicate to me or to anyone else at Urica that Pharmaplast contended that any delay in payment would be treated by Pharmaplast as a ground for rescinding the 2004 Agreement. In fact, Pharmaplast continued to ship goods to Urica until 2011. The first I heard that Pharmaplast was contending that any of Urica's performance under the 2004 Agreement was grounds for terminating that Agreement was in connection with this action").

57 *Id.*, ¶ 19 ("During late 2006 and early 2007 Urica had a serious dispute with Pharmaplast regarding early delivery of two containers of goods at the Port of Charlotte, North Carolina. Because of that dispute I instructed Urica to withhold payment of some invoices until the dispute was resolved. It ultimately was resolved; although it took some time to do so, and all past due invoices were paid").

Indeed, there are triable issues of fact regarding several questions that are relevant in assessing materiality: whether the delays were cured by Urica's subsequent payments; whether Pharmaplast was significantly deprived of the benefits it expected under the contract; and whether Urica acted in good faith when it delayed payments. See

RESTATEMENT (SECOND) OF CONTRACTS, § 241 (2005). [58]

58 Pharmaplast also asserts that Urica materially breached the contract by refusing to accept shipment of two containers of goods it ordered unless Pharmaplast reduced the price of the goods. The shipments were the subject of "a serious dispute" regarding early delivery, however. Urica asserts that it did not accept the goods because they were shipped ahead of schedule; presumably, it had no need for them yet and/or had no space in its warehouse to store them and did not want to pay demurrage charges for them. Given the evidence of this fact Urica has adduced, and the fact that Pharmaplast's evidence shows only that Urica would not accept the shipments unless Pharmaplast lowered the price of the goods, the record contains insufficient facts to permit the court to conclude as a matter of law that Urica's refusal to accept the goods constituted a material breach.

Ultimately, a "[d]elay in performance is a material failure only if time is of the essence, i.e., if prompt performance is, by the express language of the contract or by its very nature, a vital matter." *Edwards v. Symbolic Int'l, Inc.*, 414 Fed. Appx. 930, 931-32 (9th Cir. Feb. 7, 2011) (Unpub. Disp.) (citing *Johnson v. Alexander*, 63 Cal.App.3d 806 (1976)). "The general rule of equity is that time is not of the essence of the contract, unless it clearly appear from the terms of the contract, in the light of all the circumstances, that such was the intention of the parties." *Henck v. Lake Hemet Water Co.*, 9 Cal.2d 136, 143 (1937). Given the absence of such a provision in the contract between Urica and Pharmaplast, the fact that Pharmaplast consistently accepted late payments and the seemingly minor harm the delayed payments caused, the court cannot conclude that they were material breaches as a matter of law. Rather, the jury must weigh the evidence and determine whether, given URI's history of late payments, Pharmaplast was entitled to ignore its contractual obligations. Pharmaplast's motion for summary judgment on this basis must therefore be denied.

4. Whether Urica Has Adduced Evidence Raising Triable Issues of Fact Regarding Damages

***9** Pharmaplast argues finally that summary judgment is appropriate because Urica has not raised triable issues concerning the fact that is suffered measurable damages. [59] The court agrees. Pharmaplast has proffered the uncontroverted expert report of Dr. Jules Kamin, an economics expert, who opines that there is "no basis for Urica to claim any monetary damages in this matter." [60] Kamin's opinion derives primarily from the fact that Pharmaplast's decision to stop quoting prices for URI's new customers occurred *prior* to its purchase-sale agreement with Medline, and evidence that the decision was based on URI's continually late payments, not on a decision to go into business with Medline. [61] Pharmaplast, moreover, continued to supply goods for Urica's existing customers even after it began selling to Medline. As a result, Kamin asserts, Urica did not lose any current customers due to Pharmaplast's decision to sell to Medline, and did not miss an opportunity to sell to new customers because Pharmaplast had stopped quoting prices for new customers prior to the time it contracted with Medline. [62]

59 Pharm. Motion at 15-16.

60 Declaration of Jules Kamin ("Kamin Decl."), Docket No. 109 (Feb. 17, 2013) ¶ 6.

61 *Id.*, Exh. 17, ¶ 43 ("Medline's purchases from Pharmaplast did not overlap any period of time when Pharmaplast would have been willing to sell products to URIHB that were destined for new URIHB customers").

62 *Id.*, Exh. 17, ¶ 40 ("If it is determined that the March 2008 purchase-sale agreement between Medline and Pharmaplast is the event that precipitated interference with URIHB's exclusive distribution rights, then there are no damages to URIHB or Urica. The reason is that the change of terms that precluded Pharmaplast from quoting prices on new business preceded that agreement and was based on independent considerations. In this case URIHB did not lose any sales, and therefore did not lose any profits because of the allegedly interfering acts of Medline and Pharmaplast in entering into the March 2008 agreement and consummating transactions under that agreement. Indeed, Pharmaplast ensured that URIHB could maintain its sales to its existing customers and even produced and delivered supplies for the potential new institutional business").

Kamin further asserts that even if Pharmaplast had been willing to quote prices for new URI customers in the absence of its agreement with Medline, there is *no* evidence that Urica would have been able to woo Medline's customers away or sell to any new customers Medline may have acquired. Based on his review of Urica's and URI's purchases from Pharmaplast between 2008 and 2011, Kamin opines that "[n]ot only had URI[ ] never achieved [Medline's] sales levels historically, but ... it lacked the management, human and financial resources to manage such a large increase in its sales volume. Accordingly, any attribution of Medline's sales to URI[ ] for the purpose of calculating URIHB's damages must be considered speculative." [63] Urica, for its part, has adduced no evidence that it would have been able to service the customers to whom Medline sold.

63 *Id.*, ¶ 44.

It its opposition, Urica concedes that it has not adduced evidence of damages because it "has not completed its damages model." It asserts, however, that "the fact of damage is obvious" and will be proven at trial. To the extent Urica intends to rely on an as-yet unfinished damages model at trial, the expert discovery cut-off passed prior to the date Urica filed its opposition to Pharmaplast's motion. [64] Thus, any report or model created by its damages expert is untimely, and Urica will be barred from using it at trial under Rule 37 of the Federal Rules of Civil Procedure unless it can demonstrate that its failure to meet the deadline was either justified or harmless. See *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001). The court is thus skeptical Urica will be able to prove damages via expert testimony at trial.

64 Order on Stipulation to Establish New Case Management Dates, Docket No. 107 (Feb. 13, 2013) (setting the expert discovery cut-off for March 13).

***10** This is particularly problematic, since Urica's damages theory depends not on past losses but on proving that it lost future sales to unknown customers, and the profits from those sales, as a result of Pharmaplast's breach. Urica argues that its president, Moghavem, had "just ended his involvement with the razor business and was poised to jump start the bandages business." Consequently, it asserts, "[c]alculation of Urica's damages ... requires extrapolation of information from its earlier history and projection of how that information informs a reasonable estimate of future lost profits." [65]

Damages based on lost profits are inherently speculative, particularly when they derive from an unestablished business or potential customers with whom the plaintiff has no existing relationship. Courts are generally hesitant to award such damages unless they can be calculated with reasonable certainty. See *Maggio, Inc. v. United Farm Workers*, 227 Cal.App.3d 847, 871 (1991) ("Damages for loss of profits may be denied to an 'unestablished' or new business as being too uncertain and speculative if they cannot be calculated with reasonable certainty"); see also *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 961 (9th Cir. 2001) ("It has long been settled in California that the proof must establish with reasonable certainty and probability that damages will result in the future to the person wronged" (internal quotation marks omitted)); *Chromatic Communications Enterprises, Inc. v. Business Guides, Inc.*, No. 91-4186, 1993 WL 311503, *10 (N.D. Cal. July 30, 1993) ("Under California law, damages for lost profits may be awarded only if the occurrence and the extent of lost profits can be demonstrated with reasonable certainty," citing *Sanchez-Corea v. Bank of America*, 38 Cal.3d 892, 907 (1985) ("The Bank correctly argues that evidence of lost profits must be unspeculative and in order to support a lost profits award the evidence must show 'with reasonable certainty *both* their *occurrence* and the *extent* thereof,' " quoting *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists*, 14 Cal.App.3d 209, 221 (1971) (emphasis original))). "Courts allow for projections of lost profits for unestablished businesses [only] when those projections are rooted in sound factual and statistical analysis, even though such testimony does not lend itself to absolute certainties with respect to future damages." *Onyx Pharmaceuticals, Inc. v. Bayer Corp.*, No. 09-2145, 2011 WL 7860230, *7 (N.D. Cal. Sept. 21, 2011).

65 Pharm. Opp. at 15-16.

Urica has adduced no "sound factual and statistical analysis" that it would have earned additional profits but for Pharmaplast's alleged breach of the exclusive distributorship contract. In fact, there is *no* analysis, apart from Moghavem's conclusory assertion that "Urica was unable to continue to compete effectively for a portion of the bandages business" once Pharmaplast declined to quote prices for new customers. [66] This very general testimony provides no means of quantifying damages, or provide any factual basis for a damages award. Urica proffers no evidence of any customer it lost or any customer it believes it would have gained had it been able to sell Pharmaplast goods to new customers. It offers no projection—not even a basic estimate—of the

amount of profits it purportedly lost. If the case proceeded to trial on the present record, a jury would have to speculate to award damages to Urica. This is impermissible. See *Vestar Development II, LLC v. General Dynamics Corp.*, 249 F.3d 958, 962 (9th Cir. 2001) (dismissing a breach of contract claim where "[t]he only damages Vestar seeks are the future profits that it hoped to earn from the shopping center it had planned to build on the parcel it was attempting to buy. There is no way to evaluate, other than through speculation, the profits that it might have made"); *Kids' Universe v. In2Labs*, 95 Cal.App.4th 870, 887–88 (2002) ("Dr. Hanson's conclusion that plaintiffs' online business would have resulted in profits was based on an unanalyzed assumption the Kids' Universe Web site would have been a roughly equal competitor with eToys. Further, Dr. Hanson's conclusion [that] plaintiffs lost profits is based on his unexplained projected capital value of Kids' Universe without any analysis of its net worth. In short, Dr. Hanson's comparison of the proposed Web site with eToys's success does not suffice to raise a triable issue of material facts whether Kids' Universe would have realized net profits from the operation of its online business. Therefore, the trial court properly entered summary judgment in favor of the defendants"); *Greenwich S.F., LLC v. Wong*, 190 Cal.App.4th 739, 766 (2010) ("The lost profits claim was based on the assumption that Greenwich S.F. would have constructed the residence according to the plans and specifications without changes and that the venture would have been profitable. These assumptions were inherently uncertain, contingent, unforeseeable and speculative. We conclude the evidence was insufficient to show lost profits with reasonable certainty").

66 Moghavem Decl., ¶ 23.

***11** Significantly, Urica's lost profits claim is not based on the loss of existing business or reduced revenue from customers it supplied prior to Pharmaplast's breach; it has adduced no evidence that it lost even a single existing customer as a result of Pharmaplast's breach. Rather, Urica argues that its adhesive bandage business was on the verge of significant expansion, and absent Pharmaplast's breach its customer base would have grown. "[L]ost anticipated profits for an unestablished business whose operation is prevented or interrupted are generally not recoverable because their occurrence is uncertain, contingent and speculative," however. *Parlour Enterprises, Inc. v. Kirin Group, Inc.*, 152 Cal.App.4th 281, 249 (2007). When a plaintiff claims lost profits associated with a new venture or new customers, "damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." *Kids' Universe*, 95 Cal.App.4th at p. 884. Not only does Urica fail to proffer economic analyses, market surveys, or expert testimony, it has proffered *no* evidence supporting a claim that it would have expanded its customer base had Pharmaplast honored the terms of the contract. Urica adduces no evidence of the estimated amount of business it lost, the profits of comparable businesses in the adhesive bandage market, or the profits of companies operating under similar exclusive dealing arrangements. There is a dearth of evidence from which the court can conclude that Urica's lost profits are anything other than speculative.

As Urica has failed to adduce any evidence that would support an award of lost future profits, it has failed to raise triable issues of fact regarding damages. See *Rowlands v. Hanson*, 55 Fed. Appx. 438, 439 (9th Cir. Jan. 16, 2003) (Unpub. Disp.) ("Given that Rowlands sought only lost profits on his breach of contract claim, that claim fails because he did not show with reasonable certainty that profits were lost and that the loss was a result of [defendant's] breach"). Urica's bald assertion—unsupported by any evidence in the record—that "the fact of damage is obvious" is insufficient to raise triable issues of fact.[67] Even if true, Urica itself admits that there is presently no evidence from which a jury could deduce with reasonable certainty the amount of losses it purportedly suffered. Because Urica has adduced no evidence concerning a necessary element of its breach of contract claim, Pharmaplast's motion for summary judgment on the claim must be granted.

67 The fact that Urica has not adduced any evidence of lost profits is even more problematic when considering that not only will Urica have to prove lost profits at trial, but it must demonstrate that those losses were *caused by the breach*, rather than some other factor. Dr. Kamin has testified that the amount of personal expenditures on non-drug pharmaceutical products, such as adhesive bandages, decreased in 2007 and 2008; he states overall sales were "influenced by the external market and the recession that began in the fourth quarter of 2007," and therefore any lost profits would have to be specifically linked to Pharmaplast's breach, rather than external factors. (Kamin Decl., ¶ 46). Urica has adduced *no* evidence on this point.

C. Whether Medline is Entitled to Summary Judgment on Urica's Claim for Intentional Interference With Contractual Relations

As noted, Medline also seeks summary judgment on Urica's claims against it. The first of these alleges a claim for intentional interference with the Urica-Pharmaplast contract. Under California law, the elements of a "cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts intended or designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126 (1990); see *Quelimane Co. v. Stewart Title Guaranty Co.* 19 Cal.4th 26, 55 (1998); see also *Bank of New York v. Fremont General Corp.*, 523 F.3d 902, 909 (9th Cir. 2008) (citing *Reeves v. Hanlon*, 33 Cal.4th 1140, 1148 (2004)).

Medline's argument mirrors Phamaplast's—i.e., that Urica abandoned the contract and that it has adduced no evidence of damages. [68] Medline also contends there is no evidence that it knew of the exclusive contract between Urica and Pharmaplast. [69]

68 Medline Motion at 18, 23.

69 *Id.* at 21.

***12** For reasons already discussed, there is insufficient evidence to demonstrate, as a matter of law, that Urica intended to abandon the contract. The fact that Moghavem formed URI and Urica consistently placed orders through that company raises triable issues of fact regarding Urica's intent. Additionally, as noted, there is no evidence that Pharmaplast intended to abandon the contract. Urica's failure to proffer any proof of damages resulting from Pharmaplast's breach, however, is fatal to its intentional interference claim. Urica has adduced no evidence that it lost existing customers or sales, or that it lost potential future customers and sales profits as a result of Medline's alleged wrongdoing; it merely asserts that "URI ordered literally tons of bandages from Pharmaplast [between] 2004 [and] 2011," and thus "there is more than enough evidence to establish a triable issue on damages." [70] As noted, Pharmaplast continued to supply goods for Urica's existing customers even after it entered into an agreement with Medline. Urica implicitly acknowledges this fact. Although Pharmaplast and Medline entered into a contract in 2008, Urica concedes that Pharmaplast continued to ship goods to URI through 2011. At that point, Urica ceased submitting purchase orders to Pharamplast. It is undisputed, therefore, that Pharmaplast did not sever its ties with Urica as a result of Medline's purported interference. Rather, Urica continued to place orders to satisfy the needs of its existing customers.

70 Medline Opp. at 20.

Because it has not identified any existing customer it lost due to Medline's alleged interference, Urica's claim is necessarily dependent on evidence of lost *future* customers and sales. As noted, it has submitted no such evidence, and its conclusory assertion that damages are "obvious," and that it will be able to prove future losses at trial is insufficient to raise triable issues of fact. See *Vestar Development II, LLC,* 249 F.3d at 962; *Sebastian Intern., Inc. v. Russolillo*, No. CV 00–3476 SVW (JWJx), 2005 WL 1323127, *8-9 (C.D. Cal. Feb. 22, 2005) (granting summary judgement in defendant's favor on an intentional interference claim because "[p]laintiff has failed to present sufficient evidence to allow a reasonable trier of fact to find that Plaintiff suffered lost profits as a result of interference by Defendants"); *National Right To Life Political Action Committee v. Friends of Bryan*, 741 F.Supp. 807, 812 (D. Nev. 1990) ("[A]lthough damages need not be proved to a mathematical certainty, Plaintiff bears the burden of introducing sufficient facts to enable the Court to arrive at an intelligent estimate of damage [resulting from interference with contract] without speculation or conjecture"); *Hardie's Korn Kettle, Inc. v. Metrovox Snacks*, No. B158352, 2003 WL 21640642, *8 (Cal. App. July 14, 2003) ("The Achille's Heel of HKK's cause of action for 'intentional interference' is failure of proof of damages as required by the fifth element set forth *supra.* It is clear that the damages element in this context is a claim to lost profits.... The record on appeal is devoid of any profit being realized by either HKK or Metrovox on the subject enterprise constituting the joint venture. The cause of action for 'intentional interference' must fail for this reason alone"). [71]

71 At the hearing on the motions, Urica sought leave to file a supplemental brief addressing whether unjust enrichment is a proper measure of damages on an intentional interference with contractual relations claim. The court granted its request. In its supplemental brief, Urica asserts it is undisputed that Medline profited from selling Pharmaplast

goods. Citing *GHK Associates v. Mayer Group*, 224 Cal.App.3d 856 (1990), Urica contends that Medline was unjustly enriched in the amount of this profit and that the profits should therefore be the measure of its damages. (Supplemental Brief re: The Measure of Damages, Docket No. 134 (Apr. 25, 2013) at 5). This argument is unavailing. In *GHK Associates*, the court held that in certain instances, "plaintiff's loss of profits [suffered as a result of interference with a contract can] be measured by defendant's actual profits." *Id.* at 874. The court found use of this measure particularly appropriate when "the difficulty of arriving at a precise figure for [a plaintiff's] damages ... was created solely by [defendant's] wrongful acts." *Id.* *GHK*, however, is easily distinguishable.

First, the *GHK* court noted at the outset that such a measure of damages can only be used "[w]here the *fact* of damages is certain." *Id.* at 873 (emphasis original). It noted that "[t]here [was] substantial evidence in the record to support the trial court's finding that the [plaintiff's new business] would have resulted in a profit to MDC/MGI and GHK had appellants not breached the agreements." *Id.* at 875-76. There was thus evidence that plaintiffs had suffered loss; because the difficulty in measuring that loss was solely the result of defendant's conduct, the court permitted use of defendant's profits as the measure of damages. Here, there is *no* evidence in the record that Urica suffered *any* damage as a result of Medline's alleged interference. Put differently, the fact of damage is not certain. Pharmaplast continued to supply goods to satisfy the needs of Urica's current customers, and Urica has, as noted, adduced no evidence that it would have acquired new customers had Medline not interfered. Thus, Urica has not satisfied *GHK*'s threshold requirement that it adduce evidence showing the fact of damage.

More fundamentally, under California law, a plaintiff generally cannot recover more in compensatory damages on an intentional interference theory than it would have received had the contract been performed. See *Seaboard Music Co. v. Germano*, 24 Cal.App.3d 618, 622 (1972) (noting, with respect to an intentional interference claim, that "the injured party shall be compensated for all detriment proximately caused by breach of an obligation, whether it arises out of contract or not. Since appellants concede the parties could have reasonably anticipated loss of profits as a result of their action, that loss becomes the proper measure of damages under either [Civil Code § 3300 (governing contract damages) or Civil Code § 3333 (governing tort damages) and accounts for the fact the trial court awarded the same amount of damages ($6,222), as to this aspect of the case, against Ohmer who breached the lease *and against appellants who tortiously induced the breach*" (emphasis added)). Adhering to this rule, the *GHK Associates* court emphasized that using defendant's profits as the measure of damages was appropriate because there was "no evidence in the record that GHK [would] receive under the judgment a greater amount than it would have gained had the agreements been fully performed." *Id.* at 876. Here, as noted, there is no evidence that Urica suffered any damage as a result of Pharmaplast's breach, or that it would have made additional profits had the contract been honored. Therefore, awarding Urica damages in the amount of Medline's profits would afford Urica an inappropriate windfall, since such damages would of necessity be more than the zero damages proven to have resulted from the breach. Thus, Urica cannot rely on the fact that Medline may have profited from its alleged interference to defeat summary judgment. As Urica has failed to adduce any evidence that it suffered damages—i.e., because the fact of damages is not certain—summary judgment is appropriate.

***13** Urica's failure to adduce *any* evidence demonstrating that it suffered harm as a result of Medline's alleged interference is fatal to its claim. Medline's motion for summary judgment on Urica's intentional interference with contract claim must therefore be granted. [72]

72 Because Urica has failed to adduce evidence of damages, the court need not address Medline's argument that it did not know of the agreement between Urica and Pharmaplast. It notes, however, that Urica has adduced evidence that Mogahavem informed Medline in 2007 of the exclusive dealing arrangement with Pharmaplast. (Ho Decl., Exh. O ("Mogahavem Depo.") at 188:6-16 (stating that Moghavem "said to the Medline executives that Urica had an exclusive contract with Pharmaplast

which precluded Pharmaplast from selling its products ... to anyone but Urica")). There is also evidence that Atteia, a Pharmaplast executive, told Medline's Jakc Bowser that Pharmaplast had an exclusive agreement with Urica. (See PMK Depo at 89:11-16 ("Q: Did you tell—but you told [Bowser] about [the agreement with Urica]? A: Yes. Q: Okay. And did you tell him that there was an exclusive in there? A: I told him about the relation, that it was an exclusive relationship ...")). This evidence is likely sufficient to raise triable issues of fact regarding Medline's knowledge of the distributorship exclusive contract. Because Urica has adduce no evidence of damages, however, this fact does not affect the outcome of the motion.

D. Whether Medline is Entitled to Summary Judgment on Urica's Breach of Contract Claim

Urica also asserts a breach of contract claim against Medline, based on its purported breach of the confidentiality agreement related to the companies' negotiation of a possible purchase of URI by Medline. Specifically, Urica argues that "Medline breached the [confidentiality agreement] because it went around Urica to get price quotes and buy bandages directly from Pharmaplast." [73] As noted, to succeed on a breach of contract claim, Urica must prove: (1) the existence of a contract; (2) its performance of the contract, or a legally cognizable excuse for nonperformance; (3) defendant's breach; and (4) resulting damage. *In re Facebook Privacy Litig.*, 791 F.Supp.2d at 717. Medline advances two interrelated arguments concerning its entitlement to judgment on the breach of contract claim: that Urica bargained away the basis of the claim during negotiations, and that Medline did not use any of Urica's confidential information in a manner that violated the terms of the agreement. [74]

73 Medline Opp. at 23.

74 Medline also contends that Urica's breach of contract claim is subject to an arbitration provision contained in the confidentiality agreement. The contract states that "[a]ny dispute [for money damages] arising under this Agreement shall be submitted to binding arbitration." (Medline Agreement at 6). Medline argues that this provision bars Urica from seeking damages in a court action. Medline, however, did not invoke its right to arbitrate at any point prior to its filing of a summary judgment motion, despite the fact that the case has been ongoing for two years. It has therefore waived the right. The California Supreme Court has identified factors that should be considered in assessing whether a right to arbitrate has been waived: "(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and (6) whether the delay affected, misled, or prejudiced the opposing party." *St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal.4th 1187, 1196 (2003) (internal quotation marks and citations omitted); see also *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1124 (9th Cir. 2008).

At no point since this action was filed has Medline sought a stay, moved to compel arbitration, or in any other way attempted to enforce the arbitration clause. Medline asserted counterclaims against Urica and conducted extensive discovery over a period of several months. Medline, in short, engaged the litigation machinery and acted in a manner inconsistent with its right to arbitrate. Medline's only prior mention of the arbitration clause was its assertion of arbitration as an affirmative defense. This is not sufficient to preserve its right to arbitrate. See *Davis v. Continental Airlines, Inc.*, 59 Cal.App.4th 205, 208-16 (1997) (affirming the trial court's denial of defendants' motion to compel arbitration where defendants pled their right to arbitrate as an affirmative defense, but waited six months to seek a stay pending decision of a future motion to compel arbitration, during which time they propounded discovery); *Hayworth v. City of Oakland*, 129 Cal.App.3d 723, 729-30 (1982) ("[W]hile it was raised as an affirmative defense in the City's response to the petition for writ of mandate, the City took no further steps to stay the proceedings or to obtain dismissal on that ground, instead permitting the matter to go to trial.... Such a

> defendant may not ... participate in litigation in such a manner as to constitute testing the water before taking the swim" (internal quotation marks omitted)). Consequently, the court concludes that Medline waived its right to arbitrate by participating fully in this litigation and failing to raise the issue sooner.

1. Whether Medline Was Prohibited Under the Contract From Transacting Business With Pharmaplast

***14** Medline's primary contention is that its entry into a purchase agreement with Pharmaplast did not breach the confidentiality agreement because the contract did not preclude it from executing such a contract. It asserts that the purpose of the confidentiality agreement was to facilitate its purchase of goods from the "Universal Group," which included both Urica and Pharmaplast, and maintains that its entry into a contract with Pharmaplast was consistent with this purpose. Medline asserted a similar argument in its motion to dismiss the first amended complaint. Although the court observed that the argument "ha[d] some intuitive force,"[75] it ultimately concluded that Urica's allegations adequately stated a breach of contract claim. The court noted the statement in the confidentiality agreement that the purpose of sharing confidential information was to facilitate Medline's purchase of products "from or through the Universal Group," which included *both* Pharmaplast and URI.[76] This language suggested that the parties may have contemplated that both the party from which the products came (Pharmaplast, the supplier) and the party through which the products were sold (URI, the middleman) would participate in any purchase of first aid items by Medline. The contract similarly provided that the Universal Group and Medline would use the confidential information received "solely in connection with an evaluation of the desirability of [Medline] and Universal Group entering into a subsequent written agreement relating to the Business Purpose."[77] Given the contract's reference to "the Universal Group," the court found that there was some ambiguity on the face of the contract as to whether Medline could use confidential information acquired as a result of the agreement to enter into a purchase agreement not with the Universal Group collectively, but with Pharmaplast alone. It noted that "[f]urther evidence of the parties' intent [might] establish [whether] the contract [was] or [was] not susceptible [of] this reading."[78]

75 MTD Order at 18.

76 Medline Agreement at 1.

77 *Id.*

78 MTD Order at 19.

In support of its motion for summary judgment, Medline has proffered copies of earlier drafts of the confidentiality agreement. In this draft, paragraph 8 of the agreement explicitly prohibited the parties from "initiat[ing] or maintain[ing] any contact with or enter[ing into] any agreement with any partner, member, manager, officer, director, or employee of Universal Group regarding any matter whatsoever[,] including[,] but not limited to[,] the business, operation, prospects, finances, product development, or solicit[ation of] ... employee[s] of Universal Group."[79] Medline rejected this provision, and it was replaced with a paragraph that prohibited the parties from "solicit[ing] or employing or enter[ing] into any transaction with any employee of the other party."[80] Medline argues that its rejection of a provision that would have precluded it from entering into any agreement "whatsoever" with any "member" of the Universal Group—including an agreement with Pharmaplast—shows that the parties did not intend to prohibit Medline's purchase of goods directly from Pharmaplast, but sought only to ensure that information they exchanged was not disclosed to third parties.[81]

79 Declaration of Catherine Valerio Barrad ("Barrad Decl."), Docket No. 104 (Jan. 24, 2013), Exh. B at 75.

80 Medline Agreement at 5.

81 Medline Motion at 13-15.

Urica counters that, despite the revision, the business purpose of the confidentiality agreement was to have Medline purchase goods from Pharmaplast only through Urica. It asserts that Medline's contract with Pharmaplast violates this purpose and breaches the confidentiality agreement. It relies on another portion of paragraph 8 of the revised draft, which provides that "[a]ll (a) communications, (b) requests for additional information, (c) requests for facility tours ..., and (d) discussions or questions regarding procedures ... will be submitted or directed to Afshin Moghavem." It argues that properly interpreted, this provision, coupled with the business

purpose of the agreement, bars Medline from transacting directly with Pharmaplast. [82]

82 Medline Agreement at 5.

In general, "summary judgment is appropriate [in contract interpretation cases] only if the contract or the contract provision in question is unambiguous." See *Northwest Acceptance Corp. v. Lynnwood Equipment, Inc.*, 841 F.2d 918, 920 (9th Cir. 1988) (quoting *National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983)) (in turn quoting *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981)). The rationale for this rule is that "ambiguity in a contract raises a question of intent, which is a question of fact precluding summary judgment." *National Union Fire Ins. Co.*, 701 F.2d at 97. "The usual statement of the rule, however, assumes that there is at least some evidentiary support for competing interpretations of the contract's language." *Id.* Where there is no evidentiary support for the interpretation urged by a party, summary judgment against that party is appropriate, even if the contract is ambiguous on its face. *Id.* ("National cannot rely on the mere possibility of a factual dispute as to intent to avert summary judgment. Nor can it expect the district court to draw inferences favorable to it when they are wholly unsupported. National failed to raise a genuine issue of material fact as to the contract's proper interpretation. Summary judgment was appropriate"). As the Ninth Circuit has explained:

> ***15** "If we find a contract to be ambiguous, we 'ordinarily' are hesitant to grant summary judgment 'because differing views of the intent of parties will raise genuine issues of material fact.' *Maffei v. Northern Ins. Co.*, 12 F.3d 892, 898 (9th Cir. 1993). This circuit has not, however, adopted a rigid rule prohibiting reference to extrinsic evidence in resolving a contractual ambiguity on a summary judgment motion. See, e.g., *International Bhd. of Elec. Workers Local 47 v. Southern Cal. Edison Co.*, 880 F.2d 104, 107 (9th Cir. 1989) (examining parol evidence on summary judgment motion in effort to reconcile conflicting contract provisions). Rather, '[c]onstruing all evidence in the light most favorable to, and making all reasonable inferences in favor of, the non-moving party,' we have sought to determine whether the ambiguity could be resolved in a manner consistent with the non-moving party's claim. *Id.* Only if the ambiguity could be so resolved would summary judgment be denied. *Id." San Diego Gas & Elec. Co. v. Canadian Hunter Marketing Ltd.*, 132 F.3d 1303, 1307 (9th Cir. 1997).

