INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,
Claimant,

vs.
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,
Respondent.

MONDAY, AUGUST 3, 2020
ARBITRATION HEARING HELD BEFORE
PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME I (Pages 1-246)

REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
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ARBITRATOR BIENVENU: Good morning to those that are joining the hearing from North America, and good afternoon to those who are joining from Europe.

My name is Pierre Bienvenu. I serve as Chair of the Panel appointed to determine this Independent Review Process between Afilias Domains No. 3 Limited and ICANN, a proceeding in which both NU DOT CO and VeriSign, Inc., are granted leave to participate as amicus curiae pursuant to the Panel's decision on Phase I.

My co-panelists are Professor Catherine Kessedjian, who is participating in this hearing from Paris, and Mr. Richard Chernick, who is participating from Los Angeles. The administrative secretary to the Panel is Ms. Blanchette-Seguin, and she is attending this hearing in Montreal, where I too am located.

We begin today the merit hearing in this case devoted to the presentation of the opening statements of the parties and the Amici and to receiving the evidence of the fact and expert witnesses who submitted a witness statement or
expert report on behalf of the party and who were called upon to appear at the hearing by the other party.

On behalf of the Panel, I would like not only to thank, but indeed to commend counsel for the parties and Amici for their comprehensive prehearing submissions, all of which my colleagues and I have read carefully and found to be of very high quality.

This hearing is being held by remote video pursuant to the Panel's Procedural Order No. 5 for the reasons set out in Paragraphs 46 to 50 of that order.

This is so, of course, without any derogation being intended to the parties' choice of London, England, as the legal seat of these proceedings.

As regards the modalities of the hearing, they were either agreed between the parties and Amici or determined by the Panel following the prehearing conference held in relation to this hearing on July 29th, 2020.

The parties and Amici are represented in this proceeding by experienced and very sophisticated counsel, and all of us are
participating in this hearing by remote video using a state-of-the-art platform operated by experienced remote video hearing service providers.

In such circumstances, the Panel is confident that the parties and the Amici will, by their attendance and participation in this remote video hearing, be given and enjoy a full opportunity to present their case insofar as their openings and the witness evidence are concerned.

The Panel is equally confident that with the cooperation of counsel, the interests of the witnesses called upon to appear before the Panel will likewise be safeguarded throughout their participation in the hearing.

Now, should any participant feel at any point in time during the hearing that the process in any way falls short of its expectations in regard to a right to be heard or other due-process right, the Panel asks that this concern be raised immediately so that an attempt can be made to address it forthwith.

The Panel also invites counsel as the hearing progresses to consult and, as the case may be, make joint or separate submissions -- suggestions if it is felt that improvements can be
made to ameliorate or streamline the hearing.

The parties and Amici have suggested and proposed to the Panel an agenda for the hearing. My colleagues and I are content to proceed on the basis of the parties' proposed agenda, subject to adapting it if warranted by evolving circumstances.

And as most of those in attendance know, the hearing today is devoted exclusively to the presentation of the parties' and the Amici's opening statements. Each of the parties was afforded two hours for their opening, and the Amici in total were also given two hours.

Exceptionally, the Panel will, therefore, sit longer hours today in order to permit that all openings be presented on the same day.

I have confirmed that Panel members have received a copy of each of the parties' and Amici's PowerPoint presentation in support of their respective openings.

Unless anyone has any preliminary matter that they wish to raise, I would propose that we move to hearing the claimant's opening statement.

Now, I will say one last thing in introduction. The parties and the Amici were given time equal to or more than they requested. So I
would ask counsel to ensure that they respect the
time allocation for the openings.

So unless there are any preliminary
matters, I would invite counsel on behalf of
Afilias to address us, and I believe that is
Mr. Ali. You will be starting.

MR. LeVEE: May I just ask a logistical
question, Mr. Chairman. During the course of the
opening statements, since we will be sharing a
PowerPoint, it may be better for the remaining
counsel to go off screen. That's at the discretion
of the Panel, but it may be easier to just have
Mr. Ali and his colleagues, although I think there
are more than one person giving openings for
Afilias and so forth, so that you don't have so
many people showing up on your screen.

But if you'd like us to remain on, of
course we will.

MR. ALI: I believe that it may help with
bandwidth issues as well if we would follow Jeff's
suggestion.

ARBITRATOR BIENVENU: Very well. Please
proceed.

MR. ALI: Mr. Chairman and members of the
Panel, good morning and good afternoon. It's
indeed a pleasure to be here with everyone, albeit virtually.

Before I proceed with the substance of my opening, I'd like to wish my colleagues on the other screens, colleagues of Amici and ICANN and ICANN's counsel good luck.

We have had the pleasure, I would say, of having very worthy opponents in three of the world's most well-known and prestigious law firms in Jones Day, Arnold & Porter Kaye Scholer, and Paul Hastings. And I hope very much that we at Dechert have been worthy and honorable opponents as well.

I'd also like to thank our client Afilias for the honor and opportunity to represent them in this extremely critical matter. And I'd like to thank my team for their absolutely incredible, incredible hard work, focus and commitment over the course of the past few months, and in particular this past week.

Under normal circumstances getting ready for a hearing with as many witnesses and as large a record as we have and as complex a record as we have is no mean task, but with stay-at-home orders as well as quarantine protocols, getting ready for
this hearing has been far more complicated, and I truly do appreciate the personal sacrifices that every member of my team has made.

Finally, members of the Tribunal, I'd like to thank you for the work that you have done to date. I appreciate what the chairman said earlier on regarding your having read all the materials. We put a lot of paper in front of you.

I believe it is extremely important that the Panel have digested those materials. We are here to help you identify the key issues, and if necessary, point you to different parts of the written pleadings that reflect what we see as being the critical issues in this case.

Before my first-ever presentation before an international Tribunal, one of my earliest and most generous mentors, Yves Fortier, gave me some advice, which I have tried to boil down to the following maxim: Plead with passion but persuade with truth. In respect to the former, don't overdo it; and with respect to the latter, don't underdo it.

Now, we are here for an evidentiary hearing, to test the fact testimony of witnesses that have been presented by NDC and VeriSign to
support their defense to our claims.

So what I see as my purpose in the next two hours is setting the framework for you in which to evaluate the testimony that you will be receiving.

As such, I don't intend to spend a lot of time on the standards and the legal issues, which I trust we will have an opportunity to address later on, based on a more complete factual record resulting from this hearing, and that we will be able to do so in writing and, if possible, in final oral arguments.

So, Mr. Chairman, you referred to this as a merits hearing. I view this as, in all respect, an evidentiary hearing and one that is to be focused on developing the factual record that we have before us.

The first element of the framework, and one that can't be overlooked or at all minimized, is understanding who and what ICANN is.

Go to Slide 3, please.

Mr. Chairman and members of the Panel, if there's at any point in time you have problems with the PowerPoint, that we are not on the same screen or page, so to speak, please do let me know. Of
course, if there's any other technical issue where my face is frozen in an inopportune sort of way, please do let me know. I'd rather not be making a face at the Panel while I present.

So as I was saying, the first element of this framework is: Who is ICANN? ICANN is the de facto international regulator and gatekeeper to the Internet's DNS space, DNS meaning Domain Name System space, and with very limited or minimal oversight.

ICANN and ICANN alone decides which companies obtain the exclusive gTLD registry rights that typically carry extraordinary value, whether measured financially, culturally, politically, economically or otherwise.

Now, if you take a look at the slide, the first IRP Panel, ICM v. ICANN, when Mr. LeVee and I first met, said it best, and I quote, "ICANN is no ordinary non-profit California corporation. The government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN."

Now, other Panels have also recognized the special and indeed unique nature of ICANN, including the Panel on which Professor Kessedjian
sat, DCA .AFRICA versus ICANN. So I think it is critical to understand what and who ICANN is.

As we appear before you today, the U.S. government has transferred virtually all regulatory authority over DNS to ICANN, gatekeeping authority, coordination authority, call it what you will.

You may even wish to consider ICANN and its role within the context of the draft ILC articles. In applying that standard, I think you'll see that ICANN does have, indeed, a very significant oversight authority with respect to the management of the DNS.

According to ICANN's own articles of incorporation, ICANN exercises sweeping power over the DNS on a global basis. We will see what it says. "In recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, the corporation shall, except as limited by Article 40, pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest."

Next article, Article 3 of the articles of incorporation. "Consistent with the global reach
of its powers as a gatekeeper of the DNS," Articles
ICANN -- "ICANN's Articles require ICANN to," and I
quote, "operate in a manner consistent with these
Articles and Bylaws for the benefit of the Internet
community as a whole, carrying out its activities
in conformity" -- "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 in Internet-related
markets."

I ask you which ordinary California
corporation, profit, for-profit or non-profit, is
subject to the requirements of international law or
international conventions in addition to whatever
may be the local laws that apply.

The articles don't say "California law."
They say "applicable local law" because ICANN is a
global operation with offices that go far beyond
those that are just in California.

We are dealing with a very special entity,
and that, I think, needs to be kept in mind as we
consider this organization's accountability.

The second element of the framework or
context for this case is .WEB. As you are going to
hear from our experts Jonathan Zittrain and George Sadowsky. .WEB is a gTLD of considerable importance and the best likely competitor to VeriSign's .COM/.NET dominance.

It went for the highest amount in the ICANN auction by a long shot, $135 million. VeriSign clearly wants it very badly and, together with NDC, was willing to engage in process-distorting practices to obtain .WEB. I'll come back to that later on.

You have Mr. Rasco, one of NDC's witnesses, who tells you in his testimony how important .WEB is. At Paragraph 41 of his witness statement where he's discussing when VeriSign contacted him, he states, and I quote, "by that date ICANN had formed the Contention Set for .WEB (meaning no new applicants could join)

Redacted - Third-Party Designated Confidential Information

So I think you have a lot of testimony from the experts, from an economic perspective from VeriSign and ICANN's experts, but we think that what Mr. Zittrain, Professor Zittrain and Professor Sadowsky has to say carries more weight because
they are technologists and they spend their careers
and their lives in the space of Internet governance
and Internet matters.

George Sadowsky, as you will learn, is, in
fact, an ICANN Board member -- was an ICANN Board
member.

Now, the third contextual consideration
I'd like you to keep in mind is the
precedent-setting nature of this IRP. This is the
first IRP brought under ICANN's new bylaws, which
were adopted on the 1st October 2016.

The decision that you render in this case
will have enormous influence in terms of ICANN's
governance, its obligations with transparency, its
accountability to the Internet community in
connection with the management of one of our
planet's most valuable resources, and indeed, the
unfortunate circumstances of the pandemic have
indicated even more so how important the Internet
is. And the governance of the domain system is
indeed, of parallel importance, given the
situation -- given the situation that we are in and
that we will see in the future.

Now, associated with what I have just said
about the precedent-setting nature of this IRP is
the fact that this is also the first IRP under the bylaws' enhanced accountability framework.

   Rosy, if you could go to Slide No. 4.

   ICANN has long wanted independence from U.S. government oversight. In fact, the global Internet community has wanted ICANN's independence from U.S. government control and U.S. government involvement with ICANN. ICANN got what it wanted in 2016, but subject to certain requirements, including an enhanced accountability framework being put in place.

   During initial discussions about the IANA transition, the ICANN community identified a potential for the transition and changing nature of the organization's relationship, the U.S. government will affect ICANN's accountability to its community.

   Let me briefly describe the IANA stewardship. The IANA stewardship transition was the final step in a nearly two-decade-long process by the U.S. Department of Commerce to transition the coordination and management of the DNS to the private sector.

   In connection with this transition process, there was an entity set up called
CCWG-Accountability. This was a cross-community working group specifically established to deal with enhancing ICANN accountability and was convened to look at improvements that should be made to strengthen the global multi-stakeholder Internet community's oversight of ICANN as an organization.

If you'll take a look at what's up on the screen, you'll see what CCWG-Accountability had to say in their final recommendations. I believe almost all of the recommendations, at least insofar as ICANN accountability were concerned, were ultimately adopted by the Board.

They state, "Since December 2014, a working group of ICANN community members has developed a set of proposed enhancements to ICANN's accountability to the global Internet community. This effort is integral to the transition of the United States' stewardship of the IANA functions to the global Internet community, reflecting the ICANN community's conclusion that improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship that the United States government provided. The main elements of the proposal are outlined below. Together with ICANN's
existing structure and groups, these accountability enhancements will ensure ICANN remains accountable to the global Internet community."

And one of the points that's bulleted together with the overall preamble is, "An enhanced Independent Review Process" -- "An enhanced Independent Review Process and redress process with a broader scope and the power to ensure ICANN stays within its Mission." An enhanced Independent Review Process and a redress process with a broader scope to ensure ICANN's accountability and that the entity stays within its mission.

As a result of CCWG's recommendations, there's no doubt that the drafters of ICANN's new bylaws significantly strengthened IRPs, in part to prevent the types of arguments that ICANN has made in past IRPs and which ICANN nonetheless tries to make here.

And, indeed, as I quickly flip through ICANN's PowerPoint presentation, it occurred to me that there seems to be absolutely no recognition in what ICANN has argued to you so far and what it intends to present to you, I believe, when it comes to its turn for the openings in terms of ICANN's enhanced accountability and the new framework under
which we are operating.

There is no longer any doubt concerning this Panel's standard review, which is an "objective, de novo examination of the Dispute," or the Panel's mandate, which is to achieve a "binding" and "final" resolution of the dispute that is "consistent with international arbitration norms" and "enforceable in any court with proper jurisdiction."

I am going to come back to this issue of the scope of your authority later on in my presentation, but as you'll have noted in our last submissions we made, we have -- we spent quite a lot of time on walking you through the specifics of your authority with respect to -- with reference to the specific text as well as the legislative history, the drafting history of the IRP provisions.

I should also say that while prior versions of the bylaws limited IRPs to actions or inactions only of the ICANN Board, the new bylaws specifically provide for IRPs to apply, and I quote, "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."

Now, why do I draw attention to ICANN staff? Because this IRP is not just about the ICANN Board's supposed determination, if one was in fact made, to defer "consideration" of Afilias' claims until after this Panel has issued its final decision, and whether any such determination was "within the realm of reasonable business judgment."

It is about ICANN staff's flawed application of the new gTLD program rules; its biased and inadequate investigation of NDC's and VeriSign's conduct; its recommendation, if one was in fact made, to the ICANN Board to take no action; its decision without Board approval or oversight and now allegedly, despite the fact that Afilias' complaints have not been "fully evaluated" to proceed with contracting in June of 2018 and the Board's complete abdication of its responsibility to ensure implementation of the new gTLD programs rules in accordance with ICANN's articles and bylaws despite the fact that it knew about Afilias' complaints and NDC's violations.

Now, what we expected throughout this process when we, i.e., Afilias, presented its application, submitted its application fee, like
many, many other applicants, was a legitimate expectation of being treated fairly, a simple and straightforward and legitimate expectation that the AGB rules would be followed, the process would be run fairly, everyone would play by the rules, and ICANN would show that there would be consequences for noncompliance.

We lost the auction because the process was plainly unfair. It was distorted by NDC's violations of the AGB, distorted by the DAA itself, distorted by the nondisclosure of the DAA by NDC to ICANN to the contention set and to the global Internet public, distorted by ICANN's lack of transparency and not telling Afilias or anyone else about the DAA, distorted by ICANN only revealing information to NDC and VeriSign and keeping Afilias and the Internet community in the dark, distorted by ICANN not disqualifying NDC and distorted by ICANN making a secret determination of Afilias' complaints without proper investigation and due process.

Now, let's go on to the next slide.

I think I am, perhaps, violating my own rule of too much passion and not enough proof. So let's get to the specifics of the facts.
This is just a structure which you have -- a roadmap to our presentation. It is the rest of the presentation. I am going to focus on what are the known and established facts at least thus far. I'll spend a little bit of time -- that's where I'll spend the bulk of my time.

I'll spend a little bit of time on what ICANN was required to do in light of those facts, what ICANN's claims are -- sorry, Afilias' claims are, excuse me, what is the relief that Afilias has requested, and, finally, what is the scope of the Panel's remedial authority.

So Slide 7, please.

Now, as in many arbitrations and in legal proceedings of this nature, binding legal proceedings, the facts, as you all know, are key. This IRP is no different. Indeed, you have a specific instruction under the bylaws and the rules to address the facts.

Slide 8, please.

Rule 11 of ICANN's interim procedures, which repeats almost verbatim Section 4.3(i) of the bylaws, states in relevant part, "Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE. 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 ICANN's Articles or Bylaws."

These are findings of fact that apply generally, but of course -- or contextually, but also specifically with reference to the Board's conduct and staff's conduct in terms of the determination of whether the covered action constitutes an action or inaction that violates ICANN's articles or bylaws.

Go to the next slide, Slide 9.

These are the witnesses that you will be hearing from in this evidentiary hearing. With the help of the fact witnesses, we believe we will be able to confirm the facts that I am about to lay out for you and certainly develop them further, but I doubt very much what the witnesses will say, if they are being truthful, will change the factual framework that we say demonstrates ICANN's bias, lack of transparency and breach of the articles and bylaws.

Let me also say, echoing what Chairman Bienvenu said at the outset, that we are not here to try and trick or bamboozle the witnesses. So as I go through my opening, I am going to identify
certain questions that you members of the Panel
will want to get answered and issues you will want
addressed, which I trust will also allow ICANN's
and Amici's lawyers to ensure their witnesses are
sufficiently well-prepared to provide you with the
answers to the questions that we'll be putting to
them.

Let me just take a couple of minutes to
tell you about these witnesses. So Beckwith Burr,
or Becky Burr, is someone who has been involved in
matters relating to ICANN probably as long, if not
longer, than almost anyone involved in this
hearing, someone who has key experience with the
ICANN government matters. She has testified in
this IRP to ICANN's governance for purposes of the
IRP as well as on competition issues.

Samantha Eisner, who is another ICANN
witness, has been called to address issues
pertaining to our Rule 7 claim and to elaborate on
the facts associated with how the IRP-IOT and ICANN
function in developing the rules pursuant to which
the Amici participating in these proceedings.

The same applies to, in terms of
substance, to Mr. McAuley, who is a VeriSign
employee and was at the time that he participated
in the IRP-IOT. I believe he'll be appearing next week.

Following Ms. Eisner, you'll hear from Christine Willett, vice president of gTLD Operations with the Global Domains Division of ICANN, and she was involved in essentially managing the new gTLD program and the African guidebook process.

Mr. Christopher Disspain is another ICANN witness who is a Board member and, I believe, put forward by ICANN to shed light on the November 2016 meeting, where ICANN apparently took a decision to defer or took a decision not to decide anything relating to .WEB at a Board meeting.

We'll also hear from Mr. Livesay and Mr. Rasco. Mr. Livesay is a VeriSign witness who was the author, I believe, of the Domain Acquisition Agreement and has testified extensively in his witness statement about the Domain Acquisition Agreement, and Mr. Rasco who is a witness for NDC.

Next slide, please, Slide 10.

There are two Amici experts and ICANN expert witnesses and one witness who will not be cross-examined.
We mainly -- due to timing constraints, but also because we believe that their testimony is irrelevant for the matters that are before you -- have not called the Honorable John Kneuer or Professor Kevin Murphy. They are both economists, and we think their testimony has very little to add beyond what Professor Carlton has included in his testimony, but mainly we dropped them due to time constraints.

The other witness who will not be appearing is Todd Strubbe, an ICANN/Amici witness. This was because ICANN withdrew his witness statement recently. So he has not been called.

Afilias had initially presented witness statements together with our request for IRP, but we ended up withdrawing the statement of those witnesses after we had received the Domain Acquisition Agreement in the context of document production in the emergency panelist phase of these proceedings.

We didn't see that their testimony had really any relevance after we had had a chance to study the Domain Acquisition Agreement, so their statements were withdrawn.

Before I delve into the specific facts
that we think you should focus on for purposes of this hearing, let me briefly address the Amici's participation in this IRP and why the Panel should not fall prey to Amici's arguments about their due-process rights being impaired and their property rights being impaired.

First of all, they have no property rights. Whatever rights they believe they have were obtained through improper means. There is no contract that has yet been signed with ICANN, but I'll tell you that it was a close call and had we not started this IRP, ICANN very likely would have gone ahead and started -- would have signed the .WEB Registry Agreement, leaving us probably with very little option or very few options to challenge ICANN's conduct at that stage.

With respect to the Amici, we have offered them the opportunity to join as full parties in this IRP, in these proceedings, perhaps even convert these proceedings pursuant to an appropriate submission agreement so that all parties would be bound by your decision.

As you know, they refused. But be that as it may, the Amici have been given far broader participation rights than any Amici would normally
have.

The witness evidence that they wanted on record is now on record, together with the documents that those witnesses have referred to.

The Amici have been given two hours for opening; in other words, the same as each party. We have agreed that the witnesses offered by the Amici via ICANN's rejoinder may be defended by Amici's counsel.

And I note that Amici estimated far more time on a proportional basis to redirect their witnesses than each party has estimated to redirect its own witnesses.

They are getting a pretty fair shot to present their opinion in the context of these proceedings. They have thus far, and they will in this hearing and, indeed, in the posthearing submissions.

Based on Amici's conduct and comments in these proceedings and in our interaction with counsel, we can fully expect that they will attempt some sort of collateral attack on your decision, which is why it is absolutely imperative that you make the findings of fact that you have been instructed to make and issue a well-reasoned
decision based on the facts which you are also instructed to do and to render a decision that fully and finally resolves the dispute between Afilias and ICANN, which you are empowered to do.

Finally, you should not accept Amici's endorsement of what ICANN says you must do, merely send the matter of .WEB and Afilias' complaints back to the Board. In fact, you might ask yourself, why is it that the Amici are so insistent that this matter should go back to ICANN rather than be addressed by you? Is it because you are not qualified? Is it because you can't interpret bylaws and rules?

Here's what Amici had to say in NDC's submission. "An IRP Panel has no background or experience in such matters or the same ability as the ICANN BOARD -- based on years of experience in running the New gTLD Program -- to weigh the competing interests and policies that would factor into a decision on .WEB. IRP Panels" -- "IRP Panels generally are not comprised of DNS specialists and, therefore, lack the necessary expertise and resources to craft or dictate Internet policy," quote.

I find that to be a remarkably naive
statement, especially with a Panel with the qualifications that are reflected in this Panel. It is not as if the ICANN is some monolithic, immutable organization or entity. It is an institution that's made up of individuals who come on to the Board, come off the Board and were advised by ICANN staff.

There really is nothing that makes them more qualified to address matters that -- the matters that have been put before you in terms of interpretation of the AGB and the interpretation, application and enforcement of ICANN's articles and bylaws.

It would be ironic, in fact, if the very entity and individuals and institutions whose conduct is subject to independent accountability review would then have an opportunity to determine whether or not they did anything wrong in the first place.

Certainly the ICANN Board and staff do not have the same qualifications or the profound qualifications that you do to determine what are the relevant principles of international law in accordance with which ICANN must conduct itself.

Or perhaps it's because Amici -- perhaps
Amici want this to go back to the ICANN Board because they already have a pretty good sense of how this matter will turn out if you send it back to ICANN.

We don't think that would be appropriate at all in the circumstances of this case that you are now well aware of and given the positions that have been taken by ICANN, for this matter to be sent back to the Board.

It is your duty, your obligation to determine ICANN’s accountability, and we believe that you have the expertise in abundance between the three of you to do so.

Now, the next two slides, Slide 11 and 12, relate to matters of document production, which I will not refer to -- I will not discuss right now, but I'll come back to these two slides later in my presentation. Really what I have done here in the two slides is lay out some of the key steps in this IRP that have a bearing on document production.

I believe that the Panel was, within the context of ICANN’s transparency obligations and accountability proceeding, far too restrictive in terms of the production that it ordered from ICANN. But be that as it may, we will live with it, at
least for now. We have done so, but I do think
that there are legal consequences that proceed from
the privilege indication by ICANN, and we'll
address those in posthearing briefing and in oral
argument in the future.

Let's go to Slide 13, Rosey.

On each slide, members of the Panel, I
have indicated in red at the top either a month and
a year or day, month and year, just so that you
would have an orientation to the time period in
which I am referring to.

Now, ICANN closed the new gTLD application
period on April 20th, 2012, having received
approximately 1,930 separate applications for new
gTLDs. The close date was supposed to be
officially a few days before. There was some
 glitches with the system, I believe, that resulted
in ICANN extending the application deadline until
20th of April 2012.

