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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)	
)	
Claimant,)	
)	
vs.)	ICDR Case No.
)	01-18-0004-
INTERNET CORPORATION FOR)	2702
ASSIGNED NAMES AND NUMBERS,)	
)	
Respondent.)	
)	

---o0o---

MONDAY, AUGUST 3, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME I (Pages 1-246)

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)
)
 Claimant,)
)
 vs.) ICDR Case No.
) 01-18-0004-
 INTERNET CORPORATION FOR) 2702
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
)

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MONDAY, AUGUST 3, 2020
ARBITRATION HEARING HELD BEFORE

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A-P-P-E-A-R-A-N-C-E-S

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A-P-P-E-A-R-A-N-C-E-S
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CALIFORNIA, CALIFORNIA, AUGUST 3, 2020

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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

1 expert report on behalf of the party and who were
2 called upon to appear at the hearing by the other
3 party.

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

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

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

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

23 The parties and Amici are represented in
24 this proceeding by experienced and very
25 sophisticated counsel, and all of us are

1 participating in this hearing by remote video using
2 a state-of-the-art platform operated by experienced
3 remote video hearing service providers.

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

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

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

22 The Panel also invites counsel as the
23 hearing progresses to consult and, as the case may
24 be, make joint or separate submissions --
25 suggestions if it is felt that improvements can be

1 made to ameliorate or streamline the hearing.

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

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

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

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

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

23 Now, I will say one last thing in
24 introduction. The parties and the Amici were given
25 time equal to or more than they requested. So I

1 would ask counsel to ensure that they respect the
2 time allocation for the openings.

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

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

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

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

22 ARBITRATOR BIENVENU: Very well. Please
23 proceed.

24 MR. ALI: Mr. Chairman and members of the
25 Panel, good morning and good afternoon. It's

1 indeed a pleasure to be here with everyone, albeit
2 virtually.

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

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

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

21 Under normal circumstances getting ready
22 for a hearing with as many witnesses and as large a
23 record as we have and as complex a record as we
24 have is no mean task, but with stay-at-home orders
25 as well as quarantine protocols, getting ready for

1 this hearing has been far more complicated, and I
2 truly do appreciate the personal sacrifices that
3 every member of my team has made.

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

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

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

23 Now, we are here for an evidentiary
24 hearing, to test the fact testimony of witnesses
25 that have been presented by NDC and VeriSign to

1 support their defense to our claims.

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

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

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

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

21 Go to Slide 3, please.

22 Mr. Chairman and members of the Panel, if
23 there's at any point in time you have problems with
24 the PowerPoint, that we are not on the same screen
25 or page, so to speak, please do let me know. Of

1 course, if there's any other technical issue where
2 my face is frozen in an inopportune sort of way,
3 please do let me know. I'd rather not be making a
4 face at the Panel while I present.

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

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

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

23 Now, other Panels have also recognized the
24 special and indeed unique nature of ICANN,
25 including the Panel on which Professor Kessedjian

1 sat, DCA .AFRICA versus ICANN. So I think it is
2 critical to understand what and who ICANN is.

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

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

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

24 Next article, Article 3 of the articles of
25 incorporation. "Consistent with the global reach

1 of its powers as a gatekeeper of the DNS," Articles
2 ICANN -- "ICANN's Articles require ICANN to," and I
3 quote, "operate in a manner consistent with these
4 Articles and Bylaws for the benefit of the Internet
5 community as a whole, carrying out its activities
6 in conformity" -- "in conformity with the relevant
7 principles of international law and international
8 conventions and applicable local law and through
9 open and transparent processes that enable
10 competition and open entry in Internet-related
11 markets."

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

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

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

24 The second element of the framework or
25 context for this case is .WEB. As you are going to

1 hear from our experts Jonathan Zittrain and George
2 Sadowsky, .WEB is a gTLD of considerable importance
3 and the best likely competitor to VeriSign's
4 .COM/.NET dominance.

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

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

18 Redacted - Third-Party Designated Confidential Information
19
20

21 So I think you have a lot of testimony
22 from the experts, from an economic perspective from
23 VeriSign and ICANN's experts, but we think that
24 what Mr. Zittrain, Professor Zittrain and Professor
25 Sadowsky has to say carries more weight because

1 they are technologists and they spend their careers
2 and their lives in the space of Internet governance
3 and Internet matters.

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

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

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

24 Now, associated with what I have just said
25 about the precedent-setting nature of this IRP is

1 the fact that this is also the first IRP under the
2 bylaws' enhanced accountability framework.