Medline asserts that evidence of its negotiations with Urica clearly demonstrates that the parties did not intend to prohibit direct purchase transactions between it and Pharmaplast, but only to preclude it from soliciting Urica's or Pharmaplast's employees and using confidential information in dealings with third parties. Parol "evidence concerning prior negotiations" can be used "to resolve uncertainty in the language of a contract." *Du Frene v. Kaiser Steel Corp.*, 231 Cal.App.2d 452, 457 (1964); see also *Headlands Reserve, LLC v. Center For Natural Lands Management*, 523 F.Supp.2d 1113, 1129 n. 7 (C.D. Cal. 2007) ("The drafting history of the CNLM Agreement provides further evidence that the parties made a conscious decision not to assist one another in obtaining tax benefits from the transaction. Contrary to Headlands' assertion that the parties agreed that the transaction would be a 'below market sale,' CNLM offers evidence that the 'below market sale' provision that was included in the Steele Agreement was subsequently omitted from the CNLM Agreement"); *SCC Alameda Point LLC v. City of Alameda*, —— F.Supp.2d ——, 2012 WL 4059884, *12 (N.D. Cal. Sept. 14, 2012) ("SCC Alameda points to only one provision it proposed throughout the negotiating period that would have allowed it to recover its costs other than any unspent deposits made for the City's Pre–Development Costs. That is the 'Break-up Fee,' proposed in a draft dated June 11, 2007. SCC Alameda agreed to delete the 'break-up fee' provision from the subsequent June 16, 2007 draft. There is no evidence in the record of any other draft language proposed by SCC Alameda that explicitly concerned recovery of general out-of-pocket costs. David Brandt's testimony on this point is undisputed").

Here, nothing on the face of the contract clearly prohibits Medline from transacting business with Pharmaplast; it prohibits only the solicitation of Urica and Pharmaplast employees and use of confidential information for purposes other than the business purpose identified in the agreement. The fact that Urica proposed a provision that prohibited Medline from entering into an agreement with Pharmaplast "regarding any matter whatsoever," that Medline objected to the provision, and that it was replaced with a narrower restriction, arguably reflects the parties' objective mutual intent that there was to be no blanket restriction on Medline contracting with Pharmaplast. This is so because the interpretation of the contract urged by Urica—i.e., that Medline was prohibited from contracting with Pharmaplast—was explicitly rejected by Medline during negotiations. Thus, the contract is reasonably susceptible of the interpretation that Medline was permitted to transact business directly with

Pharmaplast, so long as it did not use confidential information obtained from Urica to do so.

***16** The court cannot conclude, however, that Medline's interpretation is the *only* reasonable interpretation of the agreement. The business purpose of the agreement, as set forth in paragraph 1, was to facilitate Medline's purchase of goods "from or through the Universal Group," which, as noted, included both Pharmaplast and URI.[83] As the court previously discussed in its order on Medline's motion to dismiss, this language could be interpreted as reflecting the parties' intent that, for the duration of the confidentiality agreement, URI would act as the middleman in any subsequent transaction between Medline and Pharmaplast. Medline has not adduced sufficient evidence concerning the communications that surrounded the substitution of language in paragraph 8 to demonstrate, as a matter of law, that the parties objectively intended it could purchase goods directly from Pharmaplast. While the fact that the agreement was revised to delete language that would have prohibited this makes Medline's interpretation plausible, it does not make it the only reasonable interpretation, particularly given the agreement's use of the term "Universal Group," which included both Pharmaplast and URI, and the portion of paragraph 8 requiring that all communications be submitted or directed to Moghavem or another Urica officer.

83 Medline Agreement at 1.

Thus, even in its revised form, paragraph 8 of the agreement is ambiguous regarding Medline's authority to deal directly with Pharmaplast. It states that all communications regarding the "Business Purpose"—i.e., all communications regarding Medline's purchase of goods from and through the Universal Group—were to be directed to Moghavem or Amir Daroubakhsh, another Urica official.[84] While the paragraph does not expressly prohibit direct business dealings between Medline and Pharmaplast, as the earlier draft did, it is nonetheless reasonably susceptible of Urica's interpretation that Medline was required to make any purchase of Pharmaplast goods through URI. Medline "communicated" with Pharmaplast when it entered into a purchasing contract with it, and that communication did not go through Moghavem or Daroubakhsh. Because the contract is reasonably susceptible of the interpretation Urica advocates, as well as the interpretation Medline advances, there are triable issues of fact as to whether Medline breached the agreement by transacting business directly with Pharmaplast.[85]

84 Medline Agreement at 5.

85 Medline contends that Urica has not previously argued that its contract with Pharmaplast, standing alone, constituted a breach of the contract. Rather, it asserts, Urica previously claimed that Medline had used confidential information in dealing with Pharmaplast, and that it was the *use* of confidential information that constituted a breach. Medline also argues that Urica's pleadings only refer to an alleged breach of paragraph 1 of the agreement, not paragraph 8. In the second amended complaint, Urica alleged that Medline "arranged to buy products directly from Pharmaplast in reliance on and using the [c]onfidential [i]nformation disclosed by URI." (SAC, ¶ 23). It also alleged, however, that "Medline purchases directly from Pharmaplast from about 2008 to date are in breach of [the confidentiality agreement]." (SAC, ¶ 24). Urica thus appears to have alleged two theories of breach. While generally a plaintiff may not assert a new theory of liability subsequent to the filing of a motion for summary judgment, Medline has been on notice of Urica's theory since at least the filing of the second amended complaint. See *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000) ("Because [Plaintiffs] raised the disparate impact theory of liability for the first time at summary judgment, the district court did not err when it did not allow them to proceed on it"). Stated differently, Medline has been aware of the alleged conduct that Urica contends breached the agreement since the pleading stage. Compare *Patmont Motor Werks, Inc. v. Gateway Marine, Inc.* No. C 96–2703 THE, 1997 WL 811770, *5 (N.D. Cal. Dec. 18, 1997) ("[P]laintiff did not plead in its complaint that defendant breached the contract by failing properly to behave himself; rather, plaintiff alleged only that defendant improperly used the Go-Ped mark in his e-mail address. Therefore, plaintiff cannot rely on this theory to survive defendant's summary judgment motion"). Furthermore, although Urica did not specifically mention paragraph 8 of the confidentiality agreement in the second amended complaint, its general basis for asserting a breach of contract has been consistent. Consequently, it cannot be said that Medline was surprised or

prejudiced because Urica's opposition to its motion relied on paragraph 8. See *Jefferson v. Chase Home Finance*, No. C 06-6510 THE, 2008 WL 1883484, *6 (N.D. Cal. Apr. 29, 2008) (noting that courts have discretion to refuse to allow the assertion of new theories in opposition to summary judgment, but that "even where plaintiffs shift gears and set forth an entirely new theory in opposition to summary judgment, some prejudice to defendant must be shown for this court to reject a new theory," citing *Evans v. McDonalds Corp.*, 936 F.2d 1087, 1090-91 (10th Cir. 1991) ("As a general rule, a plaintiff should not be prevented from pursuing a valid claim just because she did not set forth in the complaint a theory on which she could recover, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense on the merits")). Medline adduces no evidence that it has been prejudiced by Urica's argument that it breached paragraph 8, in addition to paragraph 1. Given the interrplay between paragraph 1 and paragraph 8—i.e., the fact that paragraph 8 expressly requires that all communications concerning the business purpose set forth in paragraph 1 be funneled through URI—the court concludes that Medline has been on notice of the basis for Urica's claim throughout and has had an adequate opportunity to conduct discovery on this claim.

***17** Medline contends that any ambiguity in the contract must be resolved in its favor, as Urica was the drafter of the agreement. When there is uncertainty in the wording of a contract, it must be interpreted "most strongly against the party who caused the uncertainty to exist." CAL. CIV. PROC. CODE § 1654; see also *Acorn v. Household Intern., Inc.*, 211 F.Supp.2d 1160, 1173 (N.D. Cal. 2002) ("In this circumstance, the doctrine of contra proferentem dictates that all ambiguities in the agreement be construed against [the drafting party]"). Medline's own evidence regarding the drafting process, however, demonstrates that the parties actively negotiated the contract's terms. "[I]t has been held that when an agreement is arrived at by negotiating, the 'preparer' principle should not be applied against either party." *Dunne & Gaston v. Keltner*, 50 Cal.App.3d 560, 563 n. 3 (1975); see also *County of San Joaquin v. Workers' Comp. Appeals Bd.*, 117 Cal.App.4th 1180, 1186 (2004) ("[A] contract is not automatically construed against a drafter where ... the contract is the result of negotiations"). The parties emailed versions of the confidentiality agreement back and forth several times, and Medline made multiple revisions. Accordingly, the court cannot conclude that any ambiguity in the agreement is attributable solely to Urica. Moreover, the rule favoring the interpretation of the non-drafting party "does not stand for the proposition that, in every case where one of the parties to a contract points out a possible ambiguity, the interpretation favored by the nondrafting party will prevail." *Rainier Credit Company v. Western Alliance Corp.*, 171 Cal.App.3d 255, 263-64 (1985). Rather, "the rule remains that the trier of fact will consider any available extrinsic evidence to determine what the parties actually intended the words of their contract to mean.... Only in those instances where the extrinsic evidence is either lacking or is insufficient to resolve what the parties intended the terms of the contract to mean will the rule that ambiguities are resolved against the drafter of the contract be applied." *Id.* Accordingly, applying the doctrine of *contra proferentum* is not an appropriate basis upon which to enter summary judgment in Medline's favor. It is for the jury to weigh the evidence regarding the mutual objective intent.

2. Whether There is a Triable Issue of Fact as to Whether Urica Suffered Damages as a Result of Medline's Purported Breach of the Confidentiality Agreement

While the confidentiality agreement is reasonably susceptible of the interpretation Urica advocates, its failure to adduce any evidence regarding the damage it has suffered is fatal to its breach of contract claim against Medline. The conduct that constitutes Medline's purported breach of the confidentiality agreement and the conduct that allegedly constitutes intentional interference with Urica's contract with Pharmaplast is identical; both claims are based on the fact that Medline contracted directly with Pharmaplast, rather than through Urica. Urica alleges that this conduct both intentionally interfered with its contract with Pharmaplast and breached the confidentiality agreement. As noted, Urica has adduced no evidence that it was damaged by Medline's interference; because Urica alleges that the same conduct constitutes both interference and a breach of the confidentiality agreement, it follows that Urica has not adduced evidence of damages resulting from Medline's alleged breach as well. Urica has proffered no evidence that it lost existing or future customers or that it was deprived of sales as a result of the Medline-Pharmaplast agreement. Nor has it adduced evidence that Medline disclosed its

confidential information to a third party, or that it was injured by such a disclosure. On this record, therefore, any award of damages would be entirely speculative.

***18** It is undisputed that Pharmaplast continued to supply goods so that Urica could meet its existing customers' needs, and Urica has adduced no evidence—expert or otherwise—that it would have acquired new customers had Medline not breached the agreement. Without such proof, or evidence that Urica was damaged by a disclosure of its confidential information, Urica's breach of contract claim fails. See *Rowlands*, 55 Fed. Appx. at 439 ("Given that Rowlands sought only lost profits on his breach of contract claim, that claim fails because he did not show with reasonable certainty that profits were lost and that the loss was a result of [defendant's] breach").

E. Whether Medline is Entitled to Summary Judgment on its Indemnity Claim against Pharmaplast

Medline seeks summary judgment on its claim against Pharmaplast; it asserts that Pharmaplast must indemnify it for the costs it has incurred defending against Urica's claims. Medline and Pharmaplast dispute the proper interpretation of paragraph 9 of the Medline-Pharmaplast agreement. The agreement provides that it "shall be construed and enforced in accordance with the laws of Illinois."[86] As a result, in resolving Pharmaplast's motion to dismiss the indemnity claim, the court earlier concluded that Illinois law controlled the interpretation and enforceability of the agreement.[87]

Paragraph 9 of the agreement states, in relevant part:

> "Seller expressly warrants that the Products comply with any and all specifications for the Products, and that the Products are free from any and all defects, including but not limited to defects in manufacture, workmanship, design and labeling (except insofar as Buyer provides Artwork under section 5). Seller shall indemnify, defend, and hold harmless Buyer against any and all claims, liabilities and damages (collectively, the 'Claims'), and the costs associated with the Claims, arising out of or relating to the sale and/or use of the Products, including but not limited to personal injury, property damage, and patent and intellectual property infringement."[88]

"An indemnity contract or contract provision is construed like any other contract. In construing an indemnification agreement the court is bound to give effect to the intention of the parties determined solely from the language used when no ambiguity exists." *Higgins v. Kleronomos*, 121 Ill.App.3d 316, 319 (1984) (citation omitted). The contract's words are typically given their "plain and ordinary meaning." See *Nicor Gas Co. v. Village of Wilmette*, 379 Ill.App.3d 925, 929 (2008).

86 Medline-Pharmaplast Agreement at 1.

87 Order Denying Motion to Dismiss Crossclaim ("Cross-Claim Order"), Docket No. 55 (May 9, 2012) at 8 ("[T]he court will apply Illinois contract law to interpret the agreement").

88 *Id.*

The terms of the indemnity provision appear clear and unambiguous. Pharmaplast agrees to indemnify Medline for "any and all" claims "arising out of or relating to the sale and/or use of the Products...." Illinois courts have held that terms such as "any and all" are expansive in scope. See *Buenz v. Frontline Transp. Co.*, 227 Ill.2d 302, 318 (2008) (observing that the term "any and all claims arising out of" was "very broad" and had a "common unambiguous meaning"); *Haynes v. Montgomery Ward & Co.*, 47 Ill.App.2d 340, 346-47 (1964) ("The words 'any and all' are all inclusive; their conciseness does not limit their scope; their coverage would not have been extended by making them more specific").

The term "arising out of or relating to" is similarly broad. See *Keeley & Sons, Inc. v. Zurich* American Ins. Co., 409 Ill.App.3d 515, 521-22 (2011) (characterizing an arbitration agreement that used "arising out of relating to" language as "sufficiently broad in scope to be deemed generic in its application" and therefore covers the "the full breadth" of disputes that may conceivably arise out of the agreement); *J & K Cement Const., Inc. v. Montalbano Builders, Inc.*, 119 Ill.App.3d 663, 456 (1983) ("The language employed in the arbitration clause in the case at bar is very broad, encompassing all claims, disputes and other matters 'arising out of, or relating to this Agreement, or the breach thereof....' From the breadth of the wording, we believe the parties intended to resolve all types of disagreements pertaining to the construction of the home"). The use of these terms in conjunction with one another reflects the parties' intent to enter into an indemnity provision that encompassed a wide range of claims.

***19** The indemnity provision covers all claims that arise out of or relate to the "sale and/or use of the Products." This clearly includes Urica's claims. As noted, Urica entered into an exclusive agreement with Pharmaplast that gave it the sole right to sell Pharmaplast's products in the Western hemisphere. Urica contends that Pharmaplast purportedly breached the contract by selling products directly to Medline, and that Medline intentionally induced the breach. All of Urica's allegations concern Pharmaplast's "sale" of products to Medline, as well as Medline's resale of the products to third parties. Given the sweeping language of the indemnity provision, as well as the substance of Urica's complaint, the contract obligates Pharmaplast to indemnify Medline.

Pharmaplast advances a series of arguments as to why the indemnity provision does not cover Urica's claims against Medline. The court has rejected almost all of its arguments, however, in denying Pharmaplast's motion to dismiss. In its opposition to Medline's motion for summary judgment, for example, Pharmaplast argues that the indemnity provision does not apply to Urica's claims against Medline because they are not personal injury or breach of warranty claims, [89] that Urica's claims against Medline do not arise out of the sale of Pharmaplast goods, [90] and that Medline's interpretation of paragraph 9 is unreasonable. [91] Pharmaplast devotes only a few sentences to each argument.

89 Indemnity Opp. at 12.

90 *Id.* at 14.

91 *Id.* at 15.

In denying Pharmaplast's motion to dismiss, the court addressed each of these contentions. [92] Pharmaplast has reasserted the arguments without further elaboration or evidence, and the court sees no reason to revisit its earlier conclusions. [93] As a result, the court addresses Pharmaplast's arguments only briefly here. Pharmaplast first asserts that paragraph 9's reference to "personal injury, property damage, and patent and intellectual property infringement" claims indicates that the scope of the indemnity provision is limited to those kinds of disputes. [94] The clause, however, covers claims "including, but not limited to" these type of claims. The parties' use of this phrase reflects an intent that the list of claims not be considered exclusive. Courts applying Illinois law have interpreted "including, but not limited to" in this fashion. See *Northern Trust Co. v. MS Securities Servs., Inc.*, No. 05 C 3370, 2006 WL 695668,*6 (N.D. Ill. Mar. 15, 2006) (" '[T]here is a strong likelihood that the parties intended that the general classification include not only items resembling those enumerated, but also items of other sorts' if the phrase, 'including, but not limited to,' is used," quoting CORBIN ON CONTRACTS, § 24.28); *Witz v. Apps*, No. 00 C 3662, 2000 WL 1720434, *5 (N.D. Ill. Nov. 14, 2000) (rejecting an interpretation of an arbitration provision that "neglect[ed] to even consider the phrase 'including, but not limited to' " because that "language necessarily include[d] other disputes not specifically listed," and did "*not* limit[ ] [the type of disputes covered] to terminations") (emphasis original); see also *Paxson v. Board of Educ.*, 276 Ill.App.3d 912, 920 (1995) (stating that term "include" is one "of enlargement, not limitation").

92 Crossclaim Order at 10-13.

93 The only evidence Pharmaplast proffers to supplement its arguments regarding interpretation of the indemnity provision is Atteia's declaration. He states that it "was not in [his] contemplation at the time [he] signed the [Medline-Pharmaplast] Agreement" that Pharmaplast would have to indemnify Medline "for [its] own intentional or willful misconduct or Medline's own breaches of contracts with others." (Declaration of Mamdouh Atteia ("Indemnity Atteia Decl."), Docket No. 115 (Mar. 18, 2013), ¶ 14). There is no evidence that Atteia's subjective understanding of the agreement was communicated to Medline, however, and his interpretation is at odds with the clear, unambiguous language of the contract. It is the *objective* mutual intent of the parties that controls. See *United Commercial Ins. Service, Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992) ("The relevant intent is 'objective'—that is, the intent manifested in the agreement and by surrounding conduct—rather than the subjective beliefs of the parties. For this reason, the true intent of a party is irrelevant if it is unexpressed"); *Brant v. California Dairies*, 4 Cal.2d 128, 133 (1935) ("[I]t is now a settled principle of the law of contract that the undisclosed intentions of the parties are, in the absence of mistake, fraud, etc., immaterial; and that the outward manifestation or expression of assent is controlling. This is the 'objective' standard"); *Mission Valley East. Inc. v. County of Kern*, 120 Cal.App.3d 89, 97 (1981) ("The law governing interpretation of written

instruments establishes that the subjective intent of a party is of no moment in ascertaining the meaning of the words used in the instruments"); see also *Empro Mfg. Co., Inc. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) ("[I]f intent were wholly subjective there would be no parol evidence rule, no contract case could be decided without a jury trial, and no one could know the effect of a commercial transaction until years after the documents were inked.... '[I]ntent' in contract law is objective rather than subjective"); *Continental Cas. Co. v. Steelcase Inc.*, No. 02 C 8064, 2004 WL 1965699, *8 (N.D. Ill. Aug. 23, 2004) ("Illinois contract law looks with particular disfavor on the use of subjective evidence—such as an interested party's testimony—to contradict the otherwise clear written terms of a contractual document," citing *Ocean Atlantic Development Corporation v. Aurora Christian Schools, Inc.* 322 F.3d 983 (7th Cir. 2003) (collecting cases)).

94 Indemnity Opp. at 13.

***20** Pharmaplast next attempts to inject ambiguity into the provision by noting that it is captioned "Warranty; Indemnity; Limitations of Liability."[95] The paragraph groups a warranty clause (the first sentence) and an indemnity provision (the second sentence) together. Pharmaplast contends that this grouping and sequence requires that the warranty and indemnity provisions be interpreted in light of another. The warranty provision represents that Pharmaplast's products are "free from any and all defects, including but not limited to defects in manufacture, workmanship, design and labeling."[96] It contends that, in combination with the indemnity provision's reference to "personal injury, property damage, and patent and intellectual property infringement" claims, the language of the warranty provision reflects the parties' intent that both the warranty and indemnity provisions be limited to "claims, liabilities and damages" arising out of the workmanship and manufacture of the products.[97] As Urica does not contend that Pharmaplast's products are defectively manufactured or designed, or that a warranty was breached, Pharmaplast asserts the indemnity provision does not apply.

95 *Id.* at 12-13.

96 Medline-Pharmaplast Agreement, ¶ 9.

97 Indemnity Opp. at 13.

As the court previously noted, this interpretation contradicts the plain language of the agreement, which uses broad, generic words to describe the scope of the indemnity provision and explicitly states that it extends to claims related to the products' sale, as opposed to their manufacture, production and design.[98] Adopting Pharmaplast's view, moreover, would violate the well-settled rule that all provisions in a contract be read in conjunction with one another and that each be given effect if possible. The warranty provision covers "defects in manufacture, workmanship, design and labeling." The concluding phrase of the indemnity provision indicates that it extends to a variety of claims that do not necessarily implicate defects in workmanship or design. Products can be free of defects and comply with specifications, yet still cause personal injury or property damage, or infringe intellectual property rights. It would be difficult, if not impossible, to interpret the indemnity provision as limited to warranty and products liability claims, on the one hand, but to give effect to the parties' obvious intention that indemnity be available for intellectual property claims, on the other. Limiting the indemnity provision to claims alleging defects in manufacture, workmanship, design and labeling would render the indemnity provision's reference to the types of claims it covers surplusage. See *Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill.App.3d 437, 451 (2007) ("Rather than adopting a stilted reading that turns part of the provision into mere surplusage, we choose the interpretation that gives full effect to the language used ... in [the] contract"); *Home & Auto Ins. Co. v. Scharli*, 10 Ill.App.3d 133, 136 (1973) ("[I]n construing a contract, meaning and effect must be given to every part, and no part should be rejected as surplusage unless absolutely necessary since it is presumed that each provision was inserted deliberately and for a purpose"); see also *Dribeck Importers, Inc. v. G.Heileman Brewing Co., Inc.*, 883 F.2d 569, 573 (7th Cir. 1989) (stating that under Illinois law, "meaning and effect should be given, if possible, to every part of a contract including all its terms and provisions. No part of a contract should be rejected as meaningless or surplusage unless absolutely necessary," quoting *Gross v. University of Chicago,* 14 Ill.App.3d 326, 338 (1973) (internal quotations omitted)). For these reasons, the court does not find paragraph 9 reasonably susceptible of Pharmaplast's proposed interpretation.

98 Crossclaim Order at 11.

Pharmaplast does offer one new basis for opposing Medline's motion for summary judgment on the indemnity claim, however. It asserts that the Medline-Pharmaplast agreement is void because it was induced by fraud. Since Pharmaplast asserts fraudulent inducement as an affirmative defense to enforcement of the contract, it bears the burden of proving each element of that defense. See *Celotex*, 477 U.S. at 322 (noting that summary judgment is appropriate where the "non-moving party fails to fails to make a showing sufficient to establish the existence of an element essential to that party's case, ... on which that party will bear the burden of proof at trial); *In re Nat'l Lumber & Supply, Inc.*, 184 B.R. 74, 81 (B.A.P. 9th Cir. 1995) ("Because Orange did not provide any admissible evidence in support of [its] defense, summary judgment should have been granted to the Trustee on this issue").

***21** To prove fraudulent inducement, Pharmaplast must show: (1) that Medline made a false statement of material fact; (2) knowing it was false or with reckless disregard for its truth or falsity; (3) with intent to induce Pharmaplast to enter into the 2008 Agreement; (4) Pharmaplast reasonably believed the false statement to be true and justifiably relied on it; and (5) Pharmaplast incurred damages as a result of its reliance on the misrepresentation. See *JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper Co., Ltd.*, 707 F.3d 853, 864 (7th Cir. 2013) (applying Illinois law).

Pharmaplast contends that Medline concealed from it the existence of the confidentiality agreement between Medline and URI, and that this constitutes fraud that entitles it to void the Medline-Pharmaplast agreement. Pharmaplast executive Atteia asserts that he asked Bowser in 2008 whether Medline had any relationship with Urica, "contractual or otherwise," and Bowser denied that there was any relationship between the companies. Atteia reports that "if [Pharmaplast] had known about the [confidentiality agreement] between Medline and URI ..., [it] would have terminated the negotiations and ... not signed the agreement" with Medline because it wished to avoid "any additional involvement with [Urica], even vicariously through Medline," given URI's late payments and the contentious relationship that had developed. [99] He states he did not learn of the confidentiality agreement or see a copy of it until this litigation commenced in 2011. [100]

99 Indemnity Atteia Decl., ¶ 12.

100 *Id.*, ¶ 13.

Medline does not contend that it disclosed the confidentiality agreement to Pharmaplast; rather, it argues there is no evidence that Pharmaplast reasonably relied on its alleged misrepresentation, nor any evidence that the misrepresentation was intended to induce Pharmaplast to enter into the Medline-Pharmaplast agreement. As respects reliance, Medline asserts Pharmaplast knew that Medline and Urica had engaged in negotiations, and had some form of relationship with one another. It cites Attweia's deposition testimony, in which he stated that he advised Moghavem in 2007 to reach out to Medline and pursue a business relationship with it, because Medline had just lost a primary supplier. [101] Medline maintains that Pharmaplast could not reasonably have relied on Bowser's statement that there was no relationship between the companies, since Pharmaplast was already on notice such a relationship existed. This argument fails to consider the chronology of events. Attweai testified that he told Moghavem to contact Medline in 2007; subsequently, Pharmaplast's relationship with Urica soured, and Pharmaplast decided to cut ties with Urica. [102] The fact that Pharmaplast may have known that Medline and Urica were in talks in 2007 does not demonstrate as a matter of law that it was not reasonable to rely on Medline's statements in 2008 that it had no relationship with Urica; indeed, it is a logical inference that Pharmaplast asked Bowser about Medline's relationship with Urica specifically because Pharmaplast knew that the two companies had discussions. There is no evidence in the record that Pharmaplast knew of the confidentiality agreement until 2011, well after the Medline-Pharmaplast contract had been executed. The mere fact that Pharmaplast may have known of the *potential* for a relationship is insufficient to demonstrate, as a matter of law, that its reliance on Medline's representation that no relationship existed was not justified. Had Pharmaplast failed to inquire about the possibility of a relationship, Medline's argument might be more persuasive. See *Teamsters Local 282 Pension Trust Fund v. Angelos*, 839 F.2d 366, 370 (7th Cir. 1988) (finding no justifiable reliance as a matter of law where a party conducted an inadequate investigation). Pharmaplast's evidence shows that Attweai specifically asked Bowser whether Medline had a business relationship with Urica, and Bowser said it did not. [103] This suffices to raise triable issues of fact regarding Pharmaplast's reliance on Medline's representation.

101 Declaration of Nitin Reddy ("Reddy Decl."), Docket No. 103 (Jan. 24, 2013), Exh. J ("Attweai Depo.") at 67:2-14.

102 *Id.* at 68:24-69:2 ("[I contacted Moghavem at the] end of 2007. And then started [the] very bad period [of] stopping payments. All our mon[ies] were delayed. Expected to be paid after 90 days. It reached 180 days and no payment").

103 Indemnity Attwei Decl., ¶ 12 ("When Jack Bowswer was in Egypt, I specifically asked Mr. Bowser if Medline had any relationship, contractual or otherwise, with URI").

***22** Medline also argues there is no evidence that it intended, by making the misrepresentation, to induce Pharmaplast to enter into the agreement. Under Illinois law, although fraud claims can be resolved on a motion for summary judgment, "as a general principle, questions of motive and intent are particularly inappropriate for summary adjudication," and "resolution by summary judgment of the issues raised by an allegation of fraud is often difficult or impossible." *Cement-Lock v. Gas Technology Institute*, 523 F.Supp.2d 827, 857-58 (N.D. Ill. 2007) (citing *P.H. Glatfelter Co. v. Voith, Inc.*, 784 F.2d 770, 774 (7th Cir. 1986)); see also *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse–Wis., Inc.*, 991 F.2d 1249, 1258 (7th Cir. 1993) ("Due to the difficulty of proving a subjective state of mind, cases involving motivation and intent are usually not appropriate for summary judgment."). Typically, it will be necessary for a factfinder to hear the evidence and determine whether to draw an inference that defendant intended to defraud based on all of the circumstances.