Now, NDC, together with several other
applicants, including Afilias, applied for a number
of new gTLDs, of course, including .WEB, and NDC
said that it was applying for .WEB so they would
aggressively market .WEB as an alternative to .COM
in order to increase competition and fight
"congestion" in the market for commercial TLD names, "commercial TLD names that fundamentally advantages older incumbent players." Obviously they are referring to VeriSign.

NDC also told the Internet community that its partner, Neustar, a former employer of Ms. Burr, would provide the back-end support necessary to operate the registry.

Now, when VeriSign applied, the gTLDs that VeriSign applied for were only those that were non-Latin character versions of .COM and .NET, as well as gTLD variations on VeriSign's name. They did not submit, as you now know, an application for the .WEB gTLD.

Slide 14, please.

When the application window closed, these were the entities that are listed, 1 through 7, as members of what is known as the .WEB contention set.

Now, for all of those applicants, except for confidential financial and technical details, their applications were posted, published for public review and comment on ICANN's website. This was done to allow the public, including other applicants and governments, to know who is applying
for a gTLD and why.

In fact, ICANN has said in its 18 July 2020 letter to you that the public portion of a gTLD application, including the mission and purpose section is, quote, "relative to the Program," close quote, because, open quotes, "it allows the Internet community to comment on the application during the public comment period based on the applicant's statement of how the mission and purpose and how the gTLD is intended to be operated," close quote.

In fact, there were many comments that were submitted by governments with reference to the different gTLD applicants, and, of course, individuals and nongovernmental entities as well. There were comments that were submitted associated with competition issues by governments.

Of course, nobody had an opportunity to comment on Verisign's interest in .WEB because Verisign didn't submit an application for .WEB and, therefore, Verisign's application could not be posted and scrutinized by -- posted publicly and scrutinized by the Internet community.

Now, when -- go to Slide 15, please.

So the important dates to keep in mind
here is the public comment period closed on 26 September 2012. As of that point, what did the Internet community understand? They understood that the applicant, at least as far as NDC was concerned, was a small but relatively ambitious and innovative limited liability company, that it publicly represented its "long-term commitment" and "proven executive team" that would aggressively market .WEB as an alternative to .COM and that they had the "intention" of adding .WEB to their .CO country code portfolio or TLD portfolio and that they planned "to implement a very similar strategy for .WEB in its launch, operation, promotion and growth."

Of course, Afilias also put forward its own views, its own capabilities as to what it is that it was going to do with .WEB, as did Google and Ruby Glen and the other members of the contention set. Of course, people knew that Afilias had a longstanding interest in .WEB because the interest had gone back at least ten -- ten years, if not longer.

Now, the next date to focus on is 25 August 2015. This is the date when NDC and VeriSign entered into the Domain Acquisition
Agreement.

We have laid out for you in some detail in our written submissions what -- how the Domain Acquisition Agreement should be characterized. We have laid out for you how it is that NDC sold, assigned and transferred rights in -- its rights and obligations in the application to VeriSign.

We have also laid out for you in some detail the degree to which the DAA allowed VeriSign -- Redacted - Third-Party Designated Confidential Information

We'll be exploring these matters with Mr. Livesay later on.

There is a separate handout that we have sent you, which was also annexed to our last submission, which lays out all the provisions of the Domain Acquisition Agreement. We simply ask that you run your eyes down all of those provisions, because I think that it very self-evidently or clearly shows what it is that was intended by the Domain Acquisition Agreement, the degree of control that it gives -- that it gave
VeriSign over NDC's application, and the complete application by NDC of its rights and obligations in its application.

I will go through those provisions because I am running out of time. If you give me a second, Chairman, let me check on how long I have been going.

Now, I don't know whether VeriSign's expert, Mr. Murphy, a notable economist, has had a chance to review the Domain Acquisition Agreement or not. But in his expert report at Paragraph 74 he cites to industry observers who say that or opine that VeriSign bought .WEB because it needs new name space to better compete with other new gTLDs.

He then goes on to state his opinion as follows, and I quote, "VeriSign bought .WEB to obtain new space, to participate in this new gTLD growth, and to counteract the declining growth that it is experiencing in .COM and .NET."

This is VeriSign's own expert, Mr. Murphy, who characterizes what it is that VeriSign did as a purchase. VeriSign bought .WEB, and, in fact, if you look at one of the annexes to the DAA,

Redacted - Third-Party Designated Confidential Information
Now, whether VeriSign's decreasing competitive position in the market is true or not --

MR. BIENVENU: Mr. Ali, sorry to interrupt you. Which specific provision of the DAA do you mean to refer to when you say that

MR. ALI: I am referring to, when one looks at the -- I think it is Annex 1 to the DAA.

ARBITRATOR BIENVENU: I don't want to interrupt the flow.

MR. ALI: That's fine. That's fine. We are here for you, Chairman. The more questions you ask me, the better, because I want to make sure that we are answering what's a concern to you.

I would say that you not only look at the -- look at Annex A, which addresses the auction activities and that specifically lays out
And in our interpretation, the -- what is affected by virtue of the totality of this agreement in substance and in form gives complete

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In our last submissions and, indeed, in our reply, we laid out in some detail -- sorry, in our last submission why this cannot be a loan agreement, why this can't be a simple financing agreement.

Now, I think what's critical here, irrespective of really how one characterizes this agreement, which we say is a sale, transfer and assignment of rights and obligations in the application, is why is it that NDC and VeriSign did this in secrecy? Why is it that ICANN facilitated that secrecy? Why did NDC not tell ICANN about the DAA when the agreement went into effect? Why did VeriSign not tell ICANN?
If this was as vanilla as they say, if this was something that was so in accordance with and reflective of market practice, why not let ICANN know? They certainly could have done so, but they chose not to.

Now, why didn't they? Certainly we can only speculate, but we have some indication from Mr. Livesay's testimony.

Slide 16, please.

Mr. Livesay says in his witness statement, and I quote, Redacted - Third-Party Designated Confidential Information

I certainly appreciate his honesty.

Redacted - Third-Party Designated Confidential Information
Or perhaps, if you go to the next slide, they didn't put in -- they didn't let ICANN know or they didn't put in an application change request because of the risk that that request might be rejected.

I ask you just to take a look at what -- the change request criteria set out. Because they reflect what are the considerations at play in terms of transparency and in terms of fairness as a result of disclosures being made with respect to applications that are in the contention set.

You can take a look at the full application change request process and criteria at C-56.

According to ICANN, these criteria were carefully developed, and here I am quoting. Begin quote, "Criteria were carefully developed to enable applicants to make necessary changes to their applications while ensuring a fair and equitable process for all applicants," close quote.

The criteria recommend rejection of change requests that would, and I quote again, "affect other third parties materially," close quote, "particularly other applicants," that's a quote, "or put the applicant filing the change request in
a position of advantage or disadvantage compared to the other applicants."

The criteria 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.

The relevant focus of the criteria, as you will see, is to assess whether "the change would affect string contention." And there are explanatory notes that go along with each of the criteria. Explanatory note for string contention states, "This criterion assesses how the change request will impact the status of the application and its competing applications, the string, and the contention set."

So in other words, 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 affects 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.
So maybe this is why they didn't let ICANN
know or didn't file a change request application.

Now, undoubtedly Mr. Livesay and
Mr. Rasco, who will be appearing before you, will
be able to shed some more light on why they kept
everything so secret.

Now, let's go to the next slide.

On the 27th of April 2016, ICANN announced
that unless the contention set was resolved through
private auction, the contention set would be
resolved by an ICANN auction on the 27th of July
2016.

Now, when NDC failed to meet the deadline
to submit its application to participate in a
private auction, in light of comments that
Mr. Rasco of NDC had made to a representative of
Ruby Glen, another contention set member, Ruby Glen
raised a complaint with ICANN that perhaps there
had been a change of control of NDC because, like
us, Ruby Glen knew nothing about the Domain
Acquisition Agreement.

As a result of that Ruby Glen submission
to ICANN, ICANN wrote to Mr. Rasco. This is Slide
18, sorry, is what Mr. Rasco said to Ruby Glen -- I
apologize. I am getting ahead of myself -- where
he refers to sort of the powers that be, but
doesn't say anything about who the powers that be
are.

Let's go on to the next slide. I do need
to pick it up a bit in terms of pace.

ICANN writes to NDC, specifically to
Mr. Rasco and says, quote, "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,)
et cetera. So ICANN is asking, can you please
confirm whether there have been any changes to your
application.

And what we have back the same day is a
very assiduous and carefully crafted answer by
Mr. Rasco to ICANN's inquiry. He says, "I can
confirm that there have been no changes to the NDC
organization that would need to be reported to
ICANN."

Notably missing is a response to ICANN's
request that NDC confirm that there have not been
any changes to your application that need to be reported to ICANN.

Given what we now know about the DAA and the provisions that we have previously described to you and the provisions that appear in the annex that you have, there's absolutely no doubt whatsoever that Mr. Rasco did not clear his response to ICANN with VeriSign.

Okay. What happens next? On the 8th of July 2016, ICANN's Christine Willett follows up with Mr. Rasco by phone. And she doesn't seem to have pressed Mr. Rasco on his responses to the query which ICANN had sent, which is really quite surprising, if not incredible, given that at this point in time there are abundant rumors circulating in the market and certainly being reported in the press, which ICANN would have known about, that VeriSign was somehow involved with NDC.

Ms. Willett calls Mr. Rasco. In a summary of that conversation to the ICANN Ombudsman, Willett represents what Rasco had told her in responding to whatever inquiries it is that she had made or whatever they talked about in that phone call. She says, and I quote, "He used language to give the impression that the decision to not
resolve contention privately was not entirely his." This is -- in language, this isn't what Mr. Rasco was saying to the other contention set members.

Then she goes on to say, "However, this decision was, in fact, his." But Rasco clearly lied to Willett.

So following that phone call that took place on the 8th of July, Ms. Willett writes to the other members of the contention set, saying that the .WEB auction, ICANN auction, as scheduled on the 27th of July 2016, is going to go forward. She states, and I quote, "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."

Of course ICANN had found no basis. Ms. Willett doesn't seem to have asked very much
and Mr. Rasco certainly wasn't inclined or permitted to say very much.

Well, the ICANN auction went forward as scheduled on the 27th of July 2016.

Go on to the next slide, please, which is Slide 20.

Here's what happened, at least from what we know so far at the ICANN auction. This is from Mr. Livesay's testimony.

He goes on to state,
And as we now know, with VeriSign's funds and NDC won the ICANN auction.

What happens thereafter? Following the ICANN auction -- Slide 21, please -- on 28th of July, VeriSign files a 10-Q statement with the SEC. A footnote in that statement sort of obliquely -- I would say inaccurately -- reports on the results of the .WEB auction.

"Subsequent to June 30th, the Company incurred a commitment to pay approximately 130 million for the future assignment of contractual rights, which are subject to third-party consent."

That's not entirely true. Really the company incurred a commitment to pay in August of 2015, and certainly as of the point in time that the ICANN auction was improperly won by NDC.

In any event, the media reports immediately appeared after VeriSign's public 10-Q statement or its 10-Q statement filing with the
SEC. And I think this is a very appropriate press report by Kieren McCarthy, who is a long-time ICANN observer. "Someone (cough, cough VeriSign) just gave ICANN 135 million for the rights to .WEB. DNS overlord literally doubled its annual revenue in one day," "DNS overlord" there referring to ICANN.

Now, in response to these reports that are appearing in the press, VeriSign issues a press release the next day which I think is also misleading, stating that it had "entered into an agreement with NDC wherein VeriSign provided funds for NDC's bid of 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."

Let's go to the next slide.

What did we do? Upon seeing what it is that VeriSign now said, general counsel of Afilias, Mr. Scott Hemphill, wrote to ICANN and says, well, we are aware that the guidebook says that the applicant may not sell, assign or transfer any of the rights obligations with the application, but he makes it clear we really don't know what's going on because we have not been able to review a copy of the agreements, whether it was one or more, between
NDC and VeriSign with respect to whatever
arrangement that they had made and we ask ICANN to
look into the matter, undertake an investigation.

    Next slide.

    ICANN -- Mr. Hemphill's letter prompted
ICANN to do something, to look into whatever
arrangement NDC and VeriSign had entered into,
which actually you might think ICANN might have
done earlier, when questions were first being
raised, but it appears Ms. Willett didn't dig very
far.

    And one wonders why she didn't learn more
about the VeriSign-NDC arrangement. Either she
didn't ask too many questions or NDC and VeriSign
were quite adamant in ensuring that this
information was kept from ICANN.

    But it looks like Mr. Hemphill's letter
did spur ICANN into some sort of action. At some
point, and we don't know when, ICANN requested its
outside counsel to call VeriSign. Why the request
was made to VeriSign at this point and not to NDC,
we don't know.

    ICANN didn't have the DAA. So why is
ICANN calling -- why is ICANN's counsel calling
VeriSign and not NDC or NDC's counsel? Why are
they calling outside litigation counsel? Why is
the call not being made to NDC's Mr. Rasco, given
Ms. Willett had made a call previously to
Mr. Rasco? But the call is now being made by
outside counsel to outside counsel for VeriSign.
Why was there a request for information on a matter
that was clearly right now controversial not made
in writing? We don't know. It certainly strikes
us as very improper and, to use Mr. Enson's words,
in fact, sinister.

What was said through that conversation
between Mr. Enson and Mr. Johnston in that phone
corveration? We don't know. In fact, even
Mr. Rasco doesn't appear to know anything about
what happened or was said. He states in his
witness statement at Paragraph 140, "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." They were
out of it. In August 2016, they got their money,
we are done. Really quite striking.

And of course Mr. Johnston's letter, which
you by now have read, does give us some insight
into the phone call. It was a very detailed,
defensive response, very long response, very
defensive response. Is that what he was asked to do by ICANN in that phone call? Again, we don't know.

What we do know is that ICANN didn't post the letter, and we'll, of course, be inquiring with Ms. Willett about this, calling and keeping in mind that all of our letters, that is, Afilias' letters to ICANN, have been posted, but this letter wasn't. Even if the DAA was highly confidential, certainly it could have been posted in redacted form.

So having received no response -- Rosey, please, Slide 25 -- to our earlier letter, Mr. Hemphill again wrote to ICANN requesting that ICANN specify what steps it was taking 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.

Again, we didn't know anything about the DAA. So on 16th of September -- Slide 26 -- what happens? ICANN sends Afilias, VeriSign, NDC and Ruby Glen a questionnaire. This is a questionnaire that's sent by Ms. Willett to, and I quote,
"facilitate informed resolution," close quote, 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.

There's nothing at all in the letter that discloses or suggests that ICANN had already received the DAA from VeriSign.

The question, when you study it with reference to Mr. Johnston's letter, shows that this was a questionnaire fit for purpose. ICANN knew what it was asking for, and it knew already, in light of Mr. Johnston's letter, that it had received what it is that NDC and VeriSign were going to say.

Now, again, Ms. Willett may well shed some light on who and where the questionnaire was prepared and to what end, especially in light of the letter that Mr. Akram Atallah, president of ICANN's Global Domains Divisions -- which is not a witness in this arbitration, and we wonder why. But Mr. Atallah sends a letter to Afilias a couple weeks later.

   Slide 27.

   And he says, as an applicant in the
contention set, you 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' comments, and other inputs that we have sought, into consideration as we consider this matter."

Now, on the 7th of October we filed our responses to the questionnaire. We believed that this is input, as Mr. Atallah has said, that is information that will be taken into consideration as we consider this matter and that it's information that is going to form part of the informed resolution that Ms. Willett had referred to in transmitting the questionnaire.

Of course, not knowing anything about the DAA, we answered the questions as best as we could. But the answers that VeriSign and NDC gave were certainly -- to the fit-for-purpose questionnaire were fit-for-purpose responses.

I will tell you we never, not once, received a single communication from ICANN to what "consideration," to use Mr. Atallah's words, was given to the information we provided in the 7 October 2016 response or how the questionnaire responses were used to "facilitate informed
resolution" of anything, to use Ms. Willett's words. We don't know even if, when or how any informed resolution took place.

On the one hand, we are told that ICANN evaluated -- and you were told that ICANN evaluated our responses and has evaluated our claims, but then you're also told that it hasn't been fully evaluated. You are told that information was being requested to facilitate informed resolution, but then you are told that a decision was taken actually not to take -- to make a decision on the status of .WEB yet.

In June 2016, at the latest, some sort of decision is taken on the claims that would permit ICANN to go forward with contracting with -- sorry, June 2018 to go forward in contracting with NDC.

Now, again, we hope that Ms. Willett will be able to clarify a lot of what was going on with all of this information that they have requested.

All right. Let's go on to Slide No. 28.

The first time we get some sort of indication or, in fact, a clear answer, from ICANN as to what may have been done with the information we provide is in June 2020, just a couple months ago, when ICANN filed its rejoinder, a point where
it finally decides in its rejoinder that's going to
tell us what the Board supposedly did.

   It tells us that at a Board meeting --
actually, it turns out to be a Board workshop
meeting, November 2016 -- the Board decided to put
off any consideration of .WEB until all
accountability mechanisms and legal proceedings
were over.

   Again, why did they wait until their
rejoinder? I'll tell you why. Because they know
what they have done is wrong, and they needed to
come up with some sort of an argument, another
context, we call it, made-for-arbitration
arguments, made-for-arbitration defense,
made-for-IRP defense, that the Board gave some
consideration to this matter and, therefore, you
cannot look into it because this falls under the
Board's business judgment.

   In reality, we didn't know about the
November meeting when we filed our reply in May
2020. You will recall that we have had various
skirmishes in document production and particularly
in the supplemental document production request
that we made once we learned about this ICANN
meeting.
And you are, of course, aware of ICANN's blanket claim of privilege in respect of the meeting and the materials that may have been provided to the Board, also about what ICANN staff said and what was apparently decided.

You upheld ICANN's privilege claim, meaning that neither we nor you are now any the wiser about this meeting that became in June 2020 the mainstay of ICANN's defense.

It is not just ICANN's indication of privilege that has left us in the dark; it is also because there is absolutely nothing, nothing posted on ICANN's website suggesting in any way that .WEB was even discussed at the November Board meeting.

Go on to the next slide.

ICANN's articles place a lot of emphasis on transparency. Section 3.1 of Article 3, "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

If you look at 3.4 and 3.5, it goes on to lay out what the obligations of transparency entail with respect to actions, decisions by the Board.

There's absolutely nothing that suggests
or that would hint to us that .WEB was in any way considered by the Board, either at the Board workshop or subsequently in the November Board meetings.

What did staff say to the Board, if anything? What options did they give to the Board, if any? What materials were provided to the Board? What materials did the Board ask for? Did the Board actually review the DAA?

Surely these are critical questions in the context of an inquiry where ICANN staff's conduct is being questioned, and ICANN is claiming that the business judgment rule shields the Board's alleged deliberations and the decision not to decide.

And if they had made these decisions, even the decision not to decide, why not say something about it? Why not tell Afilias, particularly in light of the fact that we had made a number of inquiries previously and they told us, Ms. Atallah had told us that we would be getting updated as they considered the information that we provided, and they had asked for information associated with so-called facilitate an informed resolution?

Now, what you are going to be told by ICANN is that, well, nothing needed to be said
because of ICANN's well-publicized policy regarding contention sets being kept on hold while accountability mechanisms are pending.

I will tell you that I have been involved in ICANN matters for well over a decade, in fact, probably over two decades. I first got involved in ICANN matters 20 years ago, and that's probably the context in which Mr. Steve Smith and I became firm and fast friends.

But well over a decade ago we dealt with our first ICANN IRP, and I have been involved in -- this is my fifth IRP and the fourth involving the new gTLD program. I have never seen this so-called well-publicized policy.

What was happening in November of 2016, just to be clear, insofar as pending accountability mechanisms or litigation, there was no accountability or litigation commenced by Afilias at the time.

There was a litigation involving Ruby Glen that had commenced in July 2016, that is before the ICANN auction, in which ICANN was defending on the basis of the litigation waiver that it requires all new gTLD applicants to accept, not defend on the merits, but on the basis of a litigation waiver, a
procedural defense, that they certainly suggest to represent otherwise in their pleadings.

    ICANN was also engaged in a cooperative engagement process with Ruby Glen. About what? We don't know exactly, but what we do know is that the CEP process is an amicable resolution process that either side can terminate at any time. In fact, it was ICANN that terminated the CEP in this case, that is, in the context of Afilias' request for CEP with ICANN.

    So it wasn't as if -- they had this litigation with Ruby Glen, which they were defending on the basis of the litigation waiver and an amicable resolution process that was underway. That wasn't any real basis to claim that there was some serious accountability process that was going on that would cause the Board to postpone any decision.

    So let's just go on to the next slide. Slide 31, please, Rosey -- 32.

    Okay. So they tell you that there's a policy of deferring consideration when a matter is -- when there's an accountability proceeding underway.

    Well, after we filed IRP, here's what
Mr. LeVee wrote to me. He says, "Rather, as you well know, it has not been ICANN's historical practice upon the filing of an IRP to automatically place, or continue, a hold on a contention set or application."

So here's what the policy seems to be:
When there's a settlement discussion going on, such as a CEP, or an issue associated with a documentary disclosure matter, sort of like a four-year request to ICANN, known as a DIDP, the contention set will be put on hold and no further consideration will be given to the matter.

But when you staff an IRP, a serious accountability proceeding, we are then going to take the TLD contention set off hold. But they will take it off hold or put it on hold, but only in certain circumstances that ICANN decides. What sort of policy is that? And where is this policy published? Nowhere.

And we have laid this out in some detail as well as in our last submission.

All right. So -- now, it isn't controversial between the parties -- next slide, Rosey -- or back to Slide 30. Actually, let's go to Slide 33 -- that during the pendency of the
DOJ's investigation of VeriSign's potential acquisition of .WEB that there was no further consideration given to the delegation of .WEB. And we assume that this started sometime in December 2017, and we know that the investigation was terminated on the 9th of January 2018.

Now, ICANN and Amici have made quite a big deal about the consequences of the investigation's termination and what that means for ICANN's competition mandate, but we'll deal with that in cross-examination of the experts and a couple of witnesses and then also in posthearing briefing.

What I want to show you with this slide is the fact that prior to the DOJ investigation terminating in December 2017, Mr. Rasco is having some sort of a conference call, presumably about .WEB, with ICANN's staff.

Next slide.

You can see here on this slide the scheduling of that conference call on December 12th, which is then going to happen on December 14th.

Let's go on to the next slide.

Clearly we have here communications taking place between VeriSign and ICANN about the
delegation of .WEB, some consideration being given
to .WEB and its delegation to NDC and then somehow
with VeriSign's involvement, not withstanding the
fact that no determination has apparently yet been
made on the -- on whether the DAA is consistent
with the applicant guidebook.

Then February 15th -- on February 8th we
have VeriSign's CEO, Mr. Bidzos, saying that, "We
are now engaged in ICANN's process to move the
debtation of .WEB forward." Why would he be
saying this unless somebody had told him that
everything's in the clear, Mr. Bidzos, so we are
now moving forward? Apparently, if there was a
decision made to defer, somebody at ICANN's staff
wasn't abiding by this decision.

February 15th, next slide, NDC
communicates with ICANN regarding .WEB. Mr. Rasco,
"Dear John and Akram," John being John Jeffrey,
ICANN's general counsel, Akram Atallah, who we
referred to previously, he says, "I hope this
message finds you well. In line with our previous
conversation" -- what conversation? Anyway -- "I
am contacting you regarding NU DOT CO signing the
Registry Agreement for .WEB." He goes on to say,
"Now that the DOJ CID has concluded and that there
are no pending accountability mechanisms associated with our successful bid." He goes on to say, "Thanks so much for all your help throughout this process, and I look forward to wrapping this up."

What help, how much help? I thought that they had deferred any consideration pursuant to the November 2016 meeting. Apparently they are helping him with this process at this point.

Who told Mr. Rasco and when that .WEB's processing would continue when the DOJ CID had concluded and there were no pending accountability mechanisms? He clearly seems to have known something in February 2018 that we knew nothing about.

And then Mr. Bidzos continues to make comments publicly about the processing of .WEB in April 2018 and then again in July 2018.