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

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

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

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

24 In connection with this transition
25 process, there was an entity set up called

1 CCWG-Accountability. This was a cross-community
2 working group specifically established to deal with
3 enhancing ICANN accountability and was convened to
4 look at improvements that should be made to
5 strengthen the global multi-stakeholder Internet
6 community's oversight of ICANN as an organization.

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

13 They state, "Since December 2014, a
14 working group of ICANN community members has
15 developed a set of proposed enhancements to ICANN's
16 accountability to the global Internet community.
17 This effort is integral to the transition of the
18 United States' stewardship of the IANA functions to
19 the global Internet community, reflecting the ICANN
20 community's conclusion that improvements to ICANN's
21 accountability were necessary in the absence of the
22 accountability backstop that the historical
23 contractual relationship that the United States
24 government provided. The main elements of the
25 proposal are outlined below. Together with ICANN's

1 existing structure and groups, these accountability
2 enhancements will ensure ICANN remains accountable
3 to the global Internet community."

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

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

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

1 which we are operating.

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

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

19 I should also say that while prior
20 versions of the bylaws limited IRPs to actions or
21 inactions only of the ICANN Board, the new bylaws
22 specifically provide for IRPs to apply, and I
23 quote, "any actions or failures to act by or within
24 ICANN committed by the Board, individual Directors,
25 Officers or Staff members that give rise to a

1 Dispute."

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

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

23 Now, what we expected throughout this
24 process when we, i.e., Afilias, presented its
25 application, submitted its application fee, like

1 many, many other applicants, was a legitimate
2 expectation of being treated fairly, a simple and
3 straightforward and legitimate expectation that the
4 AGB rules would be followed, the process would be
5 run fairly, everyone would play by the rules, and
6 ICANN would show that there would be consequences
7 for noncompliance.

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

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

23 I think I am, perhaps, violating my own
24 rule of too much passion and not enough proof. So
25 let's get to the specifics of the facts.

1 This is just a structure which you have --
2 a roadmap to our presentation. It is the rest of
3 the presentation. I am going to focus on what are
4 the known and established facts at least thus far.
5 I'll spend a little bit of time -- that's where
6 I'll spend the bulk of my time.

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

13 So Slide 7, please.

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

20 Slide 8, please.

21 Rule 11 of ICANN's interim procedures,
22 which repeats almost verbatim Section 4.3(i) of the
23 bylaws, states in relevant part, "Each IRP PANEL
24 shall conduct an objective, de novo examination of
25 the DISPUTE. With respect to COVERED ACTIONS, the

1 IRP PANEL shall make findings of fact to determine
2 whether the COVERED ACTION constituted an action or
3 inaction that violated ICANN's Articles or Bylaws."

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

11 Go to the next slide, Slide 9.

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

22 Let me also say, echoing what Chairman
23 Bienvenu said at the outset, that we are not here
24 to try and trick or bamboozle the witnesses. So as
25 I go through my opening, I am going to identify

1 certain questions that you members of the Panel
2 will want to get answered and issues you will want
3 addressed, which I trust will also allow ICANN's
4 and Amici's lawyers to ensure their witnesses are
5 sufficiently well-prepared to provide you with the
6 answers to the questions that we'll be putting to
7 them.

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

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

23 The same applies to, in terms of
24 substance, to Mr. McAuley, who is a VeriSign
25 employee and was at the time that he participated

1 in the IRP-IOT. I believe he'll be appearing next
2 week.

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

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

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

22 Next slide, please, Slide 10.

23 There are two Amici experts and ICANN
24 expert witnesses and one witness who will not be
25 cross-examined.

1 We mainly -- due to timing constraints,
2 but also because we believe that their testimony is
3 irrelevant for the matters that are before you --
4 have not called the Honorable John Kneuer or
5 Professor Kevin Murphy. They are both economists,
6 and we think their testimony has very little to add
7 beyond what Professor Carlton has included in his
8 testimony, but mainly we dropped them due to time
9 constraints.

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

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

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

25 Before I delve into the specific facts

1 that we think you should focus on for purposes of
2 this hearing, let me briefly address the Amici's
3 participation in this IRP and why the Panel should
4 not fall prey to Amici's arguments about their
5 due-process rights being impaired and their
6 property rights being impaired.

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

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

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

1 have.

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

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

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

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

19 Based on Amici's conduct and comments in
20 these proceedings and in our interaction with
21 counsel, we can fully expect that they will attempt
22 some sort of collateral attack on your decision,
23 which is why it is absolutely imperative that you
24 make the findings of fact that you have been
25 instructed to make and issue a well-reasoned

1 decision based on the facts which you are also
2 instructed to do and to render a decision that
3 fully and finally resolves the dispute between
4 Afiliias and ICANN, which you are empowered to do.