Pharmaplast has adduced sufficient evidence to raise triable issues concerning the fact that Medline intended to induce Pharmaplast to enter into the agreement by misrepresenting its relationship with Urica. Attweia reports that when he spoke with Bowser in 2008, severing ties with Urica was "very important to Pharmaplast," and that is why he had asked Bowser about Medline's relationship with the company. [104] Bowser testified at deposition that Atteia told him the relationship between Pharmaplast and Urica had soured and Pharmaplast wanted to end the arrangement. [105] It is undisputed that Bowser was in Egypt to enter into a business relationship with Pharmaplast because, *inter alia*, Medline had lost one of its main suppliers. A factfinder could infer that Bowser lied about the confidentiality agreement with Urica because he knew that Pharmaplast no longer wanted to deal with Urica, and he did not want his negotiations with Pharmaplast to fail as a result of Medline's arrangement with Urica. Although there is no direct evidence that Bowser or Medline made the misrepresentation with the intent of inducing Pharmaplast to enter into a contract it would otherwise not execute, direct evidence of intent is often impossible to obtain, and thus inferences based on circumstantial evidence can suffice to raise triable issues of fact. See *United States v. Paneras*, 222 F.3d 406, 410 (7th Cir. 2000) (stating that the jury is permitted to infer intent to defraud in mail and wire fraud cases without direct evidence); *United States v. Lillie*, 669 F.Supp.2d 903, 907 (N.D. Ill. 2009) ("Intent to defraud can be proven by circumstantial evidence and by inferences drawn from the scheme itself"); see also *Connolly v. Gishwiller* 162 F.2d 428, 433 (7th Cir. 1947) ("[Fraud] is rarely susceptible of direct proof, but must ordinarily be established by circumstantial evidence and legitimate inferences arising therefrom, which, taken as a whole, will show the fraudulent intent or purpose with which the party acted. The inferences to be gathered from a chain of circumstances depend largely upon the common sense knowledge of the motives and intentions of men in like circumstances"). Viewing the evidence in the light most favorable to Pharmaplast, the court concludes that there is sufficient evidence from which a jury could infer that Medline acted with fraudulent intent when it represented it had no relationship with Urica.

104 *Id.*, ¶ 12.

105 Declaration of Gordon J. Zuiderweg, Docket No. 115 (Mar. 18, 2013), Exh. 4 ("Bowser Depo.") at 12:4-10 ("And [Atteia] expressed to me at that time that ... the relationship with [Urica] was deteriorating fast, it was probably dead, he was trying to collect some money, you know, before he ended the relationship, and he would love to work directly with Medline").

III. CONCLUSION

***23** In conclusion, the court grant's Pharmaplast's motion for summary judgment on Urica's claims and Medline's motion for summary judgment on Urica's claims. The court denies Medline's motion for summary judgment on its claim for indemnity from Pharmaplast.

2013 WL 12123230

All Citations

Not Reported in Fed. Supp., 2013 WL 12123230

EXHIBIT Altanovo-15

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by In re Montano, 9th Cir.BAP (Cal.), November 1, 2013

15 Cal.4th 951
Supreme Court of California

Nida ENGALLA et al., Plaintiffs and Respondents,
v.
PERMANENTE MEDICAL GROUP, INC. et al., Defendants and Appellants.
PERMANENTE MEDICAL GROUP, INC. et al., Petitioners,
v.
The SUPERIOR COURT of Alameda County, Respondent;
Nida ENGALLA et al., Real Parties in Interest.
Willis F. McCOMAS et al., Petitioners,
v.
The SUPERIOR COURT of Alameda County, Respondent;
Nida ENGALLA et al., Real Parties in Interest.

No. S048811.
|
June 30, 1997.
|
As Modified July 30, 1997.

Synopsis

Health maintenance organization (HMO) petitioned to compel arbitration of medical malpractice claim asserted on behalf of deceased plan participant. The Alameda County Superior Court, No. H154976-4, Joanne C. Parrilli, J., denied petition, and HMO appealed. The Court of Appeal, Phelan, J., reversed. Claimant petitioned for review. The Supreme Court, Mosk, J., held that: (1) evidence supported a finding that HMO had fraudulently induced participant to agree to arbitration of disputes, but trial court would be required on remand to resolve that factual issue; (2) evidence further supported a finding that HMO had waived right to arbitration through its dilatory tactics, and trial court would be required on remand to determine that factual issue; and (3) arbitration agreement in question was not per se unconscionable.

Judgment of Court of Appeal reversed with directions to remand.

Opinion, 43 Cal.Rptr.2d 621, superseded.

Kennard, J., filed a concurring opinion.

Brown, J., filed a dissenting opinion.

Procedural Posture(s): On Appeal.

West Headnotes (41)

[1] **Alternative Dispute Resolution** Right to Enforcement and Defenses in General
Alternative Dispute Resolution Evidence

California law incorporates many of the basic policy objectives contained in Federal Arbitration Act, including a presumption in favor of arbitrability and a requirement that an arbitration agreement must be enforced on basis of state law standards that apply to contracts in general. 9 U.S.C.A. § 1 et seq.

45 Cases that cite this headnote

[2] **Alternative Dispute Resolution** Remedies and Proceedings for Enforcement in General
Alternative Dispute Resolution Evidence

Statutes create a summary proceeding for resolving petitions to compel arbitration; petitioner bears burden of proving existence of valid arbitration agreement by preponderance of the evidence, and party opposing petition bears burden of proving by preponderance of the evidence any fact necessary to its defense. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

288 Cases that cite this headnote

[3] **Alternative Dispute Resolution** Trial or hearing

In summary proceedings on petition to compel arbitration, trial court sits as trier of fact, weighing all affidavits, declarations, and other documentary evidence, as well as oral testimony received at court's discretion, to reach a

final determination. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

135 Cases that cite this headnote

[4] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

No jury trial is available for petition to compel arbitration. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

7 Cases that cite this headnote

[5] **Alternative Dispute Resolution** Determination and disposition

Trial court would be required, on remand of proceeding by health maintenance organization (HMO) to compel arbitration of malpractice complaint, to resolve factual question of whether, as asserted by claimant, HMO fraudulently induced plan participant into entering arbitration agreement; merely determining that fact issue existed on whether HMO had fraudulently induced the entering of arbitration agreement was insufficient basis for denying petition. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

12 Cases that cite this headnote

[6] **Alternative Dispute Resolution** Evidence

Evidence supported claim, asserted as defense to petition of health maintenance organization (HMO) to compel arbitration of malpractice complaint, that HMO fraudulently induced plan participant to enter arbitration agreement; arbitration agreement called for appointment of neutral arbitrator within 60 days of filing of claim, even though such timely appointment had occurred in only one percent of cases during previous years, and claimants presented evidence that 144 day period between initial presentation of claim and agreement on neutral arbitrator resulted from delays attributable to HMO. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

13 Cases that cite this headnote

[7] **Alternative Dispute Resolution** Remedies and Proceedings for Enforcement in General

Petition to compel arbitration is not to be granted when there are grounds for rescinding the agreement. West's Ann.Cal.C.C.P. § 1281.2(b).

20 Cases that cite this headnote

[8] **Alternative Dispute Resolution** Validity of assent

Party seeking to defeat a petition to compel arbitration on grounds on fraud must show that alleged fraud goes specifically to making of arbitration agreement, rather than to making of contract in general. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

13 Cases that cite this headnote

[9] **Fraud** Existing facts or expectations or promises

Promise to do something necessarily implies intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.

52 Cases that cite this headnote

[10] **Fraud** Acts induced by fraud

Action for "promissory fraud" may lie where defendant fraudulently induces plaintiff to enter into a contract.

41 Cases that cite this headnote

[11] **Fraud** Elements of Actual Fraud

Elements of fraud that will give rise to tort action for deceit are: misrepresentation, i.e., false representation, concealment, or nondisclosure; knowledge of falsity, or scienter; intent to

defraud, i.e. to induce reliance; justifiable reliance; and resulting damage.

509 Cases that cite this headnote

[12] **Alternative Dispute Resolution** Validity of assent

There is no requirement to show pecuniary damages when fraud is basis for a defense to a petition to compel arbitration, rather than a suit for damages.

3 Cases that cite this headnote

[13] **Alternative Dispute Resolution** Appointment

Provision in arbitration agreement that party arbitrators "shall" be chosen within 30 days of the filing of complaint by health plan participant, and that such party arbitrators "shall" choose neutral arbitrator within 60 days of filing of complaint, constituted at the very least commitments by health maintenance organization (HMO) to exercise good faith and reasonable diligence to have arbitrators appointed within specified time, even though those terms did not bind HMO to appoint neutral arbitrator within 60 days; that good faith duty was underscored by organizations's contractual assumption of duty as fiduciary to administer health plan.

13 Cases that cite this headnote

[14] **Fraud** Statements recklessly made; negligent misrepresentation

False representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered, and thus satisfy scienter element of a tort action for deceit.

63 Cases that cite this headnote

[15] **Fraud** Intent

Fraud Knowledge of defendant

Fraudulent state of mind includes not only knowledge of falsity of the misrepresentation but also an intent to induce reliance on it.

353 Cases that cite this headnote

[16] **Fraud** Reliance on Representations and Inducement to Act

Actual reliance, as element of tort action for deceit, occurs when a misrepresentation is an immediate cause of plaintiff's conduct which alters his legal relations, and when, absent such representation, he would not, in all reasonable probability, have entered into the contract or other transaction.

112 Cases that cite this headnote

[17] **Fraud** Presumptions and burden of proof

Presumption, or at least an inference, of actual reliance, as element of tort action for deceit, arises wherever there is a showing that a misrepresentation was material. Restatement (Second) of Contracts § 167.

58 Cases that cite this headnote

[18] **Insurance** Agency for Insurer or Insured

Employer that negotiates group medical benefits for its employees acts as an agent for those employees during period of negotiation.

4 Cases that cite this headnote

[19] **Principal and Agent** Implied and Apparent Authority

Agency relationship is a fiduciary one, obliging agent to act in the interest of principal.

15 Cases that cite this headnote

[20] **Contracts** Fraud and Misrepresentation

Defrauded party has the right to rescind a contract, even without a showing of pecuniary damages, on establishing that fraudulent contractual promises inducing reliance have

been breached. Restatement (Second) of Contracts § 164 comment.

3 Cases that cite this headnote

[21] **Contracts** Failure of Performance or Breach

Contracting party has a right to what it contracted for, and so has the right to rescind where he obtained something substantially different from that which he is led to expect.

3 Cases that cite this headnote

[22] **Alternative Dispute Resolution** Failure to Arbitrate

Party cannot defeat a petition to compel arbitration on mere showing that other party has engaged generally in fraudulent misrepresentation about speed of arbitration process; rather, party opposing petition must show that in that particular case, there was substantial delay in selection of arbitrators contrary to their reasonable, fraudulently induced, contractual expectations. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

34 Cases that cite this headnote

[23] **Alternative Dispute Resolution** Failure to Arbitrate

Mere fact that selection of arbitrators for malpractice complaint by participant in health care plan extended beyond deadlines prescribed in arbitration agreement did not by itself establish that health maintenance organization (HMO) breached agreement.

1 Cases that cite this headnote

[24] **Alternative Dispute Resolution** Remedies and Proceedings for Enforcement in General

Malpractice claimant in arbitration, like plaintiff in litigation, bears primary responsibility of exercising diligence in order to advance progress towards resolution of its claim.

4 Cases that cite this headnote

[25] **Alternative Dispute Resolution** Appointment

Arbitration agreement is not breached when delay in selection of arbitrators is result of reasonable disagreements over arbitrator selection.

14 Cases that cite this headnote

[26] **Alternative Dispute Resolution** Appointment

Statute providing for court's appointment of arbitrator on petition of a party, if there is no agreed method of appointing arbitrators or if agreed method fails or cannot be followed, does not excuse misfeasance by a party in delaying timely appointment of arbitrators; rather, statute provides a remedy for breach of duties of which parties may avail themselves. West's Ann.Cal.C.C.P. § 1281.6.

1 Cases that cite this headnote

[27] **Alternative Dispute Resolution** Waiver or Estoppel

Party that imposes and administers its own arbitration program, that fraudulently misrepresents the speed of arbitrator selection process so as to induce reliance, and that in fact engages in conduct forcing substantial delay, may not then compel arbitration by contending that the other party failed to resort to the court by filing a petition for court–appointed arbitrator. West's Ann.Cal.C.C.P. § 1281.6.

10 Cases that cite this headnote

[28] **Fraud** Fiduciary or confidential relations

Constructive fraud is generally asserted against a fiduciary by one to whom a fiduciary duty is owed. West's Ann.Cal.C.C.P. § 1573.

13 Cases that cite this headnote

[29] **Fraud** Fiduciary or confidential relations

"Constructive fraud" allows conduct insufficient to constitute actual fraud to be treated as such where parties stand in a fiduciary relationship. West's Ann.Cal.C.C.P. § 1573.

14 Cases that cite this headnote

[30] **Alternative Dispute Resolution** Waiver, laches, or estoppel

Trial court had jurisdiction, on motion by health maintenance organization (HMO) to compel arbitration of malpractice complaint, to decide question of whether organization had, as asserted by claimant, waived its right to compel arbitration by its allegedly dilatory acts with respect to selecting arbitrators. West's Ann.Cal.C.C.P. § 1281.2(a).

5 Cases that cite this headnote

[31] **Alternative Dispute Resolution** Evidence

Evidence supported claim that health maintenance organization (HMO) waived its right to arbitration of medical malpractice complaint by causing unreasonable or bad faith delays in choice of arbitrators; agreement on neutral arbitrator was not reached until 144 days after claim was initially presented, HMO's outside counsel was aware that plan participant on whose behalf claim was filed was terminally ill with cancer, and claimants cited numerous instances in which they made efforts to expedite selection of arbitrators but received either no response or delayed responses from HMO's outside counsel. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

11 Cases that cite this headnote

[32] **Estoppel** Nature and elements of waiver

Generally, "waiver" denotes voluntary relinquishment of a known right; but it can also mean loss of an opportunity or a right as result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right.

14 Cases that cite this headnote

[33] **Alternative Dispute Resolution** Waiver or Estoppel

No single test delineates the nature of the conduct of a party that will constitute waiver of the right to compel arbitration.

26 Cases that cite this headnote

[34] **Alternative Dispute Resolution** Trial or hearing

Alternative Dispute Resolution Scope and standards of review

Whether there has been a waiver of a right to arbitrate is ordinarily a question of fact, and a finding of waiver, if supported by sufficient evidence, is binding on an appellate court.

48 Cases that cite this headnote

[35] **Alternative Dispute Resolution** Appointment

When delay in choosing arbitrators is result of reasonable and good faith disagreements between parties, remedy for such delay is a petition to court to choose arbitrators, rather than evasion of contractual agreement to arbitrate. West's Ann.Cal.C.C.P. § 1281.6.

12 Cases that cite this headnote

[36] **Alternative Dispute Resolution** Evidence

In proceeding to compel arbitration in which respondent argues that petitioner has waived right to arbitration, burden is on respondent to prove to trial court that petitioner's dilatory conduct rises to such a level of misfeasance as to constitute a waiver, and such waiver is not lightly inferred.

75 Cases that cite this headnote

[37] **Alternative Dispute Resolution** Determination and disposition

Trial court was required on remand of proceeding to compel arbitration of medical malpractice complaint to make factual finding on whether, as asserted by claimant, health maintenance organization (HMO) had waived its right to compel arbitration with its alleged dilatory conduct. West's Ann.Cal.C.C.P. §§ 1281.2, 1290.2.

9 Cases that cite this headnote

[38] **Alternative Dispute Resolution** Unconscionability

Arbitration agreement between health maintenance organization (HMO) and plan participant was not per se unconscionable, though it was offered to a subscriber on a "take it or leave it" basis, though subscriber's employer did not have the strength to bargain with HMO to alter terms of contract, and though agreement gave HMO the right to veto arbitrators proposed by a claimant.

10 Cases that cite this headnote

[39] **Alternative Dispute Resolution** In general; formation of agreement

Contractual arrangements for nonjudicial resolution of disputes must possess minimum levels of integrity.

[40] **Insurance** Medical Insurance

Health maintenance organizations (HMOs) are especially obligated not to impose contracts on their subscribers that are one–sided and lacking in fundamental fairness. West's Ann.Cal.Health & Safety Code § 1367(h).

[41] **Contracts** Unconscionable Contracts

In determining whether a contract term is unconscionable, Supreme Court first considers whether contract is one of adhesion.

6 Cases that cite this headnote

Attorneys and Law Firms

***847** *959** **907** Marion's Inn, Kennedy P. Richardson, Mark Palley, Oakland, Archer, McComas & Lageson, Archer, McComas, Breslin, McMahon & Chritton and Willis F. McComas, Walnut Creek, in pro. per., and for Defendants and Appellants and Petitioners.

Paul N. Halvonik, Berkeley, Fred J. Hiestand, Sacramento, Jackson, Tufts, Cole & Black, Gerald Z. Marer, San Jose, Kenneth J. Philpot, San Francisco, Thelen, Marin, Johnson & Bridges, Curtis A. Cole, Michele Logan–Stern, Los Angeles, Hammond, Zuetel & Cahill, Kenneth R. Zuetel, Jr., Pasadena, and Victoria K. Torigian as Amici Curiae on behalf of Defendants and Appellants and Petitioners.

No appearance for Respondent Superior Court.

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Opinion

***960** MOSK, Justice.

In this case we consider the circumstances under which a court may deny a petition to compel arbitration because of the petitioner's fraud in inducing the arbitration agreement or waiver of the arbitration agreement. **908** Plaintiffs are family members and representatives of the estate of Wilfredo Engalla (hereafter sometimes the Engallas). Engalla was enrolled, through his place of employment, in a health plan operated by the Permanente Medical Group, Inc., Kaiser Foundation Hospitals, and the Kaiser Foundation Health Plan (hereafter Kaiser).

Prior to his death, Engalla was engaged in a medical malpractice dispute with Kaiser, which, according to the terms of Kaiser's "Group Medical and Hospital Services Agreement" (Service Agreement), was submitted to arbitration. After attempting unsuccessfully to conclude the arbitration prior to Engalla's death, the Engallas filed a malpractice action against Kaiser in superior court, and Kaiser filed a petition to compel arbitration pursuant to ***848 Code of Civil Procedure section 1281.2.[1] In opposing the petition, plaintiffs claimed that Kaiser's self-administered arbitration system was corrupt or biased in a number of respects, that Kaiser fraudulently misrepresented the expeditiousness of its arbitration system, and that Kaiser engaged in a course of dilatory conduct in order to postpone Engalla's arbitration hearing until after his death, all of which should be grounds for refusing to enforce the arbitration agreement. The trial court found in the Engallas' favor, denying Kaiser's petition to compel arbitration on grounds of fraud, but the Court of Appeal reversed.

We conclude that there is indeed evidence to support the trial court's initial findings that Kaiser engaged in fraudulent conduct justifying a denial of its petition to compel arbitration, but we further conclude that questions of fact remain to be resolved by the trial court before it can be determined whether Kaiser's conduct was actually fraudulent. Similarly, there is a factual question as to whether Kaiser's actions constituted a waiver of its right to compel arbitration. We accordingly reverse the judgment of the Court of Appeal and direct it to remand the case to the trial court for such factual determinations. As will appear, although we affirm the basic policy in favor of enforcement of arbitration agreements, the governing statutes place limits on the extent to which a party that has committed misfeasance in the performance of such an agreement may compel its enforcement.

*961 I. FACTUAL AND PROCEDURAL BACKGROUND

Because the nature of this case cannot be appreciated without a detailed understanding of its factual context, these facts are set forth at length below.[2]

Engalla immigrated to the United States in 1980, where he commenced employment with Oliver Tire & Rubber Company (hereafter Oliver Tire) as a certified public accountant. At that time, Engalla was invited to enroll himself and his immediate family in a health plan offered by Kaiser. Oliver Tire had offered its employees health care through Kaiser since 1976, and its plan was renewed annually thereafter. Engalla enrolled with Kaiser by signing an application form which stated, in relevant part: "I apply for health plan membership for the persons listed and agree that we shall abide by the provisions of the Service Agreement and health plan regulations. If the agreement so provides, any monetary claim asserted by a Member or the Member's heirs or personnel [*sic*] representative on account of bodily injury, mental disturbance or death must be submitted to binding arbitration instead of a court trial."

A. *The Underlying Medical Malpractice Claim.*

In March 1986, Engalla presented himself to Kaiser's Hayward facility complaining of a continuing cough and shortness of breath. Tests were administered, including radiologic examinations, and Kaiser's radiologist noted abnormalities of his right lung. Previous radiologic studies performed by Kaiser in 1982 at the same Hayward facility had been inadvertently destroyed, but would otherwise have confirmed that the abnormal condition had only recently developed. In his notes from the 1986 examination, the radiologist **909 recommended follow-up if the films could not be located, but none was ever performed. For several years thereafter, Engalla repeatedly presented Kaiser with complaints symptomatic of respiratory disease. On some occasions he was given an appointment with a physician, but on other occasions he was only permitted to see nurse practitioners. For years, he was given inhalation medication, but Kaiser failed to perform diagnostic tests that might have revealed the developing cancer. Instead, he was repeatedly diagnosed with common colds and allergies. X-rays taken in 1991 finally revealed ***849 adenocarcinoma of the lung, a type of lung cancer, but by then Engalla's condition was inoperable.

B. *The Arbitration Clause.*

On or about May 31, 1991, Engalla and members of his immediate family served on Kaiser a written demand for arbitration of their claims that Kaiser *962 health care professionals had been negligent in failing to diagnose Engalla's lung cancer sooner. The Engallas' attorney, David Rand, correctly believed his clients were required to do so pursuant to the Service Agreement which was in effect at the time. The arbitration clause contained in the Service Agreement described the process for initiating a claim, the

requirement that three arbitrators be used, and the time frame within which the arbitrators were to be selected. In this regard, section 8.B. of the Service Agreement provides that each side "shall" designate a party arbitrator within 30 days of service of the claim and that the 2 party arbitrators "shall" designate a third, neutral arbitrator within 30 days thereafter.[3] Section 8.C. sets forth general provisions concerning the arbitration of claims and incorporates applicable California law, including the California statute of limitations, the California Code of Civil Procedure provisions relating to arbitration, and the California Medical Injury Compensation Reform Act of 1975 (MICRA).

The Service Agreement further provides a broad statement governing its interpretation and, in that regard, states that Kaiser "is a named fiduciary to review claims under the Service Agreement." The nature of the claims for which Kaiser promises to act as a fiduciary is not specified, but a review of the Service Agreement reveals that the term "claims" appears in section 8, entitled "Arbitration of Claims."

The arbitration program is designed, written, mandated and administered by Kaiser. In regard to the latter, Kaiser collects funds from claimants and holds and disburses them as necessary to pay the neutral arbitrator and expenses approved by him or her. It monitors administrative matters pertinent to the progress of each case including, for example, the identity and dates of appointment of arbitrators. It does not, however, employ or contract with any independent person or entity to provide such administrative services, or any oversight or evaluation of the arbitration program or its performance. Rather, administrative functions are performed by outside counsel retained to defend Kaiser in an adversarial capacity.

The fact that Kaiser has designed and administers its arbitration program from an adversarial perspective is not disclosed to Kaiser members or ***963** subscribers. It is not set forth in the arbitration provision itself, or in any of Kaiser's publications or disclosures about the arbitration program, and it was unknown to Engalla's employer, who signed the Service Agreement on his behalf. The employer's representative, Theodomeir Roy, read the provisions of the Service Agreement, ****910** and believed that the arbitration process would be equally fair to both the employee-subscriber and to Kaiser, and that it would allow employees to resolve disputes quickly and without undue expense. His expectation in that regard was consistent with the intent of Kaiser's general counsel, Scott Fleming, who originally drafted the arbitration provision, as well as various publications *****850** disseminated to Kaiser members. In those materials, Kaiser represented that an arbitration in its program would reach a hearing within several months' time, and that its members would find the arbitration process to be a fair approach to protecting their rights.

C. ***Processing of the Engallas' Claim.***

Kaiser received the Engallas' May 31, 1991, demand for arbitration on June 5 or 6, approximately three business days after it was mailed by the Engallas' counsel. In that demand letter, Rand explained the nature of the claim, advised Kaiser of Engalla's terminal condition, and appealed to Kaiser to expedite the adjudication of the claim. Although he did not yet have a copy of the arbitration provision, Rand expressed an unqualified willingness to submit the matter to arbitration. At the same time, Rand indicated that he needed and was requesting a copy of the arbitration provision.

After hearing nothing for two weeks, Rand again wrote to Kaiser, repeated his agreement to arbitrate, and stressed the fact that "Mr. Engalla has very little time left in his life and I again urge you to assist me in expediting this matter for that reason." Several days later, Kaiser's in-house counsel, Cynthia Shiffrin, whose responsibility it was to monitor the Engallas' file, responded to the claim by acknowledging receipt and providing a copy of the arbitration provision per Rand's request. In turn, she requested $150, as required by the arbitration provision, as a deposit for half the expenses of the arbitration. Rand mailed the check the same day he received Shiffrin's letter. Shiffrin also expressed her willingness to comply with the request to avoid delay, noting that she had arranged for "expedited copies" of Engalla's medical records, and promising that outside counsel would contact Rand "in the near future with Kaiser's designation of an arbitrator."

D. ***Appointment of the Party Arbitrators.***

In his May 31, 1991, demand letter, Rand requested that Kaiser's counsel contact him at the earliest convenience "so we may choose arbitrators." He ***964** repeated that request on June 14, 1991. On June 21, Kaiser's outside counsel, Willis F. McComas, indicated that Kaiser would provide the identity of its arbitrator only after receiving the Engallas' designation. Rand objected to this staggered disclosure as not authorized by the arbitration agreement. Having heard nothing from McComas by July 8, Rand went ahead and designated Attorney Peter Molligan as the Engallas' arbitrator, again repeating his request that Kaiser do likewise "so that the two

arbitrators can immediately commence efforts to identify and appoint the neutral arbitrator." It was not until July 17, 47 days after service of the claim, that McComas designated Kaiser's party arbitrator, Attorney Michael Ney. McComas admitted that he had not calendared any of the deadlines for designation of the arbitrators, claiming "[t]here is no rule that requires that."

Although he had designated Ney as his party arbitrator, McComas had not actually contacted Ney beforehand to see if he was available. Instead, on the day he designated him, McComas wrote to Ney asking if he was available. In that letter, McComas advised Ney that the plaintiff was terminally ill, and that Rand had asked for an early arbitration date, but said that he had not responded to the request.

Although McComas was aware from the outset that Engalla was terminally ill and had only a few months to live, and claimed that he had "cooperated in the appointment of the party arbitrator very early in the case," it was later revealed that he had been advised by Ney in July that Ney was "unable [to] accept any further assignments to act as a party arbitrator until late November, over four months away. When the fact of Ney's unavailability came to light on August 15, Rand made repeated requests that Kaiser ****911** appoint another arbitrator, but McComas refused. Rand also requested that Kaiser stipulate to a single neutral arbitrator, but that request was similarly refused. However, in late July, McComas did make arrangements *****851** for a backup arbitrator, Tom Watrous, who would step in if Ney was not available when the parties were ready to proceed with the arbitration hearing. [4]

E. ***Negotiations for Appointment of Neutral Arbitrator and Hearing Date.***

According to the Service Agreement, a neutral arbitrator is to be chosen by the two party arbitrators within thirty days of their selection, and the hearing is to be held "within a reasonable time thereafter." Thus, pursuant to ***965** the time frame mandated by Kaiser, the neutral arbitrator must be selected within 60 days after initial service of the claim. There is no dispute that timely appointment of a neutral arbitrator is critical to the progress of the case, inter alia, because the Code of Civil Procedure provides a right to discovery only "[a]fter the appointment of the arbitrator or arbitrators." (§ 1283.05, subd. (a).) In fact, in this case, McComas asserted that discovery could not commence until the neutral arbitrator was selected, because the neutral arbitrator would have to approve any discovery. Similarly, a hearing date cannot be set until the neutral arbitrator is appointed. (§ 1282.2, subd. (a).) In this case, McComas refused to discuss disclosure of expert witnesses until the hearing date was set. In short, the timely appointment of a neutral arbitrator is the linchpin of all progress in a Kaiser arbitration. Without a neutral arbitrator in place, and absent a stipulation, nothing can be accomplished.

Although the arbitration provision specifies that the two party arbitrators "shall" select a neutral arbitrator, in reality the selection is made by defense counsel after consultation with the Kaiser medical-legal department. Kaiser has never relinquished control over this selection decision. Indeed, in this case, McComas instructed Ney on who should be proposed and who was unacceptable. Thus, the timeliness of appointment of a neutral arbitrator depends upon cooperation and agreement by Kaiser and its counsel, as well as that of the claimants and their attorneys.

In the initial claim of May 31, 1991, Rand requested the immediate commencement of the process for selection of arbitrators. During the next few months, Rand wrote more than a dozen letters to the arbitrators and McComas asking that the selections be made. Only two weeks after serving his demand letter, Rand stated that he intended "to encourage both designated arbitrators to identify the third arbitrator at the earliest possible date." On July 8, Rand suggested an agreement on the date for designation of experts, preferably in August, "and that we anticipate having the arbitration soon thereafter." On July 18, Rand again wrote to McComas on the subject of scheduling the arbitration hearing, noting that he would be prepared to proceed by early September. On July 23, Rand wrote to both party arbitrators and McComas, again stressing the terminal condition of the plaintiff, his desire to hold the arbitration hearing in early September, and the urgent need to select the third, neutral arbitrator. Rand again wrote to the two party arbitrators on August 9, and again urged them to "select the third arbitrator as soon as possible." The Engallas' designated arbitrator, Peter Molligan, also attempted to push the defense into motion. On August 12, after trying at least three times to get Ney on the phone, Molligan finally wrote Ney about selecting the neutral arbitrator in order to "get this case moving." A few days ***966** later, having still heard nothing, Rand tried again, saying: "Time is of the absolute essence and I again ask that you use all possible means to quickly select the third arbitrator. I am becoming increasingly concerned about the delays and am beginning to wonder whether the arbitration proceedings are suitable for this case."