So clearly something is going on, otherwise, again, Mr. Bidzos is not going to be making these statements. Mr. Rasco is not going to be making -- not going to be writing emails talking about all the help that he's been getting throughout the process and revealing information through this email that clearly he was being told things that we weren't.
And what was happening in the same time frame with Afilias? I won't go through all of these, but I'll leave them for you to review, but we are writing on February 23rd, around the same time that Mr. Rasco is having phone calls and getting information, asking for an update.

Now, when we ask for an update to what's happening with the contention set, what we are told is we are actually going to treat your request for an update as a DIDP request, a FOIA request and a request for documentation, which, by the way, they subsequently go ahead and reject every single one of the majority of our document disclosure requests pursuant to the DIDP transparency policy, ICANN refused.

However, what they did provide to us they said is publicly available on ICANN's website. Guess what, there's nothing publicly available on ICANN's website about the January 2016 meeting.

So we continue to ask for information and we are continuously stonewalled by ICANN, leading me to write to ICANN in May of 2018, saying "To date, ICANN has provided no information about the investigation (if any) it has undertaken regarding the concerns raised by Afilias."
We still thought that they were investigating this matter because we received no information from ICANN about what they are supposedly doing.

So what then happens? On the 6th of June 2018, a very simple notification is sent to Mr. John Kane, who at the time was in Australia. Out of the blue ICANN tells us that they have decided to take the .WEB contention set off hold status, signaling that it intended to proceed with delegation of .WEB to NDC, of course, in light of the terms of the DAA, of which ICANN was now fully aware, delegating .WEB to VeriSign.

This is all we get. "Dear John, thank you for contacting the ICANN team. Case 00892769 has been closed. Case information, subject: Update regarding contention set status for Application ID 1-" et cetera, et cetera. That's it. "Please contact us if you have any additional questions." We had a lot of questions, but a lot of good it did us asking questions.

So then if you go to the next slide, we invoke CEP with ICANN, which is the Cooperative Engagement Process, in order to find out what's going on and see if there's some resolution path.
that can be created with ICANN.

28 August, Afilias and ICANN participate in a CEP meeting. At that meeting we indicate to ICANN that we'll provide them with a draft IRP request. On the 10th of October we provide a draft IRP request to facilitate further discussions. And then on the 13th of November, when we have our next CEP meeting, ICANN proceeds to terminate CEP with us, probably taking into consideration what we said in our IRP.

Now, remember the draft IRP request, and 14 November IRP says is filed without our knowing anything about the DAA.

All right. In light of these facts that I have laid out previously, in the November 2016 meeting regarding the DAA regarding what it is that ICANN said to us, what is it that ICANN is supposed to do?

Next slide, Slide 48.

Now, one of the things -- because I am running out of time -- how much time do I have left? 20 minutes. I still have quite a bit to cover. There are a couple of slides here that -- members of the Panel, that I would like you to spend some time on later on when you're thinking
about everything that I have had to say. It is a timeline of events relating to the development of Rule 7.

Now, we have been dealing with Rule 7 somewhat in its own -- say the breach of Rule 7 in its own particular context. I think that's as a result of the procedures officer proceeding having its own particular context, but I think it is extremely important that you look at what was happening in the Rule 7 -- let's say the IRP-IOT and the development Rule 7 in light of the broader factual context that I have laid out for you.

Because when you look at that broader context, look at Slide 45, you will see the complete change in tone and substance and content of what it is that Mr. McAuley of VeriSign is now saying within the context of the IRP-IOT.

In October 2018, he is now insisting -- they know -- by the way, everybody knows that Afilias has started CEP by this point in time. ICANN knows that we are going to be filing a draft IRP. Mr. McAuley is saying it is essential that a person or entity has 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 the IRP. They have to be able to
protect their interests in competitive situations.
ICANN facilitates VeriSign and NDC's participation
in the context of this particular IRP.

We are going to be exploring this further
with the witnesses, so I won't discuss this any
further.

My simple point here is that we ask that
you not look at what's happening in the IRP-IOT
without reference to what is happening in the
broader factual context.

What we have in the next slides, starting
with Slide 50 -- or Slide 48.

Slide 48, we have laid out there for you
that the purpose behind the applicant guidebook and
the purpose behind the policy development process
that the ICANN community went through over the
course of several years was to provide a clear
roadmap for applicants to reach delegation.

And Mr. Dennis Carlton reflects in his
report what it is that the GNSO, which is the
Global Names Supporting Organization of ICANN, what
they had intended behind the new gTLD application
process.

So this is, again, to provide context for
what the AGB, this massive document that's very
detailed, what the intentions were. "The
evaluation and selection procedure for new gTLD
registries should respect the principles of
fairness, transparency and nondiscrimination. All
applicants for a new gTLD registry should,
therefore, be evaluated against transparent and
predictable criteria, fully available to the
applicants prior to the initiation of the process.
Normally, therefore, no subsequent additional
selection criteria should be used in the selection
process."

Well, if indirect participation in a
contention set, Redacted - Third-Party Designated Confidential Information
is permissible, then you
would have subsequent additional selection criteria
being used in the selection process.

Okay. Moving on, Slide 50.

These slides lay out the obligation of
transparency and disclosure. We wanted to create
slides of putting these -- a slide with these
provisions so that they are in front of you as you
listen to what the witnesses have to say and as you
listen to ICANN's presentation regarding the
factual context that I have laid out.
Just to point out a couple of things.

"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."

The AGB also provides that it is not just with respect to material misstatements or misrepresentations, it's omissions of material information. So statements or omissions of any information that would result in application being rendered false or misleading.

I don't see what's so complicated about this provision or the others we cited to you, for that matter, that required any specialized knowledge of the Internet or Internet governance or Internet policy making. There's nothing special about this that would prevent you from being competent to interpret that language.

I think it is going to be very important for you to have this language in front of you when you hear from Ms. Willett, Mr. Livesay, Mr. Rasco and Mr. Disspain.

And the same go for the anti-assignment rules set out in Section 2.2.3 of the applicant guidebook. "Applicant may not resell, assign, or
transfer any of applicant's rights or obligations in connection with the application."

Now, the drafters could have said, "Applicant may not resell, assign or transfer their application," but they didn't. They said, "Any of applicant's rights or obligations in connection with the application."

A quick look at the bidding rules, starting at Slide 52. The bidding rules are also quite clear in that they are -- they are defined to create a transparent system that is fair, and it applies to all applicants based on a principle of disclosure.

The ICANN Board adopted the mechanism of contention set resolution by auction because it considered an auction to be an objective test. They felt that other means of resolution would be subjective and might give rise to unfair results that are unpredictable and subject to abuses. This is what the ICANN Board has said.

They said that an auction -- "Resolution via auction provides objectivity and transparency."

What ICANN wanted to ensure is that everybody would be playing by a set of rules that applied to everyone that was in the contention set. ICANN
insisted that, "only bids that comply with all aspects of the auction rules will be considered valid." 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." In other words, bidders that submit invalid bids could not progress to the next round of the auction.

The bidding rules actually provided for the possibility that there could be a designated bidder. So the bidding rules provided for the possibility that there might be some other entity participating, but they don't provide for an undisclosed bidder, which is what effectively VeriSign was, as per the testimony I pointed out to you earlier from Mr. Livesay.

The auction rules also provide that if at any time following the conclusion of the auction the winner is determined by ICANN to be ineligible to sign a Registry Agreement for the contention string that was the subject of the auction, the remaining bidders with applications that have not been withdrawn will receive offers to have their applications accepted one at a time in descending order.
We absolutely believe that ICANN should have determined that NDC is ineligible to sign a Registry Agreement based on what NDC had done insofar as its failure to disclose information and the transfer of rights of its application of concern and the manner in which it participated in the auction.

So what, then, are Afilias' claims? Let's move on.

Our main claim is that by failing to either disqualify NDC's application or, two, reject its bids or, three, determine that it is ineligible to execute a Registry Agreement with ICANN for .WEB by not enforcing the New gTLD Program Rules, ICANN has breached its Articles and Bylaws.

Specifically, we say that ICANN has failed to act "in conformity with relevant principles of international law." We say that ICANN has failed to "Make decisions by applying documented policies consistently, neutrally, objectively and fairly without singling out any particular party for discriminatory treatment."

Next slide.

We say that ICANN has breached its articles and bylaws by not applying its standards,
policies, procedures or practices inequitably -- of course, "inequitably" meaning unjustly or unfairly. That ICANN has failed to act justly or failed to act fairly in the application of its standards and policies, and specifically its application of the new gTLD Program rules.

We say that ICANN has failed to act to the maximum extent feasible in an open and transparent manner. And we say that ICANN has failed to act in a way that is -- that promotes competition.

Okay. So now let's turn --

ARBITRATOR BIENVENU: Mr. Ali, forgive me for interrupting you. I would like to ask you -- I understand your position and the claim that you make that ICANN breached its bylaws by failing to disqualify -- I am simplifying here, but to disqualify NDC and its bid.

ICANN responds to that that they have not yet pronounced on the compliant nature of the bid because of the November 2016 decision to defer any pronouncement on what Amici calls the NDC claim.

What claim do you make in relation to that decision not to make a pronouncement on the NDC bid in November 2016? What claim do you make in relation to that Board decision?
MR. ALI: Well, first of all,
Mr. Chairman, I don't concede or in any way accept
that the Board made a decision. I don't think that
there's any --

ARBITRATOR BIENVENU: I know all that, and
I know that I'm asking you a question that assumes
that we -- that the discussion is in a subsidiary
part of your argument, but I would like to know, in
relation to that position taken by ICANN, what
claim do you make in relation to that alleged
decision?

MR. ALI: First of all --

ARBITRATOR BIENVENU: Let me just finish
my question.

MR. ALI: I apologize.

ARBITRATOR BIENVENU: Do you consider that
that decision, in and of itself, did not comply
with ICANN's bylaws? And if so, why?

MR. ALI: Well, absolutely. Because they
are required under their bylaws to make decisions.
So it is action and inaction that's -- that is at
stake here.

So there's a claim that if the -- the
claim is certainly one based on lack of
transparency, certainly one based on failure to
make a decision. If they did take the decision
that they took, then our claim is that staff have
violated the articles and bylaws by then proceeding
inconsistently with that -- with that alleged
decision.

ARBITRATOR BIENVENU: In what sense?

MR. ALI: Well, because staff -- if there
was a decision to defer consideration, well, then
certainly the evidence shows that they were taking
a position with respect to the validity or the
properness of the AGB -- of the DAA with reference
to the AGB starting in February of 2018. That's
the reason why I went through those communications.

And by June of 2018, when they decided to
proceed with the delegation by sending NDC a
Registry Agreement, that implicitly, if not
expressly, reflects a decision as to whether or not
the issues that we had raised regarding the --
regarding NDC's conduct was proper or not. They
already had the DAA.

So in light of complaints that have been
raised, you would assume that they would have
evaluated whether the DAA was compliant with the
requirements of the AGB.

So they made a decision --
ARBITRATOR BIENVENU: Thank you.

MR. ALI: -- without being transparent.
They made a decision without due process. If they
didn't make a decision, then certainly staff were
proceeding in a way that was not in accordance with
what the Board apparently decided, about which we
know nothing.

ARBITRATOR BIENVENU: Thank you. You are
close to the end of your time, Mr. Ali.

MR. ALI: Yes, I will ask for a couple
more minutes. Five minutes, that should be enough.

Your question, I think, then brings us to
the position that ICANN has taken, that there was
no decision to -- there was a decision taken to
defer consideration in November of 2016 and,
therefore, because you do not have the authority to
question what the Board decided pursuant to the
business judgment rule, you should send this matter
back to the Board for consideration.

Well, we certainly don't think that the
business judgment rule applies at all here. Albeit
this was language -- that this was a finding that
was made by the ICM Panel under a different set of
bylaws that didn't refer specifically to the
business judgment rule, ICANN did invoke the
1 business judgment rule under California law in that
2 matter.

3 The ICM Panel said the following, which I
4 think continues to apply today, "The business
5 judgment rule with respect to ICANN is to be
6 treated as a default rule that might be called upon
7 in the absence of relevant provisions of ICANN's
8 articles and bylaws and of specific representations
9 of ICANN that bear on the propriety of its
10 conduct."

11 In our view, the -- there are specific
12 provisions of ICANN's articles and bylaws that are
13 implicated by our claims. In fact, we couldn't
14 have made a claim that would implicate the business
15 judgment rule because we didn't know about the
16 November 2016 meeting.

17 So when we made -- when we filed our
18 amended request for IRP, how could we be making a
19 claim regarding Board conduct when we didn't even
20 know that there had been any Board conduct? ICANN
21 has itself complained that we have raised claims
22 that are not stated in our request for IRP.

23 So as far as I'm concerned, it is a little
24 bit all over the place insofar as ICANN's position
25 is concerned.
Moreover, the business judgment rule can't apply to ICANN's staff's conduct.

So rather than the very limited authority that ICANN says you have, we say that your authority is, in fact, quite broad, and we have laid it out in our submissions, particularly our last submission, as to why that authority is as well-defined under this enhanced ICANN accountability mechanism that we now have, this enhanced IRP.

We say that under the provisions of the bylaws, you have the authority to issue a binding determination and that you have the specific authority to direct ICANN what to do.

To the extent that you need to get direction or further guidance or to amplify what your authority is, you not only need to simply look at the plain wording of the bylaws, but -- you should not listen to advocates, but listen to the CCWG-Accountability.

What does the CCWG-Accountability tell you? They tell you that with respect to a particular IRP, "The IRP Panel shall decide the issues presented based on its own independent interpretation of ICANN's Articles of Incorporation"
and Bylaws in the context of applicable governing law," including international law, "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."

They also tell you that "CCWG-Accountability intends that if the Panel determines that an action or inaction by the Board or staff is in violation of ICANN's Articles of Incorporation or Bylaws, then that decision is binding and the ICANN Board and staff shall be directed to take appropriate action to remedy the breach."

At the end of the day, Mr. Chairman and members of the Panel, I will say this: Given the position that ICANN has taken in this IRP and given -- Rosey, next slide, please -- and given the position that ICANN has articulated in its pleadings, where ICANN has called us hypocritical and talked about the inequity of Afilias' claims -- look at what they say, "The hypocrisy and inequity of Afilias' claims against ICANN are palpable."

They have been shameless, fundamentally unfair and
self-serving. They have been tone-deaf. This is position -- these are positions that ICANN is taking.

And you honestly believe that this body, ICANN's -- the ICANN Board and ICANN staff, advised by ICANN's counsel, will be able to independently, neutrally and objectively address whether or not the DAA is compliant with the AGB and whether or not NDC should be disqualified or not?

Next slide.

I will close with the following. Here I will quote not only Voltaire, but apparently Spiderman, "With great authority comes great responsibility."

I would extend that maxim, Mr. Chairman and members of the Tribunal, as follows: With great responsibility comes enhanced accountability. We would ask that you hold ICANN accountable and issue a decision requiring ICANN to disqualify NDC's application and award .WEB to Afilias.

I thank you for your attention and close my opening presentation on behalf of Afilias.

ARBITRATOR BIENVENU: Thank you very much indeed, Mr. Ali, for your oral remarks, and our thanks also to your team behind you for assisting
you in preparing the PowerPoint presentation that you used to support your remarks.

So we have a 15 -- we will have a 15-minute break, and then we will resume to hear the opening presentation of ICANN. I am looking to our friends at Trial Lawyer -- sorry, TRIALanywhere, do we all -- what are our marching orders for the break, JD?

(Discussion off the record.)

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Please proceed.

MR. LeVEE: Yes. Thank you, Mr. Chairman. Good morning, good afternoon and good evening to the members of the Panel.

I will be giving the beginning and the end of ICANN's opening statement.

I am located in Jones Day's Los Angeles office, and my partner Steve Smith is located in the Jones Day San Francisco office, and he'll be doing the middle.

You will also meet tomorrow two other law partners working with us, each of whom you have already met by phone, Eric Enson here with me in Los Angeles, who will be representing ICANN Board member Becky Burr. And David Wallach, who is with
Mr. Smith in San Francisco and will be representing ICANN Deputy General Counsel Samantha Eisner. Also with me in my office are my colleagues Kelly Ozurovich and Mina Saffarian.

In addition, observing throughout the course of this proceeding will be two members of ICANN's office of general counsel, both based here in Los Angeles, Amy Stathos, ICANN's deputy general counsel, and Casandra Furey, who is associate general counsel.

I certainly join in Mr. Ali's comments regarding the quality of the counsel in this IRP. Mr. Chairman, you have already commented as well. I do wish we were together in Chicago where our handshakes could be actual, as opposed to virtual. And this is my first such hearing like this and it is different, but I am looking forward to it very much.

It goes without saying that ICANN would like to thank the members of the Panel for their participation in this unique process.

This IRP will have the greatest number of hearing dates of any IRP ever. Members of the Panel, we appreciate both your diligence and your patience.
Let me describe for you the outline of their opening statement. I will provide the production, during which we will discuss, among other things, a bit of ICANN's history, creation of the new gTLD Program, the nature of ICANN's accountability mechanism, such as this one, and a timeline of events associated with .WEB.

My timeline will look a little different than the timeline you just saw. Some of the things that are different provide important context.

I will then turn the microphone over to Mr. Smith, who will discuss the Panel's jurisdiction, including the standard of review, the relevant statute of limitations and repose periods and the remedies that are available under the bylaws in an IRP.

With that backdrop, Mr. Smith will then begin our discussion of the details of the claims asserted by Afilias and why the Panel should reject those claims and find that ICANN has complied with its articles of incorporation and its bylaws.

Mr. Smith will then return the microphone to me, and I will discuss the competition issues that Afilias has raised, not in too much detail, but I will discuss ICANN's mission with respect to
creating the Domain Name System and how ICANN has undoubtedly met that mission from a competitive standpoint, how ICANN addresses claims that a particular action were meant maybe anticompetitive, including the facts, as our witnesses explain, that ICANN is not an economic regulator, and then I will explain how ICANN's experts and NSI's experts -- actually, we won't need to use NSI's experts at all, whose statements ICANN has largely endorsed, confirm that there would be no basis for ICANN to reject on competition grounds the possibility that VeriSign might one day wind up operating the registry for .WEB.

So the introduction is broken up into five parts.

And, Kelly, go to the next slide, please.

You all know this. I'm going to cover it quickly. ICANN was formed in 1998 in response to the private -- an effort to privatize the oversight of the Internet's Domain Name System under the purview of what was then the Clinton administration.

ICANN is a California not-for-profit public benefit cooperation, and its mission is to oversee the technical coordination of the DNS.
It is a little difficult to read, but the point is ICANN has a Board that consists of 16 members. They are selected in a variety of ways under ICANN's bylaws. Article 7 of the bylaws actually requires the creation of a diverse and very international group of directors. ICANN has approximately 400 staff members. They are based here in Los Angeles, but also around the world.

ICANN is supported by three supporting organizations. The only one you are going to hear about in the next eight days is the GNSO, Generic Names Supporting Organization. And the GNSO develops and recommends to the ICANN Board substantive policies relating to generic top-level domains.

There are also four advisory committees, one ombudsman and an extraordinarily large group of diverse stakeholders literally from all over. Article 7 of ICANN's bylaws, in particular Section 7.3, requires that members of the ICANN Board be very knowledgeable about ICANN's mission and the Domain Name System generally. Board members must understand and consider the potential impact of ICANN decisions on the global Internet community.
They must be personally familiar with the items on that slide, registry and registrar operations, technical standards and protocols, policy development and a broad range of business, individual, academic and non-commercial uses are built right into the Board bylaws. Board members have the duty to act in what they have reason to believe are the best interests of ICANN from its bottom-up, consensus-driven, multistakeholder model.

We are going to hear a lot, both in my opening statement and throughout the hearing, about ICANN's accountability mechanisms. They are based in -- they start with Section 4.1 of the bylaws, which describes the purpose of these accountability mechanisms, and concludes in Section 4.3, a very lengthy discussion of Independent Review Process that brings us here today.

What I want to also mention is that Section 4, Article 4, provides for the reconsideration requests, and you will also hear much in this IRP about reconsideration requests, including the fact that Afilias had multiple opportunities to file reconsideration requests related to .WEB as soon as the action for .WEB was
completed in 2016, but it elected not to do so. It
elected not to file reconsideration requests for
two years. We'll talk about the consequence of
that in due course.

Slide 9, please.

So the Independent Review Process that
brings us here -- and I am not going to spend a lot
of time, Mr. Smith will discuss it in a little bit
more detail -- but the primary purpose is to
"ensure that ICANN does not exceed the scope of its
Mission and otherwise complies with its Articles of
Incorporation and Bylaws." Somewhat different than
the opening statement that you just heard.

Next slide.

"IRPs Are Not Intended to Supplant the
Decision Making of the Board." Section
4.3(i)(iii), says, "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."

Mr. Smith will describe this and discuss
this in more detail, but I wanted to give the
overview.
Slide 11.

I want you to know that Afilias is extremely familiar with ICANN's accountability mechanisms. I know this slide is hard to read. My point for you is not to read it. My point is for you to see the two exhibit numbers, because on the left, my left, Exhibit R-43 is a reconsideration request that Afilias submitted in September of 2014 with respect to its application for .RADIO, R-A-D-I-O. Exhibit R-28 reflects that in October 2015 Afilias initiated an IRP, also with respect to .RADIO, although it then withdrew its request shortly thereafter.

Slide 12.

This slide reflects what Mr. Ali already told you this morning, that he is extremely familiar with the process and the filing of IRPs as well as ICANN's accountability mechanisms. Mr. Ali was correct, he and Mr. de Gramont, Mr. Enson and I participated in the very first IRP in 2008 and '9, and I have also had the pleasure of working with counsel now representing Afilias on two other IRPs, one of which involved Professor Kessedjian serving on a Panel. She is also experienced in IRPs. There was another IRP that we had concluded in
2016.

I should mention that those IRPs were decided under a prior version of ICANN's bylaws. So you have seen quotes in Afilias' briefs regarding how those IRPs were decided and various aspects of them, and they literally do not take into account pretty significant changes that were made subsequently.

But the real reason I am providing this information is to make an important point. Afilias and its counsel knew how to invoke accountability mechanisms.

You will hear during the course of the testimony that Afilias could have done so after the auction, such as by filing a reconsideration request after NDC was declared the winner of the .WEB auction, and then Afilias sent letters and ICANN refused immediately to what Mr. Ali said ICANN should have done to disqualify NDC's bid as Afilias had requested.

Had Afilias submitted a reconsideration request from 2016, the ICANN Board would have been immediately involved because the ICANN Board or a committee of the Board immediately is involved in the reconsideration requests, both at that time and
under the new bylaws that came into effect in October 2016.

This has significant ramifications and explains a lot of what brings us here today, which I will explain in the timeline.

Afifilas waited two years, two years to file the accountability mechanism, which has a number of ramifications, as Mr. Smith will discuss during his portion of the opening.

Next slide.

So let me talk to you a little bit about the new gTLD Program and a little bit about ICANN's history of how it has created competition.

Next slide.

As you know, ICANN was founded in September 1998, and Ms. Burr, who you will meet tomorrow morning, our morning, was there at the beginning. She was a senior official of the NTIA, National Telecommunications & Information Administration, and she was one of the principal members of the Clinton administration heavily involved in ICANN's creation.

If you have any questions about ICANN's creation, she is the person who knows.

Now, Afifilas has made allegations and a
large chunk of the opening statement is based on the notion that ICANN and VeriSign have been conspiring with respect to .WEB and in this IRP.

The actual evidence and the testimony you will hear is that the relationship between ICANN and VeriSign is extremely arm's length. It is based on contracts, just as ICANN's relationship with all our registry operators is based on contracts. There's no conspiracy, never has been.

Indeed, as Ms. Burr explains, the start of the relationship between ICANN and VeriSign, all the way back in 1998, was that at the U.S. government's insistence a company called Network Solutions, which was the predecessor to VeriSign, was forced to separate its registry and its registrar functions.

Registrars are the companies you might go to to acquire a domain name subscription. GoDaddy in the United States is the largest one, but there are hundreds, as I will explain.

Back in 1998, if you wanted to acquire a second-level domain subscription, such as JonesDay.com or Dechert.com, it will cost you $35 a year.

Network Solutions liked being the only
registrar for top-level domains back then, but the
United States government created ICANN and told
ICANN to create policies that would create
competition, first at the registrar level.

So what happened, as Ms. Burr explains in
her statement, is the creation of what was known as
the Shared Registration System. Not complicated,
it simply means that multiple -- or really
unlimited number of registrars can sell domain
names for the existing registries.