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

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

25 I find that to be a remarkably naive

1 statement, especially with a Panel with the
2 qualifications that are reflected in this Panel.
3 It is not as if the ICANN is some monolithic,
4 immutable organization or entity. It is an
5 institution that's made up of individuals who come
6 on to the Board, come off the Board and were
7 advised by ICANN staff.

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

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

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

25 Or perhaps it's because Amici -- perhaps

1 Amici want this to go back to the ICANN Board
2 because they already have a pretty good sense of
3 how this matter will turn out if you send it back
4 to ICANN.

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

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

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

21 I believe that the Panel was, within the
22 context of ICANN's transparency obligations and
23 accountability proceeding, far too restrictive in
24 terms of the production that it ordered from ICANN.
25 But be that as it may, we will live with it, at

1 least for now. We have done so, but I do think
2 that there are legal consequences that proceed from
3 the privilege indication by ICANN, and we'll
4 address those in posthearing briefing and in oral
5 argument in the future.

6 Let's go to Slide 13, Rosey.

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

12 Now, ICANN closed the new gTLD application
13 period on April 20th, 2012, having received
14 approximately 1,930 separate applications for new
15 gTLDs. The close date was supposed to be
16 officially a few days before. There was some
17 glitches with the system, I believe, that resulted
18 in ICANN extending the application deadline until
19 20th of April 2012.

20 Now, NDC, together with several other
21 applicants, including Afilias, applied for a number
22 of new gTLDs, of course, including .WEB, and NDC
23 said that it was applying for .WEB so they would
24 aggressively market .WEB as an alternative to .COM
25 in order to increase competition and fight

1 "congestion" in the market for commercial TLD
2 names, "commercial TLD names that fundamentally
3 advantages older incumbent players." Obviously
4 they are referring to VeriSign.

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

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

15 Slide 14, please.

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

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

1 for a gTLD and why.

2 In fact, ICANN has said in its 18 July
3 2020 letter to you that the public portion of a
4 gTLD application, including the mission and purpose
5 section is, quote, "relative to the Program," close
6 quote, because, open quotes, "it allows the
7 Internet community to comment on the application
8 during the public comment period based on the
9 applicant's statement of how the mission and
10 purpose and how the gTLD is intended to be
11 operated," close quote.

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

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

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

25 So the important dates to keep in mind

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

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

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

1 Agreement.

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

8 We have also laid out for you in some
9 detail the degree to which the DAA allowed
10 VeriSign -- Redacted - Third-Party Designated Confidential Information
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15 We'll be exploring these matters
16 with Mr. Livesay later on.

17 There is a separate handout that we have
18 sent you, which was also annexed to our last
19 submission, which lays out all the provisions of
20 the Domain Acquisition Agreement. We simply ask
21 that you run your eyes down all of those
22 provisions, because I think that it very
23 self-evidently or clearly shows what it is that was
24 intended by the Domain Acquisition Agreement, the
25 degree of control that it gives -- that it gave

1 VeriSign over NDC's application, and the complete
2 application by NDC of its rights and obligations in
3 its application.

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

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

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

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

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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

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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

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1 And in our interpretation, the -- what is
2 affected by virtue of the totality of this
3 agreement in substance and in form gives complete

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

17 Now, I think what's critical here,
18 irrespective of really how one characterizes this
19 agreement, which we say is a sale, transfer and
20 assignment of rights and obligations in the
21 application, is why is it that NDC and VeriSign did
22 this in secrecy? Why is it that ICANN facilitated
23 that secrecy? Why did NDC not tell ICANN about the
24 DAA when the agreement went into effect? Why did
25 VeriSign not tell ICANN?

1 If this was as vanilla as they say, if
2 this was something that was so in accordance with
3 and reflective of market practice, why not let
4 ICANN know? They certainly could have done so, but
5 they chose not to.

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

9 Slide 16, please.

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

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16 I certainly appreciate his honesty.

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1 Or perhaps, if you go to the next slide,
2 they didn't put in -- they didn't let ICANN know or
3 they didn't put in an application change request
4 because of the risk that that request might be
5 rejected.

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

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

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

21 The criteria recommend rejection of change
22 requests that would, and I quote again, "affect
23 other third parties materially," close quote,
24 "particularly other applicants," that's a quote,
25 "or put the applicant filing the change request in

1 a position of advantage or disadvantage compared to
2 the other applicants."