During the week following August 15, 1991, the two party arbitrators exchanged six names. Rand also continued to press the **912 issue of the unavailability of party arbitrator ***852 Ney, which he had just learned about, and repeated his request that the parties move toward a schedule that would allow the arbitration proceedings to begin in September. On August 30, having still heard nothing about the third arbitrator, Rand wrote to Judicial Arbitration and Mediation Services (JAMS) Judge Daniel Weinstein requesting proposals for judges who could be available for a hearing date "within the next several weeks."

On September 3, Ney wrote to Molligan, rejecting as unacceptable Judge Francis Mayer, one of the "neutrals" Molligan had suggested. Apparently, this veto was exercised pursuant to McComas's instructions. Ney expressed doubts about the availability of Molligan's other two choices—retired Judge Fannin or Weinstein, although he had not checked with either judge—and pressed instead for one of his own choices. On September 5, while Molligan was out of town, Rand agreed to one of the suggestions, Judge Robert Cooney, on the condition that "he can be available to commence this matter this month." If he was not available, Rand suggested two JAMS judges he knew to be available in September. Rand wrote to McComas again on September 18 and 25, literally begging for responses to his many suggestions for expediting the arbitration process.

Despite this additional prompting, McComas did not respond for almost three weeks and, when he finally wrote to Rand on September 24, he expressed uncertainty as to whether Judge Cooney had been agreed upon. Rand immediately responded on September 26 that Judge Cooney had been accepted and that he was only waiting for confirmation that the judge would be available "in the very near future." Apparently, because Kaiser holds itself out as the program administrator, collects and disburses arbitrator fees and had, in fact, proposed Judge Cooney, Rand assumed Kaiser would handle the formal retention of Judge Cooney and pay a deposit on his fees. Kaiser takes the position that it is the claimant's burden to move the case along, including making arrangements with the neutral arbitrator.

After almost two more weeks, McComas wrote again on October 7, this time claiming that "[t]o this date, neither you nor your clients have agreed to *967 the appointment of a neutral arbitrator" because "[y]ou apparently agreed to Judge Cooney with an unrealistic condition." [5] Rand responded on October 16, stating, "I am incredulous that you are *still* asking that we agree to the appointment of the neutral arbitrator. We have repeatedly informed you that we will agree to your suggestion of Judge Cooney. Why do you continue to insist that we have not agreed? My only reservation was and still is a question concerning availability." On October 18, Rand again wrote that he was "still waiting to hear from you concerning the final retention of Judge Cooney. I had promised him that he would be hearing from you when I advised him that we had agreed to his appointment."

Finally, on October 22, McComas wrote to say that he understood the Engallas had agreed to retain Judge Cooney as the neutral arbitrator, conditioned upon his availability, and that he had, therefore, instructed Ney to complete the retainer. By this time, 144 days—almost 3 months more than the 60 days for the selection of the arbitrators represented in the Service Agreement—had elapsed since the initial service of the claim. Engalla died the next day.

F. ***Historical Data re Speed of Kaiser Arbitrations.***

Statistically, delays occur in 99 percent of all Kaiser medical malpractice arbitrations. ***853 An independent statistical analysis of Kaiser-provided data of arbitration between 1984 and 1986 reveals that in only 1 percent of all **913 Kaiser cases is a neutral arbitrator appointed within the 60–day period provided by the arbitration provision. Only 3 percent of cases see a neutral arbitrator appointed within 180 days. On average, it has taken 674 days for the appointment of a neutral arbitrator. For claimants whose cases were resolved by settlement or after a hearing, the time required to appoint a neutral arbitrator consumed more than half the total time for resolution. Furthermore, because the arbitration provision of the Service Agreement does not clearly establish a time frame for a hearing (it must be within a "reasonable time" after appointment of the neutral arbitrator), and because Kaiser claims it has no obligation to participate in a hearing until it deems itself ready, there tend to be significant additional delays after appointment of the neutral arbitrator. Thus, on average, it takes 863 days—almost 2 ½ years—to reach a hearing in a Kaiser arbitration. The depositions of Scott *968 Fleming and Arthur Bernstein, both of whom formerly served as Kaiser's in-house counsel, revealed that Kaiser had long been aware that widespread delays were commonplace in Kaiser arbitrations.

G. ***Deposition Scheduling During the Aborted Arbitration Proceedings.***

In proceedings parallel to his efforts to complete appointments of the arbitrators, Rand began attempts to conduct discovery immediately after filing his demand for arbitration. On June 14, 1991, he wrote to Kaiser stating his desire to complete Engalla's deposition "on the earliest date permitted by law," and his willingness to schedule it for a mutually convenient time. McComas promptly responded to that request by noticing the depositions of all the Engallas for November 18, 1991—a date more than five months down the road and despite Rand's admonition that Engalla "had very little time left in his life." On June 26, Rand notified McComas that his proposed dates were unacceptable, and suggested that Engalla's deposition be taken "much earlier than you have noticed [because his] developing condition may not permit a full deposition on November 18." Rand again indicated his willingness to find mutually agreeable dates. He also requested the depositions of involved doctors "in the near future."

When McComas did not respond for almost two weeks, Rand noticed Engalla's deposition for August 9. In a letter accompanying that notice, Rand repeated his request for deposition of the doctors "this month" (July), proposed an agreement to designate experts in August, and offered to set dates for the other Engalla claimants at McComas's "earliest convenience." After the location was changed for medical reasons, Rand proceeded with Engalla's deposition on August 9, over Kaiser's objection that it had not been given any prior opportunity to conduct a discovery deposition. The August 9 deposition of Engalla, noticed and taken by Rand, was to be the only deposition that would be accomplished in the arbitration phase of this case.

Rand's efforts to schedule depositions of the involved doctors and nurses continued to founder. He initially requested dates for the depositions of the treating physicians on June 26, and did so again on July 8. In his June 26 request, and in each subsequent request, Rand offered to schedule the depositions at times—even after hours or on weekends—that would be convenient for Kaiser. He finally set them by notice of July 18. On July 24, McComas's secretary called Rand to request that they be taken off calendar. Rand responded that he would cooperate, but only if alternative dates could be established. No alternative dates were ever proposed by Kaiser, and the witnesses did not attend their scheduled depositions. McComas failed to ***969** respond to three subsequent requests for depositions, which were made on September 5, 18, and 25. On September 24, McComas simply promised that his secretary would call to give dates for the health care providers. That did not occur until October 2, when McComas's secretary offered November 21 and 22 for the depositions of the *****854** doctors. This was the first time Kaiser had offered to produce the involved physicians, and the dates were still almost a month after Engalla's death. Although Rand ultimately convinced McComas to provide earlier dates for some (but not all) of the involved health care providers, the depositions were not taken ****914** because Engalla died before they could be completed.

As McComas subsequently admitted in a sworn declaration, the reason for the delays in scheduling depositions was that he "did not obtain all of the significant advice from [his] principal outside medical experts until early October, 1991 [and it] was for [that] reason that [he] never suggested deposition dates ... before the fourth week of October."

H. *Termination of the Prior Arbitration.*

Immediately upon learning of Engalla's death on October 23, Rand notified McComas of that fact and asked him to stipulate that Kaiser would not capitalize on the delays that had plagued the arbitration. Specifically, Rand explained that under the case of *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 273 Cal.Rptr. 231, the limitation of $250,000 on noneconomic damages under Civil Code section 3333.2 for a medical malpractice suit is applied separately to the claims of a patient and his spouse who simultaneously claims loss of consortium. Because Mrs. Engalla had made such a claim, *Atkins* authorized a total claim for noneconomic damages of $500,000. However, upon the passing of Engalla, the case of *Yates v. Pollock* (1987) 194 Cal.App.3d 195, 239 Cal.Rptr. 383, required merger of the widow's loss of consortium claim into an indivisible claim for wrongful death, which warrants only a single general damage claim limited to $250,000. Rand's request for a stipulation to override the effect of *Yates* was refused. At that point, Rand notified McComas that the Engallas refused to continue with the arbitration.

I. *Commencement of Court Proceedings.*

On February 21, 1992, the Engallas filed their complaint in Alameda Superior Court. They alleged, in addition to the underlying malpractice claim, fraud as a defense to enforcement of the arbitration provision of the Service Agreement (hereafter arbitration agreement) and as the basis of an affirmative claim for damages, as well as various

other claims related to the ***970** breach of the arbitration agreement. On March 20, Kaiser removed the case to the United States District Court for the Northern District of California, claiming that the action and all issues presented were subject to the rule of federal preemption contained in the Employee Retirement Income Security Act of 1974 (29 U.S.C. §§ 1132, 1144). About the same time, Kaiser proposed to continue the arbitration process. The Engallas declined the offer and, instead, filed a motion to remand. On June 19, the federal court granted the Engallas' motion in its entirety and remanded the matter back to state court.

Upon remand, the Engallas immediately filed a motion to compel discovery they had served prior to Kaiser's removal effort. Kaiser responded with a petition to compel arbitration and stay the court action. The parties thereafter briefed both the discovery and arbitration motions, and the trial court heard lengthy argument and took the matters under submission. On September 29, 1992, the court issued an order continuing the matter for 90 days to permit the Engallas to make their "best showing with respect to the evidentiary grounds that exist to warrant removal of this case from the arbitration process." Discovery rulings were made only with respect to discovery that specifically pertained to the arbitration (as opposed to the medical malpractice) issues.

The parties embarked upon a course of discovery which was limited in light of the summary nature of the petition Kaiser had filed. The Engallas ultimately had five months to complete discovery, during which time thirteen motions were filed and more than a dozen depositions were taken.

The parties then submitted further briefs in connection with Kaiser's petition to compel arbitration. The Engallas also moved for *****855** summary adjudication of issues, asking for a judicial determination, pursuant to section 437c, subdivision (f), that Kaiser owed them certain duties. This motion was subsequently dismissed without prejudice based on certain technical defects. The Engallas also filed a discovery motion to obtain assertedly privileged documents.

****915** After a hearing the trial court issued its order denying Kaiser's petition after making specific findings of fact on the issue of fraud both "in the inducement" and "in the application" of the arbitration agreement. The court further found that the arbitration agreement, as applied, was overbroad, unconscionable and a violation of public policy, inasmuch as Kaiser was arguing that the agreement could not be avoided on grounds of fraudulent inducement. The court further found that equitable considerations peculiar to this case required the invalidation of the arbitration provision.

***971** On June 4, 1993, a hearing was held on the Engallas' discovery motion. At that hearing, Kaiser's counsel advised the court that Kaiser would not appeal the decision denying the petition, conceding that the court's ruling on the petition "was quite correct." However, Kaiser later reconsidered and appealed.

The Court of Appeal reversed. It rejected the claim that Kaiser had defrauded the Engallas, finding inter alia that Kaiser's contractual representation of a 60–day time limit for the selection of arbitrators was not "a representation of fact or a promise by Kaiser because appointment of the neutral arbitrator requires the cooperation of and *mutual agreement* of the parties." (Italics in original.) The court further concluded there was no evidence of actual reliance on these representations nor evidence that the Engallas would have been any better off had their claims been submitted for judicial resolution rather than arbitration. The court also found that the availability of section 1281.6, which permits one of the parties to petition the court to appoint an arbitrator when the parties fail to agree on one, undermined the Engallas' claim that Kaiser's alleged deliberate delay in selecting arbitrators was a ground for avoiding the arbitration agreement. The court further rejected the claim that Kaiser's special relationship as Engalla's insurer or as a fiduciary in the administration of his health plan created any special duty to disclose the workings of its arbitration program. Finally, the court held the Engallas' waiver and unconscionability claims to be without merit. We granted review. [6]

II. PROCEDURAL ISSUES

[1] Before proceeding to the merits, we must address certain procedural and threshold matters. As both parties concede, California law is expressly incorporated into the arbitration agreement in question, and governs the adjudication of any disputes arising from that agreement. (*Volt Info. Sciences, Inc. v. Bd. of Trustees* (1989) 489 U.S. 468, 476, 109 S.Ct. 1248, 1254, 103 L.Ed.2d 488.) California law incorporates many of the basic policy objectives contained in the Federal Arbitration Act, including a presumption in favor of arbitrability ***972** (*Ericksen Arbuthnot, et al. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323, 197 Cal.Rptr. 581, 673 P.2d 251) and a requirement that an arbitration agreement

must be enforced on the basis of state law standards that apply to contracts in general (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 709, fn. 11, 131 Cal.Rptr. 882, 552 P.2d 1178 (*Madden*)). These policies guide our determination of the present matter.

[2] **[3]** **[4]** The nature of the proceeding to resolve a petition to compel arbitration under ***856** California law was recently explained by this court in *Rosenthal v. Great Western Financial Securities Corporation* (1996) 14 Cal.4th 394, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (*Rosenthal*). As we explain in that case, sections 1281.2 and 1290.2 create a summary proceeding for resolving these petitions. (14 Cal.4th at p. 413, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition **916 bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. (*Ibid.*) In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. (*Id.* at pp. 413–414, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) No jury trial is available for a petition to compel arbitration. (*Id.* at p. 413, 58 Cal.Rptr.2d 875, 926 P.2d 1061.)

[5] Although the record is not entirely clear on this point, it appears that the trial court in this case, as in *Rosenthal* (see *Rosenthal, supra,* 14 Cal.4th at p. 414, 58 Cal.Rptr.2d 875, 926 P.2d 1061), incorrectly treated Kaiser's petition to compel arbitration as a type of summary judgment motion, in which it was obliged to determine only that there was a legitimate factual dispute among the parties and not to resolve that dispute. The court stated at the conclusion of its ruling on the petition to compel: "In summary, the Plaintiffs have made a substantive challenge to the arbitration clause and have presented facts tending to show that they were victims of fraud in the inducement and application of the arbitration clause. *How a trier of fact will ultimately decide the issues is not for this court to decide.* However, given the seriousness of the *allegations,* the showing of a factual basis for those claims, and the finality of arbitration even in the face of apparent legal error [citation], the strong policy favoring arbitration is outweighed by the law and facts in support of Plaintiffs' position." (Italics added.) To judge from remarks made by the trial court during the hearing on the petition to compel, the court appears to have followed the reasoning of *Rowland v. PaineWebber Inc.* (1992) 4 Cal.App.4th 279, 285–286, 6 Cal.Rptr.2d 20, that a court must only determine whether "there are any facts supporting the allegations of fraudulent inducement." Toward the end of the hearing on the petition to compel, the trial court again alluded to cases "that have ... talked in terms of the burden being akin to a burden on a summary judgment motion." Moreover, ***973** both counsel for the Engallas and for Kaiser appear to have conceived their burden as one similar to summary judgment. The trial court was apparently of the view that it did not have to definitively decide the fraud issue in order to dispose of the petition, because that issue would be ultimately decided by a jury in the context of the Engallas' damages action. Because the trial court, understandably confused by case law (see *Rosenthal, supra,* 14 Cal.4th at p. 407, 58 Cal.Rptr.2d 875, 926 P.2d 1061 and cases cited therein), apparently abdicated its role as trier of fact in deciding the petition to compel arbitration, the case must be remanded to that court to resolve any factually disputed issues, unless there is no evidentiary support for the Engallas' claims. (See *id.* at p. 414, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) We turn then to the question whether there was such support. [7]

III. FRAUD IN THE INDUCEMENT OF THE ARBITRATION AGREEMENT

[6] **[7]** **[8]** The Engallas claim fraud in the inducement of the arbitration agreement and therefore that "[g]rounds exist for the revocation of the agreement" within the meaning of section 1281.2, subdivision (b). As has been pointed out, the "revocation of a contract" referred to in section 1281.2 is something ***857** of a misnomer. "Offers are 'revoked.' [Citation.] Contracts are extinguished by rescission." (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group, 1996) ¶ 5.111, p. 5–31, italics omitted.) We construe section 1281.2, subdivision (b), to mean that the petition to compel arbitration is not to be granted when there are grounds for rescinding the agreement. Fraud is one of the grounds on which a contract can be rescinded. (Civ.Code, § 1689, subd. (b)(1).) In order to defeat a petition to compel arbitration, the parties opposing a petition to compel must show that the asserted fraud

claim goes specifically "to the 'making' of the agreement to arbitrate," rather than to the making of the contract in **917 general. (*Rosenthal, supra,* 14 Cal.4th at p. 415, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) In the present case, the Engallas do allege, and seek to show, fraud in the making of the arbitration agreement.

[9] [10] [11] [12] The Engallas claim[8] that Engalla was fraudulently induced to enter the arbitration agreement —in essence a claim of promissory fraud. " 'Promissory fraud' is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.] [¶] An action for *974 promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377, 909 P.2d 981.) The elements of fraud that will give rise to a tort action for deceit are: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Ibid.*) As explained below, there is no requirement to show pecuniary damages when fraud is the basis for a defense to a petition to compel arbitration, rather than a suit for damages.

Here the Engallas claim (1) that Kaiser misrepresented its arbitration agreement in that it entered into the agreement knowing that, at the very least, there was a likelihood its agents would breach the part of the agreement providing for the timely appointment of arbitrators and the expeditious progress towards an arbitration hearing; (2) that Kaiser employed the above misrepresentation in order to induce reliance on the part of Engalla and his employer; (3) that Engalla relied on these misrepresentations to his detriment. The trial court found evidence supporting those claims. We examine each of these claims in turn.

[13] [14] First, evidence of misrepresentation is plain. "[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered." (*Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55, 30 Cal.Rptr. 629.) As recounted above, section 8.B. of the arbitration agreement provides that party arbitrators "shall" be chosen within 30 days and neutral arbitrators within 60 days, and that the arbitration hearing "shall" be held "within a reasonable time thereafter." Although Kaiser correctly argues that these contractual representations did not bind it to appoint a neutral arbitrator within 60 days, since the appointment of that arbitrator is a bilateral decision that depends on agreements of the parties, Kaiser's contractual representations were at the very least commitments to exercise good faith and reasonable diligence to have the arbitrators appointed within the specified time. This good faith duty is underscored by Kaiser's contractual assumption of the duty to administer the health service plan as a fiduciary.

Here there are facts to support the Engallas' allegation that Kaiser entered into the arbitration agreement with knowledge that it would not comply with its own contractual timelines, or with at least a reckless indifference ***858 as to whether its agents would use reasonable diligence and good faith to comply with them. As discussed, a survey of Kaiser arbitrations between 1984 and *975 1986 submitted into evidence showed that a neutral arbitrator was appointed within 60 days in only 1 percent of the cases, with only 3 percent appointed within 180 days, and that on average the neutral arbitrator was appointed 674 days—almost 2 years—after the demand for arbitration. Regardless of when Kaiser became aware of these precise statistics, which were part of a 1989 study, the depositions of two of Kaiser's in-house attorneys demonstrate that Kaiser was aware soon after it began its arbitration program that its contractual deadlines were not being met, and that severe delay was endemic to the program. Kaiser nonetheless persisted in its contractual promises of expeditiousness.

**918 Kaiser now argues that most of these delays were caused by the claimants themselves and their attorneys, who procrastinated in the selection of a neutral arbitrator. But Kaiser's counterexplanation is without any statistical support, and is based solely on anecdotal evidence related by Kaiser officials. Moreover, the explanation appears implausible in view of the sheer pervasiveness of the delays. While it is theoretically possible that 99 percent of plaintiffs' attorneys did not seek a rapid arbitration, a more reasonable inference, in light of common experience, is that in at least some cases Kaiser's defense attorneys were partly or wholly responsible for the delays, and Kaiser's former general counsel conceded as much in deposition testimony. It is, after all, the defense which often benefits from delay, thereby preserving the status quo to its advantage until the time when memories fade and claims are abandoned. Indeed, the present case illustrates

why Kaiser's counsel may sometimes find it advantageous to delay the selection of a neutral arbitrator. There is also evidence that Kaiser kept extensive records on the arbitrators it had used, and may have delayed the selection process in order to ensure that it would obtain the arbitrators it thought would best serve its interests. Thus, it is a reasonable inference from the documentary record before us that Kaiser's contractual representations of expeditiousness were made with knowledge of their likely falsity, and in fact concealed an unofficial policy or practice of delay.

The systemwide nature of Kaiser's delay comes into clearer focus when it is contrasted with other arbitration systems. As the Engallas point out, many large institutional users of arbitration, including most health maintenance organizations (HMO's), avoid the potential problems of delay in the selection of arbitrators by contracting with neutral third party organizations, such as the American Arbitration Association (AAA). These organizations will then assume responsibility for administering the claim from the time the arbitration demand is filed, and will ensure the arbitrator or arbitrators are ***976** chosen in a timely manner.[9] Though Kaiser is not obliged by law to adopt any particular form of arbitration, the record shows that it did not attempt to create within its own organization any office that would neutrally administer the arbitration program, but instead entrusted such administration to outside counsel retained to act as advocates on its behalf. In other words, there is evidence that Kaiser established a self-administered arbitration system in which delay for its own benefit and convenience was an inherent part, despite express and implied contractual representations to the contrary.[10]

*****859** **[15]** A fraudulent state of mind includes not only knowledge of falsity of the misrepresentation but also an " 'intent to ... induce reliance' " on it. (*Lazar v. Superior Court, supra,* 12 Cal.4th at p. 638, 49 Cal.Rptr.2d 377, 909 P.2d 981.) It can be reasonably inferred in the present case that these misrepresentations of expeditiousness, which are found not only in the contract but in newsletters periodically sent to subscribers touting the virtues of the Kaiser arbitration program, were made by Kaiser to encourage these subscribers to believe that its program would function efficiently. One such newsletter stated: "In the jury trial system, a malpractice complaint takes at least three years—and frequently longer—to reach court and a typical trial lasts ten to fourteen days. Arbitration proceedings don't involve a judge or jury; can be concluded *in several months time,* and a typical hearing lasts only ****919** two days." (Italics added.) Such statements can plausibly be viewed as reflecting Kaiser's intent to induce subscription or renewal of subscription in Kaiser's health services plan by misrepresenting the actual workings of its arbitration program.

[16] Kaiser also claims that the Engallas failed to demonstrate actual reliance on its misrepresentations. Actual reliance occurs when a misrepresentation is " 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' " and when, absent such representation, " 'he would not, in all reasonable probability, have entered into the contract or other transaction.' " (*Spinks v. Clark* (1905) 147 Cal. 439, 444, 82 P. 45; see also 5 Witkin, Summary of Cal. Law (9th ed.1988) § 711 at p. 810.) "It is not ... necessary that [a plaintiff's] reliance upon the truth of the ***977** fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct.... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision." (Rest.2d Torts, § 546, com. b, p. 103.)

[17] Moreover, a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814, 94 Cal.Rptr. 796, 484 P.2d 964; see also 12 Williston on Contracts (3d ed.1970) § 1515, p. 480; Rest.2d, Contracts, § 167.) A misrepresentation is judged to be "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question" (Rest.2d Torts, § 538, subd. (2)(a); see also *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 188, fn. 5, 183 Cal.Rptr. 881), and as such materiality is generally a question of fact unless the "fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it." (Rest.2d Torts, § 538, com. e, p. 82.) Thus, the Engallas need only make a showing that the misrepresentations were material, and that therefore a reasonable trier of fact could infer reliance from such misrepresentations, in order to survive this summary-judgment-like proceeding, absent evidence conclusively rebutting reliance. (Cf. *Security Pac. Nat. Bank v. Associated Motor Sales* (1980) 106 Cal.App.3d 171, 179–180, 165 Cal.Rptr. 38 [presumption which shifts the burden of proving evidence entitles plaintiff to summary judgment if defendant fails to produce evidence to rebut the presumption].)

[18] **[19]** In the present case, our assessment of the materiality of representations is somewhat complicated by the fact that the primary decision maker responsible for selecting the Kaiser health plan was not Engalla himself but his employer, Oliver Tire. The evidence shows that Engalla had little if any cognizance of the arbitration agreement, and that the form he signed to enroll in Kaiser merely stated that members' claims must be submitted to arbitration "[i]f the [health services plan] agreement so provides." On the other hand, Oliver Tire and its personnel ***860** employees were obviously aware of the arbitration provision and were responsible for scrutinizing the details of the health services plan before offering it to the company's employees. But this complication does not alter fundamentally our analysis of materiality. As we have recognized, an employer that negotiates group medical benefits for its employees acts as an agent for those employees during the period of negotiation. (*Madden, supra,* 17 Cal.3d at pp. 705–706 & fn. 5, 131 Cal.Rptr. 882, 552 P.2d 1178.) An agency relationship is a fiduciary one, obliging the agent to act in the interest of the principal. (See *Fischer v. Machado* (1996) 50 Cal.App.4th 1069, 1072, 58 Cal.Rptr.2d 213.) Accordingly, a material representation in this case is one *978 that would have substantially influenced the health plan selection process of Oliver Tire, acting as an agent of its employees as a class. [11]

**920 Applying these principles to the present case, we conclude that Kaiser's representations of expeditiousness in the arbitration agreement were not "so obviously unimportant" as to render them immaterial as a matter of law. We have recognized that expeditiousness in is commonly regarded as one of the primary advantages of arbitration. " '[T]he parties to an arbitral agreement knowingly take the risks of error of fact or law committed by the arbitrators ... in order to obtain *speedy* decisions by experts in the field whose practical experience and worldly reasoning will be accepted as correct by other experts.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 12, 10 Cal.Rptr.2d 183, 832 P.2d 899, italics added.) We have accordingly rejected, as a general proposition, the claim that arbitration agreements between an HMO and its participants are inherently one-sided in favor of the former. "The speed and economy of arbitration, in contrast to the expense and delay of a jury trial, could prove helpful to all parties...." (*Madden, supra,* 17 Cal.3d at p. 711, 131 Cal.Rptr. 882, 552 P.2d 1178.) The explicit and implicit representations contained in Kaiser's arbitration agreement serve to confirm to the reasonable potential subscriber that Kaiser has an efficient system of arbitration, in which what is lost in terms of jury trial rights would be gained in part by a swifter resolution of the dispute. If it is indeed the case that these representations were false, and concealed an arbitration process in which substantial delay was the rule and timeliness the rare exception, then we cannot say these misrepresentations were so trivial that they would not have influenced a reasonable employer's decision as to which among the many competing employee health plans it would choose for its employees.

Kaiser argues to the contrary that the existence of section 1281.6 negates any possible materiality that its misrepresentation of expeditiousness may have had. That section states in pertinent part that in the absence of an agreed method of appointing an arbitrator, "or if the agreed method fails or for any reason cannot be followed ... the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator." (*Ibid.*) But the mere fact *979 that there is a statutory remedy to expedite the arbitrator selection process does not necessarily render the reality of Kaiser's systematic delay irrelevant to the selection of a health plan. A party's success in having a section 1281.6 petition granted is not necessarily assured, nor is it costless, nor is it in accord with normal expectations of arbitration participants, who view arbitration as an alternative to the courts. " 'Typically, those who enter into ***861** arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts.' " (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Given the reality that there exists a considerable number of roughly comparable group health plans (see *How Good Is Your Health Plan?* (Aug.1996) Consumer Reports, at pp. 28, 40–41), a reasonable employer choosing a health plan for its employees may very well decline to select a plan with a dysfunctional arbitration system requiring court supervision.

Nor is there any evidence to conclusively rebut the inference of Oliver Tire's reliance on Kaiser's representations of expeditiousness. Kaiser claims to the contrary that the company paid scant attention to the arbitration clause, focusing in particular on the statement of Theodomeir Roy, a personnel officer with Oliver Tire who advised the company in its selection of employee health plans, that he "would not be concerned if [the plan] didn't [have an arbitration clause]. And in fact if it did, as it has here, [we] sort of look with favor on it, thinking that it was an expeditious way to resolve disputes." Yet although Roy may have been indifferent to

whether arbitration or some other effective dispute resolution mechanism was available, the evidence suggests he would have looked unfavorably on a system such as Kaiser is alleged to have actually had, which delayed the resolution ****921** of claims, required constant action by the claimant, and failed to adhere to its own contractual terms. There is therefore sufficient evidence to support the claim that Oliver Tire actually relied on Kaiser's misrepresentations.

[20] **[21]** **[22]** We turn then to the question of injury. A defrauded party has the right to rescind a contract, even without a showing of pecuniary damages, on establishing that fraudulent contractual promises inducing reliance have been breached. (See *Earl v. Saks & Co.* (1951) 36 Cal.2d 602, 611, 226 P.2d 340; see also Calamari & Perillo, The Law of Contracts (3d ed.1987) § 9.16, p. 360; Rest.2d, Contracts, § 164, com. (c), p. 448.) The rule derives from the basic principle that a contracting party has a right to what it contracted for, and so has the right "to rescind where he obtain[ed] something substantially different from that which he [is] led to expect." (*Earl v. Saks & Co., supra,* 36 Cal.2d at p. 612, 226 P.2d 340.) It follows that a defrauded party does not have to show pecuniary damages in order to defeat a petition to compel arbitration. Of course, the Engallas cannot defeat a ***980** petition to compel arbitration on the mere showing that Kaiser has engaged generally in fraudulent misrepresentation about the speed of the arbitration process. Rather, they must show that in their particular case, there was substantial delay in the selection of arbitrators contrary to their reasonable, fraudulently induced, contractual expectations. Here, there is ample evidence to support the Engallas' contention that Kaiser breached its arbitration agreement by repeatedly delaying the timely appointment of an available party arbitrator and a neutral arbitrator.