And ICANN right at the beginning, as it
explained in the timeline, between 1998 and 2000,
focused on creating competition at the registrar
level by accrediting dozens and dozens and
ultimately hundreds and hundreds of new registrars,
and that resulted in the price of domain names
literally plunging. It was a period of time that
you could get a name for nothing if you bought
other services from the registrar.

So it's clear that ICANN achieved in
spades its mission from the U.S. government to
create competition at the registrar level.

As for competition at the registry level,
ICANN proceeded a little bit more slowly because it
needed to. The first thing it did in the year 2000
was to conduct a trial to make sure that the
introduction of new top-level domains would not
affect the security or the stability of the
Internet, and I am pleased to tell you that it did
not.

Thereafter, in 2004, ICANN had another
very small round of new gTLDs, and that round also
was successful.

So in 2005, ICANN's GNSO, the Generic
Names Supporting Organization, began a policy
development process to consider the introduction of
new gTLDs. As I mentioned before, the way ICANN is
formed, it is supposed to be a bottoms-up
organization. We get policy from all the people
around the world who want input and have a say on
these policies.

So then if you go to the next slide,
you'll see that it took about three years for the
GNSO to finish its policy recommendations for the
ICANN Board to adopt those recommendations in order
for ICANN to develop a plan for the program.

What ICANN then did was to create what was
originally the first version of the guidebook. You
know it well today as a 338-page document that has
tried to anticipate virtually everything it could.
But the point was that the staff published a guidebook. The draft was revised multiple times. ICANN received hundreds and hundreds and hundreds of public comments over those years. And in 2012, June, the ICANN Board adopted the operative guidebook.

Slide 16.

The guidebook contains numerous grounds for rejections. Only one of them is relevant to us today. It is called string confusion objection. It is applied when an -- the objection can be asserted when an applied-for string is confusingly similar to an existing top-level domain or to another applied-for string.

Here ICANN received seven applications for .WEB and two applications for .WEBS, plural. As we'll discuss in a moment, a string confusion objection was filed as a result of those nine applications.

Slide 17.

Under Section 4.1 of the guidebook, when you have two or more applicants that have submitted for the same string, this results in a contention set. You have heard this phrase many times. And the guidebook provides two ways to resolve the
contention set. As indicated in this provision, one of the ways is if the parties settle on their own, but if they cannot, ICANN conducts an auction. You read about that a lot as well. I want to be clear, this is not a public auction. It is an ICANN auction. It is limited to members of the contention set.

Slide 18.

This is what happened to ICANN in 2012. It received -- and no one predicted this -- 1,930 applications for new top-level domains, an extraordinary number.

Continue with the slide, Kelly.

To date, ICANN has introduced into the Internet 1,235 top-level domains. Again, a truly extraordinary number. And yet we are accused here of not achieving under our core values additional competition. This is the literal definition of additional competition.

Next slide, please.

Many of the applications had obstacles. More than 200 contention sets were created. So what that means is two or more applicants submitting for the same string. Had to be ways of resolving it. Hundreds and hundreds -- this slide
doesn't really explain -- were subjected to objection proceedings, that there were intellectual property claims or other claims, all of which had to be worked out, and a little more than 20 new gTLDs have been subject to the IRP or litigation.

Next slide.

ICANN anticipated there would be disputes, no question. As the last slide showed, there were lots of disputes and lots of contention sets.

ICANN also knew that the bylaws contained accountability mechanisms.

So the way to resolve those disputes was through those mechanisms, as No. 6 of the guidebook makes very clear in its intentions.

ICANN also anticipated that it would get lots of letters and lots of emails. Of course they do. Candidly, since no one anticipated 1,930 applications, I am sure they didn't anticipate the volume of correspondence.

But if an applicant wanted to be certain that its concerns were addressed, the way to do that was to initiate an accountability mechanism.

Here's what our witnesses said on that subject.

This is Mr. Disspain, ICANN Board
director. You will meet him likely Thursday.

"ICANN adhered to, and continues to adhere to, the procedures set forth in the Bylaws and the New gTLD Program's Applicant Guidebook that require requests for ICANN to take action or not take action with respect to a particular application being made within ICANN's Accountability Mechanisms, rather than private lobbying or letter-writing campaigns."

Next slide.

This is what Ms. Burr said, another ICANN member, "communications that call for reconsideration or reversal of a decision to act (or not act) or that otherwise challenge an ICANN or Board decision should be raised by invoking one of ICANN's formal Accountability Mechanisms, and resolved through those mechanisms."

Next slide.

ICANN does not take action on matters that are subject to accountability mechanisms. I know what you heard in the opening statement is to the contrary. But the evidence you will hear is that ICANN puts contention sets on hold when there are accountability mechanisms pending, with one exception that we will discuss.

This is what Mr. Disspain says, "As a
matter of procedure, ICANN places new gTLD applications or contention sets on hold, and generally takes no action on those applications or contention sets while Accountability Mechanisms are pending, although with respect to IRPs, claimants are typically required to submit a request for interim measures in order for the hold to be instituted."

I want to clarify because there was a letter that I wrote -- Mr. Ali put it up on the screen -- IRPs have a whole process set forth in this to obtain interim relief. So there was no reason for ICANN to automatically put a contention set on hold when an IRP was filed, and Mr. Ali had filed one in conjunction with the .AFRICA matter that Professor Kessedjian knows very well. That is ICANN's practice.

But other than with respect to IRPs, if you file a CEP or a reconsideration request or any other accountability mechanism, ICANN automatically puts a contention set on hold, as I will show you in the next slide.

As I said -- and we predicted that Afilias will argue that ICANN does not put contention sets on hold. What I have done is give you Exhibit
R-22, which is an April 2014 termination of the ICANN Board governance on a reconsideration request. Remember, most issues at ICANN bubble up to the Board via reconsideration requests. That's the evidence you will hear.

The entity that filed the reconsideration request was complaining that ICANN staff had put the application of .SHOP, S-H-O-P, on hold to reflect that the application was involved in two reconsideration requests and a CEP. Here's what the Board governance committee wrote. "In light of the pending Reconsideration Requests and the active CEP, the decision by ICANN staff to change the status of the .SHOP application to 'on hold' was in accordance with ICANN transparency and with stated procedures for application status update and of placing applications on hold pending the final outcome of accountability mechanisms." Truly critical.

Now I am going to tell you the history of .WEB. I am going to do it as fast as I can, but the timeline is important and it will take us up to June 2018.

As I mentioned, there was a string contention objection because of .WEB and .WEBS with
the argument that they were substantially similar and that resulted in a contention set.

Next slide.

An IRP got filed challenging the inclusion of .WEBS' application in the final .WEB contention set.

Next slide.

ICANN prevailed in that IRP, meaning that .WEB and .WEBS remained in the same contention set, and the Board then resolved to move forward with the processing of the contention set. Per the guidebook, on April 27, ICANN scheduled an auction because at the time there had been no prior resolution, and of course that never occurred.

Next slide.

Donuts then complained to ICANN about an alleged change of control of NDC, and this is what Donuts said, "Upon information and belief, there have been changes to the Board of Directors and/or potential control of NDC that has materially changed its application." "We request that ICANN investigate."

Next slide.

Ms. Willett and the ICANN ombudsman did investigate claims that NDC's ownership and control
had changed. She addresses this in her witness statement. On July 13th they complete their investigation, finding no reason to postpone the auction.

Next slide.

Ruby Glen then files an emergency reconsideration request. As I said, that's how you get the Board's attention. They filed that request, and they then filed a federal lawsuit here in Los Angeles seeking a temporary restraining order to halt the action.

The TRO was denied, and the reason is under the guidebook the applicants are not supposed to be suing ICANN. That's under Module 6. So on the 27th and 28th of July, the auction was held and NDC was the prevailing bidder.

August 1, as you saw, VeriSign announced that it had funded NDC's bidding. This is what they released in the securities file. "The Company entered into an agreement whereby the Company provided funds for NU DOT CO's bid. We are pleased the bid was successful." And they "anticipate that NU DOT CO will execute the .WEB Registry Agreement with ICANN" and then seek to assign it to VeriSign.

Let's stay there a minute. I want to be
clear, because there's suggestions to the contrary. This was the very first time ICANN knew anything about any agreement between VeriSign and NDC. We are accused of conspiring to keep something hush-hush. Ask all of our witnesses, this is the first time.

Next slide.

Donuts, the next day, invoked ICANN's CEP, Cooperative Engagement Process, regarding .WEB.

Mr. Ali talked about a cooperative engagement process. I will tell you that I understand the discussions that occurred during CEPs are intended to be privileged, and I am not going to comment on privileged communications, but the important point is that because Donuts invoked the CEP, that put the .WEB contention set back on hold.

Next slide.

Afilias' general counsel wrote to ICANN, demanding that ICANN deny NDC's application. And I am calling out this letter and the next so that you can see that Afilias' claims are strikingly similar and virtually identical to the claims Afilias makes today. Afilias says, hey, we think that there's been a transfer of rights and obligations, and we think there's been a material change in the
applicant's financial condition.

Next slide.

Afilias' general counsel on September 9, still in 2016, writes to ICANN -- by the way, these letters are sent with copies to the Board Chair, but they are not actually sent to ICANN. They are sent to the head of the Domain Names Division at that time, Mr. Atallah, who is no longer with ICANN, and we were accused of not bringing him to have you hear from him, but he is the CEO of Donuts.

So this is what the Afilias general counsel wrote, "NDC violated Paragraph 10 of the Terms and Conditions in Module 6." They are not supposed to resell, assign or transfer any obligations or rights. They say, "NDC violated Section 1.2.7 of the Guidebook." They say, "NDC violated the Auction Rules." That's exactly what Afilias argues today. They didn't need the DAA to know what their claims were.

So the record shows that rather than filing reconsideration requests, CEP or filing -- invoking a CEP or filing an IRP, Afilias sent ICANN letters. They continued to do that in 2018. It did not initiate an accountability mechanism, which
is what they could easily have done.

Next slide.

September 16 ICANN does send questions to Afilias, NDC and VeriSign asking about potential guidebook violations that have been raised not only by Afilias, but also by Ruby Glen.

Next slide.

ARBITRATOR BIENVENU: Mr. LeVee, may I interrupt you here? I understand your point about a reconsideration request being an avenue that was available to Afilias in order to put forward its concerns with NDC's application and the decision to declare it winner of the auction.

But here in response to the letter from Afilias, ICANN is not saying to Afilias, if you have complaints, you should make a reconsideration request. ICANN is sending a questionnaire out.

So can Afilias be reproached -- seeing that ICANN engages with those who raise concerns about whether the NDC bid was compliant, can it be reproached if ICANN engages with it to respond to the engagement and proceed in that fashion as opposed to filing, as you say, a reconsideration request?

MR. LeVEE: Thank you, Mr. Chairman, for
the question. I believe that when you look at the
totality of the facts, where we have one letter
responding to Afiliias saying that we are looking at
this and then time passes and Afiliias still does
not file accountability mechanisms, that they
should have, could have and in normal circumstances
I believe would have filed a reconsideration
request because they knew, everyone knew, that
that's how you bring -- you force the Board to act.

Mr. Ali kept saying, well, you know, the
Board didn't act and we didn't know and we didn't
know and we didn't know about the November meeting
and nothing was happening. We couldn't tell.

This is how you force the Board to act if
you believe that the Board is not doing something
that it is supposed to do. And you'll hear also
from our witnesses, Board members on exactly this
subject.

So yes, there is one letter, but balanced
against all of the other -- and something I am
about to get to in the timeline, that explains that
ICANN makes it clear that these -- that the letters
do not put the contention set on hold. I think
that's very important. I am about two slides away
from that, if I may.
ARBITRATOR BIENVENU: Thank you.

MR. LeVEE: So next slide. So this is ICANN's response to Afilias' letters, one of them, "As you were notified via the Customer Portal on 19 August 2016, we placed the .WEB/.WEBS contention set on hold. This was to reflect a pending Accountability Mechanism initiated by another member in the contention set." That was Ruby Glen.

We knew that.

So now look at the next letter.

Slide 48.

Afilias responds, and it says, "We are concerned that this statement appears to imply that ICANN is not placing the contention set on hold in order to address the issues raised by Afilias."

That's exactly right. They were 100 percent right. ICANN does not put contention sets on hold when it receives letters. It puts contention sets on hold when it receives accountability mechanisms, such as the Ruby Glen reconsideration request.

So Afilias knew that the contention set was on hold because of what Ruby Glen did, not that anything it did for a long time.

Slide 49.
On 3 November 2016 at a Board session in Hyderabad, India, during the course of one of the three very large ICANN meetings that occur each year all over the world -- at least prior to COVID-19 circumstances -- the ICANN Board decided not to take any action on .WEB because of the pending Donuts CEP and the likelihood that additional accountability mechanisms would be invoked. I must say this is not a made-for-IRP allegation. This Board session actually occurred.

We have had litigation about the fact that ICANN claims privilege about it. And Mr. Disspain will talk to you about it on Thursday, and I am sure you will have questions for him. The meeting occurred and ICANN made the decision not to act because of the accountability mechanism that was pending at the time.

Now, in addition, in its brief responding to Amici's brief and in its opening statement, Afilias contends the Board decision was not a decision, it was improper and so forth. Mr. Smith will explain in a moment why Afilias' interpretation of that is wrong.

Next slide.

We do know that in January of 2017 the
United States Department of Justice Antitrust Division sent a civil investigation demand. It is essentially a subpoena. And they sent it to VeriSign and others. They also sent it to ICANN. And the CID sought material in connection with the investigation of VeriSign's proposed acquisition of NDC's contractual rights to the .WEB generic top-level domain. So it is clear the DOJ was investigating this precise matter.

We also note that a year later the Justice Department closed its investigation. And while there are references in the brief that Afilias filed that they took a year or so, maybe they were probably thinking pretty hard about it, bottom line, we don't know anything. What we do know is that the Justice Department closed the investigation and took no action, and that's the most important takeaway, as I'll discuss when I come back to discuss the competition issue.

Slide 52, please.

On 30 January the Donuts CEP, which had been filed long ago, ended with no resolution. And ICANN gave Donuts an extension of time to file an IRP, but Donuts never did.

Next slide.
NDC then -- because there were no accountability mechanisms pending, they sent ICANN a letter saying, "We want a registry." This is the letter. "NDC and VeriSign, as an interested party, believe there's no reasonable justification for further delay. We reiterate our earlier requests." We want a .WEB Registry Agreement. Why did they say that? Because there's no pending accountability mechanisms.

Next slide.

This is a very important letter. This is from Mr. Ali. It is in April of -- 16th, and he says, Afilias wants to know what you're doing with the contention set "because we intend to initiate a CEP and a subsequent IRP against ICANN."

Let's be clear. This is the promise from Afilias that they are going to initiate a CEP and a subsequent IRP. It is the first time they have said this.

Next slide.

Now, we haven't discussed much the so-called DIDP, D-I-D-P, process. It stands for Documentary Information Disclosure Policy, a policy designed to permit members of the public to get certain documents that are in ICANN's possession
that are not otherwise privileged or confidential. And Afilias has submitted two of these requests. They then filed a reconsideration request on the DIDP projections of our decision. ICANN denied the reconsideration request on June 5.

Next slide.

At that point, what I want to explain is the process that then happens. We have no accountability mechanisms triggered. Afilias had promised to initiate a CEP or an IRP. And so ICANN took the hold off the .WEB contention set. And on June 13th, 2018, ICANN staff sent NDC a form registry agreement pursuant to the guidebook.

It is important to know that when you take the hold off the contention set, that is the -- notice is given to all of the members of the contention set. So Afilias received notice, which is required under the guidebook. I want to explain very quickly that what ICANN did here was exactly what the guidebook provides.

Next slide.

This is Section 4.1.4 of the guidebook. "An application that prevails in a contention set resolution, either community priority evaluation or auction, may proceed to the next stage."
Next slide.

This is Section 1.1.2.11 of the guidebook, which provides if an applicant has completed all the relevant stage, the next step is to send the applicant a Registry Agreement.

This is confirmed by Section 4.4 of the guidebook, which provides that, "An applicant that has been declared the winner of a contention set resolution process," such as an auction, "will proceed by entering into the contract execution step."

Now, Afilias had already promised in its April 16 letter to initiate a CEP and an IRP regarding .WEB. ICANN sent the contract to NDC. NDC signed the contract, but ICANN did not. Instead Afilias invoked the CEP, just as it had promised, and some months later it filed an IRP.

That's the timeline, and with that, I would like to turn the microphone over to Mr. Smith in San Francisco.

ARBITRATOR BIENVENU: Mr. LeVee, I would like, if I may, to ask a question which I raised in one of our prior hearings, and that question is: Is there not tension between the sending by ICANN of a Registry Agreement to NDC for execution and
the statement in your pleadings -- and I was
actually reacting to a statement in one of your
letters that the ICANN Board has never pronounced
on whether the NDC bid was compliant.

   It seems to me that by sending a Registry
Agreement to NDC for execution, you are
implicitly -- sorry, ICANN is implicitly
representing that it doesn't have an issue with the
bid that results in the right to receive that
Registry Agreement.

   Am I missing something here, or do you see
that tension?

   MR. LeVEE: I understand your question,
but I disagree that there's tension.

   What had happened to that point was that
Afilias had sent letters and the Board had
determined that it would wait for accountability
mechanisms to play out.

   I don't know, and you can ask Mr. Disspain
whether the Board envisioned or assumed that
Afilias would initiate the accountability
mechanism, but the bottom line is that it had not
done so. And yes, they had sent letters
complaining, but you will hear from Ms. Willett,
who will testify on Wednesday, that ICANN has a
process under the guidebook, and the process is we
go from Stage 1 to Stage 2 to Stage 3, et cetera.

We knew that Afilias had sent letters, but
they hadn't invoked an accountability mechanism.

So the tension I believe you are
suggesting is caused by Afilias, not caused by
ICANN.

ARBITRATOR BIENVENU: I think we are
speaking of different tension here.

I am speaking of the tension between your
statement as counsel on behalf of ICANN that ICANN
has never pronounced on the compliant nature of
NDC's bid and ICANN's decision on 13th June to send
a Registry Agreement to NDC.

Let's imagine that Afilias would not have
initiated an accountability mechanism, then NDC, as
it did, would have signed a Registry Agreement,
sent it back to ICANN and ICANN logically would
have signed it. Therefore, ICANN would have
addressed the serious concerns that a number of
participants had raised as to whether or not this
bid was compliant with the guidebook.

And by raising the question, I express no
view on whether it was. I just see -- I find it
difficult to reconcile the decision to send it out
and the statement that you made on behalf of ICANN that ICANN never pronounced on the compliant nature of the bid.

        MR. LeVEE: It is correct ICANN never did, but the reason ICANN never did is because Afilias never submitted an accountability mechanism. It sent letters.

        Let me correct one thing, because I simply don't know. You said that NDC, after it signed, that ICANN presumably would have signed. I don't know that. ICANN -- and Ms. Willett will tell you that ICANN anticipated the CEP, and so there's no way for me to know what would have happened if Afilias had not issued a CEP for some period of time.

        ICANN was certainly aware that Afilias had sent letters and then Afilias promised to initiate a CEP and then an IRP.

        So ICANN took the contention set off hold, .WEB contention set in June of 2018, knowing that that would finally provoke Afilias to initiate an accountability mechanism. And it did.

        I can't tell you what would have happened in the event that Afilias had not done what it had promised to do.
I understand the tension you are identifying, and my -- the core of my response is that ICANN followed the guidebook in telling -- in doing what it was supposed to do under the guidelines and knowing that Afilias did have concerns and still had not raised reconsideration requests, CEP and IRP and done what they could easily have done two years earlier.

I don't know -- and you can ask ICANN's witnesses what they may have been thinking at the time or predicted. I don't know what they were thinking, but I can tell you that -- and Mr. Disspain says this in his witness statement, Afilias --

ARBITRATOR BIENVENU: I was just thanking you for your answer to my question.

MR. LeVEE: Anything else?

ARBITRATOR BIENVENU: No, thank you. I didn't mean to cut you off.

MR. LeVEE: Candidly, I think my answer -- I am now just repeating myself.

MR. BIENVENU: Thank you very much,

Mr. LeVee. We will hear from you later in the presentation.

Mr. Smith.
MR. SMITH: Can everybody see and hear me?

ARBITRATOR BIENVENU: I certainly can.

Welcome.

MR. SMITH: Thank you. It is a privilege to be addressing such a distinguished Panel. Good morning, good afternoon and good evening to you all.

I am going to be discussing the Panel's jurisdiction. As you can see from this overview slide, I am going to be addressing the disputes that may be heard, the standard of review, the business judgment rule, the limitations to the proposed periods that the Panel is required to follow in the interim supplementary procedures, and then finally the available remedies that are permitted in the bylaws, Section 4.3(o).

So let me start with the Panel's jurisdiction of the disputes that may be heard.

I think the Panel is very well-aware of by now, given the voluminous submissions in this matter and also the fact it has already issued an award on Phase I, that an IRP is a bespoke, final and binding arbitration process subject to very clear and narrow jurisdictional boundaries.

The Panel's jurisdiction is limited by,
first, the types of disputes that can be heard, the extent to which the Board's judgment can be challenged, the limitations and repose periods that restrict the claims that can be considered, and then also the remedies that are available.

Now, Afilias relies on a selection of statements from the CCWG-Accountability on its recommendations and intentions at various times with respect to the drafting of Section 4.3 of the bylaws on the Independent Review Process for covered actions in the current bylaws.

But what controls are the resulting amended bylaws. So throughout this presentation, I am going to be focusing on the controlling bylaw provisions.

Now, the bylaws limit the Panel's jurisdiction to hearing and resolving disputes. Section 4.3(b) states that, "The scope of the IRP is defined with reference to the following terms," the scope of the Panel's jurisdiction is defined with reference to the following terms.

And its "'Covered Actions' are defined as any actions or failure to act by or within ICANN committed by the Board," and then, "individual Directors, Officers or Staff members that give rise
to a Dispute."

And then the next provision defines "Disputes" as 'Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws."

When you take these two provisions together, the Panel's jurisdiction is limited to resolving claims that the Board, individual directors, officers or staff committed actions or inactions that violated the articles or bylaws. That defines the Panel's jurisdiction with respect to claims.

Now I am going to turn to the standard of review, and that's set forth in Section 4.3(d).

So the Panel's jurisdiction is also limited to the causes of actions asserted in the amended request for IRP.

And Section 4.3(d), at the top of this slide, defines a claim as the "written statement of Dispute" which refers to the request for IRP. And here it is the amended request for IRP. This is confirmed by Rule 6 of the interim supplementary procedures, which is down at the bottom of the slide, which states, the "Written statement of a DISPUTE shall include all claims that give rise to
a particular DISPUTE."

So the claims that the Panel has jurisdiction over are limited to those asserted in the amended request for IRP.

To the extent Afilias' case has evolved and is now based on claims it has only asserted in its statement of reply or even its response to the Amici submissions -- and those were both submitted well over a year after its amended requests for IRP -- those claims are outside of the Panel's jurisdiction.

ARBITRATOR CHERNICK: Mr. Smith, may I ask a question?

MR. SMITH: Yes.

ARBITRATOR CHERNICK: Is there a procedure for the amendment of claims to account for developing or new information?

MR. SMITH: There's not within the bylaws. As you saw in this IRP, Afilias reached out and asked as a result of receiving the DAA that it wished to amend its IRP. ICANN consented.

So it would have to be a separate request and consent by ICANN, but it is not something that's automatically contemplated -- or contemplated as automatic in the bylaws.
ARBITRATOR CHERNICK: Thank you.

MR. SMITH: So now I'd like to turn to the standard of review, and that's set forth --

ARBITRATOR BIENVENU: If I may, just to pick up on your discussion with Mr. Chernick, what about the ICDR arbitration rules? Is there anything about the amendment of claims there? And is it your position that these are supplemented by the provisions you have just drawn our attention to?

MR. SMITH: Well, the ICDR rules do not trump the provisions of either the bylaws or the interim supplementary procedures. There is a hierarchy here, and the bylaws apply and the interim supplementary procedures and then the ICDR only as they define the supplement.

If there's a provision in the bylaws or interim supplementary procedures that addresses an issue, it controls. The provisions I just reviewed provide very clearly that the claims that are within your jurisdiction have to be submitted with the request for IRP.