3 The criteria state that if a change
4 request would "materially impact other third
5 parties, it will likely be found to cause issues of
6 unfairness," therefore, weighing in favor of
7 denial.

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

17 So in other words, the fundamental premise
18 underlying ICANN's change request criteria is that
19 applicants must disclose any information that could
20 potentially impact string contention or the
21 interests of other applicants. The focus is less
22 on the nature or affects of the new circumstances
23 on the applicant, but rather on the impact of the
24 new circumstances on other applicants in the
25 contention set and the fairness of the process.

1 So maybe this is why they didn't let ICANN
2 know or didn't file a change request application.

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

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

8 On the 27th of April 2016, ICANN announced
9 that unless the contention set was resolved through
10 private auction, the contention set would be
11 resolved by an ICANN auction on the 27th of July
12 2016.

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

22 As a result of that Ruby Glen submission
23 to ICANN, ICANN wrote to Mr. Rasco. This is Slide
24 18, sorry, is what Mr. Rasco said to Ruby Glen -- I
25 apologize. I am getting ahead of myself -- where

1 he refers to sort of the powers that be, but
2 doesn't say anything about who the powers that be
3 are.

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

6 ICANN writes to NDC, specifically to
7 Mr. Rasco and says, quote, "We would like to
8 confirm that there have not been changes to your
9 application or the NDC organization that need to be
10 reported to ICANN. This may include any
11 information that is no longer true and accurate in
12 the application, including changes that occur as
13 part of regular business operations, (e.g., changes
14 to officers or directors, application contacts,)"
15 et cetera. So ICANN is asking, can you please
16 confirm whether there have been any changes to your
17 application.

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

24 Notably missing is a response to ICANN's
25 request that NDC confirm that there have not been

1 any changes to your application that need to be
2 reported to ICANN.

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

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

19 Ms. Willett calls Mr. Rasco. In a summary
20 of that conversation to the ICANN Ombudsman,
21 Willett represents what Rasco had told her in
22 responding to whatever inquiries it is that she had
23 made or whatever they talked about in that phone
24 call. She says, and I quote, "He used language to
25 give the impression that the decision to not

1 resolve contention privately was not entirely his."
2 This is -- in language, this isn't what Mr. Rasco
3 was saying to the other contention set members.

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

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14 So following that phone call that took
15 place on the 8th of July, Ms. Willett writes to the
16 other members of the contention set, saying that
17 the .WEB auction, ICANN auction, as scheduled on
18 the 27th of July 2016, is going to go forward. She
19 states, and I quote, "In regards to potential
20 changes of control of NDC, we have investigated the
21 matter, and to date we have found no basis to
22 initiate the application change request or postpone
23 this auction."

24 Of course ICANN had found no basis.
25 Ms. Willett doesn't seem to have asked very much

1 and Mr. Rasco certainly wasn't inclined or
2 permitted to say very much.

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

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

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

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23 He goes on to state,
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6 And as we now know, with VeriSign's funds
7 and Redacted - Third Party Designated Confidential Information
8 NDC won the ICANN auction.

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

15 "Subsequent to June 30th, the Company
16 incurred a commitment to pay approximately 130
17 million for the future assignment of contractual
18 rights, which are subject to third-party consent."
19 That's not entirely true. Really the company
20 incurred a commitment to pay in August of 2015, and
21 certainly as of the point in time that the ICANN
22 auction was improperly won by NDC.

23 In any event, the media reports
24 immediately appeared after VeriSign's public 10-Q
25 statement or its 10-Q statement filing with the

1 SEC. And I think this is a very appropriate press
2 report by Kieren McCarthy, who is a long-time ICANN
3 observer. "Someone (cough, cough VeriSign) just
4 gave ICANN 135 million for the rights to .WEB. DNS
5 overlord literally doubled its annual revenue in
6 one day," "DNS overlord" there referring to ICANN.

7 Now, in response to these reports that are
8 appearing in the press, VeriSign issues a press
9 release the next day which I think is also
10 misleading, stating that it had "entered into an
11 agreement with NDC wherein VeriSign provided funds
12 for NDC's bid of the .WEB TLD. We anticipate that
13 NDC will execute the .WEB Registry Agreement with
14 ICANN and will then seek to assign the Registry
15 Agreement to VeriSign upon consent from ICANN."