[23] **[24]** **[25]** To be sure, the mere fact that the selection of arbitrators extended beyond their 30– and 60–day deadlines does not by itself establish that Kaiser breached its arbitration agreement. It is, after all, the malpractice claimant in arbitration, like the plaintiff in litigation, who bears the primary responsibility of exercising diligence in order to advance progress towards the resolution of its claim (see *Burgess v. Kaiser Foundation Hospitals* (1993) 16 Cal.App.4th 1077, 1081–1082, 20 Cal.Rptr.2d 488), and Kaiser is under no obligation to press for appointment of arbitrators when a claimant is himself dilatory. Nor is the contract breached when delay in the selection of arbitrators is the result of reasonable disagreements over arbitrator selection. Nonetheless, as explained above, Kaiser, by agreeing to 30– and 60–day periods for the appointment of arbitrators, committed itself to cooperate with reasonable diligence and good faith in the process of appointing the arbitrators within the specified times. (See *Frey & Horgan Corp. v. Superior Court* (1936) 5 Cal.2d 401, 404, 55 P.2d 203.) Here, there is strong evidence *****862** that, despite a high degree of diligence on the part of Engalla's counsel in attempting to obtain the timely appointment of arbitrators, Kaiser lacked either reasonable diligence or good faith, or both, in cooperating on these timely appointments. Instead, the evidence shows that it engaged in a course of nonresponse and delay and added extracontractual conditions to the arbitration selection process, such as the requirement that the claimant name a party arbitrator first. Thus, strong evidence supports the conclusion that Kaiser did not fulfill its contractual obligations in this case to appoint arbitrators in a timely manner.

[26] Nor does the presence of section 1281.6 excuse Kaiser's alleged misfeasance, as Kaiser contends. That section, as explained above, provides a statutory method for resolving breakdowns in the arbitrator selection process, and states in pertinent part that in the absence of an agreed method of appointing an arbitrator, "or if the agreed method fails or for any reason cannot be followed ... the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator." Kaiser contends that section 1281.6 is implicitly incorporated into the contract, which specifies that California law be followed. Yet the availability of section 1281.6 does not absolve ***981** Kaiser of its explicit and implicit contractual duties to timely select a neutral arbitrator and to not obstruct progress towards arbitration. All section 1281.6 provides is a *remedy* for the breach of those duties of which parties may avail themselves. As noted, this remedy compels claimants to go into superior court and seek ****922** specific performance of the arbitration agreement, forcing them to engage in at least some litigation in order to vindicate their rights and thereby violating the usual expectations of an arbitration agreement. (See *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.) Nothing in the language of section 1281.6 compels a party to seek this remedy, nor does this language suggest that resort to section 1281.6 is a precondition to opposing successfully a petition to compel arbitration when the petitioning party has engaged in fraud. Rather, section 1281.6 appears to be simply a legislative means of implementing this state's policy in favor

of arbitration by permitting parties to an arbitration contract to expedite the arbitrator selection process.

[27] Of course, when a delay in the selection of arbitrators is the result of a reasonable and good faith disagreement between parties, or of some other reasonable cause, the remedy for such delay may indeed be a section 1281.6 petition rather than the abandonment of the arbitration agreement. But a party that imposes and administers its own arbitration program, that fraudulently misrepresents the speed of the arbitrator selection process so as to induce reliance, and that in fact engages in conduct forcing substantial delay, may not then compel arbitration by contending that the other party failed to resort to the court by filing a section 1281.6 petition.

[28] **[29]** In sum, we conclude there is evidence to support the Engallas' claims that Kaiser fraudulently induced Engalla to enter the arbitration agreement in that it misrepresented the speed of its arbitration program, a misrepresentation on which Engalla's employer relied by selecting Kaiser's health plan for its employees, and that the Engallas suffered delay in the resolution of its malpractice dispute as a result of that reliance, despite Engalla's own reasonable diligence. The trial court, on remand, must resolve conflicting factual evidence [12] in order to properly adjudicate Kaiser's petition to compel arbitration. [13]

***863 *982 IV. WAIVER

The Engallas also claim the petition to compel arbitration should be denied on grounds of waiver. For reasons discussed below, we conclude that their waiver claims may have merit, but that the question of waiver must be determined by the trial court on remand.

Section 1281.2, subdivision (a), provides that a trial court shall refuse to compel arbitration if it determines that "[t]he right to compel arbitration has been waived by the petitioner." The Engallas argue that Kaiser's various dilatory actions constituted a waiver of its right to compel arbitration.

[30] As a threshold matter, Kaiser argues that this waiver claim should be resolved by an arbitrator rather than by the court. Kaiser asserts that "arbitrators have exclusive jurisdiction to decide not only the substantive merits of a controversy but also any procedural disputes that precede the arbitration hearing," and that the Engallas' waiver claim is such a "procedural" dispute. In support of this assertion, it cites *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, 556–558, 84 S.Ct. 909, 917–919, 11 L.Ed.2d 898. That case is inapposite. There the court considered an arbitration agreement that was part of the grievance ****923** machinery established by a labor management contract. There was no question that the parties had a valid and enforceable arbitration agreement, and no claim that the agreement had been waived. The court held rather that the question whether the parties had properly exhausted their remedies in the preliminary stages of the grievance process prior to invoking their right to arbitration—that is, whether a party's arbitration rights were invoked prematurely—was for the arbitrator to decide. (*Id.* at pp. 557–558, 84 S.Ct. at pp. 918–919.) "Once it is determined, ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." (*Id.* at p. 557, 84 S.Ct. at p. 918.) Here, the question is different and more fundamental—whether Kaiser, by its delay or by other acts or omissions, has in fact waived its right to compel arbitration. Section 1281.2, subdivision (a), gives the trial court jurisdiction to decide this question when petitioned to compel arbitration. [14]

[31] **[32]** **[33]** **[34]** Turning to the substance of the waiver claim, we have explained that the term "waiver" has a number of meanings in statute and case law. ***983** (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315, 24 Cal.Rptr.2d 597, 862 P.2d 158.) "Generally, 'waiver' denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to ... relinquish the right." (*Ibid.*) The varied meanings of the term *****864** "waiver" are reflected in the case law on the enforcement of arbitration agreements. "In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the 'bad faith' or 'wilful misconduct' of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.] [¶] Although a number of authorities properly caution that a

waiver of arbitration is not to be lightly inferred [citation], our cases establish that no single test delineates the nature of the conduct of a party that will constitute such a waiver. As our court stated in *Sawday v. Vista Irrigation Dist.* [(1966)] 64 Cal.2d 833, 836[, 52 Cal.Rptr. 1, 415 P.2d 816]; 'Whether there has been a waiver of a right to arbitrate is ordinarily a question of fact, and a finding of waiver, if supported by sufficient evidence, is binding on an appellate court. [Citations.]' " (*Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425–426, 158 Cal.Rptr. 828, 600 P.2d 1060 (*Davis*); see also *Platt Pacific, Inc. v. Andelson, supra,* 6 Cal.4th at pp. 315–316, 24 Cal.Rptr.2d 597, 862 P.2d 158.) The Engallas claim that unreasonable delay and bad faith found in Kaiser's dilatory conduct in choosing arbitrators constituted a form of waiver, and that Kaiser's petition to compel arbitration accordingly should be denied.

As we explained in *Davis,* the question of waiver is one of fact, and an appellate court's function is to review a trial court's findings regarding waiver to determine whether these are supported by substantial evidence. The trial court in this case made no findings regarding the Engallas' waiver claim, focusing instead on their fraud claim, which has therefore been our primary focus as well. ****924** Given the summary-judgment-like ***984** posture of the present case, our sole task is to review the record to determine whether there are facts to support the Engallas' waiver claim. We conclude that the evidence of Kaiser's course of delay, reviewed extensively above, which was arguably unreasonable or undertaken in bad faith, may provide sufficient grounds for a trier of fact to conclude that Kaiser has in fact waived its arbitration agreement.

[35] **[36]** **[37]** We emphasize, as we explained in our discussion of fraud, that the delay must be substantial, unreasonable, and in spite of the claimant's own reasonable diligence. When delay in choosing arbitrators is the result of reasonable and good faith disagreements between the parties, the remedy for such delay is a petition to the court to choose arbitrators under section 1281.6, rather than evasion of the contractual agreement to arbitrate. The burden is on the one opposing the arbitration agreement to prove to the trial court that the other party's dilatory conduct rises to such a level of misfeasance as to constitute a waiver (see *Rosenthal, supra,* 14 Cal.4th at p. 413, 58 Cal.Rptr.2d 875, 926 P.2d 1061), and such waiver "is not to be lightly inferred" (*Davis, supra,* 25 Cal.3d at p. 426, 158 Cal.Rptr. 828, 600 P.2d 1060). In this case, there is ample evidence that the claimant was diligent in seeking Kaiser's cooperation, and instead suffered from Kaiser's delay, a delay which was unreasonable or in bad faith. We leave it to the trial court to determine on remand whether waiver of the right to compel arbitration has in fact occurred.

V. UNCONSCIONABILITY

[38] **[39]** **[40]** We turn then to the Engallas' unconscionability argument. We have required that "contractual arrangement[s] for the nonjudicial resolution of disputes" must possess " 'minimum levels of integrity.' " (*Graham v. Scissor–Tail, Inc.* (1981) 28 Cal.3d 807, 827, 171 Cal.Rptr. 604, 623 P.2d 165.) Thus, in *Graham v. Scissor–Tail, Inc.,* we held that an arbitration agreement that called for the selection of an arbitrator affiliated with one of the parties to the contract was unconscionable. (*Ibid.*) In addition to *****865** the general doctrine of unconscionability derived from contract law, HMO's such as Kaiser are regulated by the Knox–Keene Health Care Service Plan Act, which provides among other things that all contracts made in connection with a health service plan be "fair, reasonable, and consistent with the objectives" of that statute. (Health & Saf.Code, § 1367, subd. (h).) HMO's are therefore especially obligated not to impose contracts on their subscribers that are one-sided and lacking in fundamental fairness.

[41] In determining whether a contract term is unconscionable, we first consider whether the contract between Kaiser and Engalla was one of adhesion. (See *Graham v. Scissor–Tail, Inc., supra,* 28 Cal.3d at p. 817, 171 Cal.Rptr. 604, 623 P.2d 165.) In *Madden,* ***985** *supra,* 17 Cal.3d 699, 131 Cal.Rptr. 882, 552 P.2d 1178, we held that an agreement between Kaiser and a state employee was not a true contract of adhesion, although Kaiser's health plan was offered to state employees "on a 'take it or leave it' basis without opportunity for individual bargaining." (*Id.* at p. 710, 131 Cal.Rptr. 882, 552 P.2d 1178.) We reasoned that the Kaiser contract was not adhesive because (1) it "represents the product of negotiation between two parties, Kaiser and the [State Employees Retirement System], possessing parity of bargaining strength" and (2) the state employee could

choose from among a number of different health plans, and thus was not confronted with the choice typical of a contract of adhesion of "either adher[ing] to the standardized agreement or forego[ing] the needed service." (*Id.* at p. 711, 131 Cal.Rptr. 882, 552 P.2d 1178.) We also found that the arbitration clause in question was not, unlike the unconscionable clauses in adhesion contracts, a term that limits the liability or obligations of a stronger party, but rather "could prove helpful to all parties." (*Ibid.*)

The present agreement, which was also offered to Engalla on a "take it or leave it" basis, has more of the characteristics of an adhesion contract than the one considered in *Madden.* First, although Oliver Tire is a corporation of considerable size, it has had only a small number of employees enrolled in Kaiser, and did not have the strength to ****925** bargain with Kaiser to alter the terms of the contract. Second, Engalla did have one other health plan from which to choose, but not several plans as was the case in *Madden.* Finally, unlike in *Madden,* the Engallas do not claim that the arbitration clause itself is unconscionable, but that the arbitration program Kaiser established was biased against them.

Nonetheless, although the present contract has some of the attributes of adhesion, it did not, *on its face,* lack " 'minimum levels of integrity.' " (*Graham v. Scissor–Tail, Inc., supra,* 28 Cal.3d at p. 827, 171 Cal.Rptr. 604, 623 P.2d 165.) The unfairness that is the substance of the Engallas' unconscionability argument comes essentially to this: The Engallas contend that Kaiser has established a system of arbitration inherently unfair to claimants, because the method of selecting neutral arbitrators is biased. They claim that Kaiser has an unfair advantage as a "repeat player" in arbitration, possessing information on arbitrators that the Engallas themselves lacked. They also argue that Kaiser, under its arbitration system, has sought to maximize this advantage by reserving for itself an unlimited right to veto arbitrators proposed by the other party. This method is in contrast to arbitration programs run by neutral, third party arbitration organizations such as the AAA, which give parties a very limited ability to veto arbitrators from its preselected panels. [15]

Yet none of these features of Kaiser's arbitration program renders the arbitration agreement per se unconscionable. As noted above, section 1281.6 ***986** specifically contemplates a system whereby neutral arbitrators will be chosen directly by the parties. The alleged problem with Kaiser's arbitration in *****866** this case was not any defect or one-sidedness in its contractual provisions, but rather in the gap between its contractual representations and the actual workings of its arbitration program. It is the doctrines of fraud and waiver, rather than of unconscionability, that most appropriately address this discrepancy between the contractual representation and the reality. Thus, viewing the arbitration agreement on its face, we cannot say it is unconscionable. [16]

VI. CONCLUSION AND DISPOSITION

For the foregoing reasons, the judgment of the Court of Appeal is reversed with directions to remand the case for proceedings consistent with this opinion.

GEORGE, C.J., and BAXTER, WERDEGAR and CHIN, JJ., concur.

KENNARD, Justice, concurring.
I concur in the majority opinion. I write separately to note that this case illustrates yet again the essential role of the courts in ensuring that the arbitration system delivers not only speed and economy but also fundamental fairness.

Unfairness in arbitration sufficiently extreme to justify court intervention can take many forms. As I have previously stated, in my view courts have the power to overturn an arbitrator's decision if it contains manifest error that causes substantial injustice. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 36–40, 10 Cal.Rptr.2d 183, 832 P.2d 899 (dis. opn. of Kennard, J.).) It is also my view that arbitrators are limited to the same remedies that a court could award under the circumstances of the case, and that a court may overturn an arbitrator's award of relief that exceeds that limit. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 394–395, 400–401, 36 Cal.Rptr.2d 581, 885 P.2d 994 (dis. opn. of Kennard, J.).)

***987** This case illustrates the role that courts play in maintaining the procedural fairness, as well as the substantive fairness, of arbitration proceedings. Procedural manipulations can be used by a party not only to delay and obstruct

the proceedings, thereby denying the other party the speed and efficiency that are the arbitration system's primary justification, but also to affect the possible outcome of the arbitration. As to speed and efficiency, the Kaiser arbitration provision provides for appointment of a neutral arbitrator within a 60–day period. (See maj. opn., *ante,* at p. 849, fn. 3 of 64 Cal.Rptr.2d, at p. 885, fn. 3 of 938 P.2d, fn. 3.) In reality, a neutral arbitrator was appointed within 60 days in less than 1 percent of Kaiser's arbitrations; the appointment occurred within 180 days (3 times the contractual time period) in less than 3 percent of Kaiser's arbitrations. Indeed, the *average* time for appointment of a neutral arbitrator was *674 days,* more than 11 times the contractual time period. The *average* time for a Kaiser-administered arbitration hearing to *begin* (not conclude) was *863 days* or almost 30 months. (*Id.,* at p. 852 of 64 Cal.Rptr.2d, at p. 912 of 938 P.2d.) Although the comparison is not exact, it is instructive to compare the "speed" of Kaiser's arbitration process to the speed of judicial proceedings in Alameda County Superior Court, where this action was filed. During the 1993–1994 fiscal year that court disposed of 96 percent of its civil cases in less than 24 ***867 months. (Judicial Council of Cal., Annual Data Reference (1993–94) Caseload Data by Individual Courts, Table No. 22, p. 52.)

By delaying arbitration in this case until after Wilfredo Engalla died, Kaiser also affected the potential outcome of his malpractice claims. Engalla's death reduced Kaiser's potential liability for noneconomic damages to $250,000 from the $500,000 potential liability it would have faced had the claims been arbitrated during Engalla's life. (See maj. opn., *ante,* at pp. 853–854 of 64 Cal.Rptr.2d, at pp. 913–914 of 938 P.2d.)

As the majority opinion makes clear, courts must be alert to procedural manipulations of arbitration proceedings and should grant appropriate relief when such manipulations occur. As here, such conduct may give rise to claims of fraud in the inducement of the arbitration agreement or claims that the manipulating party has waived its right to enforce the arbitration agreement. Moreover, if such conduct affects the arbitration award, it may form the basis for vacating the award as one "procured by corruption, fraud or other undue means." (Code Civ. Proc., § 1286.2, subd. (a).)

Finally, it is worth noting that new possibilities for unfairness arise as arbitration ventures beyond the world of merchant-to-merchant disputes in which it was conceived into the world of consumer transactions (like the *988 health care agreement in this case) and nonunion employment relationships.[1] In **927 such cases, the assumption that the parties have freely chosen arbitration as a dispute resolution mechanism in a process of arm's-length negotiation may be little more than an illusion. Unlike the traditional model of arbitration agreements negotiated between large commercial firms with equal bargaining power, consumer and employment arbitration agreements are typically "take it or leave it" propositions, contracts of adhesion in which the only choice for the consumer or the employee is to accept arbitration or forego the transaction. And the fact that the business organization imposing the arbitration clause is a repeat player in the arbitration system, while the consumer or employee is not, raises the potential that arbitrators will consciously or unconsciously bias their decisions in favor of an organization or industry that hires them regularly as an arbitrator.

Here, neither plaintiffs' decedent nor his employer was afforded an opportunity to accept or reject arbitration as the means of resolving disputes. Rather, Kaiser's standard health care agreement, which included the arbitration requirement, was presented on a "take it or leave it" basis. (See maj. opn., *ante,* at p. 865 of 64 Cal.Rptr.2d, at p. 924 of 938 P.2d.) There was no true bargaining involved here. Moreover, although Kaiser ***868 appears to have led its members to believe that Kaiser administered its arbitration system fairly and as a "fiduciary" (*id.,* at p. 849 of 64 Cal.Rptr.2d, at p. 909 of 938 P.2d), in reality the opposite may have been true. Kaiser "administered" its arbitration system through its defense attorneys, who appear to have manipulated the process to Kaiser's advantage. (*Id.,* at p. 858 of 64 Cal.Rptr.2d, at p. 918 of 938 P.2d.)

*989 Private arbitration may resolve disputes faster and cheaper than judicial proceedings. Private arbitration, however, may also become an instrument of injustice imposed on a "take it or leave it" basis. The courts must distinguish the former from the latter, to ensure that private arbitration systems resolve disputes not only with speed and economy but also with fairness.

BROWN, Justice, dissenting.

The intended target of the majority's wrath—the Permanente Medical Group, Inc., Kaiser Foundation Hospitals, and the Kaiser Foundation Health Plan (hereafter Kaiser)—could not be more deserving. I write separately to represent the interests of the unintended victim of the majority's holding—private arbitration in California.

I. INTRODUCTIon

Pursuant to the terms of a prior written agreement, the parties in this case submitted a medical malpractice dispute to private, or nonjudicial, arbitration. California law, like corresponding federal law under the United States Arbitration Act (9 U.S.C. §§ 1–16), has long reflected a strong policy in favor of such arbitration.

As this court recently explained, "Title 9 of the Code of Civil Procedure, [1] as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. (§ 1280 et seq.) Through this detailed statutory scheme, the Legislature has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citations.] Consequently, courts will ' "indulge every intendment to give effect to such proceedings." ' [Citations.] Indeed, more than 70 years ago this court explained: 'The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.' [Citation.] 'Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.)

****928** Although the majority purports to "affirm the basic policy in favor of enforcement of arbitration agreements" (maj. opn., *ante,* at p. 848 of 64 Cal.Rptr.2d, at p. 908 of 938 P.2d), it nonetheless concludes that "the governing statutes place limits on the extent to which a party that has committed *misfeasance in the performance* of such an agreement may compel its enforcement." (*Ibid.,* italics added.) I cannot ***990** agree with the majority's interpretation of the governing statutory framework. In my view, except for seeking statutorily prescribed court assistance in the arbitrator selection process (see *post,* at pp. 870–871 of 64 Cal.Rptr.2d, at pp. 930–931 of 938 P.2d), once a private arbitration is pending, a party must seek relief for its adversary's "misfeasance in the performance" in the arbitral forum, not in the courts. Make no mistake about it. The majority's decision to validate a party's unilateral withdrawal from a pending arbitration based on the conduct of its arbitration adversary will wreak havoc on arbitrations throughout the state. Therefore, I respectfully dissent.

II. FACTUAL AND PROCEDURAL BACKGROUND

Almost lost in the majority's exhaustive procedural summary is one key fact—namely, *****869** the arbitration process was already underway by the time the plaintiffs unilaterally withdrew. A brief review of the history of the arbitration is in order.

On May 31, 1991, [2] pursuant to the terms of a "group medical and hospital services agreement," Wilfredo Engalla, his wife, and their four children (hereafter the Engallas) demanded that Kaiser submit a medical malpractice dispute to binding private arbitration. On June 17, Kaiser submitted to the Engallas' arbitration demand. Two days later, the Engallas' counsel sent Kaiser the $150 check "required in order to initiate the arbitration proceeding."

The Engallas designated their party arbitrator on July 8, Kaiser designated its party arbitrator on July 17, and the parties confirmed their agreement on a neutral arbitrator on October 22. While the parties were in the process of designating arbitrators, they exchanged a number of discovery requests.

Thereafter, on October 28, the Engallas refused to continue with the pending arbitration. [3] The reason the Engallas withdrew from the arbitration was that Kaiser declined to stipulate that Mrs. Engalla's separate loss of consortium claim survived her husband's death. It is this unilateral withdrawal from a pending arbitration that the majority's decision validates.

*991 III. DISCUSSIon

In evaluating both the Engallas' fraudulent inducement claim and their waiver claim, the majority focuses on Kaiser's *performance* during the course of the aborted private arbitration. According to the majority, the sine qua non of successful fraudulent inducement and waiver claims is unreasonable or bad faith delay by Kaiser. (Maj. opn., *ante,* at pp. 861–862, 864–865 of 64 Cal.Rptr.2d, at pp. 920–921, 923–924 of 938 P.2d.) Thus, the majority permits the fraudulent inducement claim to proceed because "there is

strong evidence that, despite a high degree of diligence on the part of the Engallas' counsel in attempting to obtain the timely appointment of arbitrators, Kaiser lacked either reasonable diligence or good faith, or both, in cooperating on these timely appointments." (*Id.* at p. 861 of 64 Cal.Rptr.2d, at p. 921 of 938 P.2d.) Likewise, the majority permits the waiver claim to proceed because "there is ample evidence that the [Engallas were] diligent in seeking Kaiser's cooperation, and ****929** instead suffered from Kaiser's delay, a delay which was unreasonable or in bad faith." (*Id.* at p. 864 of 64 Cal.Rptr.2d, at p. 924 of 938 P.2d.)

Although the majority's desire to penalize Kaiser's obduracy is understandable, the consequences of validating a party's unilateral withdrawal from a pending arbitration based on the conduct of its arbitration adversary will reverberate far beyond the bad facts of the instant case. In stark contrast to the legislative response, which enhances the procedures for *keeping* a case in private arbitration (see *post,* at p. 871 of 64 Cal.Rptr.2d, at p. 930 of 938 P.2d), the majority expands the procedures for *removing* a case from arbitration. The majority maintains that section 1281.2 compels its decision. (See maj. opn., *ante,* at pp. 856, 862–864 & fn. 14 of 64 Cal.Rptr.2d, at pp. 916, 922–923 & n. 14 of 938 P.2d.) I cannot agree. That statute delineates certain narrow circumstances in which a trial court may uphold a party's "refus[al] to arbitrate." (§ 1281.2.) Nothing in section 1281.2 permits a party that has *****870** previously *submitted* a dispute to arbitration, and thereby *agreed to arbitrate,* to *withdraw* from that arbitration at some later date based on the unreasonable or bad faith delay of its adversary.

To construe section 1281.2 in the sweeping fashion advanced by the majority will seriously compromise the integrity of the arbitral process and will impose an unpredictable and unnecessary burden on our trial courts. It is well established that "contractual arbitration has a life of its own outside the judicial system." (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1805, 13 Cal.Rptr.2d 678; see also *Nanfito v. Superior Court* (1991) 2 Cal.App.4th 315, 318, 2 Cal.Rptr.2d 876; *Byerly v. Sale* (1988) 204 Cal.App.3d 1312, 1316, 251 Cal.Rptr. 749.) "It is the job of the arbitrator, not the court, to resolve all questions needed to determine the ***992** controversy. [Citations.] The arbitrator, and not the court, decides questions of procedure and discovery. [Citations.] It is also up to the arbitrator, and not the court, to grant relief for delay in bringing an arbitration to a resolution." (*Titan/Value Equities Group, Inc. v. Superior Court* (1994) 29 Cal.App.4th 482, 487–488, 35 Cal.Rptr.2d 4, fns. omitted.)

"This does not mean that a party to an arbitration proceeding has no remedy against dilatory tactics." (*Brock v. Kaiser Foundation Hospitals, supra,* 10 Cal.App.4th at p. 1808, 13 Cal.Rptr.2d 678.) Rather, a party who has suffered as a result of such tactics may seek appropriate relief in the arbitral forum. (*Ibid.*; see also *Titan/Value Equities Group, Inc. v. Superior Court, supra,* 29 Cal.App.4th at p. 488, 35 Cal.Rptr.2d 4; *Nanfito v. Superior Court, supra,* 2 Cal.App.4th at pp. 318–319, 2 Cal.Rptr.2d 876; *Byerly v. Sale, supra,* 204 Cal.App.3d at p. 1316, 251 Cal.Rptr. 749; *Young v. Ross–Loos Medical Group, Inc.* (1982) 135 Cal.App.3d 669, 673, 185 Cal.Rptr. 536.)

Nor does the fact that the arbitrator selection process in a given private arbitration has not yet been completed preclude a party from obtaining appropriate relief. To the contrary, section 1281.6 provides a mechanism by which a party can seek limited assistance from the trial court in obtaining the appointment of an arbitrator or arbitrators.[4] (*Burgess v. Kaiser Foundation Hospitals* (1993) 16 Cal.App.4th 1077, 1079, 1081–1082, 20 Cal.Rptr.2d 488; *Brock v. Kaiser Foundation Hospitals, supra,* 10 Cal.App.4th at pp. 1803–1804, 13 Cal.Rptr.2d 678; ****930** *American Home Assurance Co. v. Benowitz* (1991) 234 Cal.App.3d 192, 198–202, 285 Cal.Rptr. 626; *Boutwell v. Kaiser Foundation Health Plan* (1988) 206 Cal.App.3d 1371, 1374, 254 Cal.Rptr. 173; *Young v. Ross–Loos Medical Group, Inc., supra,* 135 Cal.App.3d at pp. 674–675, 185 Cal.Rptr. 536; *Cook v. Superior Court* (1966) 240 Cal.App.2d 880, 887, 50 Cal.Rptr. 81.) "[O]nce there is an arbitrator appointed pursuant to section 1281.6, the party seeking to expedite the arbitration proceedings can apply to the arbitrator for [appropriate relief]." (*Brock v. Kaiser Foundation Hospitals, supra,* 10 Cal.App.4th at p. 1804, 13 Cal.Rptr.2d 678.)

***993** I do not share the majority's view that requiring a party to a private arbitration to file a section 1281.6 petition would "violat[e] the usual expectations of an arbitration agreement." (Maj. opn., *ante,* at p. 862 of 64 Cal.Rptr.2d,

at p. 922 of 938 P.2d.) The majority's reliance on the statement in *Moncharsh* ***871 *v. Heily & Blase, supra,* 3 Cal.4th at page 9, 10 Cal.Rptr.2d 183, 832 P.2d 899, that " '[t]ypically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts' " (maj. opn., *ante,* at p. 860 of 64 Cal.Rptr.2d, at p. 920 of 938 P.2d), is misplaced. *Moncharsh* did not hold that a party to a private arbitration would *never* have to have any contact with the courts but rather that "judicial intervention in the arbitration process [should] be *minimized.* [Citations.]" (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 10, 10 Cal.Rptr.2d 183, 832 P.2d 899, italics added.) Indeed, the very paragraph of *Moncharsh* quoted by the majority emphasizes that title 9 of part 3 of the Code of Civil Procedure—which includes section 1281.6—"represents a comprehensive statutory scheme regulating private arbitration in this state. [Citation.]" (*Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 9, 10 Cal.Rptr.2d 183, 832 P.2d 899.)

Section 1281.6 is the statutory remedy that our Legislature has provided for *resolving* disputes in the arbitrator selection process, thereby preventing such disputes from becoming occasions for avoiding private arbitration agreements. The statute's evident purpose is to facilitate, not to hinder, private arbitration. Requiring a party to employ a legislatively prescribed remedy simply cannot be deemed contrary to the "normal expectations of arbitration participants." (Maj. opn., *ante,* at p. 860 of 64 Cal.Rptr.2d, at p. 920 of 938 P.2d.) In fact, the arbitration provision at issue in the present case specifically alerts the signatories that "[w]ith respect to any matter not herein expressly provided for, the arbitration shall be governed by California Code of Civil Procedure provisions relating to arbitration."