ARBITRATOR BIENVENU: Thank you.

MR. SMITH: Turning now to the standard of review and Section 4.3(i), it provides that, "Each
IRP Panel shall conduct an objective, de novo examination of the Dispute." I don't think there's any disagreement regarding that.

So what it does is it establishes a general de novo standard of review, and these are the subsections of 4.3(i) that are leveled into this IRP. Subsection (i) states that the "Panel shall make findings of fact to determine whether" covered actions violate the bylaws or articles.

Subsection (ii) states that, "All Disputes shall be decided in compliance with the" bylaws and articles, and that serves to underscore the jurisdictional limits that we are reviewing.

But then Subsection (iii) imposes a significant limitation on the Panel's authority in determining claims challenging an action or inaction of the Board in the exercise of its fiduciary duties.

On such claims, as we have here, the Panel must respect the Board's action or inaction so long as it's "within the realm of reasonable business judgment."

Now, the bylaws do not define the Board's fiduciary duty, which is referenced in 4.3(i). ICANN's a California non-profit corporation,
therefore, this term has been construed in the
courts of California law. Under California law,
all actions of the Board on behalf of ICANN are
subject to a fiduciary duty to act in good faith
and in the interest of ICANN.

This is a quote just under that from the
California Corporations Code that makes it clear
that whenever a director is performing duties as a
director, he or she is subject to a fiduciary duty
to the corporation.

So all actions or inactions of the Board
addressing matters relating to ICANN are in the
exercise of the Board's fiduciary duties.
So regardless whether the action or
inaction resulted in a formal Board resolution or
not, when the Board meets and discusses issues
relative to ICANN, the directors and the Board in
general are exercising their fiduciary duties.

For Section 4.3(i)(iii) to apply, which
contains the business judgment provision, the Panel
needs to find only that the Board's action or
inaction was on behalf of ICANN.

ARBITRATOR KESSEDJIAN: Mr. Smith, I am
getting at this stage -- hopefully you can answer
that question, if not immediately, then we can
revert to it later on. But how do you reconcile what you have just described under California law with the fact that ICANN is a body that has the kind of duty -- I don't know whether we can call it fiduciary or not -- to the Internet community? And the accountability principle that you find in the ICANN mission is also to be considered under fundamental rights and international law principles.

So how would you describe the mission of this Panel in terms of those two kinds of elements that we have to take into consideration, if not apply?

MR. SMITH: I would say initially -- and we can come back to this and respond to it more fully. But you're a Panel that has been constituted under Section 4.3 of the bylaws which govern the Independent Review Process for covered actions, which is what we are in, and also the interim supplementary procedures. So those provisions apply to you very directly.

They also make reference here and there to ICANN acting in accordance with ICANN's bylaws, which include its mission and its core values. And your duty in considering the claims is to consider
whether ICANN or its Board acted in violation of either its bylaws or its articles of incorporation.

But when you do so, when you do so, you have to act within the jurisdictional limits that are very clearly applicable to you through Section 4.3 of the bylaws and the interim supplementary procedures.

I will make this point later in my presentation, but you do not act consistent with international law or consistent with the norms of international arbitration if you do not act within your jurisdiction as defined by Section 4.3 of the bylaws and the interim supplementary procedures.

In fact, if you act outside of your jurisdiction, you will be acting in violation of international law and norms of international arbitration, which are also concepts that are baked into Section 4.3.

I hope I have answered that question, but we'll consider it further, and if we need to supplement, we will find an opportunity to do that.

ARBITRATOR KESSEDJIAN: Let me just give precision here. 4.3 that you are invoking must be read in the context. So my question was really the context in which 4.3 must be applied.
I do agree with you that we have to act within our jurisdiction. This is a fundamental principle.

MR. SMITH: Thank you.

ARBITRATOR BIENVENU: Mr. Smith, reading the last bullet on Page 68 of your PowerPoint, can you give us examples of Board action or inaction that would not be on behalf of ICANN?

MR. SMITH: I can't give you an example that comes to mind that's relevant to this particular proceeding.

The Board, on November 3, 2016, met in a workshop session to discuss expressly .WEB with the assistance of counsel. That whole thing, as you know, and the Panel has upheld, is a privileged discussion and cannot be divulged.

But I would say that clearly there the Board was acting above board and addressing matters that related directly to ICANN and its affairs.

In this particular case, it is an instance where the Board is exercising its fiduciary duties.

MR. BIENVENU: Right. But you are not answering my question. My question was: Aren't you, in fact, saying that this applies all the time? Because what actions or inactions of the
Board would not be on behalf of ICANN? This amounts to saying that the rule you say applies here applies to all Board decisions.

MR. SMITH: All Board, yes, actions or inactions taken as a Board with respect to the affairs of ICANN. So presumptively the Board in taking that action or inaction was acting in its fiduciary duties unless it's established otherwise.

ARBITRATOR BIENVENU: Thank you.

MR. SMITH: Now, the bylaws don't define "reasonable business judgment" and, therefore, we look to California law for the meaning of this term as well. Under California law, the business judgment rule, Board action or inaction is entitled to deference if, one, it is objectively reasonable and; two, the party challenging the action has not shown a conflict of interest, improper motives or similar circumstances rebutting the presumption that the Board acted in accordance with its fiduciary duties. That discussion in the case law is presented in ICANN's rejoinder memorial at Paragraph 58 and 59.

The claimant has the burden that's showing that any actions or inactions of the Board that it challenges do not comply with this standard.
The second prong is not at issue here because Afilias has made no attempt to show a conflict of interest, improper motive or other circumstances vitiating the presumption that the Board complied with its fiduciary duties.

The only issue is whether Afilias has met its burden to show that the Board's judgment was objectively unreasonable in the circumstances, and if it doesn't meet that burden, then the Panel is required to respect the deference to any decision made by the Board in the exercise of what would be its reasonable business judgment.

So there's really only one issue here, and that is: Has Afilias met its burden to show that the Board's judgment was objectively unreasonable for the circumstances?

ARBITRATOR KESSEDJIAN: Mr. Smith, I'm sorry, I need to interrupt you here. Can you give us a concrete example of what you refer to to be an objectively unreasonable business judgment, just an example, concrete?

MR. SMITH: Well, I don't have one off the top of my head. I will tell you, though, that I think that the Board's decision not to take action while accountability mechanisms were pending or
anticipated is objectively reasonable in the circumstances of this particular case.

ARBITRATOR KESSEDJIAN: But my question is objectively unreasonable. You can think about the question. I don't need an immediate answer, but please come back at some stage during the hearing.

MR. SMITH: Okay. I will give you one, but perhaps at the end we can think about this.

At the end of this process the Panel will issue its final decision. Under -- I think it is Section 4.3(x), the Board is required at its next meeting to take into consideration the Panel's decision.

And in this particular case, if the Board, not withstanding that bylaw provision, did not take into account the Board's decision, I would say that would be subject to challenge on this particular issue, whether that would be a reasonable business judgment rule, given the bylaws specifically require it to do so.

So if it acts in direct derogation of its bylaw responsibilities, knowing what those bylaw responsibilities are, that is something that begins to gravitate into the realm of objectively unreasonable.
ARBITRATOR KESSEDJIAN: Thank you. But still think about a concrete example.

MR. SMITH: Okay. Maybe we can find some in the case law as well.

The next thing I am going to address are the limitations and repose periods imposed on Afilias' claims in the interim supplementary procedures. The IRP regime that we are applying here imposes strict limitations. The limitations are in Rule 4 of the interim supplementary procedures, and it creates two limitations.

One, it limits the period for bringing the claims and also a repose period. And this first slide highlights the limitations period. So, "A CLAIMANT shall file a written statement of a DISPUTE," that's the request for IRP, here the amended request, "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."

That's the limitations period.

And then here is the repose period that is set forth in Rule 4, "A statement of a DISPUTE may not be filed more than 12 months from the date of such action or inaction."
So the 120-day limitation period turns on the date that the claimant became aware of the material effect of the action or inaction at issue, but the claimant's state of mind is irrelevant to the repose period. Under the repose provision, an IRP may not be initiated more than 12 months from the date of the action or inaction at issue. Only the date of the action or inaction being challenged matters.

Now, the periods of limitation in repose are jurisdictional. The first call-out is from the Glamis Gold case. It's a NAFTA proceeding under the UNCITRAL rules. The Panel there stated, "An objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for the purposes of Article 21(4)." And that was the UNCITRAL rules.

Then in the Resolute Forest Products case, which is another NAFTA proceeding, the Panel there stated, "Although the time limit specified in" those articles of NAFTA "is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction."
Now, the Panel's jurisdiction is also limited with respect to available remedies. And the Panel's remedial authority is defined by Section 4.3(o), and it provides, "Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to," and then we have highlighted the only provisions that have any application in this IRP. It is 4.3(o)(iii), "Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws."

And then indirectly Section 4.3(o)(iv) gives the Panel the authority to "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."

Now, Section 4.3(o) is an exclusive list of the Panel's remedial authorities. The only binding remedy is under Subsection (iii), which we just reviewed, which allows the Panel to declare whether or not a covered action violated the articles or bylaws. The Panel there has the authority to issue a declaration.

The only affirmative relief is under Subsection (iv), and that's the provision that we
just read that gives the Panel authority to
recommend that ICANN stay any action or take
necessary interim action during a very short period
of time.

So the Panel cannot order mandatory or
non-interim affirmative relief. It does not have
that authority.

So what does Afilias argue in the face of
these very clear provisions? It argues that 4.3(o)
is non-exhaustive because it "does not say that the
Panel's authority is limited to the listed items"
and that the drafters, quote, "could have inserted
the word 'only' if they had intended to restrict an
IRP Panel's remedial authority to just those
items."

We are dealing with the bylaws -- the
interim systematic procedures for California
corporations. California rules of construction
apply to those.

Here in this call-out we have a statement
of black letter law in California, but I think this
principle is recognized almost in all legal
systems, and it is that the rule of expressio unius
est exclusio alterius "creates an assumption that
when a statute designates certain persons, things,
or manners of operation, all omissions should be understood as exclusions."

In other words, as listed in 4.3(o) regarding the Panel's remedial authorities, that's exclusive, and if the list in Section 4.3(o) were meant to be non-exhaustive, as Afilias maintains, the drafters could have introduced the phrase "including but not limited to the following remedies," or it could have ended the list with the phrase "and whatever further relief the Panel deems appropriate" or something similar to that.

But Section 4.3(o) doesn't say that. The drafters did not opt for such language, so that list is exhaustive.

Afilias also asserts that the Panel's authority to issue mandatory relief is implicit in the bylaws' statement that IRP declarations are intended to, quote, "resolve disputes and constitute," quote, "binding final decisions."

This is really a non-sequitur. The Panel's decision will be binding and final only if it's within the limits of the Panel's prescribed jurisdiction. A decision by the Panel dealing with a difference not contemplated by or not falling within the terms of the submission to arbitration
here, the bylaws and supplementary procedures is subject to vacatur under the New York Convention Section V(1)(c), implemented through Sections 67 and 68 of the English Arbitration Act of 1996, which is inferred by the fact that London is the place where the arbitration is set.

I don't need to tell the Panel this, but apparently I do need to emphasize this to my friends representing Afilias, that acting within the Panel's jurisdiction is in compliance with principles of international law and the norms of international arbitration. Acting outside the Panel's jurisdiction is not, as I think we have already agreed.

Afilias' amended request for IRP required a declaration providing seven forms of relief, and here is Section -- or Paragraph 89 of this amended request which includes those seven requested forms of relief.

The first form of relief, "that ICANN has acted inconsistent with its articles and bylaws," that's within the Panel's jurisdiction, although it should be denied because Afilias' claims are without merit, and I'll get to that shortly.

When I say it is within its jurisdiction,
I mean that that is a remedy that the Panel can give. It is outside the Panel's jurisdiction to the extent those claims were not timely brought.

Now, Request Nos. 2 through 5 clearly exceed the Panel's authority. Nothing in the bylaws gives the Panel authority to affirmatively order ICANN to disqualify NDC, which is (2); proceed to contracting with Afiliias, which is (3); or determine the price that Afiliias is to pay for .WEB if it were to do (2) and (3), or to declare Rule 7 to be unenforceable. A Panel decision granting any of that relief would be outside the Panel's jurisdiction and unenforceable.

Now, with regards to Request No. 6, the Panel does have authority under Section 4.3 of the bylaws to issue a cost award but only on the finding that for these claims a defense was frivolous or abusive, and there's no contention here that ICANN's defenses are frivolous or abusive. They clearly aren't. Therefore, there is no basis for costs awarded.

Request No. 7 here on the slide is requesting other relief as the Panel may consider appropriate in the circumstances. Doesn't specify any particular form of relief.
The only thing I will say about it is that any additional relief that the Panel may consider must be within the limits of the Panel's authority as described by Section 4.3(o). It must be related to a claim that was asserted in the amended IRP and is not time-bolted.

And obviously ICANN has to be given a fair opportunity to address any such request for remedial relief that doesn't violate those limitations.

Now, I am going to talk about why Afilias' claims lack merit given our understanding of the Panel's jurisdictional limitations, the standards, the limitations that are imposed and so on and so forth.

But to start, I'd like to summarize Afilias' claims. This would be from their amended request for arbitration. I think it is important to identify precisely what those claims are and which bylaw provisions Afilias contends have been violated.

As I have shown, the only question for this Panel is whether some action or inaction by ICANN violated the bylaws or articles.

In Afilias' briefs, they are replete with
strident rhetoric, but Afilias makes little effort
to show that any particular action or inaction by
ICANN violated a particular provision of the bylaws
or articles.

On this slide I have identified the bylaw
provisions that Afilias invokes in its claim in its
amended request for IRP, and here they are.

Section 1.2, it requires ICANN to "Make
decisions by applying documented policies
consistently, neutrally, objectively and fairly" --
that's a phrase you will see throughout the
papers -- "without singling out any particular
party for discriminatory treatment (i.e., making an
unjustified prejudicial distinction between or
among different parties)."

Then Section 1.2(b), which deals with what
Afilias has labeled ICANN's quote/unquote
competition mandate. So, "In performing its
mission, the following 'Core Values' should also
guide the decisions and actions of ICANN."

And (b)(iii) is, "Where feasible and
appropriate, depending on market mechanisms to
promote and sustain a competitive environment in
the DNS market." So the emphasis there is
depending on the market.
And then (b)(iv) is, "Introducing or 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."

So this is Paragraph 78 from Afilias' amended request for IRP. These are what I'll refer to as their charging allegations. What they allege is that "ICANN failed to apply its policies 'neutrally, objectively and fairly','" that language from the bylaw that we just reviewed here, because the guidebook required ICANN to disqualify NDC, the guidebook required ICANN to reject NDC's application, to deny NDC's application.

It goes on to state that, "ICANN failed to fully investigate rumors that NDC had reached an agreement with VeriSign prior to the .WEB Auction," what I'll refer to as the pre-auction period, that "ICANN failed to sanction NDC for lying to ICANN" during that investigation, that "ICANN further violated its policy of transparency by refusing to update Afilias as to the status of its investigation," and then, "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."

So Afilias' claim is very extreme.

According to Afilias, ICANN's Board had no discretion under its bylaws but to disqualify NDC in the fall of 2016 based on NDC's alleged violations of the guidebook in entering the DAA.

In other words, Afilias is arguing that the Board violated the bylaws by not disqualifying NDC and instead opting not to take action on the claims being asserted by Afilias and others while the related accountability mechanism was pending.

That's their core claim.

Now, ICANN allegedly violated its mandate to promote competition by enabling VeriSign to gain control over .WEB. This is from Afilias' amended request for IRP at Paragraph 83, Section 5, Paragraph 83. Here it states, "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 process -- have also resulted in the violation of ICANN's mandate to introduce and promote competition." "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."

What's significant here is the heading. The heading of this section sets out Afilias' contention that ICANN violated its so-called competition mandate, but it is the only place in the amended request where Afilias makes oblique reference to ICANN sending the Registry Agreement to NDC in June of 2018. It's only in that heading.

So in its amended request for IRP, ICANN's decision to send the Registry Agreement is alleged to have violated only the competition mandate, not any other provision of ICANN's bylaws.

Afilias needs to be held to this claim, and the merits of the competition claim, as Mr. LeVee explained at the outset, will be addressed after I am done by him.

Now the Panel's Phase I decision -- I am going to turn now to the brunt of the Rule 7 claim. The Panel's Phase I decision rejected most of the Rule 7 claim as beyond the Panel's
jurisdiction. The surviving part of the claim is limited to Afilias' allegation that ICANN staff acted improperly in the development of Rule 7. This is Paragraph 182 of the Panel's decision on Phase I, and it provides, "For the reasons just given, the Panel declines in this decision to make a finding as to the propriety of the involvement of ICANN's staff in the development of the amicus provisions of Rule 7, and Afilias' contention that its action violated the Articles of Incorporation and Bylaws" of ICANN.

Now, the Panel did not allow Afilias' Rule 7 claim to prevent the Amici from participating in this IRP, which was the principal purpose of the claim. So as far as ICANN's concern, what little remains of this claim is a time-consuming sideshow.

Now I am going to turn to why the claims we just identified as the request for amended IRP lack merit. The first part of the presentation is discussing the application of the time bars that we reviewed from Rule 4 of the interim supplementary procedures.

As I just explained, Afilias' principal claim, its core claim is that ICANN had an immediate, absolute and unqualified obligation to
disqualify NDC and reject its application in August, September, October, November 2016, when Afilias first asserted its allegations against NDC in the two letters to ICANN that Mr. LeVee referred to earlier.

And in their reply memorial, Afilias emphasizes this. "ICANN knew that NDC committed these material breaches of the New gTLD Program Rules by (at the latest) August 2016, when VeriSign provided ICANN with the DAA (and also the 26 July 2016 letter from Livesay to Rasco)." That's the related letter agreement. "Yet ICANN failed to act in accordance with the New gTLD Program Rules and its Articles and Bylaws."

And they go on to state in Paragraph 86, "ICANN violated its Articles and Bylaws when it failed to disqualify NDC's bid and application upon receiving the DAA in August 2016." So that's Afilias' claim that ICANN violated the bylaws by its inaction in August-September 2016.

As Mr. LeVee stated, the claims that Afilias asserted then back in August and September 2016 are the same claims that it's asserting in this IRP.

And what the next slides do, for purposes
of this comparison, on these slides, we are using the September 9, 2016, letter from Scott Hemphill, the general counsel of Afilias, to ICANN and then their claims as they have been asserted in this IRP.

I don't have time to go through these one by one, but you will see that the claims being asserted here are exactly the same claims that they knew about and asserted back in August and September of 2016, and I ask that the Panel review this comparison when it has the opportunity.

Now, Afilias suggests it couldn't have asserted its claims until it obtained a copy of the DAA, which it did in this proceeding, but that argument cannot be reconciled with the letters, because Afilias back in August and September asserted the same claims.

And then in this bottom call-out, you'll see that Mr. Hemphill states, "Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from VeriSign's own press release and its disclosure in its Form 10-Q filed with the SEC for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction
to transfer NDC's rights and obligations regarding its .WEB application to VeriSign."

So it is simply making the point, we don't need to see the DAA to know that they entered into an arrangement that violated the guidebook in the ways that we specified in this letter October 8, 2016, and September 9, 2016, which are exactly the same claims that are asserted here.

Remember that Afilias initiated this IRP and asserted its present claims before it had a copy of the DAA. So the argument that Afilias needed the DAA before it could assert its claims is simply false.

Now, Afilias claims that ICANN was required to disqualify NDC based on the rule violations that Afilias identified in August-September 2016. That claim and related claims are time-barred. They are categorically barred by the period of repose because of actions or inactions that occurred more than 12 months before Afilias filed the IRP, and they are also barred by the limitations period, because Afilias' August and September 2016 letter show that it was unquestionably aware of those claims.

Its claims regarding the inadequacy of
ICANN's investigation are also time-barred. So it asserted in its amended IRP request that ICANN violated the bylaws in its pre-auction investigation of rumors concerning VeriSign's involvement with NDC. It has really abandoned that claim for the most part. You don't see it discussed in its subsequent submissions.

What they do discuss, and they do this in their reply, is that ICANN violated the bylaws in its post-auction investigation of Afilias' allegations against NDC. This is Paragraph 110 of Afilias' reply memorial, and they say, "Once ICANN learned of the terms of the DAA, it was required to disqualify NDC's application and bid. Instead, ICANN proceeded to commence an 'investigation' designed to protect itself."

Specifically in Paragraphs 102 through 118 of this reply memorial, Afilias makes a series of allegations that ICANN violated its bylaws and articles by engaging in allegedly contrived investigation into Afilias' post-auction allegations as a cover-up to avoid disqualifying NDC.

But whether we are talking about the pre-auction investigation claim that they actually
asserted in their amended request or this belatedly
asserted post-auction claim, both are time-barred.

The actions occurred more than 12 months
before Afilias filed the IRP and are, therefore,
barred by the repose period, but they are also
barred by the 120-day limitation period because
Afilias was aware of the actions when they
occurred. So both investigation claims are
time-barred and outside the Panel's jurisdiction.

Now, Afilias' only real attempt to avoid
the time bar that so clearly excludes its claims is
to raise an equitable estoppel claim, which it has.

Equitable estoppel requires that the party
to be estopped was apprised of certain facts; two,
misrepresented facts or misled the other party with
the intent that its conduct would be acted on;
three, the other party was ignorant as to the true
facts; and four, it relied to its detriment. And
Afilias satisfies none of those elements.

So this next slide shows what they
actually say they rely on for their equitable
estoppel defense. It is a letter from Akram
Atallah to Scott Hemphill. And he says in that
letter on September 30, 2016, "As an applicant in
the contention set, the primary contact for
Afilias' application will be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms. We will continue to take Afilias' comments, and other inputs that we have sought, into consideration as we consider this matter."

And then there's the letter from Christine Willett, who you will see later this week, on September 30, 2016, to John Kane, and she simply said in providing the questions that she wanted the contention set numbers to answer -- "To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information." So that's it.

So based on those statements, Afilias satisfies none of the elements of equitable estoppel. The statements don't misrepresent any facts. Afilias was notified of changes to the contention set status and the status of relevant accountability mechanisms through the ICANN portal. ICANN's statements were not intended to dissuade Afilias from filing an IRP or otherwise pursuing its claims, nor can they possibly be construed as doing that.

And finally, there's no evidence of
reliance, i.e., that Afilias actually decided not
to file an IRP based on the true statements that we
just reviewed. And reliance has to be proven. It
can't be presumed. We explained that. Afilias has
offered no testimony or documents that support its
asserted reliance, so it hasn't met its burden of
proof there at all.

Importantly, equitable estoppel is also
not available as a matter of law where a party was
represented by counsel.

In this call-out from the California 3rd
Appeal decision, we have the proposition, "Where
one has been misrepresented by an attorney in
connection with a claim, the necessary elements of
estoppel are not established as a matter of law."
This is black letter law. It is the final nail in
the coffin of this ill-conceived equitable estoppel
claim.

The next slide simply shows that at this
time, Afilias was represented by counsel, Mr. Scott
Hemphill. He signed the letter on September 9,
2016, and then he cc'd our friend Arif Ali at
Dechert.

Now, I am going to briefly describe --
because I am aware of the time -- how Afilias'}
claims lack merit, that ICANN actually complied with its articles and bylaws. I am going to go through this very quickly and leave some of this for you to review once the hearing today is over or at some later point.

   Around the time of the Afilias letter of August 8, 2016, the .WEB applicants initiated litigation and ICANN accountability mechanisms arising from NDC's alleged guidebook violations. I guess the Ruby Glen lawsuit -- which they lost in this report, took up on appeal -- Donuts initiated a CEP challenging the .WEB auction in early August and then Afilias filed a complaint with the ombudsman in August of 2016. So it certainly also knew how to invoke the accountability mechanism back then as well.

   Now, at the time ICANN reasonably expected that additional accountability mechanisms and legal proceedings might follow. So this is the backdrop for the Board's decision not to take action with respect to Afilias' claims against NDC while an accountability mechanism was pending.

   Now, the Board's decision to let related accountability mechanisms run their course was made in the exercise of the Board's fiduciary duties.
Given the surrounding circumstances that we just very briefly touched upon and ICANN's established practices, that decision was objectively reasonable and is entitled to deference under the business judgment rule.