The inclusiveness of the language of section 1281.6 belies the notion that it contains some sort of ill-defined exception for unreasonable or bad faith delay. (See maj. opn., *ante,* at pp. 861–862, 864–865 of 64 Cal.Rptr.2d, at pp. 921–922, 923–924 of 938 P.2d.) By its own terms, the statute comes into play whenever "the agreed method [of appointing an arbitrator] fails or *for any reason* cannot be followed." (§ 1281.6, italics added.) If there were any doubt that the statutory remedy was intended to apply broadly, the Legislature has now put it to rest. Largely in response to this very case, the Legislature recently enacted Health and Safety Code section 1373.20, subdivision (a)(2), providing that for nonindependent arbitration systems such as Kaiser's "[i]n cases or disputes in which the parties have agreed to use a tripartite arbitration panel consisting of two party arbitrators and one neutral arbitrator, and the party arbitrators are unable to agree on the designation of a neutral arbitrator within 30 days after service of a written demand requesting the designation, it shall be conclusively presumed that the agreed method of selection has failed and the method *994 provided in Section 1281.6 of the Code of Civil Procedure may be utilized." The new legislation also provides for attorney fees and costs against a party that "has engaged in dilatory conduct intended to cause delay in proceeding under the arbitration agreement." (Health & Saf.Code, § 1373.20, subd. (b).)

In this case, having previously submitted their dispute to private arbitration and having already completed the arbitrator selection process, the Engallas should have sought relief for Kaiser's dilatory conduct in the pending arbitration. For example, the Engallas **931 could have presented their fraud and waiver claims directly to the arbitrators and requested that they not enforce the arbitration provision. (See *ATSA of California, Inc. v. Continental Ins. Co.* (9th Cir.1983) 702 F.2d 172, 175 [waiver claim]; *Local 81, Am. Fed. of Tech. Eng. v. Western Elec. Co., Inc.* (7th Cir.1974) 508 F.2d 106, 109 [same]; cf. *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 431–433, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (conc. opn. of Kennard, J.) [fraudulent inducement claim as to the contract as a whole].) Likewise, the Engallas could have requested that the arbitrators sanction Kaiser's dilatory conduct by deeming Mrs. Engalla's separate loss of consortium claim to have survived her husband's ***872 death. (See *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 36 Cal.Rptr.2d 581, 885 P.2d 994 [describing broad remedial powers of arbitrators].) In fact, at oral argument, the Engallas' counsel conceded that this case could likely have remained in private arbitration if Mrs. Engalla's economic loss had been ameliorated.

The one thing the Engallas should not be permitted to do, however, is to circumvent the arbitrators altogether. The consequences of validating a party's unilateral withdrawal from a pending arbitration will be dramatic. Jurisdictional disputes will inevitably arise. Suppose, for example, that following the Engallas' unilateral withdrawal, Kaiser had elected to continue to pursue the pending arbitration and that the arbitrators had ultimately entered a default judgment in favor of Kaiser. Would that default judgment have been

valid? Would the same have been true if the trial court had simultaneously entered a default judgment in favor of the Engallas in the pending litigation?

In addition, as the Engallas' counsel acknowledged at oral argument, if this court validates the Engallas' unilateral withdrawal, other parties to pending arbitrations will doubtlessly engage in the same conduct. Counsel's answer to this dilemma was that this court should "trust the trial courts." The majority's answer is to "emphasize ... that the delay must be substantial, unreasonable, and in spite of the claimant's own reasonable diligence" and ***995** not "the result of reasonable and good faith disagreements between the parties." (Maj. opn., *ante,* at p. 864 of 64 Cal.Rptr.2d, at p. 924 of 938 P.2d; see also *id.* at pp. 861–862 of 64 Cal.Rptr.2d, at pp. 920–921 of 938 P.2d.)

Neither answer is satisfactory. Under the majority's holding, which has all the precision of a "SCUD" missile, the resolution of fraudulent inducement and waiver claims will necessarily entail fact-intensive, case-by-case determinations.[5] (See maj. opn., *ante,* at pp. 861–863, 863–865 of 64 Cal.Rptr.2d, at pp. 921–922, 923–924 of 938 P.2d.) The disruptive, time-consuming nature of these determinations is well illustrated by the facts of the present case, in which "[t]he Engallas ultimately had five months to complete discovery [on the petition to compel arbitration], during which time thirteen motions were filed and more than a dozen depositions were taken." (*Id.* at p. 854 of 64 Cal.Rptr.2d, at p. 914 of 938 P.2d.) Even assuming that the trial courts ultimately resolve all future claims correctly, the interim disruption to pending arbitrations will be simply intolerable.

IV. CONCLUSION

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." (*Northern Securities Co. v. United States* (1904) 193 U.S. 197, 400–401, 24 S.Ct. 436, 468, 48 L.Ed. 679 (dis. opn. of Holmes, J.).) Although legislators, practitioners, and courts have all expressed concern that disparities in bargaining power may affect the procedural fairness ****932** of consumer arbitration agreements, this case amply demonstrates why any solutions should come from the Legislature, whose ability to craft precise exceptions is far superior to that of this court.

However well-intentioned the majority and however deserving its intended target, today's holding pokes a hole in the barrier separating private arbitrations and the courts. Unfortunately, like any such breach, this hole will eventually cause the dam to *****873** burst. Ironically, the tool the majority uses to puncture its hole is the observation that " ' "those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." ' [Citation.]" (Maj. opn., *ante,* at p. 860 of 64 Cal.Rptr.2d, at p. 921 of 938 P.2d; see ***996** also *id.* at p. 862 of 64 Cal.Rptr.2d, at p. 921 of 938 P.2d.) Because I suspect that parties to private arbitrations will be having quite a bit more contact with the courts than they ever bargained for, I dissent.

All Citations

15 Cal.4th 951, 938 P.2d 903, 64 Cal.Rptr.2d 843, 21 Employee Benefits Cas. 1407, 97 Cal. Daily Op. Serv. 5206, 97 Daily Journal D.A.R. 8384

Footnotes

1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 Part I of this opinion has been adapted from the Court of Appeal opinion, with some modifications.

3 The relevant portions of the Kaiser arbitration provision, found in section 8.B. of the Service Agreement, are as follows: "Within 30 days after initial service on a Respondent, Claimant and Respondent each shall designate an arbitrator and give written notice of such designation to the other, and Claimant shall forward $150, made

payable to Kaiser Foundation Health Plan Arbitration Account, to Kaiser Foundation Health Plan.... This $150 will be deposited with Respondent's $150 in a special account maintained by Bank of America National Trust and Savings Association [and will] ... provide the initial funds to pay the fees of the neutral arbitrator and expenses of arbitration as approved by him or her.... Within 30 days after these notices have been given and payments made, the two arbitrators so selected shall select a neutral arbitrator and give notice of the selection to Claimant and all Respondents served, and the three arbitrators shall hold a hearing within a reasonable time thereafter....”

4 Watrous was, however, planning a three-week European vacation during October, which would have made him unavailable for much of the time period in which the Engallas were seeking to complete the arbitration.

5 The Engallas claim that McComas dissembled on September 24 and October 7 when he expressed uncertainty about Judge Cooney's availability and the plaintiffs' agreement to appointment of the retired judge. They argue that, by that time, McComas had not even contacted Judge Cooney to determine his availability, and that, in fact, Judge Cooney *was* available during September and October to preside over the hearing. They conclude that, by initially feigning uncertainty about whether Engalla had agreed to Judge Cooney's appointment, McComas managed to delay the appointment for over six weeks.

6 Kaiser and its counsel also filed in the Court of Appeal separate writ petitions requesting reversal of the trial court's discovery order discussed above. The Court of Appeal granted that relief, concluding that such discovery issues should be addressed to the arbitrator. The petition for review did not request review of the Court of Appeal's decision in the writ petition, which was premised on its grant of Kaiser's petition to compel arbitration. Accordingly, we do not address the issues raised by the writ petitions in this opinion. On remand, the parties are free to make or renew any discovery request relevant to the resolution of the petition to compel arbitration.

7 In reviewing this quasi-summary-judgment motion we will “undertake [ ] an independent review of the evidence presented to the trial court to determine whether [any] triable issues of fact were presented.” (*Schrader v. Scott* (1992) 8 Cal.App.4th 1679, 1683, 11 Cal.Rptr.2d 433.)

8 For the sake of convenience, the arguments of the various amici curiae for the parties will be attributed to the parties.

9 Under the AAA proceeding, for example, that organization submits simultaneously to each of the parties, shortly after the arbitration demand is filed, a list of names of possible arbitrators and their biographical information. Each party is then given 10 days to cross off the names to which it objects and to number the remaining names in order of preference. If a party does not respond within the 10–day period, all the arbitrators on the list are deemed to be acceptable to it. The AAA then selects the arbitrator or arbitrators from the list, who set a hearing date and supervise discovery. A similar procedure is employed for judicial arbitration. (See Cal. Rules of Court, rule 1605.)

10 There is also evidence that Kaiser disseminated information through its newsletters which was seen by responsible officials in Oliver Tire, the company in which Engalla was employed, that represented Kaiser's arbitration system as fast and efficient. These misrepresentations further support the Engallas' fraud claim.

11 We recognize, of course, that this inverse agency relationship between the employer and its employees is a narrow one, and does not preclude an employer from acting in its own interests to obtain cost savings for the enterprise as a whole when choosing a group health plan. But, within these constraints, an employer negotiating or selecting a group health plan on behalf of its employees is presumed to be acting in their interest. If that proves not to be the case, then an employee bound by an arbitration agreement of which he was scarcely aware could well raise a claim that such agreement was unconscionable. (See *Madden,*

supra, 17 Cal.3d at p. 711, 131 Cal.Rptr. 882, 552 P.2d 1178.) In the present case, the deposition testimony of Oliver Tire personnel confirms that the company acted with its employees' interests in mind in selecting a group health plan.

12 On remand the trial court may, at its discretion, rely on the documentary evidence already presented, may request further documentary submissions, or may request oral testimony. (See *Rosenthal, supra,* 14 Cal.4th at p. 414, 58 Cal.Rptr.2d 875, 926 P.2d 1061.)

13 The Engallas also argue "constructive fraud" based on Kaiser's duty, as a fiduciary, to disclose the actual workings of its arbitration system, including systemwide delay. Constructive fraud consists of "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." (Civ.Code, § 1573.) It is generally asserted against a fiduciary by one to whom a fiduciary duty is owed. (See, e.g., *Estate of Gump* (1991) 1 Cal.App.4th 582, 601, 2 Cal.Rptr.2d 269.) "Constructive fraud allows conduct insufficient to constitute actual fraud to be treated as such where the parties stand in a fiduciary relationship." (*Ibid.*) Because we conclude the Court of Appeal must be reversed on the Engallas' *actual* fraud theory, we need not and do not address the question of constructive fraud.

14 Kaiser also claims that support for its position that the waiver issue is for the arbitrator can be found in *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 13 Cal.Rptr.2d 678. In that case, the plaintiff filed a medical malpractice claim against Kaiser, and the claim was stayed by the trial court pursuant to section 1281.4 after the parties stipulated to submit to contractual arbitration. After more than five years had elapsed, Kaiser filed a petition in the trial court for dismissal of the action on grounds of delay. The Court of Appeal held the trial court had no jurisdiction to dismiss the case, but that any such action must be taken by the arbitrator. (10 Cal.App.4th at p. 1808, 13 Cal.Rptr.2d 678.) In the present case, unlike *Brock,* one of the parties to the arbitration claims the other party has waived its right to compel arbitration within the context of a petition to compel arbitration. Section 1281.2, subdivision (a), gives the court jurisdiction to decide such a waiver claim.

15 See footnote 9, *ante,* at page 858 of 64 Cal.Rptr.2d, at page 918 of 938 P.2d, for an explanation of AAA's procedures.

16 We note that after review was granted in this case, the Legislature enacted Senate Bill No. 1660 (1995–1996 Reg. Sess.) amending Health and Safety Code section 1373.19 and adding Health and Safety section 1373.20. Health and Safety Code section 1373.20 specifically addresses a situation in which a health care service plan does not use "a professional dispute resolution organization independent of the plan" to settle arbitration disputes. For such organizations, Health and Safety Code section 1373.20 provides a means of expediting the procedures set forth in Code of Civil Procedure section 1281.6, mandating the trial court to "conclusively presume[ ]" that the agreed method of selecting arbitrators has failed 30 days after one party has served a written demand to designate an arbitrator upon the other one. That section also provides for an award of the reasonable cost of a section 1281.6 petition when the court finds a party's conduct to be "dilatory." We express no opinion whether this new legislation would affect our analysis of cases such as the present.

1 Legislation is pending on both the state and federal levels to address some of the unique problems of arbitration agreements governing consumer and nonunion employment disputes. At the state level, legislation is currently pending that would make arbitrations conducted under standardized employment, health care,

and consumer contracts reviewable for legal error that causes a miscarriage of justice; in addition, a party could require the arbitrator in such a case to give a written explanation of the basis for the award. (Sen. Bill No. 19 (1997–1998 Reg. Sess.), approved by Sen., May 8, 1997.)

Also at the state level, legislation has been introduced to prohibit enforcement of predispute arbitration agreements in the case of nonunion employment disputes. (Assem. Bill No. 574 (1997–1998 Reg. Sess.).) At the national level, legislation has been introduced to prohibit enforcement of predispute arbitration agreements in the case of employment discrimination claims arising under federal civil rights laws. (Sen. No. 63, H.R. No. 983, 105th Cong., 1st Sess.(1997).)

I also note that a major provider of arbitration services, the American Arbitration Association, has recently promulgated special rules governing the arbitration of employment disputes. (American Arbitration Association, National Rules for the Resolution of Employment Disputes (eff. June 1, 1996).) The stated purpose of these rules is to "meet ... due process standards" and "administer cases in accordance with the law." (*Id.,* at p. 3.) Among other features, the rules provide that in employment disputes the award "shall provide the written reasons for the award unless the parties agree otherwise." (*Id.,* rule 32(b).) And the chairman of the National Labor Relations Board has recently called for reform of nonunion employment arbitration to ensure that it meets basic criteria of fairness. (Debare, *NLRB Chief Gould Backs Rules for Arbitration,* S.F. Chronicle (Apr. 10, 1997) p. C1.)

1 Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

2 Unless otherwise indicated, all further references to dates are to the year 1991.

3 In my view, the private arbitration commenced on June 17, the date Kaiser submitted to the Engallas' arbitration demand. Even if the arbitration could somehow be deemed to have commenced on a later date, it is beyond peradventure that the arbitration was pending as of October 28, the date of the Engallas' unilateral withdrawal. By this time, the parties had already designated both the party arbitrators and the neutral arbitrator. Thus, the majority properly characterizes the Engallas' actions on October 28 as the "[t]ermination of the [p]rior [a]rbitration." (Maj. opn., *ante,* at p. 854 of 64 Cal.Rptr.2d, at p. 913 of 938 P.2d.) Similarly, in a declaration submitted to the trial court, the Engallas' counsel correctly references "the termination of the arbitration proceedings."

4 Section 1281.6 provides that "if the agreed method [of appointing an arbitrator] fails or for any reason cannot be followed, ... the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator." The United States Arbitration Act affords a nearly identical remedy. (See 9 U.S.C. § 5.)

As noted above, the parties in this case had already designated both the party arbitrators and the neutral arbitrator by the time the Engallas unilaterally withdrew from the pending arbitration. Therefore, the majority's discussion of whether the Engallas should have invoked section 1281.6 at some earlier point in the arbitration is largely beside the point. (See maj. opn., *ante,* at pp. 861–862, 864–865 of 64 Cal.Rptr.2d, at pp. 921–922, 923–924 of 938 P.2d.) Rather, as discussed in the text, since the arbitration panel was already in place, the Engallas should have sought appropriate relief from the arbitrators. Nonetheless, since the majority deems it necessary to discuss section 1281.6, I address my differences with the majority's view of that statute.

5 The majority's decision to validate the Engallas' waiver claim promises to be particularly pernicious because the success of such a claim does not depend on any up-front, precontractual misrepresentations but solely on a party's performance during the course of a pending arbitration.

EXHIBIT Altanovo-16

KeyCite Yellow Flag - Negative Treatment
Distinguished by Jordan Pond Company, LLC v. United States, Fed.Cl., April 8, 2014

971 F.2d 736
United States Court of Appeals,
Federal Circuit.

PLANNING RESEARCH CORPORATION, Appellant,
v.
The UNITED STATES, Appellee,
and
Electronic Data Systems Federal Corporation, Intervenor.

No. 89–1562.
|
Aug. 5, 1992.

Synopsis
Disappointed bidder on contract to operate government computer facility filed bid protest. The General Services Board of Contract Appeals sustained protest, and winning bidder appealed. The Court of Appeals, Archer, Circuit Judge, held that: (1) postaward substitution of personnel to perform computer facility operation contract warranted termination of contract, and (2) Board went beyond its bid protest jurisdiction in ordering contract terminated at no cost to government.

Affirmed in part; vacated in part.

Procedural Posture(s): On Appeal.

West Headnotes (4)

[1] **Public Contracts** Scope of review
United States Scope of review
Findings of fact by General Services Board of Contract Appeals are final unless found to be arbitrary, capricious, based upon less than substantial evidence, or rendered in bad faith; decision of Board on any question of law, however, is not final or conclusive and is reviewable de novo by court. Contract Disputes Act of 1978, § 10(b), 41 U.S.C.A. § 609(b).
14 Cases that cite this headnote

[2] **Public Contracts** Scope of review
United States Scope of review
Winning bidder's postaward substitution of personnel to perform computer facility operation contract was properly reviewable in bid protest action; allegations that winning bidder had misrepresented personnel to be used on contract raised issue of whether full and open competition in bidding and award of contract had been achieved.
13 Cases that cite this headnote

[3] **Public Contracts** Determination and disposition
United States Determination and disposition
Post award substitution of personnel to perform computer facility operation contract warranted termination of contract; there was evidence that, though personnel proposed in bid were a factor in awarding contract, that winning bidder misrepresented personnel who would perform contract and intended to alter his staffing after award.
16 Cases that cite this headnote

[4] **Public Contracts** Administrative procedures in general
United States Administrative procedures in general
General Services Board of Contract Appeals went beyond its bid protest jurisdiction in ordering contract terminated at no cost to government; Board had jurisdiction to determine legality of award of contract, but not to settle all claims which might arise between terminated contractor and government.
13 Cases that cite this headnote

Attorneys and Law Firms

***737** Herbert L. Fenster, McKenna, Conner & Cuneo, of Washington, D.C., argued for appellant. With him on the brief were Lawrence M. Farrell and Susan F. Heck.

John S. Groat, Attorney, Commercial Litigation Branch, Dept. of Justice, of Washington, D.C., argued for appellee. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen., David M. Cohen, Director and Thomas W. Petersen, Asst. Director. Also on the brief were Thomas West and Prentis Cook, Dept. of Energy, of counsel. Ronald K. Henry, Baker & Botts, of Washington, D.C., argued for intervenor. With him on the brief was Stephen L. Teichler.

Before NIES, Chief Judge, ARCHER, Circuit Judge, and KELLEHER, District Judge. [1]

[1] Judge Robert J. Kelleher of the United States District Court for the Central District of California, sitting by designation.

Opinion

ARCHER, Circuit Judge.

Planning Research Corporation (PRC) appeals the decision of the General Services Board of Contract Appeals (board) which sustained the protest filed by Electronic Data Systems Federal Corporation (EDS) to the contract awarded to PRC by the Energy Information Administration (EIA), United States Department of Energy, 89–2 BCA ¶ 21,655. EDS intervened and urges on appeal that the board's decision be affirmed. The United States has contested that part of the board's decision holding that PRC's contract should be terminated at no cost to the government. The board's decision terminating the contract is affirmed, but its determination that the contract termination should be at no cost to the government is vacated.

I.

EIA solicited bids for the management and support of its Forrestal Computer Facility located in Washington, D.C. EDS was the incumbent contractor at the facility. The contract was for a term of two years, with three successive one-year renewal options. The total estimated cost was in excess of $34 million.

In the original Request for Proposal EIA informed bidders that:

> The selected offeror must be able to provide a dedicated, stable, and technically qualified staff to maintain continuity in level of service.... Therefore, in order for the contractor to be successful the majority of the work must be performed by a qualified work force whose personnel remain relatively constant.... Work cannot be delayed in order to continuously train new contract personnel.

To evaluate each bidder's proposed staffing, EIA required the submission of a résumé for each of the nineteen "key" and eighty-two "non-key" personnel to be committed for the first year's staffing. The solicitation also required a statement defining the extent to which the corporation would commit the named key personnel to the contract. [2]

[2] In the board's findings, these solicitation requirements are set out as follows:

> The solicitation required offerors to submit a resume for each of the 101 people proposed for the first year of the contract:
> A. The qualifications of dedicated key personnel.
> ....
> 2. Submit resumes for the persons to be proposed for the key positions [19 persons]. Each resume should not exceed four pages in length. Each should contain the names and current telephone numbers of at least three business-related references not associated with your company. If any Key Personnel positions are to be filled with subcontractor staff, the subcontractor as well as the key person must be identified.
> 3. Because the personnel proposed to fill the Key Personnel positions are considered critical to this procurement, the offeror shall provide a statement defining the extent of corporate commitment to the dedication of each person.
> ....

> B. The qualifications of dedicated, non-key personnel
> The offeror shall propose named individuals for each required non-key position.
> 1. Resumes are to be provided for proposed non-key personnel. The resume shall demonstrate the satisfaction of the General Position Description special knowledge, training, and skills of the position for which the individual is proposed. Each resume should not exceed two pages in length and shall not include references.
> 2. If the offeror proposes any non-key personnel who are not currently employed by the offeror or proposed subcontractor, a commitment letter should be furnished with the resume.

***738** PRC submitted its initial proposal to EIA containing the résumés of 101 people retrieved from a database of employee résumés maintained for bidding and other purposes. In its proposal, however, PRC disclosed that, if awarded the contract, it intended to hire and rely on incumbent EDS employees to staff the contract. The PRC proposal stated that "immediately upon contract award, PRC will obtain a roster of incumbent employees and begin recruiting efforts" and that it "estimate[d] that a high percentage of incumbent personnel at EIA will be available to join PRC." After the field of potential contractors was reduced to PRC and EDS, EIA asked the two corporations to respond to written and oral questions. Specifically, EIA questioned PRC's statement concerning the hiring of incumbent personnel and advised PRC that, if true, it would be considered a weakness in its proposal. Thereafter, PRC repeatedly assured EIA both orally and in writing that incumbent personnel would not be required and that the people named in its proposal would be the actual ones who would perform the contract. For example, in its written response to one of EIA's questions, PRC stated:

> PRC will provide, as proposed, a full and complete staff for the EIA Forrestal Computer Facility from our current personnel resources. No incumbent personnel are required.

The revised PRC proposal also provided:

> It should be noted that PRC's transition planning does not assume the retention of incumbent personnel. PRC has developed a superior project staff from our own current resources, the key people being members of our most senior staff. PRC has identified employees for all project positions.
>
> ....
>
> We do not anticipate recruiting new personnel to initially staff the EIA project.

Despite the repeated assurances regarding staffing, the board found that, with the exception of the project director and one or two other key personnel, PRC had not contacted the people who had been proposed, or their supervisors, to determine their availability to work on the EIA contract at the time of submitting its best and final offer (BAFO). Moreover, at about the time PRC's BAFO was submitted, a senior personnel manager sent a memorandum regarding the EIA contract to PRC's vice president in charge of the procurement stating that:

> [b]ased upon assumptions that relatively few internal candidates will actually be assigned to the effort and few of the incumbents will join PRC, I am anticipating that we will have to hire in excess of 50 people over the next two months.

PRC's personnel office then began planning the recruiting effort for the EIA contract.

During the course of contract negotiations, the changes that PRC and EDS made in their proposed staffing received the close scrutiny of EIA. In the nine-month period between the submission of its initial offer and its BAFO, PRC made twelve substitutions. In every case, these substitutions were made only after PRC was advised ***739** by government representatives that its selected people appeared to be overqualified or underqualified for the position involved or no longer worked for PRC.

EDS, on the other hand, made numerous substitutions to its proposed staffing for various reasons. EDS stated at the time of submitting its BAFO that the information on the changes in proposed staffing was to "make sure that they reflected the exact situation at the time of submission." EIA viewed EDS's substitutions to be "turnover" and considered it a weakness in evaluating EDS's proposal. The board found that EIA

"downgrade[d] EDS for its forthright revisions in staffing." As a result, PRC was awarded the contract.

After contract award, PRC's project director asked EIA's contract supervisor (who had also served as chairman of the EIA source evaluation board that reviewed PRC's and EDS's BAFOs) if there were incumbent EDS personnel he would like to see hired by PRC. The names of four or five incumbent employees were provided, as well as the home telephone numbers of all incumbent employees of EDS and its subsidiary. With EIA's approval, PRC then discussed employment or offered positions to all of EDS's (and its subsidiary's) personnel at the Forrestal Computer Facility. In the same time frame, PRC ran an advertisement in *The Washington Post* for an open house at which it recruited for the EIA contract.

The board found that PRC's substitutions of personnel to staff the contract were extensive. At the time the board issued its order suspending the contract, seventy-four people had been "identified" to work on the EIA contract. PRC had hired twenty-four of these people from EDS or its subsidiary and had five offers outstanding. Twelve were hired from other sources. Three positions were filled by PRC employees who were not among those proposed. For the key positions, PRC had replaced three employees and was seeking replacements for four others. Based on these findings of the board, forty-two of the seventy-four employees for the EIA contract were not the ones proposed by PRC in its BAFO.

EDS filed a protest with the board challenging the award of the contract to PRC and the board suspended EIA's procurement pending the resolution of the protest. In its decision on the protest, the board found that (1) PRC offered the services of employees it never intended to provide, (2) EIA ignored evidence that should have made it aware of PRC's misrepresentations, and (3) immediately after the award, EIA permitted and assisted PRC in making massive substitutions for the proposed personnel. The board stated:

> Notwithstanding its specific statements to the contrary, PRC never intended to provide the services of the 101 specific people named in its proposal.
>
> ....
>
> EIA ... at a minimum ignored evidence that should have put it on notice of PRC's intended "bait and switch." Moreover, after requiring the offerors to propose the services of specific personnel to work on the contract, and evaluating the proposals on the basis of their qualifications, EIA turned right around and gave PRC the home telephone numbers of all of the incumbent EDS personnel and permitted PRC to hire as many of them as it could to work on the contract. Full and open competition was not achieved because EIA in essence materially modified, after contract award, the contract requirements upon which the competition was based.

In its reconsideration decision, the board reaffirmed its holding that PRC misrepresented the personnel to be used on the contract and again noted the government's assistance to PRC in substituting personnel by stating that:

> immediately after award, the Government permitted (and even helped) PRC to make massive substitutions of personnel which, in essence, invalidated the evaluation process under which PRC won the contract.

The board's decision directed EIA to terminate the contract at no cost to the government.

***740** II.

[1] This appeal is brought pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601–13 (1988). The board's findings of fact are final unless they are found to be arbitrary, capricious, based upon less than substantial evidence, or rendered in bad faith. 41 U.S.C. § 609(b) (1988); *American Elec. Lab., Inc. v. United States,* 774 F.2d 1110, 1112 (Fed.Cir.1985). The decision of the board on any question of law, however, is not final or conclusive and is reviewable *de novo* by this court. *Id.* Legal interpretations by tribunals having expertise are helpful, even though not compelling. *United States v. Lockheed Corp.,* 817 F.2d 1565, 1567 (Fed.Cir.1987).

[2] A. PRC contends that its post-award substitution of personnel to perform the EIA contract was a matter of contract administration and was not properly reviewable by the board in a bid protest action. It relies on prior Comptroller General decisions which denied protests based on allegations of improperly substituted personnel after award. While those decisions are not binding authority, they may nevertheless be

considered because of the Comptroller General's experience in dealing with bid protests. *See id.* We are not persuaded, however, by PRC's argument. The facts involved in this procurement differ significantly from those in the cited Comptroller General decisions.

PRC first cites *Applications Research Co.,* Comp.Gen. B–230097, 88–1 CPD ¶ 499 (1988) which it describes as "a case factually on point with the instant case." We view this case as factually distinguishable and not supportive of PRC's position. In *Applications Research,* the procurement was for data technician services requiring 20 individuals with one to three years of experience. The successful bidder, INS, stated in its proposal that it would "strive to hire as many of the incumbent's high quality personnel as possible." The agency's evaluators considered this recruitment plan as a strong point in the INS proposal. The decision also notes that the agency neither encouraged nor required INS to hire incumbent personnel. INS ultimately hired former agency personnel for the bulk of the workforce used to perform the contract. Under these circumstances, the Comptroller General determined that INS's personnel changes were not improper and denied the bid protest. Similarly, in *A.B. Dick Co.,* Comp.Gen. B–233142, 89–1 CPD ¶ 106 (1989), another decision cited by PRC as analogous to the instant case, the offeror "indicated in its proposal that it would consider hiring 'qualified candidates from the incumbent's staff to supplement its operational staff.' " Upon securing award of the contract, the offeror proceeded to hire eight employees from the incumbent's staff and substitute them for personnel originally proposed. A bid protest based on these personnel changes was dismissed. The Comptroller General determined that as a general rule, the substitution of personnel after award of a contract falls within the responsibility and discretion of the agency's contracting officer, *see* 4 C.F.R. § 21.3(m)(1), and does not constitute grounds for a bid protest.

The board in this case determined that the personnel substitution clause of the contract could not be used to justify major modifications to the procurement that was bid. It said that the clause is "intended to permit the natural turnover of personnel that tends to occur during performance of a contract [and is not intended to be] a license for the contractor to implement a new proposal immediately following the award." We agree because the facts here are not comparable to those in the decisions cited by PRC.

After initially indicating that it would recruit heavily from the incumbent's work force, PRC expressly changed its plan when it found that the agency considered this a weakness. PRC repeatedly represented and assured EIA that it would staff the contract with the personnel for whom résumés had been provided. The board found this was a misrepresentation by PRC because it did not have that intent. In the board's words, there was an "intended 'bait and switch' " by PRC. We are convinced, as was the board, that the misrepresentations of PRC, together with the "massive" ***741** personnel substitutions made by PRC after award with the acquiescence and assistance of EIA, tainted the bidding and evaluation process.

More pertinent to the instant case, therefore, is the Comptroller General's decision in *Ultra Technology Corp.,* Comp.Gen. B–230309.6, 89–1 CPD ¶ 742 (1989), where each offeror was required to submit résumés of the key personnel that were proposed for the contract. After award, none of the key personnel proposed by the successful bidder was used on the contract. The successful bidder gave a number of purported reasons for the changes. The protestor, however, was able to show that in some cases the proffered reasons were false. For example, one of the proposed key employees did not authorize his name to be submitted in connection with the offer, while another was never offered the designated position. The Comptroller General then recommended that the agency terminate the contract absent a satisfactory explanation for the change of personnel.

Similar allegations that an offeror had misrepresented the availability of personnel were involved in *In re Informatics, Inc.,* B–188566, 57 Comp.Gen. 217 (1978), where the Comptroller General stated:

> [W]e believe that the submission of a misstatement, as made in the instant procurement, which materially influences consideration of a proposal should disqualify the proposal. The integrity of the system demands no less. Any further consideration of the proposal in these circumstances would provoke suspicion and mistrust and reduce confidence in the competitive procurement system.

Id. at 225.

Because full and open competition in the bidding and award of the contract was not achieved, the board properly considered and decided the bid protest of EDS. *See* 48 C.F.R. § 6.000 (1991) ("This part prescribes policies and procedures to promote full and open competition in the acquisition process ...").

[3] B. We turn then to the questions of whether the board erred in finding PRC misrepresented the personnel it would use to perform the contract and in finding that EIA permitted and encouraged material modifications in the personnel actually used to perform the contract, contrary to the requirements of the bidding and evaluation process. PRC states that the board's holding that PRC engaged in a "bait and switch" was "arbitrary, capricious, grossly erroneous, not supported by substantial evidence or not in accordance with applicable law." PRC's position boils down to a contention that the record does not establish that PRC *intended* to change its proposed staffing at the time it submitted its proposal. PRC asserts that the board relied primarily on the memorandum from a senior manager in PRC's personnel office to support its finding. It urges that the credibility of its live witnesses was greater than the statements in this memorandum. Finally, it argues that the post-award conduct in using people on the contract other than those designated was merely an attempt to accommodate EIA in providing a shorter phase-in during the Christmas holiday season.

These arguments are not persuasive. The board's findings are supported by substantial evidence and its credibility determinations are virtually unassailable. *See Hambsch v. Department of the Treasury,* 796 F.2d 430, 436 (Fed.Cir.1986). Based on these findings, the board properly could reach the conclusion that PRC misrepresented the personnel who would perform the contract and intended to alter its staffing after award.

The identity of the individuals proposed for contract performance was a critical factor in the evaluation process and PRC was fully aware of this. The solicitation expressly so stated:

> Because the personnel proposed to fill the Key Personnel positions are considered critical to this procurement, the offeror shall provide a statement defining the extent of the corporate commitment to the dedication of each person.

***742** The solicitation also indicated that the entire work force not only had to be highly qualified, but also dedicated, stable, and relatively constant so that work would not be delayed for training new personnel.

It was not, as PRC contends, just the memorandum of PRC's personnel manager regarding staffing for the EIA contract that caused the board to conclude that PRC misrepresented its intentions. The board also relied on other findings in reaching this conclusion. It found that when PRC submitted its original proposals, the employee résumés were taken from a database, and submitted without ascertaining whether any of the people would be available to work on the EIA contract, which was contrary to the normal practice and policy of PRC. The board discounted PRC's testimony that the vice presidents and supervisors within PRC were contacted to inform them that personnel in their departments had been proposed for the EIA contract because it found that PRC "provided only one undated letter to one vice president concerning 5 of the 101 proposed employees" and that "no responses were received to any letters" that may have been sent regarding the availability of the 101 employees. According to the board at the time of submitting its BAFO, PRC "still had not contacted the people who had been proposed, or their supervisors, to determine their availability to work on the EIA contract."

When EIA advised PRC that its intent to hire incumbents would be considered a weakness in its proposal, PRC repeatedly assured EIA that the individuals named in its proposals would be the ones performing the work. Similarly, PRC did not indicate during the course of the negotiations that there would be any changes in the proposed staffing of the contract unless a specific individual was questioned by EIA as being underqualified, overqualified, or unavailable for the proposed position. Only then would PRC designate a replacement.

In discerning PRC's intent, the board also relied on its post-award conduct, which included offering employment, with EIA's approval, to substantially all of the incumbent personnel, holding an open house to recruit incumbent personnel for the EIA contract, and conducting the open house for other potential employees by advertising it in the newspaper.

PRC argues that the board erroneously relied on this post-award activity to ascertain pre-award intent. According to PRC, these changes occurred because the award was made during the Christmas season and the phase-in period was shortened from 60 days to approximately 30 days. The board considered these explanations but found they were not credible. It found instead that PRC "never even attempted, or intended, to provide the proposed personnel." The board concluded that PRC's post-award activities were merely an attempt to carry out the staffing plan described in its original proposal, which PRC repeatedly assured EIA had been abandoned.

This court has held that intent frequently must be proved by circumstantial evidence. *See Klein v. Peterson,* 866 F.2d 412, 415 (Fed.Cir.1989). Based on all the facts and circumstances, the board inferred that PRC never intended to produce the 101 people proposed for the EIA contract. It was within the board's function after observing witnesses and evaluating their testimony to assess PRC's explanations of the substitutions and to reject PRC's explanation of intent. We are persuaded that the board's findings are supported by substantial evidence and therefore discern no error.

In deciding that full and open competition in this procurement had not been achieved, the board further concluded that EIA, in essence, modified the contract requirement upon which the competition was based and undermined the assumptions of the bid evaluation process.

In reaching this conclusion the board relied primarily on the fact that EIA downgraded EDS's proposal for its "forthright revisions" to its proposed staffing that were made while the bid negotiations were being conducted, and then, immediately after award of the contract to PRC, permitted PRC to discard its proposed personnel ***743** and to hire as many of the incumbent personnel as it could.

EIA's actions were not merely a response to PRC's requests under the personnel substitution clause contained in the contract. EIA encouraged the immediate substitution of incumbent personnel and gave PRC the home telephone numbers of all such personnel. The EIA employee who had chaired the source evaluation board, which evaluated the bid proposals, was the same person who instructed that the home telephone numbers be given to PRC.

As a result of these actions by EIA, PRC was able to offer employment to all of the incumbent personnel. At the time the contract was suspended, the board's findings indicate that well over one-half of 74 people who had been identified by PRC to work on the contract had been replaced and that a large part of the replacements came from the incumbent personnel.

We agree that the agency's post-award conduct, which was wholly inconsistent with its criteria for evaluating the bid proposals, contributed to the failure of this procurement to achieve full and open competition. As stated by the board, "EIA's actions after award completed the circle of uncompetitiveness." Accordingly, we affirm the decision of the board as being fully supported by the misrepresentations of PRC in the bidding process and by the modification of the contract permitted and encouraged by EIA after award.

III.

[4] While we agree with the board's conclusion to uphold EDS's protest, it went beyond its protest jurisdiction in ordering the contract terminated at no cost to the government. In a protest, the board has jurisdiction to determine the legality of an award of the contract, but not to settle all claims which may arise between the terminated contractor and the government. As this court said in *United States v. Amdahl Corp.,* 786 F.2d 387 (Fed.Cir.1986):

> *GSBCA* has authority under the [protest] statute to determine whether a contract award violates a statute or regulation and to modify, revoke or suspend procurement authority. It *does not sit to settle the rights of a terminated contractor vis-a-vis the government, a matter not litigated in the protest nor within its protest jurisdiction.* Such matters must be resolved in the traditional forums for their resolution....

Id. at 395; *see also* 40 U.S.C. § 759(h)(5)(B) (1988), as amended. The basis for termination and the rights of PRC against the government or vice versa are not issues in EDS's protest. Because the board lacked protest jurisdiction to direct that the contract be terminated at no cost to the government in this case, we vacate this holding.

Each party shall bear its own costs.

AFFIRMED IN PART and VACATED IN PART.

38 Cont.Cas.Fed. (CCH) P 76,383

All Citations

971 F.2d 736, 38 Cont.Cas.Fed. (CCH) P 76,383

EXHIBIT Altanovo-17

KeyCite Yellow Flag - Negative Treatment
Distinguished by Alaska Structures, Inc. v. United States, Fed.Cl., July 12, 2019

125 Fed.Cl. 431
United States Court of Federal Claims.

ALGESE 2 S.C.A.R.L., Plaintiff,
v.
The UNITED STATES, Defendant,
and
Louis Berger Aircraft Services, Inc., Defendant–Intervenor.

No. 15–1279C
|
(Filed Under Seal: March 4, 2016)
|
(Reissued for Publication: March 14, 2016)

Synopsis

Background: Unsuccessful bidder on best value contract with United States Department of the Navy for air terminal and ground handling services at naval base in Spain filed post-award bid protest, claiming successful bidder had failed to disclose its parent's and sister corporations' misconduct. After successful bidder was permitted to intervene, both unsuccessful bidder and Navy moved for judgment on the administrative record.

Holdings: The Court of Federal Claims, Wheeler, J., held that:

[1] successful bidder made intentional material misrepresentations in proposal;

[2] bidder was criminally "charged" based on parent's deferred prosecution agreement, triggering disclosure requirements under integrity and business ethics procurement regulation;

[3] parent was bidder's "principal," triggering disclosure requirements under integrity and business ethics procurement regulation; and

[4] permanent injunction was warranted.

Plaintiff's motion granted.

West Headnotes (22)

[1] **Public Contracts** Parties; standing
United States Parties; standing

Determining whether a bid protester has standing to pursue a claim in Court of Federal Claims is a threshold jurisdictional issue that must be met in any protest. 28 U.S.C.A. § 1491(b)(1).

[2] **Public Contracts** Scope of review
United States Scope of review

The Administrative Procedure Act's (APA) standard of review allows Court of Federal Claims to cancel an agency's procurement decision if it lacked a rational basis or if the agency's decision-making involved a violation of regulation or procedure. 5 U.S.C.A. § 706(2)(A).

[3] **Public Contracts** Scope of review

When evaluating a challenge to the award of a government contract as to whether action was arbitrary or capricious, court must determine whether contracting agency provided a coherent and reasonable explanation of its exercise of discretion.

[4] **Public Contracts** Rights and Remedies of Disappointed Bidders; Bid Protests
Public Contracts Scope of review

If an agency acted without a rational basis or contrary to law in awarding a government contract, reviewing court must find bid protestor was prejudiced by the conduct in order to cancel agency's procurement decision; protestor shows prejudice by demonstrating that there was a

substantial chance it would have received the contract award but for agency's error.

[5] **Public Contracts** Form and requisites; responsiveness

Material, intentional misrepresentations in a proposal for a government contract disqualify offeror from competing for the contract award, since such misrepresentations taint the award process, prevent government officials from determining the best value to the government, and retard the competitive bidding process.

1 Cases that cite this headnote

[6] **Public Contracts** Debarment and suspension of bidders

If an offeror on a government contract is found to have made material, intentional misrepresentations in a bid, it loses its right to execute the solicited work or bid on the reprocurement of the contract.

1 Cases that cite this headnote

[7] **Public Contracts** Conditions and restrictions on bidders

Public Contracts Form and requisites; responsiveness

A government contract bidder's misrepresentation is "material," as will disqualify bidder from competing for the contract award, if contracting officer relied on it in forming his opinion.

[8] **Public Contracts** Conditions and restrictions on bidders

Public Contracts Form and requisites; responsiveness

Government contract bidder must intend to make a material misrepresentation in order to be disqualified from competing for the contract award based on the misrepresentation.

[9] **Public Contracts** Evidence

Proof of a government contract bidder's intent to make a material misrepresentation on a bid, as will disqualify it from competing for the contract award, may come from circumstantial evidence.

1 Cases that cite this headnote

[10] **Public Contracts** Scope of review

United States Scope of review

When a government contracting officer relies on an offeror's misstatement, the resulting award is arbitrary and capricious. 5 U.S.C.A. § 706(2)(A).

[11] **Public Contracts** Conditions and restrictions on bidders

Public Contracts Form and requisites; responsiveness

United States Conditions and restrictions on bidders

United States Form and requisites; responsiveness

Bidder on best value contract with Department of the Navy for air terminal and ground handling services at naval base in Spain willfully and intentionally concealed criminal proceedings involving its parent and sister companies by failing to report their corruption and fraud in its proposal, resulting in material misrepresentations and false certification to the United States, and requiring disqualification of bidder, termination of contract awarded to bidder, and cessation of any further performance by bidder under that contract. 48 C.F.R. 52.209-5, 52.209-7.

[12] **Public Contracts** Conditions and restrictions on bidders

Public Contracts Reliability and responsibility of bidder

United States Conditions and restrictions on bidders

United States Reliability and responsibility of bidder

Bidder on best value contract with Department of the Navy for air terminal and ground handling services at naval base in Spain was criminally "charged," triggering disclosure requirements under integrity and business ethics procurement regulation for proposal, where its parent corporation was a party to a deferred prosecution agreement and explicitly accused of engaging in a 12-year conspiracy to bribe foreign officials. 48 C.F.R. 52.209-5.

2 Cases that cite this headnote

[13] **Public Contracts** Conditions and restrictions on bidders

United States Conditions and restrictions on bidders

In reviewing a government contracting officer's responsibility determination in a bid, based on the integrity and business ethics requirement in federal regulations, court may look to the more extensive debarment regulations for guidance. 48 C.F.R. 9.402, 52.209-5(a)(1)(B).

1 Cases that cite this headnote

[14] **Public Contracts** Conditions and restrictions on bidders

Public Contracts Reliability and responsibility of bidder

United States Conditions and restrictions on bidders

United States Reliability and responsibility of bidder

Government contract bidder's direct parent corporation was the bidder's "principal," triggering disclosure requirements under integrity and business ethics procurement regulation for proposal, despite bidder's claim that parent did not exert operational or managerial control over it, where parent held 100 percent of bidder's company. 48 C.F.R. 52.209-5.

[15] **Public Contracts** Form and requisites; responsiveness

United States Form and requisites; responsiveness

The protection of the integrity of the federal procurement process from the fraudulent activities of unscrupulous government contractors requires rejection of an award founded on material misstatements.

[16] **Injunction** Award of contract; bids and bidders

To obtain permanent injunctive relief in the government bidding context, movant must show that: (1) it will suffer immediate and irreparable harm; (2) the balance of hardships on all parties favors movant; and (3) the public interest would be better served by granting the relief requested.

[17] **Injunction** Award of contract; bids and bidders

No one factor used to obtain permanent injunctive relief in the government bidding context is dispositive, as the weakness of the showing regarding one factor may be overborne by the strength of the others.

[18] **Injunction** Award of contract; bids and bidders

When assessing irreparable harm, for purposes of permanent injunction in the government bidding context, the relevant inquiry is whether plaintiff has an adequate remedy in the absence of an injunction.

[19] **Injunction** Award of contract; bids and bidders

Irreparable harm, as required for permanent injunction in the government bidding context, is particularly strong where a competing offeror has secured contract to the detriment of plaintiff

through willful material misrepresentations and false certifications.

[20] Injunction Award of contract; bids and bidders

Following finding that successful bidder on best value contract with United States Department of the Navy for air terminal and ground handling services at naval base in Spain made intentional material misrepresentations in its proposal, permanent injunction disqualifying bidder, terminating contract awarded to bidder, and ceasing any further performance by bidder under that contract was warranted where unsuccessful next-in-line bidder demonstrated irreparable harm, in that but for the misconduct its bid would have been selected for award, balance of harm favored unsuccessful bidder given that Navy could continue to use incumbent contractor until new awardee was in place, and public had strong interest in maintaining the integrity of the procurement process.

[21] Injunction Award of contract; bids and bidders

In context of permanent injunctive relief in government bidding context, public has a strong and overriding interest in maintaining the integrity of the procurement process.

[22] Injunction Award of contract; bids and bidders

In context of permanent injunctive relief in government bidding context, generally, the public interest in honest, open, and fair competition in the procurement process is compromised whenever an agency abuses its discretion in evaluating a contractor's bid.

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Post-award Bid Protest; Offeror's Failure to Inform Navy of Parent Corporation's Corruption and Fraud in Multiple Government Procurements; Effect of Material Misrepresentations and False Certifications in Proposal; Permanent Injunctive Relief.

OPINION AND ORDER [1]

WHEELER, Judge.

This post-award bid protest presents the question of whether the Navy may award a contract to an offeror that has materially misrepresented and concealed its corporate parent's long history of public corruption and fraud in government procurement. For the reasons explained below, the Court finds that the awardee, Louis Berger Aircraft Services, in coordination with its corporate family, willfully and intentionally concealed criminal proceedings involving its parent and other Louis Berger entities. The failure to report the corruption and fraud in Louis Berger's proposal to the Navy constituted a material misrepresentation and a false certification to the United States. The Navy's affirmative determination of responsibility for Louis Berger Aircraft Services initially was based on a lack of knowledge, because the parent corporation's corruption and fraud had been concealed. Upon a later review when the corruption and fraud came to light in a bid protest, the Navy should have found Louis Berger Aircraft Services ineligible for award, but it did not. The Navy's actions in proceeding with an award to Louis Berger Aircraft Services were arbitrary, capricious, and

without a rational basis. Accordingly, the Court permanently enjoins the Navy by requiring the termination of the contract award to Louis Berger Aircraft Services, and the cessation of any further performance under that contract.

I. *Factual Background* [2]

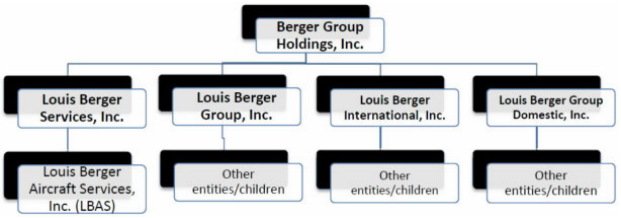
A. *The Rota Solicitation*

On March 2, 2015, the U.S. Department of the Navy issued the Solicitation at issue for ***435** air terminal and ground handling services at Naval Station Rota, Spain. Administrative Record ("AR") 167, 172. The Navy sought to procure these services for an eleven-month base period with four twelve-month option periods. AR 169–72. The Solicitation stated that the Navy would award the contract to the responsible offeror with a best value proposal based on a trade-off determination. AR 206–07. The Solicitation's evaluation factors included technical capability, past performance, and price. AR 204. The Navy would evaluate an offeror's technical capability on an acceptable/unacceptable basis. AR 204–05. Only offerors the Navy rated as "acceptable" on technical capability would be eligible for award. Further, the Solicitation stated the Navy would consider past performance and price using a trade-off process in which past performance is more important than price. AR 205–06. To be eligible for the award, the offeror needed to be responsible, including a "satisfactory record of integrity and business ethics...." AR 207.

The Navy received proposals from Plaintiff Algese 2 s.c.a.r.l. ("Algese"), incumbent and awardee Louis Berger Aircraft Services, and a third offeror. After reviewing both Algese's and Louis Berger Aircraft Services' revised proposals, the Navy gave Algese and Louis Berger Aircraft Services acceptable ratings for technical capability and "substantial confidence" for past performance, making price the determining factor. AR 1112–14. Louis Berger Aircraft Services' price was four percent lower than Algese's price. The Contracting Officer determined that Louis Berger Aircraft Services was responsible. Algese challenges this determination in the present bid protest. The Contracting Officer recommended award to Louis Berger Aircraft Services. AR 1112.

B. *Louis Berger History of Corruption in Public Procurement*

The awardee, Louis Berger Aircraft Services, is part of a family of companies controlled by Berger Group Holdings, Inc. AR 1408–09. The Louis Berger family of corporations is described graphically below. [3] *See* AR 1408–15 (describing corporate structure).



At the time of Louis Berger Aircraft Services' certification and proposal submission on April 6, 2015, the Louis Berger family of companies had faced, and was facing, government investigations and prosecution for fraud and bribery related to multiple procurements around the world. As discussed below, Louis Berger Aircraft Services failed to disclose these public integrity issues that the Louis Berger family of companies faced.

On December 12, 2014, Derish Wolff, the former chairperson of Louis Berger Aircraft Services' parent corporation Berger Group Holdings, pleaded guilty to a 20–year conspiracy to defraud the federal government. Two years after the Louis Berger Group and two of its executives confessed to fraud, Mr. Wolff admitted to directing the subsidiary to defraud the U.S. Agency for International Development ("USAID") by obtaining payment on fraudulent contractual claims in violation ***436** of the U.S. False Claims Act. AR 1432. Louis Berger Group, an affiliated subsidiary, "intentionally overbilled USAID in connection with ... [government] contracts. The scheme to defraud the government was carried out by numerous [Louis Berger Group] employees at the direction of Wolff." *See* Office of the U.S. Attorney, District of New Jersey, Press Release: *Former Louis Berger Group Inc. Chairman, CEO, and President Admits 20–Year Conspiracy to Defraud Federal Government* (Dec. 12, 2014) https://www.fbi.gov/newark/press-releases/2014/formerlouis-berger-group-inc.-chairman-ceo-and-president-admits-20-year-conspiracy-to-defraud-federal-government. Mr. Wolff agreed to a twelve-month sentence of home confinement and a $4.5 million fine. Four years earlier, Louis Berger Group entered into a deferred prosecution

agreement with the U.S. Attorney's Office in New Jersey regarding this same misconduct. AR 1325. As part of the 2010 deferred prosecution agreement, Louis Berger Group agreed to take action against those senior executives responsible for the fraud. AR 1325. On August 23, 2010, Derish Wolff announced his retirement from Berger Group Holdings. *See* Louis Berger, Press Release: *Chairman of Berger Group Holdings, Inc. Retires After 48 Years of Service* (Sept. 14, 2010), http://www.louisberger.com/news/chairman-berger-group-holdings-inc-retires-after-48-years-service.

On July 7, 2015, Berger Group Holdings and Louis Berger International, Inc. entered into a deferred prosecution agreement with the New Jersey U.S. Attorney's Office for violations of the Foreign Corrupt Practices Act between 1998 and 2010. AR 1346–1407. Importantly, Louis Berger International was not formed until 2012, two years after the end of the bribery at issue ended. As such, the unsealed criminal complaint addressed the actions of "Louis Berger International, Inc. ('LBI'), ... a wholly-owned subsidiary of Berger Group Holdings, Inc. ('BGH'), [which] ... as part of a corporate restructuring assumed responsibility for all international operations and liabilities of BGH previously conducted by other BGH subsidiaries or affiliates (hereinafter collectively referred to as 'the Company')." AR 1372. After including Berger Group Holdings in the definition of "Company", the criminal complaint charged a decade-long conspiracy "to make and conceal corrupt payments to foreign officials in India, Kuwait, Vietnam and elsewhere in order to obtain and retain contracts with government entities...." Compl. at 2, 4, *United States v. Louis Berger Int'l, Inc.,* Mag. No. 15–3624 (MF) (D.N.J.).

Under the 2015 deferred prosecution agreement, Berger Group Holdings "agree[d] to certain terms and obligations ... to ensure compliance by BGH [Berger Group Holdings] and its subsidiaries and affiliates" with the terms of the agreement. AR 1346. Further, Berger Group Holdings was extensively involved in the investigation of the Foreign Corrupt Practices Act violations and fashioning remedial efforts, such as firing responsible employees at its subsidiary and improving compliance efforts across the Berger Group family of corporations. AR 1348. The deferred prosecution agreement remains in effect to date. *See* AR 1347 (explaining the agreement remains in place for three years from the date of the criminal complaint).

In February 2015, the World Bank sanctioned two Louis Berger companies. The World Bank debarred Louis Berger Group and imposed a one-year conditional non-debarment on Berger Group Holdings for making corrupt payments to government officials in Vietnam. AR 1467. Under a conditional non-debarment, the World Bank has determined that the party bore "some responsibility" for the sanctionable conduct but was not directly involved. World Bank Group [WBG], *World Bank Sanctioning Guidelines* at 2. However, in the event that the sanctioned party fails to demonstrate compliance with the terms established by the World Bank Sanctions Board, a "debarment would automatically become effective...." *Id.* Berger Group Holdings "failed to effectively supervise [Louis Berger Group] and thus bears responsibility for [Louis Berger Group's] misconduct." *Id.* "Under the terms of the sanctions, [Louis Berger Group] and [Berger Group Holdings] must take appropriate remedial measures to address the misconduct for which they have been sanctioned ***437** ...." AR 1467. As a result of the debarment, Louis Berger Group is ineligible for contracts from at least one federal agency. *See* Millennium Challenge Corporation, *MCC Program Procurement Guidelines* (Aug. 15, 2015), https://www.mcc.gov/resources/doc/program-procurement-guidelines# heading 191.

C. *Louis Berger Representations and Certifications*

The Solicitation at issue called for certifications and representations regarding the offerors' records for integrity including those listed in Federal Acquisition Regulation ("FAR") 52.212–4(t). This provision requires offerors to complete the certifications mandated by the System for Award Management page ("SAM"),[4] including "Certification Regarding Responsibility Matters." FAR 52.209–5; *see* AR 1287 (Louis Berger Aircraft Services' certification). Also, the Solicitation included "Information Regarding Responsibility Matters" which requires the offeror to post the certifications therein in the Federal Awardee Performance and Integrity Information System ("FAPIIS"). FAR 52–209–7.

Despite the Louis Berger companies' history of public corruption, Louis Berger Aircraft Services represented that neither it nor its principals are "presently indicted for, or otherwise criminally ... charged with" fraud, bribery, or a criminal offense in connection with obtaining or performing a public contract. AR 1287 (incorporating FAR 52.209–5). Similarly, Louis Berger Aircraft Services claimed neither it nor "any of its principals ... within five years, in connection with the award to or performance by the offeror of a Federal contract or grant, [have] been the subject of a

proceeding ... that resulted in a ... conviction." AR 1278–1320 (incorporating FAR 52.209–7). Both FAR provisions define "principal" as an "officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity...." FAR 52.209–5(a)(2).

The Navy's review of the SAM and FAPIIS revealed no adverse integrity reports. AR 1465. Indeed, as another Louis Berger affiliate company conceded, essentially no Louis Berger entity, including Louis Berger Aircraft Services, disclosed the above-mentioned history of integrity violations and investigations in the certifications required for SAM or FAPIIS. AR 1737–44.

D. *Navy's Review of Integrity Issues*

The Navy was unaware of any of the public corruption investigations involving Louis Berger companies, until Algese filed a GAO protest regarding award of a parallel Navy contract at Sigonella, Italy ("Sigonella Protest"). Hr'g Tr. at 20, Dec. 22, 2015. On August 11, 2015, five months after the Navy issued the Solicitation in this case, Algese filed its Sigonella Protest noting significant integrity issues with the Louis Berger companies. Specifically, Algese questioned why the Navy awarded the contract to a Louis Berger affiliate that did not disclose integrity failures of its parent and affiliated companies in its certification under FAR 52.209–5. AR 1448–53. Substantially, this is the same issue Algese raises in the present protest.

Days after Algese filed its Sigonella Protest, Navy Acquisition Integrity Office attorney Isaac Natter emailed the Navy's attorneys responsible for the Sigonella Protest and for the Rota procurement. AR 1524–26. Mr. Natter commented that "it is possible [the Louis Berger awardee in the Sigonella procurement] may have made a false certification in connection with [its] proposal." AR 1516–18. After commenting that Louis Berger International was indicted for violating the Foreign Corrupt Practices Act on July 7, 2015, Mr. Natter noted that the indictment defines "the Company" to include Berger Group Holdings, the parent corporation, its subsidiaries and affiliates. "Moreover, [Louis Berger International] did not exist until 2012, while the FCPA violations charged in the indictment took place between 1998 and 2010.... Therefore, the indictment could be read broadly to encompass [Berger Group Holdings], or narrowly to ***438** only be against [Louis Berger International]." AR 1516–18.

The Navy attorney handling the Rota procurement agreed that Berger Group Holdings "would likely be considered a principal [of Louis Berger International]," but questioned whether Berger Group Holdings' role would rise to the level of requiring disclosure in the certification. Then, he suggested Mr. Natter follow up with the Assistant U.S. Attorney responsible for the 2015 deferred prosecution agreement to discuss Berger Group Holdings' role. AR 1514–16. On September 1, 2015, Mr. Natter reported his conversation with the Assistant U.S. Attorney:

> [The Assistant U.S. Attorney] confirmed [Berger Group Holdings] was not criminally charged; he also told me that [Berger Group Holdings] was very careful to carve out that [Louis Berger International] was the defendant in the criminal (FCPA) complaint, and he [the Assistant U.S. Attorney] believed that it was to avoid any requirement that its numerous subsidiaries have to disclose the FCPA matter.