Afilias certainly hasn't made out its case and met its burden that it was objectively unreasonable in those circumstances and, therefore, not entitled to deference under the business judgment rule.

So there's no plausible argument that the Board's decision did not comply with its commitment, Section 1.2(v) of the bylaws, to "Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment."

In these remaining slides what I do is I discuss Afilias' technical arguments that the Board's business judgment and the business judgment rule does not apply because the Board may only act at an annual, regular or special meeting and then it must do so through a published resolution. And they do that in sections -- Paragraph 171 of their response to the Amici briefs, so in their last
submission. It wasn't in their reply.

And then they also rely on snippets from bylaw provisions to attempt to support that argument, but there's a very basic response to it. And that is Section 4.3(i)(iii), which sets forth the Board's business judgment protection, does not require the Board's exercise of its reasonable judgment to be in any particular form.

There's no requirement that the Board's exercise of its reasonable judgment be at an annual, regular or special meeting be in the form of a resolution or be published.

So the technical arguments that Afilias has only just made as to why the Board's judgment is not entitled to deference under the business judgment rule is contrary to the text of Section 4.3(o) -- sorry, 4.3(i)(iii), which contains the business judgment and standards and the other bylaw provisions that Afilias cites.

ARBITRATOR BIENVENU: Mr. Smith, I think this would be a good time to ask a question I intended to ask Mr. LeVee.

At Page 45 of the slides, when he identified the ICANN Board decision of which you are speaking, I think he said in India, he was
explaining that the Board meets all over the world, and 3rd November, that's the date of the workshop. So do I understand that the workshop happened on the same day as the actual Board meeting?

MR. SMITH: Mr. Bienvenu, I am going to allow Mr. LeVee to answer that question because I don't know, and I am going to try to finish so that he can have a few minutes to discuss the competition mandate. And when he does, I think he's more familiar with that and will be able to give you an appropriate response.

ARBITRATOR BIENVENU: He's going to have very few minutes if you go on for too long.

MR. SMITH: I think I am going to end here, but I'd just like to remind the Panel that when the Board meets and addresses matters related to ICANN, as was the case when it met in a session to address .WEB on November 3, 2016, in India, it does so subject to its fiduciary duties and its decisions are subject to deference under the business judgment rule.

The remainder of my slides, they address very specifically the contentions Afilias makes as to why NDC violated the guidebook as a result of the main acquisition agreement, and they set out
the Afilias charge and then the NDC-VeriSign

counter argument.

You can see that these are not issues on
which the answer is so clear-cut that ICANN has no
discretion. In fact, ICANN has discretion under
the guidebook to determine all of these matters,
and it also has discretion under the guidebook to
determine the consequences in the event that it
finds that there has been a violation of the
guidebook. So that is the point of the remaining
slides.

Finally, I also do a comparison with
respect to Afilias' allegations that there have
been violations of the auction rules, and there
what I do is I actually go through the auction
rules that they cite, and I give them to you in
full. And you'll see that it is very clear that
they are inapplicable and that in a number of
instances they have been taken out of context or
misleadingly applied.

So with that, ICANN hasn't made a decision
on any of this. We reserve our position, but I
just wanted to point out that ICANN does have
discretion with respect to these matters. Afilias
is wrong in saying ICANN has no choice but to
disqualify NDC. And that these are all matters that are within ICANN's discretion.

With that, I'll turn it back over to Mr. LeVee. Thank you.

ARBITRATOR BIENVENU: Thank you very much, indeed, Mr. Smith.

Mr. LeVee.

MR. LeVEE: Thank you, Mr. Chairman. I am going to respond to your discussion first.

This is something that could be explored with both Mr. Disspain and Ms. Burr. I didn't give enough flavor. When ICANN holds these meetings around the world three times a year, the meetings actually last a week or more. There are workshops. There are sessions. The various advisory committee meets. The government advisory committee meets. The schedule is published on ICANN's website. In fact, most of the ICANN people are gone for about two weeks.

At this particular meeting, there was a Board workshop. And Mr. Disspain and Ms. Burr can describe the intensity of these workshops as a generic matter, but the next two Board meetings were November 5th and November 8. So the workshop occurred probably on a -- a typical session ICANN
meeting ends on a Thursday with a Board meeting. So if I work backwards, the session that was the workshop that Mr. Disspain identifies was probably about five days sooner, perhaps even older.

But the Board and literally 2– or 3,000 people descend on these locations and participate and attend dozens and dozens of sessions, some including the Board, some not including the Board, most really not including the Board. Is that helpful?

ARBITRATOR BIENVENU: To a certain extent. I am looking at Pages 49 and 103. At 49 you give us a date, and you say "ICANN's Board decided to not take any action on .WEB," et cetera.

MR. LeVEE: Yes, sir.

ARBITRATOR BIENVENU: November 3, is that the date of the workshop?

MR. LeVEE: Yes.

ARBITRATOR BIENVENU: Right. And was there on November 3 also a Board meeting during which a resolution was adopted endorsing or acting upon the consensus at the workshop? How did it work technically?

MR. LeVEE: Because of the way the workshop was done -- I am trying to be very careful
because of the privilege. The purpose of the workshop was to focus on .WEB and top-level domains where there were issues. And the Board received advice from counsel, general counsel and the deputy general counsel in particular, and then as, Mr. Disspain explains, the Board decided that it would take no action. There was no specific resolution that was passed in that -- with respect to the Board's decision not to do anything.

ARBITRATOR BIENVENU: Thank you very much.

MR. LeVEE: Okay. I don't know how much time I have left, but I think it is very short. So I am going to ask that we start at Slide 122 and then I am going to skip most of the slides and just hit a couple highlights.

The allegation is that Afilias should disqualify -- sorry, that ICANN should disqualify NDC's bid because of the possibility that VeriSign would then receive an assignment would violate ICANN's core value and be anticompetitive.

So very briefly on this page, these are the core values, and we can discuss and explore them a little bit more in due course, but as I mentioned and I emphasized in my opening, the first portion of my opening, ICANN clearly has introduced
and promoted competition. There's nothing in the core values that says that ICANN is supposed to choose between registry operators to determine which registry operator may or may not create the most competition.

Let's skip to Slide 127 -- sorry -- yeah, 127. So in our papers we explain, and Ms. Burr explains as well as Mr. Disspain, "ICANN's bylaws make it clear that ICANN is prohibited from acting as a regulator." And this is the bylaw, "For the" -- Section 1.1, "For the avoidance of doubt, ICANN does not hold any governmentally-authorized regulatory authority." Others say that, and I am going to skip ahead. I wanted to note on Slide 130 that this should be a point that Afilias agrees with, because they have.

This is Exhibit R-28. It is a document that was signed by a number of regulatory operators in February 2006. The registry operators were submitting a statement regarding a proposed settlement between ICANN and VeriSign that was going to result in a new agreement for the .COM registry.

And interestingly, if you read the exhibit, the registry operators were arguing that
ICANN has very limited authority and it ought to stay in its lane. This is what the regulatory operators, signed by Afilias and several others, said. "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 of the delivery to domain name regulatory services. Neither ICANN nor the GNSO have the authority or expertise to act as antitrust regulators. Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances."

Next slide.

What ICANN does -- we explained this in our brief. If there is an issue that relates to competition and ICANN has a concern that there may be competition issues, ICANN refers those matters to the relevant competition authority, as Ms. Burr explains and Mr. Kneuer.

You are not going to meet Mr. Kneuer because Afilias says he is irrelevant, but his statement is quite relevant in our view. So it goes unrebutted because of Afilias' decision not to
call him and cross-examine him.

Finally, let me skip ahead to -- I was going to introduce you to all of our economists, but in the interest of time, you will meet -- pull up Slide 136. The economist you are not going to meet is Professor Murphy. He's a very highly respected economist. He was retained by VeriSign, and so he's the Amici's economist. I can endorse nearly all of his witness statement with the exception of some words that he used and a few other concepts.

He trained at the University of Chicago, taught at the University of Chicago for many years, and I find it very odd that Afilias elected not to cross-examine him. His conclusions are thus unrebutted that the addition of a single new gTLD, .WEB, is highly unlikely to have a significant impact on competition for domain name registrations for .COM or any other domain name.

He reaches a number of other conclusions, but the other thing that he and Dr. Carlton, who you will meet, ICANN's expert witness, is that they make it clear that the analysis that the Afilias experts have provided to you, it is not the sort of analysis economists will do when they evaluate
competition issues.

Professor Zittrain, whom I respect, he's not an economist, did no economic analysis, and Mr. Sadowsky did no economic analysis either. You'll hear about that during their cross-examination.

Two last slides, Slide 140. So I showed you this before, but I wanted to make a point. In conjunction with Afilias' competition claims, this is probably the most important slide. The Department of Justice investigated and then they closed their investigation. Since ICANN is not an antitrust regulator and since ICANN would refer competition issues relating to activity in the United States to the U.S. Department of Justice Antitrust Division, the fact that the Antitrust Division has already investigated and declined to act basically resolves the matter from ICANN's perspective.

Afilias argues to you that you can't tell whether the antitrust investigation viewed the issue to be a close call. Maybe it was, maybe it wasn't; we will never know.

But the point is that what ICANN would have done if it had found a competition concern was
to ask the Department of Justice to take a look, and that's what happened without ICANN referral.

So once the Department of Justice Antitrust Division closes its investigation, there's nothing more ICANN would do. It does not make decisions on which registry operator should or should not be operating a top-level domain in a contention setting. There's no argument that the guidebook provides for that, and it does not.

So now our last slide is our conclusion, Slide 142. This is what we are asking the Panel to do, and I just wanted to make sure it was not overlooked, five things.

The Panel should reject Afilias' claims and declare that ICANN did not violate its articles or bylaws in conjunction with the auction for .WEB.

The Panel should find that ICANN exercised reasonable business judgment in November 2016, when it decided to allow accountability mechanisms to run their course.

The Panel should find that ICANN did not violate its articles or bylaws by taking the .WEB contention set off hold in June 2018.

The Panel should find that Afilias' claims are time-barred, and Mr. Smith spent a fair amount
of time on that, and appropriately so. They are
either time-barred -- or they are time-barred and
they are otherwise outside the Panel's limited
jurisdiction or seek relief the Panel has no
authority to grant.

Finally, the Panel should find that ICANN
has complied with its core values with respect to
competition.

Thank you, members of the Panel, and ICANN
thanks you for your patience, mostly for your
attention.

ARBITRATOR BIENVENU: Thank you very much,
Mr. LeVee, to you and the team supporting you and
Mr. Smith for the very complete PowerPoint
presentation that we were provided with.

So we will have another break and the
break will be 15 minutes, and then we resume with
the opening statement on behalf of the Amici. So
thanks again, Mr. LeVee, and thank you to
Mr. Smith.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. Johnston,
welcome. We look forward to hearing your opening
presentation on behalf of the Amici.

Please proceed.
MR. JOHNSTON: Before I start, thank you -- I want to thank you, join in the thanks of all the hard work you have done and very briefly introduce the other members of the VeriSign team who are participating for all or part of the hearing today.

Maria Chedid, Jim Blackburn, John Muse-Fisher and Hannah Coleman, and then from VeriSign at one point or another today, Kirk Salzmann, Helen Lee and Tom Indelicarto, all from the general counsel's office of VeriSign.

Because Amici are the last thing between you and lunch, dinner or bed, depending on what time zone you are in, we are going to jump right into it.

Mr. Marenberg and I will be splitting the argument for Amici.

John, would you put up Slide 2, please.

We are going to split the argument roughly as follows: I will discuss first why the Panel in our view does not have the authority to determine the claim Afilias has made that the DAA violates the guidebook or made findings of fact dispositive of claims between Amici and Afilias.

Secondly, we will address -- I will
address, were the Panel to consider the claims regarding the guidebook, why the Domain Acquisition Agreement does not violate the guidebook or ICANN's competition mandate.

Mr. Marenberg will discuss why Afilias' claims that the DAA required an amendment to the application are without merit, and secondly, he will discuss Afilias' unclean hands and unsuccessfully trying to rig a private auction purposefully violating guidebook blackout rules, and then finally, when Afilias lost the auction, pursuing the IRP in the fashion it has done.

Slide 3, please, John.

This Panel in its Procedural Order No. 5 observed that this IRP is not the proper forum for the resolution of potential disputes between Afilias and nonparties, here Amici. Yet that is precisely Afilias' strategy.

Afilias used this IRP since day one to seek relief against NDC and VeriSign without their participation in the decision. The relief Afilias seeks is a reversal of the public auction award in favor of NDC and an award of the .WEB registry to Afilias based on claims that NDC violated the guidebook and VeriSign is a monopolist.
Notwithstanding the substance of the claims made here by Afilias, since the IRP was filed, Afilias sought to prevent VeriSign and NDC from appearing as Amici or otherwise participating in any capacity in this proceeding.

Afilias also sought to preclude NDC and VeriSign from opposing or participating in essentially an injunction proceeding seeking to stay delegation pending the IRP, and then Afilias has tried later in these proceedings to prevent Amici from introducing evidence regarding Amici's conduct while challenging that conduct, tried to prevent us from participating in hearings and day-to-day proceedings.

Now, some of that has been reversed in the past week, but up until a week to ten days ago, the same strategy was pursued here with respect to asserting claims against Amici and their conduct while trying to limit their involvement.

An IRP is a very special proceeding where interested persons cannot be parties based on the rules. They can't be parties unless they separately make a claim against ICANN.

VeriSign has never made a claim against ICANN with respect its management of the new gTLD
Program and thus, under the rules, VeriSign could not be a party to this proceeding.

In any legal system premised on fundamental notions of due process, it's frankly inconceivable that a dispute resolution proceeding could be designed to be used as Afilias has sought to use this IRP. It is not conceivable that an IRP properly could be used to make binding decisions, findings of fact or enter relief that would have the effect of depriving nonparties of valuable rights.

Indeed, such an IRP process itself, such a system would be stricken down as an egregious violation of due process.

Instead, the proper jurisdiction -- which I'll address at some length -- of this Panel is limited to determining, because of the nature of this proceeding and the system itself, whether ICANN violated its bylaws by whatever decision or inaction was performed by ICANN.

The Panel should avoid making findings of fact that would adjudicate the rights of nonparties, Amici here, and instead make decisions on the merits of the claims of ICANN's conduct.

Now, I heard earlier today perhaps an
emerging agreement between Mr. Ali and me on this issue. At Page 26, Lines 13 through 19 of the transcript, Mr. Ali, in describing the scope of the authority of the Panel to make findings of fact, state, and I quote, "These are to be findings of fact that apply generally, but of course are contextually, but also specifically with reference to the Board's conduct and staff's conduct in terms of the determination of whether the covered action constitutes an action or inaction that violates ICANN's articles or bylaws."

That's a very important distinction. The question is findings of fact are appropriate with respect to ICANN's conduct, they are not appropriate with respect to conduct of third parties where the effect of those decisions would be to adjudicate valuable property interests or rights.

Now, ICANN has stated under oath that it has not determined the merit of Afilias' objections. Instead, according to ICANN, it made a policy-based decision to defer a decision on the merits of Afilias' objections pending the outcome of these accountability proceedings.

Therefore, as ICANN has described its
decision, the issue for this Panel is whether ICANN's policy-based decision to defer a consideration of Afilias' objections was a violation of its bylaws.

Now, Afilias, by contrast, says ICANN is lying, that in reality ICANN already secretly decided that Afilias' claims had no merit and rejected those claims.

Now, Afilias makes that claim as a strained effort, in our view, to try and persuade this Panel to usurp ICANN's authority to decide the merits of Afilias' claims of a violation of ICANN's rules by NDC. Afilias does not want ICANN to decide the merits of its claims. It wants the Panel to make findings regarding the merits of its claims of misconduct by NDC and VeriSign.

But those claims are the job of ICANN. A decision by ICANN on the merits of the claims that Afilias makes against Amici is mandated by ICANN's bylaws, which also establish the jurisdiction of this Panel.

Slide 5, please, John.

Now, whatever the decision ICANN may have made, whether it was to defer or whether the Panel believes it rejected Afilias' claims, the decision
by this Panel in concept remains the same. The
decision -- the issue for the Panel is whether or
not as a matter of fair process ICANN acted
consistent with its bylaws, not to make findings of
fact regarding third-party conduct.

Now, under the bylaws -- Slide 6,
please -- the decision as to whether ICANN has
acted properly consistent with those bylaws is
largely a process-driven effort. The questions --
and these are all questions that Afilias has taken
a position on.

The questions by which the Panel should
review ICANN's actions are whether ICANN acted
transparency, whether it made a reasoned decision,
whether it acted without discrimination, whether it
acted impartially.

Now, those are the claims that Afilias has
made in attacking ICANN's process here, and those
questions are the proper realm of consideration by
the Panel, did ICANN act consistent with those
obligations in their bylaws?

If the Panel decides that ICANN acted
consistent with those obligations, that should be
the end of this IRP.

If the Panel decides that ICANN did not
act consistent with those obligations, then the Panel's job is to refer to the Board of ICANN to decide whether or not -- to make a decision consistent with its bylaws regarding Afilias' claims.

Jurisdiction is defined by the dispute resolution agreement between the parties. Jurisdiction of an IRP Panel is not decided by the articulations of a clever pleader, such as Afilias is, adding claims that the Panel should, quote, declare, close quote, that rights of ownership of a third party should be transferred to the claimant.

Jurisdiction doesn't change from IRP to IRP based on the insistence of the claimant or the way the claims are drafted. Instead the question is whether or not ICANN has acted consistent with the obligations under its bylaws.

Slide 7, please.

Now, in not liking what the bylaws say, Afilias has tried to go back to the CCWG report to make an argument that "declare" doesn't mean what it said, but allows the Panel to go beyond that and dictate Board decisions and award relief.

Contrary to an Afilias claim, however, the reports specifically confirm that an IRP Panel may,
quote, direct the ICANN Board and staff to take adequate action to remedy a breach of the articles of incorporation or bylaws. "The Panel shall not replace the Board's fiduciary judgment with its own judgment." That's a critical part of the report that was ignored by Afilias.

In other words, what Afilias implies in Paragraph 188 of its most recent filing response, which we did not have an opportunity to respond to before now, the report did not recommend that the IRP Panel make specific directions of specific actions by the Board -- Slide 8, please, John -- but instead only that the Panel more generally direct ICANN to take appropriate actions based on its declaration regarding ICANN's conduct.

Slide 9.

In fact, the recommendations make this very clear. The recommendations by the CCWG provide -- and we have got them on the screen -- "An IRP would result in a declaration that an action or failure to act complied or did not comply with ICANN's articles and bylaws."

The recommendations go on, "Such a declaration represents a limitation to the type of decision by an IRP Panel."
The recommendations continue that, "The purpose of such limitation is to mitigate the potential effect that one key decision of the Panel might have on several third parties."

In other words, this report does not recommend that you as a Panel decide the rights of third parties, but instead specifically anticipates that you will not make decisions that would affect the rights of third parties.

Finally, the recommendation states that, "The Panel shall not replace the Board's fiduciary judgment with its own judgment."

ARBITRATOR BIENVENU: Mr. Johnston, maybe I should have asked that question to ICANN, but perhaps you have the answer. Is there an ICANN statement as to the relevance or lack of relevance of the CCWG's recommendations once ICANN has acted upon the subject matter of these recommendations?

MR. JOHNSTON: I am not aware of a clear, specific statement to that effect. I think that the report and recommendations have been looked at more in the nature of legislative history, if you will, but the bylaws are the final and binding articulation of the responsibilities and obligations of the Board, as I understand it. And
these -- go ahead.

ARBITRATOR BIENVENU: I was merely thanking you for your answer, sir.

MR. JOHNSTON: Oh, thank you.

In substance, the bylaws and this report that's cited by Afili...nts here because the claims here raise important policy issues for ICANN.

Afili...es are antithetical to the entire strategy underlying this IRP since its beginning. The bylaws were intended to mitigate against second-guessing of the judgment of the ICANN Board and, importantly here, to prevent findings in an IRP determining third-party rights.

Slide 10, please.

The application of these principles of decision as to the scope of authority of the Panel are especially important here because the claims here...for ICANN.

Afili...s is essentially trying to turn this Panel, in terms of the effect of its decision, into a policy-making body for the Domain Name System.

By contrast, the guidebook gives broad discretion in ICANN on these issues, recognizing that this is an international program which will probably be conducted again in the future with changes where necessary and appropriate and a program that affects a broad spectrum of interest
across the Internet.

Slide 11, please.

For example, the guidebook states that ICANN's, quote, decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion.

The guidebook also provides the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community is for ICANN.

Slide 12, please.

Importantly, the bylaws specifically recognize that the Board often must balance core values in order to survey policy developed through the bottom-up multistakeholder process, such as that process that produced the guidebook.

In its briefs in this matter, ICANN has specifically recognized that a decision on the Domain Acquisition Agreement requires a consideration of industry practice to interpret the guidebook, decisions ICANN has made in similar situations and the affect on the new gTLD Program overall by a decision on the claims made here.

That is a role for ICANN's Board, not an IRP
reviewing Panel in the relatively isolated scenario of competitors fighting over rights to a single TLD.

Instead, this kind of dispute has far more reaching consequences. In our briefs in this matter, we have explained how based on industry practice and what has gone on generally within the secondary market for gTLDs, the decision on some of the issues Afilias raises would have significant impact, including contradicting current industry practices.

The doctrine of abstention that often is applied in administrative proceedings by reviewing bodies such as a court, I think teaches to the same effect. Here ICANN is an expert in developing certain kinds of practices and policies.

ICANN was in charge of creating this guidebook, knows the industry, knows what it's decided in other similar circumstances, knows its goal for future similar programs and knows the reality of how registries conduct business.

Thus, whatever decision the Panel might find the Board made here, the Panel's authority is only to decide whether the Board acted transparently, without discrimination, impartially
or consistent with the other obligations, mostly
process and orientation, that Afilias has made
claims based on against ICANN.

Here Afilias specifically claims that
ICANN's decision was made without investigation and
was made in a discriminatory fashion. If the Panel
agreed with that, then it would declare that ICANN
violated its bylaws and should send this to the
Board for appropriate action as to Afilias'
objections, but that's distinct from deciding facts
underlying those objections of claims of misconduct
against third parties NDC and VeriSign.

Afilias' final brief, and in one of the
slides earlier this morning, I think, brazenly
makes clear its position in this IRP proceeding,
namely that this Panel should usurp the Board's
role and not allow ICANN to decide the merits of
Afilias' claims against NDC and VeriSign because,
according to Afilias, the Board cannot be trusted.

Afilias argues that the Panel should not,
quote, remand the matter to the very ICANN Board
that sought to rubber-stamp VeriSign's acquisition
of .WEB, close quote.

Now, that may be fancy penmanship, but
there's absolutely no evidence of a rubber-stamping
or any misconduct that is produced in request that the Panel take over the Board's job.

Afilias can't simply ignore the ICANN bylaws and IRP because it doesn't want to live by the rules.

Contrary to Afilias' position, as a matter of law, it's the Board's decision. The Panel cannot skip the step of allowing the Board to make a decision because of speculation by Afilias that the Board will not do the job correctly or because Afilias simply doesn't want to follow the rules that define ICANN's job and the jurisdiction of this Panel.

Slide 14, please.

Now, because of what I would call the improper breadth of Afilias' claims and Afilias' claims for relief and because the Panel hasn't ruled on the scope of its authority here, I am now going to turn my attention to the DAA and why it doesn't violate the guidebook, but in so doing we, of course, do that subject to our objections to any expansion of the Panel's authority based on our offering this argument.

Most fundamentally, the claim that the domain acquisition violates the guidebook is a
perfect example of an issue that is for ICANN to
determine and not the IRP Panel.

ICANN created these rules and policies --
not only ICANN, but the entire process that you
were described earlier of the bottom-up
decision-making to which thousands of people
throughout the world contribute, that group, ICANN,
created the rules that govern these broad industry
concerns and future programs. And these rules that
you were asked to look at raise questions of
Internet policy, industry practice and precedent.

Slide 15, please.

ICANN describes the nature of the decision
that Afilias seeks to have this Panel make in the
following terms. This is from ICANN's rejoinder.
"ICANN has to approach any such analyses with an
eye towards the potential impact" -- sorry, go back
to Slide 14.

"Determining that NDC violated the
guidebook is not a simple analysis that is answered
on the face of the guidebook. It requires an
in-depth analysis and interpretation of the
guidebook provisions at issue, their drafting
history, to the extent it's known, how ICANN has
handled similar situations and the terms of the
DAA. This must be done by those with requisite knowledge, expertise and experience, namely ICANN, as ICANN's job is defined in the bylaws."

Slide 15, please.

"ICANN has to approach any such analysis with an eye towards the impact a decision on these issue will have on the global Internet community."

As set forth in ICANN's response as well as the witness statements of Messrs. Livesay and Rasco, there have been a number of arrangements that appear to be similar to the DAA in the secondary market for new gTLDs, including transactions involving Afilias and other registry operators."

ICANN goes on. "Indeed, the auction rules seem to foresee the possibility of such transactions. The auction rules appear to contemplate the possibility of post-auction ownership transfer arrangements being in place prior to an auction."

Certainly industry precedent does establish those kind of arrangements. There are hundreds of them, and we'll come back to those.

Slide 16, please.

Secondly, the DAA, comparing it with the language of the guidebook, does not constitute a,
quote, resell, assignment or transfer in violation of Section 10 of the guidebook.

Earlier this morning Section 10 language was up on the screen, and certainly it's addressed quite extensively in our brief. At bottom, a resell, assignment or transfer of rights with respect to the application requires a transfer of title to a right or obligation such that it resides -- that right or obligation resides in the assignee and no longer resides in or is enforceable by the assigner.

Now, we addressed the law in some detail beginning at Page 5 of our brief, but in Afilias' response to our brief, Afilias does not dispute our description of relevant law, that a resell, assignment or transfer requires a transfer of title to that right or obligation so that it is forever changed in terms of the party who has it.

The only part of a test that Afilias adds to our statement is that, quote, for an assignment to be effective, Afilias goes on, "it must include manifestation to another person by the owner of his intention to transfer the right without further action to such other person or third party."

In other words, Afilias explains in its
responsive brief that whether or not there's been
this transfer of title depends upon the manifested
intention of the parties and the transfer must be
unconditional and complete.

The DAA, the domain acquisition is clear
as to the intent of the parties and there was no
such unconditional transfer.

Afilias points out one additional doctrine
of the law, again without disputing the principles
of law we state in our brief. Afilias states that
under Virginia law, you can have partial
assignments.

Whether or not that is true, a partial
assignment still requires that rights be assigned
even though there are suddenly rights in a chosen
action that are split, but title to rights must
still be transferred so that the right now exists,
the one being transferred exists in the assignee or
transferee and no longer in the assignor.

In brief, under the consistent statement
of applicable law by both Afilias and VeriSign,
there was no assignment of rights with respect to
the application. NDC today retains all rights in
the application and continues to be ultimately
responsible for all obligations under the
application.

Mr. Marenberg will address that more fully.

Secondly, the DAA undertook obligations to VeriSign, but the obligations and rights under the application remain with NDC.

VeriSign could not enforce NDC's rights under that application, and NDC cannot escape its obligations directly to ICANN under that -- under the application because

Slide 17, please.

Interpreting whether title to any rights or obligations were assigned, the scope of the rights acquired must be interpreted as Afilias notes in light of the statement of intention. The domain acquisition is quite express that there was no intention to resell, assign or transfer rights or obligations with respect to the application.

Furthermore, the DAA does explicitly provide
Also, if NDC at any time needs to separately take any action to fulfill its obligations under the application, it can do so,

These provisions we have just gone through are antithetical to the transfer of rights in the application to VeriSign. Those provisions explicitly contradict that form of transfer of title to rights or obligations with respect to the application to VeriSign.

The only reference in the domain
acquisition

That kind of an arrangement is common in the industry and indeed is anticipated by the guidebook and auction rules when it refers to the allowability of post-auction ownership transfer arrangements as long as they are not decided or agreed to during the blackout period.

Mr. Marenberg will discuss the blackout period.

In other words, NDC owns all rights in the application today and conduct by NDC not required by the guidebook could pose a dilemma for NDC if it were to breach obligations NDC owes to VeriSign, but VeriSign doesn't own any of the rights. VeriSign can't go to ICANN and insist on performance required by the application, and NDC is protected so long as it's acting consistent as required by the guidebook and its application in doing what it does without consent or interference by VeriSign.

Finally, one additional note that's confirmatory of this, since the beginning of these proceedings, and I believe it is in the original request for a stay of delegation pending the
outcome of this IRP, Afilias has taken the 
application that any attempt to assign, transfer or 
resell rights or obligations with respect to the 
application would be void, just would not have 
happened.

That is true because the guidebook does 
not grant and expressly reserves such rights to an 
applicant. So were NDC to try to assign rights 
under the application or obligations to VeriSign,
as far as the transaction between ICANN and NDC,
that effort, those rights, that transfer would be 
void and have no affect.

Slide 20, please.

Now, as ICANN's description of the 
guidebook indicates, the Domain Acquisition 
Agreement looks like many other transactions that 
have occurred daily in the secondary market for new 
TLDs.

The posture that Afilias has struck in 
this proceeding is quite at odds with its own 
conduct, and the conduct in reality takes place as 
a matter of industry practice in the secondary 
market that's developed under the new gTLD Program.

I am trying to watch my time here. I know 
it is particularly imperative because it is getting
late.

Illustrative of the hundreds of different kinds of transactions that have the effect of transferring new gTLDs, including before business is ever conducted, is Afilias' own programs.

Slide 21, please.

As you can see, Afilias has adopted a posture similar to the car advertisements we used to see here in Los Angeles, that they'll buy any car, or in this case, any new gTLD. This is one of the marketing executives from Afilias at an industry conference drumming up business to acquire more new gTLDs.

Next slide, please.

This is an advertisement typical that has been found on blogs and in newsletters by Afilias. "We buy TLDs!" Market Basket, with Afilias' name prominently permitted.

Again, there's no magic here to new TLDs being treated like other property rights, where people monetize them in many different ways.

Slide 23, please.

There's numerous examples that we have cited in our papers of pre-delegation financing arrangements in exchange for post-delegation
assignments. We talk about the Donuts/Demand Media agreement. That agreement for financing in exchange for post-auction assignments covered 107 -- that single agreement, 107 new gTLD applications. Many of those new TLDs were later assigned to Demand Media pursuant to that agreement.

That agreement was not disclosed in the new gTLD application for any of those TLDs. And so as far as we are aware, ICANN never objected to that over 100 assignments that were made in exchange for financing.

In an Afilias reply most recently filed to Amici's breach, Afilias defined one reference to Demand Media and 307 different applications filed by Donuts or its related companies. But even that one reference to Demand Media did not disclose the agreement for an assignment in exchange for financing. Instead, it only disclosed that Demand Media would be a back-end service provider under the application.

Slide 24, please.

.BLOG is another example. This is addressed in our papers. WordPress secretly bid for .BLOG using Primer Nivel's application in
exchange for a subsequent assignment of the gTLD.

The assignment subsequently took place.

There's no objection by anybody, not by ICANN, not
by Afilias, who participated in that auction, and
WordPress said after it acquired the rights that it
didn't disclose its financing or agreement because
it, quote, it wanted to stay stealth in the bidding
process and afterward in order not to draw too much
attention, close quote.

.BLOG is an example of the fact that we
are dealing with sophisticated commercial
competitive entities, and typically they are
participating in a competitive auction, which in a
real sense is open to whomever applied for the TLD
application. And those applications and the
bidding process is frequently financed by other
parties in order to monetize the value of that new
gTLD application, and they commonly include
assignments following the auction award.

And commercial competitors, it is not
uncommon for them to keep their financial dealings
confidential, as WordPress expressed publicly once
the auction was completed.

.TECH is another example. Afilias
describes .TECH as follows: Radix contracted to
acquire the applicant .TECH -- often there's an applicant set up for each TLD application. Radix contracted to acquire the applicant .TECH in the event that the latter was successful in the auction. In other words, if it won the auction, then we will proceed in acquiring it.

The application was updated after the auction to disclose Radix's ownership interest. The application was not updated to disclose that information before the auction.

ICANN consented to that transfer. That kind of transfer also requires ICANN consent under the form of the Registry Agreement.

Slide 26, please.

.MEET, .PROMO, .ARCHI, .SKI and others I group together because these are resales of new gTLDs by or to Afilias. In these cases, at least in some of them, there was a change in the mission or purpose from that stated in the application, also a very common phenomenon.

ICANN approved each assignment and ICANN approved each assignment on the criteria that ICANN normally uses, that's the important criteria of the technical and financial ability to operate the new TLDs. That's not an issue certainly here either.
since VeriSign has successfully operated .COM and
other TLDs for 30 years.

Afilias offers no evidence in its rebuttal
regarding any of these transactions. It makes some
arguments in the brief, but it offers no evidence
to distinguish any of these transactions in
economics or substance from what happened with
.WEB.

Indeed, even if we look at .WEB, Afilias
tried to acquire, in Afilias' terms, NDC's
application rights to .WEB before the auction. NDC
tried to bargain -- sorry. Afilias tried to
acquire from NDC an agreement that it would be a
participant in a private auction at which it would
be paid $17 million for losing.

There's no economic or substantive
registry transactional difference between what
Afilias tried to do before the auction and the
agreement Afilias attacks so fervently here.

As ICANN acknowledges, our evidence
demonstrates and Afilias' conduct also establishes
the secondary market for new gTLDs is rife with
elements of different ways to monetize that
application. Hundreds of new TLDs have been sold
or assigned following delegation.
NDC is no different in terms of its transactions in this regard from Afilias, Donuts or countless other applicants.

Indeed, as we get into these in more detail in the evidence, the form that these transactions take are only limited by the ingenuity of entrepreneurs in the tech space, all of which we have some experience.

Slide 28, please.

I am going to address some of the specific attacks that Afilias makes on the DAA and why Afilias claims that it violates Section 10 barring assignments or transfers.

Afilias first says that the DAA, my shorthand for Domain Acquisition Agreement, a tongue-twister after all these hours, assigned the obligation to timely amend the application. Afilias states by reason of the DAA, NDC could not amend the application without the consent of VeriSign. That's not true.

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Now, such an obligation is common. These agreements, in this proceeding protected by a protective order, involve trade-secret and confidential information that routinely, every day in the tech space, is regarded as trade-secret and confidential information.

By contrast, ICANN is a transparent administrator. Thus, if something is disclosed to ICANN, it may well go further unless it specifically designated to the contrary.

But most importantly, there was no obligation under the guidebook or application to disclose the terms of the DAA.

Slide 30.

Afilias also attacks the DAA as selling
the right to resolve string contentions. Afilias objects that VeriSign would not allow NDC to use VeriSign's money for a private auction that was probably a violation of the antitrust laws.

There's no obligation under the guidebook to agree to a private auction. That is the choice that is made by the applicant. There's no obligation that says he has to exercise any kind of discretion or any type of limitation and agree with all others to agree to a private auction.

Furthermore, the terms for the proposed private auction in this matter may have violated the antitrust laws as a horizontal agreement among competitors that would directly affect the price for .WEB.

VeriSign could not participate in a transaction that was a violation of the antitrust law, and so NDC made the choice to use VeriSign as its financier and to engage in a public auction as opposed to a private auction.

Slide 31, please.

Afilias also attacks the DAA as having sold the right to participate in the ICANN auction to VeriSign.

The provisions of the domain acquisition
cited by Afilias, as ICANN has acknowledged, are
mostly concerning the mechanics of the auction, not
substantive provisions of the guidebook.

Now, the auction itself was an open-ended,
complex auction spanning two days and covering
numerous rounds of bidding without any upper limit.

Any financier of such an auction would
have participated and protected itself in the way
it handled the auction, including having some
control over the mechanics of the auction.

So VeriSign's participation in the auction
is nothing that would not be expected from anybody
providing this kind of money. Indeed, Afilias has
admitted that its financier limited its bidding
such that Afilias was precluded from acquiring
.WEB. That's the ultimate control by a financier
when they cut you off.

Slide 32, please.

Afilias also attacks NDC's agreement
because it sold the right and obligation to
negotiate and enter into the .WEB Registry
Agreement.

First of all, as I pointed out before, NDC
had the right to do anything required of it by the
application or guidebook in negotiating with ICANN.
Furthermore, quite obviously, VeriSign's participation in those discussions with ICANN could only occur with ICANN's consent. That's the way negotiations of regulatory agreements occur.

If ICANN didn't consent to VeriSign being in the room, VeriSign wouldn't be in the room. So by both the provision allowing NDC to do that necessary to comply with the guidebook and the obvious oversight of ICANN during the process, there was no transfer of a Registry Agreement that should be odd or objected to by Afilias.

Slide 33, please.

Afilias objects that the right to operate the registry was essentially transferred by reason of the DAA. First of all, the right to operate the .WEB Registry Agreement was completely conditional on consent by ICANN, no exceptions. Therefore, any necessary scrutiny would have been done by ICANN. Therefore, any right that was negotiated between NDC and ICANN was a conditional future right and not a sale of title.

You also saw that these kinds of transactions are common in the industry.

Furthermore, contrary to Afilias' argument, there are numerous scenarios under which
NDC might end up operating the .WEB registry or sell it to yet another party.

Slide 34, please.

The obligations as to what to do under the myriad of scenarios and different potential fact patterns is addressed ultimately in the agreement as one that

Afilias also attacks the compensation arrangement, calling it a sales price, but Afilias this morning was only able to point to Annex 1 to the Domain Acquisition Agreement as showing that the money was the purchase of .WEB. Annex 1 is
Slide 35, please.

Late in the game, I think about three and a half years after the auction, Afilias came up with a new claim that NDC violated the auction rules. The auction rules are distinct from the guidebook as representing mechanical rules, not substantive provisions addressing rights under the application, but instead mechanical rules for the conduct of the auction.

Now, they only apply if the parties end up going into a public auction. If it is a private auction, the parties do whatever they want under ICANN's guidebook in the sense that they agree to what mechanical rules should be applied to the private auction.

Now, here's what ICANN says about its auction rules. "The auction rule violations alleged by Afilias appear to be based on a strained interpretation of the text of the rules." The rules by and large are, quote, concerned only with the mechanics of the auction. The auction rules do not appear to be designed to address the extent to which a non-applicant, including a financier, affiliated entity or contractual counterparty may be permitted to have an interest in a gTLD.
In other words, according to ICANN, it is these rules that govern mechanical aspects of the transaction. And Afilias' attempt to strain on the literal language of some of these rules, another potential violation -- which it took them three and a half years to do -- really doesn't add substance to the claim.

ICANN further notes -- Slide 36, please -- there's no question that ICANN has the discretion of determining whether a serious violation has taken place of the auction rules, and if so, what penalty or remedy should be applied, if any.

This is another example of these kind of decisions with which ICANN is invested with great discretion under the guidebook and even the auction rules, should go to ICANN, because ICANN created the rule, ICANN is going to live by the rules in thousands of other cases and future programs for additional applications for gTLDs may end up living by the same or similar rules.

Slide 37, please.

The specific violations alleged by Afilias of the guide rules are mostly regurgitations of its basic argument that the DAA transferred the application to VeriSign. So VeriSign is the
applicant, and therefore, these rules that talk about what an applicant should do don't match with what VeriSign or NDC was doing because NDC wasn't the real applicant at that point, VeriSign was.

We have addressed that argument in other ways earlier today and in our briefs, but they rest on the assumption that VeriSign is the applicant, which simply is not true.

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that

that's a violation of the auction rules. But it was Afilias' financier that Afilias admits cut it off and caused it to lose the auction because it wouldn't allow it to increase its bid.

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Again, this is a provision governing the manner of conducting the auction, not the substantive provision regarding the allocation of rights and obligations such as is found in the guidebook itself.

Secondly, Mr. Rasco explains what the provision means, as he understood it, that NDC
would not also be appearing at the auction
attending to the interest of another or conflicting
party, but instead would be acting in order to
serve its interests and agreements with VeriSign.

The strained, hypertechnical parsing of
nonsubstantive language of the DAA by Afilias on
its allegations or claims of a violation of the
auction rules, frankly, are very reminiscent -- or
cut throughout Afilias' arguments regarding the
meaning of the DAA and why it violated the
guidebook. Surely they have no merit.

Since it was addressed at some level
before, I am going to briefly touch on the fact
that ICANN is not an economic regulator.

Quite beyond ICANN's bylaws, you have
witness statements by two declarants who were
senior people within the government at the time of
the creation of ICANN and at the time of the
agreements that govern ICANN's relationship
vis-à-vis the Department of Commerce and VeriSign.
Those declarations of senior people who were
involved in this process all along make it clear
that ICANN is not -- was never intended to be an
economic regulator.

The cooperative agreement between the
government, Department of Commerce and VeriSign, by contrast, is quite clear as to who or what entity provides oversight with respect to VeriSign.

Amendments 30 and 35 of the cooperative agreement couldn't be clearer that the government provides competitive oversight for the .COM registry operated by VeriSign.

Furthermore, Amendment 35, which was executed in the last 18 months -- or 20 months, provides specifically that the competition in the DNS is expanding. And it did two things. It relaxed the competitive oversight the Department of Commerce provided over VeriSign's operation of the .COM registry, and it further made clear that the competitive oversight that was necessary was limited to the .COM registry and not other transactions involving different gTLDs in which VeriSign might be involved.

I want to spend a couple of minutes on competition. Between ICANN and VeriSign, we provided economic reports from two of the foremost economists in the world. Those two economists agree that there's no evidence of any threatened injury to competition by VeriSign's operation of .WEB. Those two economists also agree that there's
no economic evidence that .WEB is unique or special.

By contrast, Afilias offers no economic evidence. The two witness statements offered by Afilias are not practicing economists. They present no economic analysis or evidence, and they mostly rely on industry gossip and blogs, many of which are 10 or 15 years old.

The notion that any kind of competent evidence from this kind of analysis could be gleaned from 10 or 15 years ago on the Internet is almost laughable.

I am not going to cover those in complete detail. Both in our slide presentation I covered the report of Dr. Murphy and in our brief we also discuss his report, and of course, it is also submitted for the Panel, but there are a couple of things I do want to point out.

There's been a lot of discussion during this IRP of how much money was paid for .WEB and how that should show how important a competitive force it would be.

Dr. Murphy, among other things, looks at the price of other TLDs that have been transferred and the market share that attended those TLDs, and
by comparison with the price for .WEB concludes and shows it with the numbers that .WEB could not have been anticipated -- if it was going for that price, could not have been anticipated to be a significant competitive inroad.

He also does a projection based on a price of registrations and how many registrations it would have to take in order to meet that price. Again, it shows that if people were only willing to bid 135 million, it was going to make no inroad in .COM. The registration base would be so limited to justify only that price.

So I would encourage, and I know you will, to review Dr. Murphy's report.

I am jumping ahead because there's a couple of things that came up in this morning's argument that I'd like to address.

One is the notion that because there was a conversation between me and a partner at Jones Day to provide the Domain Acquisition Agreement, that that was somehow evidence of collusion or -- I think the word this morning was "bribery."

For 18 years I have been an adversary of ICANN. I have -- on behalf of VeriSign, I have sued ICANN under antitrust laws and other claims.
I have also sat across the table from Jones Day in transactions where we were always adverse parties.

So I know the partners at Jones Day. They are down the block from my office. We don't get together socially, but we have a respectful adversarial relationship.

It is even conceivable to me that when I saw the press on this I might have initiated this by calling somebody there and saying, "Hey, guys, if you're concerned about this, let us know." But in any event, the agreement, the DAA was promptly given to ICANN when they asked for it, along with the description of why it was not a violation of the guidebook, and it was just as simple as that.

Now, ICANN had to keep it confidential because we designated it confidential under the ICANN rules. Thus ICANN could not go out and disclose it to Afilias or the community based on its own rules of confidentiality when trade-secret or confidential information is submitted to ICANN. So ICANN's failure to provide it to NDC -- sorry, to Afilias was not in the least a sign of any bad doing by ICANN.

I don't know where the notion of bribery comes up. All the times I have been adverse to
ICANN, I have never accused ICANN of bribery, certainly.

But the money from a public auction goes into a special designated fund that's used for the benefit of Internet DNS structural activity. It doesn't go to ICANN's employees as salary. It doesn't go to ICANN's officers as bribe money. Instead money from a public auction goes directly into an Internet betterment.

By contrast, what Afilias and Donuts and other bidders have complained of here is they wanted a private auction. Because in a private auction, instead of the money going to the betterment of the Internet, the money is paid by the winner to the losers.

Now, that, of course, also affects the price at the end of the day at the private auction, but it is really Afilias and its other contention set members who want a piece of the money for their own private purposes by having a private auction instead of the money being used to support the Internet.

I'd like to comment also on the suggestion that the investigation in September by ICANN, that there was something wrong with that. We answered
all of the questions. The questions may have been tailored to the Domain Acquisition Agreement, but the reason's obvious. The reason for the investigation was to analyze and get people's views on whether the Domain Acquisition Agreement violated the guidebook or was bad for the industry.

So naturally the questions in that investigation would be oriented towards terms of the Domain Acquisition Agreement.

Since day one, however, we have been bystanders to the ICANN process, just as Afilias says it has been. There's been no inside deals, no inside track. And ICANN sometimes acts slow, but it's got a lot of powerful economic forces on each side of it. But we weren't on the inside, just as Afilias says it wasn't.

A couple of other quick comments.

One question that was asked was why was this agreement made when it was and maintained as confidential. Frankly, VeriSign kind of missed the boat in the sense that it didn't apply for anything by the application deadline. So it investigated and looked for some way to participate in the new TLD market. It ultimately entered the agreement with NDC, an agreement that is not uncommon within
the industry and which VeriSign believed was quite consistent, and still does, with the guidebook.

The agreement itself was confidential. It's very common that in commercial entities, they enter into complex agreements that are maintained as confidential, as was this one.

VeriSign did not avoid any scrutiny by -- avoid any scrutiny by reason of the way this transaction was structured because VeriSign will not ultimately gain any rights to .WEB without the consent of ICANN.

One final point. The claim that --

ARBITRATOR BIENVENU: In relation to that comment, Mr. Johnston, and I am conscious that time is advancing, but you have heard and you have read the submissions of counsel for VeriSign.

One of the points they make is that VeriSign avoided the scrutiny of the Internet community by acting in the way that it did. Had it, to use your words, not missed the boat, but put in an application as part of the process, its application would have been subject to comments of the community. What do you say in response to that?

MR. JOHNSTON: Twofold. There's no basis
in the guidebook to complain about another applicant based on the identity of that applicant.
If Afilias would have said, "Hey, VeriSign should not be an applicant because it's a big competitor," ICANN would have had to ignore that objection under the guidebook.

Secondly, under the guidebook, competition is explicitly not a criteria for evaluating an application. The notes to Question 18, which is what Afilias relies on, expressly state that information on competition is being collected for future programs and the ultimate evaluation of this program, but is not part of the evaluation criteria for an applicant.

So the only basis upon which one can object to another applicant based on the identity of the company or the applicant for a gTLD is that the applicant is guilty of past criminal conduct. There is an exception for that because you have to meet certain requirements. You can't have committed crimes or been convicted of crimes. I don't remember the precise language. But that is the basis, and I believe that's the only basis upon which to object to another applicant because of who the applicant is.
Finally, I make a very quick comment about Afilias' claim that they offered us a chance to arbitrate.

This is an IRP proceeding. This is a special accountability proceeding where ICANN -- it is addressed whether ICANN has complied with its bylaws. An arbitration of claims is an entirely different kind of proceeding.

We have claims against Afilias. We have no intention of arbitrating those claims. We want to use a court of law if we bring these claims, and we shouldn't have to submit them to arbitration in order to not be -- not have to put them into an IRP. In other words, the IRP is a special proceeding quite, quite different than what Afilias was proposing.

Furthermore, we had been excluded from all the decisions in this IRP up to that point in time, and the purpose of the IRP is really not at all designed to assess our claims. I don't even know how -- what it would look like.

But I would like to point out that Afilias is talking out of both sides of its mouth here. Because in Afilias' request for IRP, it specifically stated that it reserved all rights to
challenge any result in the IRP based on the nature of the process. So Afilias is participating in the IRP, but it's reserving its rights to challenge what this Panel would do based on the express statement in the IRP.

Now, the Amici have raised questions about due process because of the way Afilias has tried to misuse the IRP process in order to adjudicate third-party claims against people who aren't part of the IRP and by definition under the IRP rules cannot be part of the IRP unless they want to do what Afilias did, which is make a claim against ICANN.