AR 1513–14.

The next day, September 2, 2015, the Navy attorney responsible for the Rota procurement e-mailed the contracting officers about the 2015 deferred prosecution agreement. Berger Group Holdings "was very careful not to be a named a defendant and to avoid reporting requirements." AR 1507. Meanwhile, Louis Berger Aircraft Services sent a letter to the Navy responding to certain responsibility questions prompted by the Navy's discovery of Mr. Wolff's guilty plea and the 2015 deferred prosecution agreement. AR 1417–25. Louis Berger Aircraft Services responded that all representations and certifications regarding the Rota procurement were accurate and complete despite failing to disclose the above-described integrity concerns. AR 1417.

During this time, Algese's Sigonella Protest continued at the GAO. On September 1, 2015, the Navy announced it would take corrective action in Sigonella after the GAO denied the Navy's motion to dismiss. The Navy stated that it intended to "reassess, and document, its responsibility determination and past performance evaluation of [the Louis Berger affiliate] in accordance with FAR Subparts 9.1 and 42.15.... The [Navy's]

corrective action is intended to ensure a fair and impartial competition and to address the concerns raised in the protest." AR 1748. In the Sigonella Protest, Algese alleged the integrity failures discussed above and noted that none of over 60 Louis Berger subsidiaries and affiliates had disclosed any integrity failures as part of the required certifications under FAR 52.209–5(b). AR 1718–19, 1738–44.

E. *Navy's Responsibility Determination*

In its written responsibility determination for the Rota procruement, the Navy Contracting Officer awarded Louis Berger Aircraft Services the contract. AR 1121. He reviewed information about criminal and civil misconduct of multiple Louis Berger entities unearthed by Algese during its Sigonella protest, including Derish Wolff's plea agreement and both deferred prosecution agreements. AR 1115–19.

Rightly, the Contracting Officer concluded that Louis Berger Aircraft Services was not directly implicated in any of the public integrity scandals. Having been presented with evidence of misconduct by the parent and affiliated companies, the Contracting Officer examined the Louis Berger entity's corporate structure to determine if Louis Berger Aircraft Services had a duty to report the public corruption scandals involving its parent and sister companies. He said that no reporting duty existed. The Contracting Officer concluded that "all representations and certifications provided by [Louis Berger Aircraft Services] are accurate and that [Louis Berger Aircraft Services] has not made any false certification" by failing to disclose its parent's and sister corporations' misconduct. AR 1120. He determined Louis Berger Aircraft Services "to be responsible as required by FAR 9.104–1." AR 1120.

F. *Notice of Award and Navy Debriefing*

On October 7, 2015, the Navy notified Algese that it had awarded the contract to Louis Berger Aircraft Services. AR 1603. The Navy stated that both Louis Berger Aircraft Services and Algese were assigned "acceptable" technical ratings and past performance ***439** ratings of "substantial confidence." *Id.* However, Algese's price was higher than that of Louis Berger Aircraft Services. Thus, "[t]he Government conducted a tradeoff analysis in accordance with the solicitation and FAR 15.101–1 and selected Louis Berger Aircraft Services as the awardee." *Id.*

On October 20, 2015, the Navy held a telephonic debriefing with Algese. The Navy stated that it considered integrity and business ethics as part of its consideration of past performance. It stated that it "was aware" of the Sigonella protest and that the Source Selection Authority had "reviewed all information within the protest and the 2010 and 2015 deferred prosecution agreements." AR 1519.

G. *Protest Action in This Court*

Algese filed its complaint in this Court on October 28, 2015. On October 30, 2015, the Court granted Louis Berger Aircraft Services' motion to intervene. The Government produced the administrative record on November 20, 2015 and supplemented it with certain portions of the administrative record from the parallel Navy procurement for Sigonella, Italy on December 8, 2015. The Navy voluntarily agreed to withhold any performance under the newly awarded contract until the Court decided this protest. The Court is not aware of any Navy decision on the Sigonella, Italy procurement as a result of its corrective action. Algese filed its motion for judgment on the administrative record on January 8, 2016. On January 22, 2016, the Government filed its cross-motion and response. The motions are fully briefed. The Court heard oral argument on February 12, 2016.

II. *Discussion*

A. *Jurisdiction and Standing*

Pursuant to the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996, this Court has "jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

[1] Determining whether a bid protester has standing to pursue a claim in this Court "is a threshold jurisdictional issue" that must be met in any protest. *Myers Investigative & Sec. Servs. v. United States,* 275 F.3d 1366, 1369 (Fed.Cir.2002) (citing *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102–04, 118 S.Ct. 1003, 140 L.Ed.2d

210 (1998)). To establish standing under the Tucker Act, an aggrieved protester must demonstrate that it is an "interested party" by showing that it is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *Am. Fed'n of Gov't Emps. v. United States,* 258 F.3d 1294, 1302 (Fed.Cir.2001) (quoting 31 U.S.C. § 3551(2) (Supp. IV 1998)).

Neither the Government nor Intervenor Louis Berger Aircraft Services disputes that Algese has standing to pursue this action. Indeed, Algese has standing as it was an actual offeror with a direct economic interest that would be affected by the award of or failure to award this contract. The Navy deemed Algese its second choice for award of the contract.

B. *Standard of Review*

In a bid protest, this Court reviews an agency's decision under the standards in the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701–706 (2000); *see, e.g., Impresa Construzioni Geom. Domenic Garufi v. United States,* 238 F.3d 1324, 1332 (Fed.Cir.2001) (stating that the APA standard of review shall apply in all procurement protests in the Court of Federal Claims). Under the APA, a court shall set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

[2] **[3]** **[4]** The APA standard allows this Court to cancel an agency's procurement decision if it lacked a rational basis or if the agency's decision-making involved a violation of regulation or procedure. *Impresa,* 238 F.3d at 1332. When evaluating a challenge on the first ground, a court "must determine 'whether the contracting agency provided a ***440** coherent and reasonable explanation of its exercise of discretion.' " *Axiom Res. Mgmt., Inc. v. United States,* 564 F.3d 1374, 1381 (Fed.Cir.2009) (quoting *Impresa,* 238 F.3d at 1333 (Fed.Cir.2001)). If the agency acted without a rational basis or contrary to law, the court must then determine whether "the bid protestor was prejudiced by that conduct." *Bannum, Inc. v. United States,* 404 F.3d 1346, 1351 (Fed.Cir.2005). The plaintiff must show prejudice by demonstrating "that there was a substantial chance it would have received the contract award but for [the agency's] error." *Alfa Laval Separation, Inc. v. United States,* 175 F.3d 1365, 1367 (Fed.Cir.1999) (internal citation omitted).

C. *Louis Berger Aircraft Services' Material Misrepresentations*

[5] **[6]** Material, intentional misrepresentations in a proposal disqualify an offeror from competing for the contract award. *Microdyne Outsourcing, Inc. v. United States,* 72 Fed.Cl. 230, 233 (2006) (citing *Northrop Grumman Corp. v. United States,* 50 Fed.Cl. 443, 468 (2001)). As material, intentional misrepresentations taint the award process, "prevent government officials from determining the best value to the government and retard the competitive bidding process," an offeror who is found to have made such a misrepresentation "will lose its right to execute the solicited work or bid on the reprocurement of the contract." *Microdyne,* 72 Fed.Cl. at 233 (2006).

[7] **[8]** **[9]** **[10]** A misrepresentation is material if the contracting officer relied on it in forming his opinion. *See Acrow Corp. of Am. v. United States,* 97 Fed.Cl. 161, 175 (2011) (citing *Tucson Mobilephone, Inc.* B–258408, 1995 WL 335101 (Comp. Gen. June 5, 1995) and *PPATHI, Inc.,* B–249182, 1993 WL 25128 (Comp.Gen. Jan. 26, 1993) ("The contracting official need only show that the impropriety 'might have affected the award decision.' ")). The offeror must intend to make the statement. *Northrop Grumman,* 50 Fed.Cl. at 468. Proof of intent may come from circumstantial evidence. *Planning Research Corp. v. United States,* 971 F.2d 736, 742 (1992). Where, as here, a contracting officer relies on an offeror's misstatement, the award is arbitrary and capricious. *See Acrow,* 97 Fed.Cl. at 175–76 (2011).

1. *Former Chairperson Derish Wolff's 2014 Plea Agreement*

[11] Louis Berger Aircraft Services certified under FAR 52.209–7 that neither it nor "any of its principals ... within five years, in connection with the award to or performance by the offeror of a Federal contract or grant, have been the subject of a proceeding ... that resulted in ... a conviction." AR 419. This statement was false.

Derish Wolff, the former chairperson of Louis Berger Aircraft Services' parent corporation, had been indicted for and pleaded guilty to defrauding USAID within five years of Louis Berger Aircraft Service's proposal. Mr. Wolff pleaded guilty in December 2014, four months before Louis Berger Aircraft Services submitted its proposal. AR 1432. The Government and Intervenor assert that Louis Berger Aircraft Services had no duty to disclose Mr. Wolff's guilty plea because he was not a principal within the meaning of FAR 52.209–7 at the time of his plea agreement. Mr. Wolff retired in August 2010 after Louis Berger Group admitted to fraudulently overcharging USAID and agreed to fire executives involved in the misconduct. This argument belies the factual record and the purposes of the disclosure requirements.

At the time of his plea, Mr. Wolff owned 25 percent of Berger Group Holdings, the parent corporation which wholly owns Louis Berger Aircraft Services. Retired or not, owning a quarter of the parent corporation, Mr. Wolff was an owner and thus a principal in 2014. These facts triggered Louis Berger Aircraft Services' reporting obligations. Setting aside his ownership interest in the parent corporation, Mr. Wolff pleaded guilty to fraud in connection with his activities as chairperson of Berger Group Holdings. Undoubtedly, he was a principal when he committed the misconduct. If the Court were to accept the Government's argument, offerors seeking to avoid certification requirements could simply extricate any employees, or in this case, chairpersons, engaging in misconduct before submitting a proposal. Allowing this type of loophole in the certification process ***441** would significantly undermine the government's anti-corruption regime and reduce confidence in the competitive procurement process. *See* *Planning Research Corp. v. United States,* 971 F.2d 736, 741 (Fed.Cir.1992).

At a minimum, the Contracting Officer ignored contradictory information which should have put him on notice of Louis Berger Aircraft Services' misstatement in its certifications. *Planning Research Corp.,* 971 F.2d at 739. This failure rendered his determination arbitrary and capricious. Louis Berger Aircraft Services represented that Mr. Wolff was "separated" from the company in August 2010 and his shares were "redeemed and converted to non-voting trust certificates to be redeemed in November 2015." AR 1414–15. However, the Department of Justice's indictment plainly stated that Mr. Wolff owned a quarter of the stock in Berger Group Holdings at the time of his plea agreement. Perplexingly, the Contracting Officer noted that Mr. Wolff was "formally separated" from Louis Berger Group in August 2010 but failed to discuss his 25 percent ownership. AR 1119. More problematically, the Contracting Officer's failure to recognize Mr. Wolff's ownership interest meant that he also neglected to assess whether Mr. Wolff was a "principal" at the time of his plea agreement. The Contracting Officer arbitrarily relied on Louis Berger Aircraft Services' certification under FAR 52.209–7 despite contradictory information in the record. *See* *Acrow,* 97 Fed.Cl. 161, 175–76 (2011).

2. *Parent Company Berger Group Holdings' 2015 Deferred Prosecution Agreement*

Under FAR 52.209–5, Louis Berger Aircraft Services certified that neither it nor its principals were "presently indicted for, or otherwise criminally or civilly charged by a governmental entity with commission of" fraud or other specified bribery and public integrity offenses. AR 429. However, Louis Berger Aircraft Services' parent corporation Berger Group Holdings was, and is currently, a party to a deferred prosecution agreement. Berger Group Holdings entered into the deferred prosecution agreement in July 2015, in the midst of the procurement at issue here. Berger Group Holdings was not a named defendant, and therefore, not "indicted" under FAR 52.209–5. However, Berger Group Holdings was explicitly accused of engaging in a conspiracy to bribe foreign officials. *See, e.g.,* AR 1372–73 ("Company [defined to include Berger Group Holdings, subsidiaries and affiliates] engaged in a scheme to pay bribes to various foreign officials....").

[12] The Court must determine if Berger Group Holdings was "otherwise criminally ... charged," triggering disclosure requirements on Louis Berger Aircraft Services' part. FAR 52.209–5. The FAR does not define "charge". The Government and Algese offer different definitions: one grounded in a dictionary definition and the other in the regulatory scheme governing suspension and debarment. Under either definition, Berger Group Holdings was "charged" for the purposes of FAR 52.209–5 requiring disclosure.

For its part, the Government relies on Black's Law Dictionary's definition, a "formal accusation of a crime as a preliminary step in prosecution," to argue that Berger Group Holdings was not charged. Def. Mem. at 21 (quoting *Black's Law Dictionary* (9th ed. 1999)). However, under

this definition Berger Group Holdings was in fact charged. The Department of Justice formally accused Berger Group Holdings of engaging in a long-term scheme to bribe foreign officials to win public contracts. Berger Group Holdings agreed to the accuracy of the allegations and agreed not to contest them. AR 1347. The corporation acknowledged that it may be subject to criminal prosecution based on the allegations in the deferred prosecution agreement. *Id.*

[13] Turning to Algese's definition, as the "regulations concerning responsibility determinations are cryptic," this Court "may look to the more extensive debarment regulations for guidance, at least on questions related to the 'integrity and business ethics' requirement." *Impresa,* 238 F.3d at 1335 (citing *Steptoe & Johnson,* Comp. Gen. Dec. B–166118, 1969 WL 4287, at *5 (Mar. 28, 1969); ***442** *Secretary of the Army,* 39 Comp. Gen. 868, 872, 1960 WL 1741 (1960)); *see also NEIE, Inc. v. United States,* No. 13–164, 2013 WL 6406992, at *19 (Fed.Cl. Nov. 26, 2013) ("In reviewing a responsibility determination based on the 'integrity and business ethics' requirement, the court may look to the more extensive debarment regulations for guidance[.]" (quoting another source, internal quotation marks omitted).) Indeed, the regulators who drafted FAR 52.209–5 noted that the certification requirement was "consistent with guidelines recently promulgated by [the U.S. Office of Management & Budget] for agency use in nonprocurement actions [for suspension and debarment]...." 52 Fed.Reg. 28642 (July 31, 1987) (citing 52 Fed.Reg. 20360 (May 29, 1987) (describing Guidelines of Nonprocurement Debarment and Suspension)). The Office of Management & Budget guidelines instruct that suspension may be appropriately based "on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent." *Id.* at 20368. As FAR 52.209–5(a)(1)(B) already requires disclosure of an indictment and thus a conviction, the Court adopts the latter definition. *See* FAR 52.209–5(a)(1)(B) (requiring disclosure if the offeror or its principal has "been convicted of or had a civil judgment rendered against them" in the past three years). The Court is satisfied that the irregularities-seriously-reflecting-on-propriety standard is not unduly burdensome and is properly applied to disclosure requirements.

Berger Group Holdings' conduct presented adequate evidence of irregularities seriously reflecting on the propriety of further Federal Government dealings. Louis Berger Aircraft Services' parent corporation was accused of, and admitted to, engaging in a twelve-year conspiracy to "pay bribes to various foreign officials in Indonesia, Vietnam, India and Kuwait to secure contracts with government agencies and instrumentalities...." AR 1372–73. Although not named in the criminal case, Berger Group Holdings was very much a part of the activities upon which the criminal conviction was based. When assessing a prospective contractor's record for integrity and business ethics under FAR Part 9, the contracting officer is considering the reputational and performance risks the offeror may pose. Here, the offeror's principal participated in a decade-long international bribery scheme to obtain public contracts. *Id.* This is precisely the type of information that an offeror should put before the contracting officer so he can assess reputational risk posed to the government. *See J.E.T.S., Inc. v. United States,* 838 F.2d 1196, 1201 (Fed.Cir.1988) (finding a false certification after attributing a parent corporation's conviction to the wholly-owned subsidiary). Under both definitions, Berger Group Holdings was otherwise criminally charged. Having determined that Louis Berger Aircraft Services' certification to the contrary was a false statement, the Court now considers whether Berger Group Holdings was Louis Berger Aircraft Services' principal.

Quoting Louis Berger Aircraft Services, the Contracting Officer found that Berger Group Holdings does not "exert operational or managerial" control over Louis Berger Aircraft Services or its direct parent, Louis Berger Services. AR 1117. He observed that Berger Group Holdings was not a "principal" and thus Louis Berger Aircraft Services did not have to disclose the deferred prosecution agreement. *Id.* This conclusion both disregards the full definition of "principal" and ignores contradictory information in the administrative record.

[14] As with Berger Group Holdings, a "principal" can be an owner, not only a person having "primary management or supervisory responsibilities" as the Contracting Officer suggested. FAR 52.209–5(a)(2). Despite discussing the Louis Berger family of companies' corporate structure, the Contracting Officer failed to realize that Berger Group Holdings owns 100 percent of Louis Berger Aircraft Services. He noted that Louis Berger Services is Louis Berger Aircraft Services' direct parent corporation. AR 1117. Berger Group Holdings is Louis Berger Services' direct parent corporation. Louis Berger Services owns 83 percent of Louis Berger Aircraft Services and Berger Group Holdings owns the remaining 17 percent. Id In fact, Berger Group Holdings owns 100 percent of Louis Berger Services. Thus, ***443**

Berger Group Holdings wholly owns Louis Berger Aircraft Services. This makes Berger Group Holdings a "principal" of Louis Berger Aircraft Services prompting the certification requirements. The Contracting Officer bypassed this fact adopting wholesale, and without explanation, Louis Berger Aircraft Services' false statement. This fact alone made the Contracting Officer's determination arbitrary and capricious.

Louis Berger Aircraft Services' false statement that it does not control its subsidiaries was both self-serving and obvious. At a minimum, the Contracting Officer ignored evidence of the misrepresentation. *Planning Research,* 971 F.2d at 739 (upholding a finding of a material misstatement and decision to terminate the contract award). To be sure, there was clear evidence in the record that Berger Group Holdings held "supervisory responsibilities" over its subsidiaries, including Louis Berger Aircraft Services. FAR 52.209–5(a)(2). For example, despite not being indicted in either investigation, Berger Group Holdings "fully cooperated with Government investigations and took substantial remedial measures to address both the violations [in the 2010 and 2015 deferred prosecution agreements] as well as the misconduct related to over-allocating overhead charges to USAID." AR 1118. As part of these efforts, Berger Group Holdings set up an independent compliance monitor for all Berger Group companies, and "terminated employees responsible for the misconduct." AR 1118–19. Berger Group Holdings terminated its subsidiary's chief executive officer, chief financial officer, and two senior vice presidents. AR 1118–19. By establishing and monitoring company-wide compliance efforts and controlling the staffing of its subsidiaries, Berger Group Holdings assumed supervisory responsibilities for its subsidiaries. In the corporate law context, courts have found the very conduct at issue here sufficient to determine the parent corporation exercised control over its subsidiary. *See, e.g., Richard v. Bell Atl. Corp.,* 946 F.Supp. 54, 62 (D.D.C.1996) (explaining where a parent controls hiring and firing of subsidiary employees, the parent exercises control over the subsidiary) (collecting cases).

The final problem plaguing the Contracting Officer's conclusion is that it is internally inconsistent. The Contracting Officer concluded that "[Berger Group Holdings] does not assert any direct operational, managerial or supervisory role over any of the first-tier subsidiaries." AR 1117. He concluded also that Louis Berger Services "operates independently from BGH [Berger Group Holdings]...." AR 1119 (Responsibility determination). Yet, a mere one page later, the Contracting Officer concluded "LBS [Louis Berger Services] ... and BGH [Berger Group Holdings] are affiliates of one another as *BGH wholly owns and legally controls all entities.*" AR 1120 (emphasis added).

The Court fails to understand how Berger Group Holdings can "wholly own[ ] and legally control[ ] all entities" but not exert power over them so that each is a "standalone business." *Compare* AR 1120 *with* AR 1119. The Contracting Officer failed to justify or explain this patently inconsistent finding.

3. *Louis Berger Aircraft Services Misrepresented the 2015 Deferred Prosecution Agreement.*

Quoting Louis Berger Aircraft Services, the Contracting Officer asserted, "Berger Group Holdings was not, and has not been, investigated, accused, or charged with any misconduct by the government, and is not otherwise subject to the DPA [deferred prosecution agreement]." AR 1413. Thus, he concluded that Louis Berger Aircraft Services was not required to disclose the 2015 deferred prosecution agreement because Berger Group Holdings is merely a guarantor. AR 1117. Contrary to the factual record, this conclusion lacks a rational basis and cannot stand. *Cf. Bender Shipbuilding & Repair, Co. v. United States,* 297 F.3d 1358, 1362 (Fed.Cir.2002) ("When [responsibility determinations] have a rational basis and are supported by the record, they will be upheld.").

In fact, Berger Group Holdings was subject to an extensive government investigation, as described in the 2015 deferred prosecution agreement. AR 1346–1407. The Contracting Officer concluded that Berger Group Holdings had not been accused of misconduct. This statement also is untrue. The ***444** deferred prosecution agreement and criminal complaint expressly included Berger Group Holdings as one of the parties engaging in a decade-long conspiracy "to make and conceal corrupt payments to foreign officials in India, Kuwait, Vietnam and elsewhere...." Compl. at 2, 4, *United States v. Louis Berger Int'l, Inc.,* Mag. No. 15–3624(MF) (D.N.J.).

* * * *

The record before the Court leaves no doubt that Louis Berger Aircraft Services intended to make false statements

in its proposal. This entity is part of a family of corporations that has intentionally hidden its history of public corruption scandals through misrepresentations, false certifications, and a scheme to avoid reporting requirements. As part of its scheme, the corporation created a new subsidiary in which to dump its criminal liability problems. In the 2015 deferred prosecution agreement, the only named defendant, Louis Berger International, had not been formed until two years after the end of the bribery at issue. This subsidiary was formed to assume "responsibility for all international operations and liabilities of [Berger Group Holdings and its subsidiaries]...." AR 1372. Indeed, essentially none of the Louis Berger companies have disclosed the many criminal investigations, charges, and convictions in SAM or FAPIIS. The scheme was so effective that the Navy was not even aware of this history of public corruption until Algese brought its bid protest at the GAO in the Sigonella, Italy procurement.

[15] The Court agrees with both the U.S. Assistant Attorney in charge of the 2015 deferred prosecution agreement and the Navy officer in charge of this procurement: Berger Group Holdings was "very careful not to be a named defendant and to avoid reporting requirements" for itself and its subsidiaries. AR 1507 (email from Scott E. Miller); *accord Id.* (reporting that the U.S. Assistant Attorney believed Berger Group Holdings did not want to be a defendant "to avoid any requirement that its numerous subsidiaries have to disclose the FCPA matter"). Louis Berger Aircraft Services' actions were not simply deficient or unknowing. They were willful and intentional. *Cf.* *Northrop Grumman,* 50 Fed.Cl. at 468–69 ("Without some proof that [awardee's] actions in preparing its proposal were sinister, not just deficient ..., [Plaintiff's] claim that [awardee] wrongfully misrepresented its ability to perform the contract fails."). The protection of the integrity of the federal procurement process from the "fraudulent activities of unscrupulous government contractors" requires rejection of an award founded on material misstatements. *K & R Eng'g v. United States,* 616 F.2d 469, 476 (Ct.Cl.1980).

Turning to prejudice, the Court is convinced that, if not for the Navy's arbitrary and capricious responsibility determination, there was a substantial chance Algese would have received the contract award. *Alfa Laval Separation, Inc. v. United States,* 175 F.3d 1365, 1367 (Fed.Cir.1999) (internal citation omitted). Algese was the Navy's second rated offeror behind Louis Berger Aircraft Services. Proper consideration of Louis Berger Aircraft Service's history, false statements, and false certifications should have resulted in a non-responsible determination, precluding award to Louis Berger Aircraft Services.

III. *Injunctive Relief*

[16] **[17]** Having concluded that the instant procurement was legally flawed and that Algese was thereby prejudiced, the Court must determine whether Plaintiff has made three additional showings to warrant injunctive relief. Algese must show that: (1) it will suffer immediate and irreparable harm; (2) the balance of hardships on all parties favors the Plaintiff; and (3) the public interest would be better served by granting the relief requested. *Lab. Corp. of Am. v. United States,* 108 Fed.Cl. 549, 568 (2012) (collecting cases). No one factor is dispositive as the "weakness of the showing regarding one factor may be overborne by the strength of the others." *FMC Corp. v. United States,* 3 F.3d 424, 427 (Fed.Cir.1993). Here, the existence of irreparable injury to Algese, the balancing of harms in favor of Algese, and the public interest, all lead the Court to grant injunctive relief to Algese.

***445** A. *Irreparable Harm*

[18] **[19]** **[20]** When assessing irreparable harm, the relevant inquiry is whether plaintiff has an adequate remedy in the absence of an injunction. *Serco Inc. v. United States,* 81 Fed.Cl. 463, 501 (2008). Plaintiff asserts that, if not for the erroneous and unfair procurement, the Navy would have awarded the contract to Algese, the next-in-line offeror. Courts have recognized that loss derived from a lost opportunity to compete on a level playing field for a contract is sufficient to prove irreparable harm. *See, e.g., Impresa Construzioni Geom. Domenico Garufi v. United States,* 52 Fed.Cl. 826, 828 (2002); *Cardinal Maint. Serv., Inc. v. United States,* 63 Fed.Cl. 98, 110 (2004) (collecting cases). Irreparable harm is particularly strong where a competing offeror has secured the contract to the detriment of Plaintiff through willful material misrepresentations and false certifications. Accordingly, Algese has demonstrated irreparable harm.

B. *Balancing of Harm to Others*

Here, the Court weighs the hardships Plaintiff would suffer absent an injunction against the harm such an injunction would inflict on the Government. *Sheridan Corp. v. United States,* 94 Fed.Cl. 663, 670 (2010). The Government suggests that enjoining the performance of the contract would delay services necessary to the Navy's business in Rota, Spain. However, this Court has observed that " 'only in an exceptional case would [such delay] alone warrant a denial of injunctive relief, or the courts would never grant injunctive relief in bid protests.' " *PGBA, LLC v. United States,* 57 Fed.Cl. 655, 663 (2003) (quoting *Ellsworth Assocs., Inc. v. United States,* 45 Fed.Cl. 388, 399 (1999)). The Government has offered no reason why this is such an exceptional case. Further mitigating harm to the Government, the current incumbent Louis Berger Aircraft Services has been and can continue to perform the services under the former contract until a new awardee is in place. The Court does not see any harm to the Government from having to properly evaluate proposals and award a contract in accordance with law. The Navy presumably can perform these tasks promptly.

C. *Public Interest*

[21] **[22]** The public has a strong and overriding interest in maintaining the integrity of the procurement process. *Sys. Appl'n & Techs., Inc. v. United States,* 100 Fed.Cl. 687, 721 (2011). Generally, "the public interest in honest, open, and fair competition in the procurement process is compromised whenever an agency abuses its discretion in evaluating a contractor's bid." *PGBA,* 57 Fed.Cl. at 663. This concern is heightened when, as here, an offeror has misrepresented its history of corruption to secure a contract. Allowing a contract award to move forward after the considerable flaws in this procurement would "provoke suspicion and mistrust and reduce confidence in the competitive procurement system." *Planning Research,* 971 F.2d at 741 (Fed.Cir.1992). The public interest in the integrity of the procurement process strongly weighs in favor of granting injunctive relief.

IV. *Conclusion*

Algese requested that the Court remand this case to the Navy for further consideration of its responsibility determination. The Court declines to do so. Injunctive relief is the proper remedy here. An offeror who is found to have made an intentional, material misrepresentation has so tainted the award process to have "los[t] its right to execute the solicited work or bid on the reprocurement of the contract." *Microdyne,* 72 Fed.Cl. at 233 (Fed.Cl.2006). To preserve the integrity of the competitive process, the Court sets aside the Navy's award to Louis Berger Aircraft Services and enjoins its performance under this Solicitation. The terms of the injunction are as follows:

> The Department of the Navy, through its officers, employees, and agents, and all others working in concert with them, shall forthwith terminate the unlawfully awarded contract to Louis Berger Aircraft Services under the Solicitation at issue, and shall cease any and all further performance under this contract.

***446** The Clerk of Court shall enter judgment in favor of Plaintiff Algese.

IT IS SO ORDERED.

All Citations

125 Fed.Cl. 431

Footnotes

1 The Court issued this decision under seal on March 4, 2016 and invited the parties to submit proposed redactions of any competitive-sensitive, proprietary, confidential, or other protected information on or before

March 11, 2016. By that date, none of the parties proposed redactions. Thus, the Court reissues the opinion in its entirety for publication.

2 The facts in this decision are taken from the administrative record, as supplemented. The pages in the administrative record are numbered in sequence, and the documents are divided by tabs. The Court's citations to the administrative record generally are to the page numbers. A few citations are to other sources, of which the Court takes judicial notice.

3 The chart does not include all Louis Berger companies, merely those at issue in this protest.

4 4 The System for Award Management is “the Official U.S. Government system that consolidated the capabilities of CCR/FedReg, ORCA, and EPLS.” *System for Award Management* (Feb. 19, 2016, 10:04 A.M.), *https://www.sam.gov* (last visited March 3, 2016).