So I can't imagine ICANN would have ever consented to turn this IRP into an arbitration either, but we weren't prepared to either waive our claims against Afilias or submit them to arbitration, which was part of the deal that was offered by Afilias.

Subject to any questions the Panel has, I would like to turn it over to Mr. Marenberg. Thank you.

ARBITRATOR BIENVENU: Thank you, Mr. Johnston, for your oral presentation.

Mr. Marenberg, we call upon you to present
your oral statement on behalf of NDC.

MR. MARENBERG: Thank you, Mr. Chairman. Give me one second to get myself organized here.

ARBITRATOR BIENVENU: Just to guide you, I think Mr. Johnston has used about an hour and 20 minutes of your time, so -- of the time given in total to the Amici.

MR. MARENBERG: Very well.

ARBITRATOR BIENVENU: While you get set up, may I mention that the paper copy I have of your opening statement is the one that was circulated yesterday. So if it is possible to give me the old numbering at the same time as the new one and if it is not too burdensome for you to do that, otherwise I will just find it looking at what is displayed on the screen.

MR. MARENBERG: I think you'll recognize the slides. Some are just gone. I had a feeling I'd be in the position I am in right now and want to cut it down.

ARBITRATOR BIENVENU: Okay. Please proceed and ignore my request. I'll just find the slide. Let me say first, on behalf of the Panel, a warm welcome, sir, and please go ahead.

MR. MARENBERG: Thank you. My name is
Steve Marenberg. Together with my colleagues Josh Gordon and April Hua of Paul Hastings, we represent NDC.

I have given a fair number of opening statements in the course of my career, but never have I said what I am about to say now, which is good afternoon, good evening and with apologies to Professor Kessedjian, good morning. Thank you all for your patience. It's gone on quite some time. I represent -- and I will try to be brief.

I represent NDC, which is -- despite all of the talk about transfers that we have heard about, as we stand here today, NDC is the holder of the right to enter into a Registry Agreement with ICANN. There is no other party, not VeriSign, not Afilias, that can say that.

I want to digress for a second in light of that fact to answer a question that the Chair posed to Mr. LeVee. You indicated or you wondered about a tension between ICANN's statement that the Board had not really decided anything other than to put this -- these issues on hold pending the resolution of accountability proceedings, or mechanisms, and the fact that staff sent an RA, Registry Agreement, to NDC for execution, and wasn't there tension in
that.

I think not, and let me tell you why. That is because NDC has the right to receive that Registry Agreement in the absence of an accountability mechanism, as ICANN suggested. And letters to the Panel by Afilias don't upset that right.

So when ICANN was sending the Registry Agreement to NDC after the DOJ finished its Civil Investigative Demand for investigation on competition grounds and after Donuts' first CEP and then its IRP were resolved and no accountability mechanism was then pending, then ICANN was doing exactly what it should have been doing at the time.

And there really isn't any tension between the statement that he had cited and signing the Registry Agreement.

It was incumbent upon Afilias to do what it did, and I think what everybody understood it was likely to do at the time in order to bring this matter to a head, but there was no tension in what ICANN was doing.

ARBITRATOR BIENVENU: Mr. Marenberg, I don't want to labor the point, but the tension is between sending the Registry Agreement and writing
in submission to this Panel that ICANN has never
taken a position on whether or not the NDC bid is
compliant.

And what I said is that I saw a tension
between that statement and the sending for
execution of the Registry Agreement. So it is
different than what you have postulated here.

MR. MARENBERG: Your Honor, I don't want
to belabor the point, but in my view, the question
becomes ripe for ICANN to resolve once it sends out
the Registry Agreement to NDC after there is no
pending accountability mechanism. And, therefore,
Afilias jumped in when it did because it had not --
it had neglected prior to that to start any
accountability mechanism of its own.

So ICANN was doing, I think, what the
rules required it to do at the time because Afilias
had failed to file an accountability mechanism.

So let's turn to my presentation. I am
going to really focus on three issues.

First, there's been a lot said, a lot of
ink spilled on whether NDC was honest with ICANN
during ICANN's investigation. Afilias has made
some rather startling accusations about my client,
and we are going to answer them.
Second, I am going to focus -- but I think I am going to truncate my focus in light of the discussion that's taken place earlier today -- on whether the DAA and NDC's .WEB application conformed to the requirements of the guidebook.

And third, I am going to talk about whether Afilias is here with unclean hands.

Briefly let me just tell you about my client, NDC. It was founded in 2012 for the purpose of participating in ICANN's new gTLD Program, but the managers of NDC were not inexperienced in the gTLD -- TLD industry at all. Rather, they had successfully transformed .CO, the country code for Columbia, into a rather generic TLD that was very successful in attracting many registrants to that top-level domain.

In addition, NDC successfully applied under the new gTLD Program, and it operates today .HEALTH. It applied for approximately 13 TLDs and it has participated in private resolution for many of them, and as we know in this instance, the ICANN batch.

It has an experienced management team with experience in this industry, headed by Juan Calle, who you will not meet, and Jose Rasco, who you will
meet later this week. Mr. Rasco is NDC's chief financial officer. He has a Bachelor of Science degree from the Wharton school of business at the University of Pennsylvania, a Master's in taxation and over ten years' experience in the domain industry.

Let me also describe the DAA from NDC's perspective, why we entered into it. First and foremost from NDC, which is a small company, there are the economics of the DAA.

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In exchange, what were we obliged to do? We were obliged -- in language that's been
misconstrued by Afilias, we were obliged to act exclusively with VeriSign.

We had committed to VeriSign, and we were going to participate in the auction with the idea that we were transferring -- if -- after we signed the Registry Agreement, if ICANN agreed, to VeriSign.

A couple of other things that they are mentioning.

So from NDC's perspective, why enter into this? Well, when we are approached in 2015 by VeriSign, we know -- and by the way, I think it is not contested --

and, therefore, we have a choice.
And so we sign the agreement.

Now, let me talk about the first of the subjects that I mentioned. Afilias has made a number of statements about the veracity of Mr. Rasco in connection with ICANN's pre-auction investigation of the facts. Let's go back and set this in context.

By June of 2016, the auction agreement had been sent out to all parties in the contention set. Everyone knew -- perhaps a surprise to everyone
else besides NDC -- that all of the parties were agreeing to go to the private auction other -- other than NDC. That was probably something that upset -- in fact, it was undoubtedly something that upset other members of the contention set who were relying on a private auction, as they had in other instances in order to get some compensation from the auction for this TLD.

And if you look at the documentation here, there is almost uniformity, a word-for-word objection of ICANN accusing NDC of undergoing a change of control for the purpose of either, one, delaying the auction, or two, trying to coerce NDC to change its mind and go to a private auction.

The complaints to ICANN are the same, and they all stem out of a discussion that Mr. Rasco had with Jon Nevett of Donuts in which he called him up and said, "I don't understand why you're not going to a private auction. You seemingly have in the past."

Afilias has made a lot of claims about this conversation, but my response is you need to have -- you need to view this conversation in context, and let me see if I can put it in these terms.
Mr. Johnston and I are old friends. In fact, our friendship goes back to the days when his hair was blonde and I actually had some.

We have often talked about going to the theater together. He's invited me to go to the theater with him on Friday night. I in the past had always gone to the theater with him on Friday night.

But when he calls me up for this Friday night, I know I'm committed to go with someone else, maybe Mr. Ali, and I know that that will bother Mr. Johnston if I say that. So I tell him a little white lie. I say I have got to check with others. I have got to check with my wife. And the truth is my wife says we have other things to do that night.

It's a white lie that Mr. Rasco is telling Mr. Nevin at the time in that conversation. They had been colleagues in the Internet industry, and Mr. Rasco says, when Mr. Nevin was pressing him on who was making this decision, I just wanted to deflect. It is a natural thing to do. And out of that comes the complaints to ICANN.

And the complaints all concern the same thing, which is that NDC has undergone the change
of management or a change in control. That is what ICANN is investigating pre-auction. They are not investigating the DAA. No one knows about VeriSign's agreement with NDC.

The investigation and the response that Mr. Rasco gives to ICANN prior to the auction relate to the issue that has been raised by other members of the contention set, specifically, has NDC undergone a change in control.

A couple of things to say about that. One, the accusations made by everybody else were not true. NDC did not undergo a change in control. The directors in the context of the LLC, the managers were all the same. There's been no change in shareholders or the member level of an LLC that requires anything in the application to be changed.

And so when there are repeated inquiries from ICANN all to the same effect, has there been a change of control, Mr. Rasco deals with those inquiries directly and says no.

Now, Mr. Ali in his well-crafted opening this morning -- I think I wrote this down correctly -- says that Mr. Rasco assiduously crafted his response to Mr. Erwin on June 26 and points to Exhibit C-96 as proof of that.
If you look at Exhibit C-96, Mr. Rasco, assuming he picked up the email the moment that Mr. Erwin sent it to him, which is, of course, quite an assumption, responded only 48 minutes later, hardly enough time to assiduously craft anything.

What Mr. Rasco said was, I understood that he was asking about a change of control in the management of NDC, and I told him no, the same as the inquiries he got from Mr. Waye, the ICANN ombudsman, and Ms. Willett, the ICANN vice president later before the auction.

That's what ICANN was inquiring about, and Mr. Rasco responded promptly. They were not inquiring about VeriSign. And even if they were, Mr. Rasco had no obligations to tell them about VeriSign.

Here's the interesting thing, is that we are going to hear a lot about Mr. Rasco's conversations with -- or email conversations with Mr. Erwin and Mr. LaHatte, telephone conversation and email conversations with Ms. Willett, but the fact of the matter is that the contention that NDC underwent a change of control, which was front and center prior to the auction, the basis upon which
everybody was demanding that the auctions be delayed, the basis upon the Court proceedings were started, is no longer part of this IRP.

If you look at Paragraph 78, which Mr. LeVee put in front of you today, of Afilias' amended IRP, there is no complaint that ICANN or this Panel should disqualify NDC's application because NDC underwent a change of control. It is no longer in the case, and one wonders why we are going to hear so much about it.

Now, as I said, ICANN never inquired about VeriSign or the DAA prior to the auction, but there's no reason to think that even if they had, they care. Because after all, we have an indicia of what ICANN thought about the VeriSign involvement and NDC's winning bid in the auction from the correspondence that's in the record.

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ARBITRATOR KESSEDJIAN: Mr. Marenberg, at this stage on this very slide, which was 11 in your previous copy that we received, I guess, yesterday, I am a bit surprised by the way you relate the conversation between Ms. Willett and your client. When was this message from Ms. Willett sent to Mr. Rasco?

MR. MARENBERG: I believe it was either August 1st or August 2nd. I can check that for you.

ARBITRATOR KESSEDJIAN: Well, I checked. I checked. It is 31st July.

MR. MARENBERG: Okay. I am one day off.

ARBITRATOR KESSEDJIAN: Well, well, wait. That's quite important. Because you seem to say that Ms. Willett, knowing of the existence of your agreement with VeriSign, still doesn't see any problem with it. That's what you just said to us, unless I am not understanding what you are saying.

But on the 31st of July, Ms. Willett had no knowledge of what has happened between NDC and VeriSign. Am I wrong on that?

MR. MARENBERG: I believe so. And
Mr. Rasco will provide his testimony about what he said. But as I understand it, Mr. Rasco was giving Ms. Willett a heads-up that there was going to be an announcement by VeriSign, in other words, the announcement that they are talking about here and that she is referencing when she says, "Thanks for letting me know about the announcement," is an announcement that's coming from VeriSign, not NDC, and, therefore, he has told her that VeriSign has been involved in this.

By the way, there's also evidence -- I think it's been withdrawn by Afilias, but at this point there is a lot of speculation in this close-knit community that VeriSign has been behind NDC's bids. This is an open secret out there so that this is not something that she's guessing about or that is it.

Mr. Rasco is calling to confirm that for her, and the announcement that's coming is VeriSign's. She's not upset with -- so she does have the knowledge she needs to have to react -- the involvement of VeriSign in this transaction.

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Now, I will -- she does not know of the DAA. ICANN has not received the DAA and doesn't get it until later in the month, but they do know that the financial impetus for our winning the bid is from VeriSign. That is something that's not hidden from her at all.

ARBITRATOR KESSEDJIAN: Thank you.

MR. MARENBERG: So now having gone through or explained that we did not mislead ICANN in the investigation, pre-auction or post-auction, I want to talk about the specific contentions that Afilias has made here that our application violated the guidebook in light of the DAA.

Essentially Afilias has made two broad contentions. First, there is a contention that we have transferred some rights in violation of Module 6 and in violation of other provisions of the guideline, particularly Module 6, that we may not resell, assign or transfer any of the applicant's rights or obligations in connection with the application.

The DAA does not violate this provision of the guideline. For one, I think we have heard all we need to know from Mr. Johnston and Mr. LeVee that as a matter of law and as a matter of the
agreement itself, there has been no transfers of
the application itself. Rather, the DAA

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So there would be no way to fulfill this agreement
ultimately by pulling the wool over ICANN's eyes.

They are going to -- when the question is
right, after we have signed the Registry Agreement,
they are going to get the opportunity to review
that transaction and consent to it or not. This
could not have been, much less was it not intended,
as a secret conspiracy.

ARBITRATOR CHERNICK: Mr. Marenberg, do
you see a distinction between an intention to
assign or transfer the application and the transfer
of applicant's rights or obligations in connection
with the application?

MR. MARENBERG: There is a possible
distinction, but neither has happened. And I think
as to the rights and obligations, you would have to
figure out: One, what rights are allegedly
transferred; and, two, is that a violation; and
three, if it is a violation, is it material? But
certainly the application itself has not been
transferred, and I believe that that's really the core of this.

You're sort of anticipating my next slide, which is that Afilias' argument really is disaggregating all of the pieces or the bones that make up an application and saying have you transferred any of these bones or these rights.

I think the answer there is, one, as a matter of their looking at the DAA and saying, "We see there's all these consents and revisions that seem to us to be transferable," but the fact of the matter is: One, I don't believe that's the right way to look at the question; and two, if you'd look at the document itself, there are no rights in the application that have been transferred.

That's because of this:

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So, therefore, even if, on the one hand, there was an arguable consent obligation that may have given VeriSign an interest, on the other hand that is taken back in the final analysis and nothing is transferred. And in the letter of confirmation, that is made plain again in Subsection (m).

So although Afilias likes to pick apart this DAA, the one thing they ignore is the.

And, of course, the DAA will ultimately be disclosed to ICANN, as I mentioned. There's no way to accomplish this transaction without disclosing the DAA to ICANN, and that was never anybody's intent.
So we didn't transfer any rights under the DAA that would make our application a violation of the guidebook.

The second contention that Afilias makes is that we failed to advise ICANN about the change in any circumstances that would render any information provided in the application false and misleading.

Again, this contention is wrong.

First and foremost, all of the responses relating to NDC's qualifications to operate .WEB remain accurate to this day in our application. As I mentioned, there's been no change of management or control to this day.

And the other scoring elements or scoring questions relate to our financial ability to operate .WEB, which is intact today and doesn't require any change.

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And two, our technical ability to operate .WEB also remains intact. As we mentioned in our application, we made arrangements, as we had when we operated .CO, for a company called Neustar to operate the back end and provide the back-end
infrastructure when we operated the registry. We mentioned in our application that we are contracting with Neustar to do that for .WEB and that contract remains in place today. I want to emphasize that.

If we need to operate .WEB tomorrow, we have the back-end resources and the technical resources to do it and nothing has changed with respect to our application on that.

Now, what we didn't disclose is that we had a powerful funding source in VeriSign for the .WEB auction. But, of course, that's not something that needs to be disclosed any more than Afilias needed to disclose to us that they had gone out to the Bank of America or the Bank of Ireland or whatever bank they went to to get funding for their bids. That's confidential information that's not subject to third-party disclosure.

There has been a suggestion earlier today in Afilias' presentation that there was some obligation to disclose information that had, quote, an impact on other applicants. That suggestion is wrong.

If you pierce that requirement, there's an impact -- there's an obligation to disclose
materials that have an impact on other applicants, means something like if there's a change in application to a community, priority application which would advance us above and ahead of other applicants, we need to disclose that.

But that's not referring to who's backing you, what financial resources you have backing us. Just because they might be effective, because we might have a bigger ability to win the auction, that's not something that you disclose under the guidebook.

And by the way, whether it is or is not, as ICANN has mentioned and as VeriSign's mentioned, that's a question really remitted to the expert piece of the ICANN litigation, and with all respect, not in this.

In any event, there was no duty on us to disclose to our competitor that we had financial backing and that we might win the auction. That's not needed to be disclosed under the guidebook rules.

Finally, Afilias spends a lot of time arguing that once we signed the DAA with VeriSign, that the answer that we gave with respect to the mission or the purpose that we saw for .WEB no
longer was active.

Well, as we sometimes said in first-year procedure, when you file a motion to dismiss, the answer to that is so what.

This question, 18, relating to mission and purpose, has nothing to do with qualifications relating to .WEB and the ability to operate .WEB. And how do we know that? Because the attachment to Module 2 of the guidebook tells us just that. It says this -- the information gathered in response to Question 18 is intended to inform the postlaunch review of the new gTLD Program, not assessing your ability to operate a TLD.

In fact, this explanation goes on to say, "This information is not used as part of the evaluation or scoring of the application."

And by the way, we'll get to this one more time before I finish. There's a good reason why you don't have to update this section and it doesn't matter. Because as I said, it is not used to determine the qualifications and operate the TLD, which is what ICANN is evaluating during this process.

Now, there's another reason why we didn't need to change this or we shouldn't have changed it
because, as Mr. Johnston has mentioned, and if you
read the DAA it becomes apparent, is that there are
instances, real instances in which we may be or
could have been or still might be the party that
operates .WEB.

Now, I don't want to mislead you. Plan A
is for us to sign the Registry Agreement to submit
it to ICANN for approval so that it can be assigned
to VeriSign.

But if ICANN rejects the assignment, then
the DAA then provides Redacted - Third-Party Designated Confidential Information
In other words, in that
instance, we would have to decide what to do.

Now, we have to decide along with
VeriSign. We couldn't do it without them and shove
it down their throats. But we'd be in the position
as the holder of the Registry Agreement to decide
what to do with our rights at that time.

What we would do at that time can't be
predicted because it would really depend on the
value or the perceived value of the .WEB TLD.

Now, if we believe some of the sources
that Afilias' experts quote and .WEB is worth $500
million, well, then any good businessman will tell
you, "If I have to pay back $135 million to acquire
an asset worth 500 million, I'll find a way to do it. I'll find alternative financing to pay back VeriSign," and at that point all of the statements I made, mission and purpose, are still operative. So that's another reason why Afilias' harping on our response to Question 18, doesn't disqualify our application under the guidebook.

Let's talk about Afilias for a second and whether it comes to the Board or this Panel. Afilias has very adept lawyers. I respect the ability of counsel to construct these arguments. They very adeptly construed my client's statements as sinister and fraudulent, but when it comes to Afilias' statements, they have a very different attitude.

Let's talk about the blackout period. The ICANN rules prohibit members of a contention set from cooperating or deliberating with each other with respect to bidding strategy and negotiating settlement.

Prior to the blackout period, Mr. Kane approached Mr. Rasco with the following orders -- offer, which is a communication about bidding strategies and settlement agreements because that's how you'd have to accomplish this, with a
settlement agreement. We'll give you 17.01 million
to settle this and go to a private auction so that
we can get the TLD. That's okay because it is
outside the blackout period.

But within the blackout period, Mr. Kane
sends to Mr. Rasco this message. "Talk?" And
remember, that's the same thing, same opening as
the last one. "Talk? If ICANN delays the auction
next week, would you again consider a private
auction?"

This is an attempt to make a deal with NDC
during a time when the parties are in a blackout
period and they can't be discussing settlement.

Now, Afilias offers two explanations to
try to take the sting out of this improper
communication. The first is that the message did
not discuss estoppel. My reaction to that is:
Really? Does anyone have any doubt that this
message was discussing .WEB?

Was Mr. Kane willing to come here before
his witness statement was withdrawn and subject
himself to cross-examination that this message
didn't involve .WEB? Of course not.

Then they say it doesn't refer to a
settlement. Of course it does. Everybody
understands that this message during the blackout period has been referring back to this one, which is why don't we settle up and you'll take $17 million. This is a violation of the blackout period. This should be disqualifying Afilias' bid.

Now, Afilias has also made a lot of statements that NDC violated the bidding requirements.

I don't have much time, so I will just remit you -- I looked at ICANN slides earlier today, particularly Slide 116, 121, which do a very good job of explaining why, in fact, we did not violate that.

Again, this is Afilias saying that different rules apply to NDC than apply to Afilias. Our bids were constrained by the financial support we were getting from VeriSign, that is true. Afilias' bids were constrained from the financial support that they got from their banker. In fact, if there's anyone who was constrained more by outside third-party financial interests that were never disclosed to anyone until this proceeding when Afilias 'fessed up and said it had third-party financing -- by the way, when they really 'fessed up -- I forget the footnote number,
I think Footnote 365 in there replied to our Amici brief. Maybe they thought we were only using 50 footnotes, but it was in there, admitting that there were limitations on what they could bid imposed on them by a third-party bank.

Neither one of us, I believe, violated the bidding guidelines. We did nothing different than they did.

As you already heard, and I won't belabor the point, in 2006 Afilias is saying neither ICANN nor the GNSO have the authority to act as antitrust regulator. And today they are saying ICANN must regulate competition and preclude VeriSign from operating .WEB. Again, different rules apparently that apply to that.

And then I want to end up with this one, which, again, goes back to the mission/purpose questioning. Afilias has bought and sold gTLDs without ever amending questions, in response to questioning the TLD. A good example is .MEET. When Afilias applied for .MEET, they described the purpose of .MEET as a popular, accessible, innovative destination for people seeking online dating and companionship services. And they got the .MEET domain name.
Once they acquired .MEET, they sold it to Google, who is using .MEET for the very purposes we are here today, as a competitor for Zoom or Webex or those kind of services.

Now, obviously that's not consistent with Afilias' statement of the mission or purpose of .MEET when it applied for it.

Afilias says, well, that's true, but we transferred .MEET after we signed the registry and wasn't in a pre-auction or pre-Register Agreement application.

Well, one, we don't even know if that's true. That's just ipsy-dipsy from their accounts at this time. There's no evidence to support that, and more importantly, within the contours of this proceeding and our limited role in that proceeding, my client, NDC, can't even challenge it, particularly can't even challenge it because Afilias has withdrawn all their witnesses so we can't cross-examine anybody.

Even if it was true, there's no functional difference between transferring the Registry Agreement after it's signed and before it's signed when the purpose of that TLD is completely changing. There's no functional difference at all.
And if there is, again, a difference, if there's a reason to approve it post-signing the agreement, as opposed to pre-signing it, it all goes back to suggest ICANN, with its experience in regulating the industry, ought to be the persons deciding this rather than this Panel.

Let me just summarize, and thank you before I do for your extraordinary patience. This has been a very long day. You have heard a lot from a number of us, and it is very late.

On behalf of all of the parties at Amici, I know that we really appreciate the time that you have put in today and will put into the hearing, and we thank you for that.

So I'll conclude by saying the NDC-VeriSign arrangement is authorized by the guidebook. Entering into the DAA it was a smart decision for NDC. It allowed us to maximize the value in the circumstance of our .WEB application and even gives us the possibility -- although, as I said, it is not Plan A. Plan A is to sign the Registry Agreement and sign it and send it to VeriSign, but should that be rejected, we may have the option of operating .WEB after all.

ICANN should be the one to decide and
should be given the latitude to decide whether they
are going to permit the assignment of the Registry
Agreement to VeriSign.

And this Panel, with all deference, does
not have, in the context of the proceeding, the
ability to strip Amici of what is a very valuable
property interest.

Thank you for your patience, and I look
forward to the presentation of the evidence over
the next week.

ARBITRATOR BIENVENU: Thank you very much,
Mr. Marenberg.

So it is very late for one of us, so I
will be brief in reiterating on behalf of the Panel
our thanks to all of those who have presented and
all of those who supported them.

We will reconvene tomorrow at 11:00 a.m.
Standard -- Eastern, and we need to hear the
evidence of Ms. Burr and Ms. Eisner.

So thank you all, and we adjourn until
tomorrow.

(Whereupon the proceedings were
concluded at 3:30 p.m.)

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Dated: 08/10/20

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