16 Let's go to the next slide.

17 What did we do? Upon seeing what it is
18 that VeriSign now said, general counsel of Afilias,
19 Mr. Scott Hemphill, wrote to ICANN and says, well,
20 we are aware that the guidebook says that the
21 applicant may not sell, assign or transfer any of
22 the rights obligations with the application, but he
23 makes it clear we really don't know what's going on
24 because we have not been able to review a copy of
25 the agreements, whether it was one or more, between

1 NDC and VeriSign with respect to whatever
2 arrangement that they had made and we ask ICANN to
3 look into the matter, undertake an investigation.

4 Next slide.

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

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

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

23 ICANN didn't have the DAA. So why is
24 ICANN calling -- why is ICANN's counsel calling
25 VeriSign and not NDC or NDC's counsel? Why are

1 they calling outside litigation counsel? Why is
2 the call not being made to NDC's Mr. Rasco, given
3 Ms. Willett had made a call previously to
4 Mr. Rasco? But the call is now being made by
5 outside counsel to outside counsel for VeriSign.
6 Why was there a request for information on a matter
7 that was clearly right now controversial not made
8 in writing? We don't know. It certainly strikes
9 us as very improper and, to use Mr. Enson's words,
10 in fact, sinister.

11 What was said through that conversation
12 between Mr. Enson and Mr. Johnston in that phone
13 conversation? We don't know. In fact, even
14 Mr. Rasco doesn't appear to know anything about
15 what happened or was said. He states in his
16 witness statement at Paragraph 140, "I had not
17 heard from or communicated with Ms. Willett or
18 anyone else at ICANN about .WEB since confirming
19 our payment for .WEB in August 2016." They were
20 out of it. In August 2016, they got their money,
21 we are done. Really quite striking.

22 And of course Mr. Johnston's letter, which
23 you by now have read, does give us some insight
24 into the phone call. It was a very detailed,
25 defensive response, very long response, very

1 defensive response. Is that what he was asked to
2 do by ICANN in that phone call? Again, we don't
3 know.

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

11 So having received no response -- Rosey,
12 please, Slide 25 -- to our earlier letter,
13 Mr. Hemphill again wrote to ICANN requesting that
14 ICANN specify what steps it was taking to
15 disqualify NDC's bid and to confirm that ICANN
16 would not enter into a Registry Agreement with NDC
17 for .WEB until the ombudsman had completed its
18 investigation, the ICANN Board had reviewed the
19 matter and any ICANN accountability mechanisms had
20 been completed.

21 Again, we didn't know anything about the
22 DAA. So on 16th of September -- Slide 26 -- what
23 happens? ICANN sends Afiliias, VeriSign, NDC and
24 Ruby Glen a questionnaire. This is a questionnaire
25 that's sent by Ms. Willett to, and I quote,

1 "facilitate informed resolution," close quote, of
2 questions regarding, among other things, whether
3 NDC should have participated in the 27-28 July 2016
4 .WEB auction and whether NDC's application for the
5 .WEB gTLD should be rejected.

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

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

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

24 Slide 27.

25 And he says, as an applicant in the

1 contention set, you will be notified of any future
2 changes to the contention set status or updates
3 regarding the status of .WEB. "We will continue to
4 take Afiliias' comments, and other inputs that we
5 have sought, into consideration as we consider this
6 matter."

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

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

20 I will tell you we never, not once,
21 received a single communication from ICANN to what
22 "consideration," to use Mr. Atallah's words, was
23 given to the information we provided in the 7
24 October 2016 response or how the questionnaire
25 responses were used to "facilitate informed

1 resolution" of anything, to use Ms. Willett's
2 words. We don't know even if, when or how any
3 informed resolution took place.

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

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

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

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

21 The first time we get some sort of
22 indication or, in fact, a clear answer, from ICANN
23 as to what may have been done with the information
24 we provide is in June 2020, just a couple months
25 ago, when ICANN filed its rejoinder, a point where

1 it finally decides in its rejoinder that's going to
2 tell us what the Board supposedly did.

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

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

19 In reality, we didn't know about the
20 November meeting when we filed our reply in May
21 2020. You will recall that we have had various
22 skirmishes in document production and particularly
23 in the supplemental document production request
24 that we made once we learned about this ICANN
25 meeting.

1 And you are, of course, aware of ICANN's
2 blanket claim of privilege in respect of the
3 meeting and the materials that may have been
4 provided to the Board, also about what ICANN staff
5 said and what was apparently decided.

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

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

15 Go on to the next slide.

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

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

25 There's absolutely nothing that suggests

1 or that would hint to us that .WEB was in any way
2 considered by the Board, either at the Board
3 workshop or subsequently in the November Board
4 meetings.

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

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

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

24 Now, what you are going to be told by
25 ICANN is that, well, nothing needed to be said

1 because of ICANN's well-publicized policy regarding
2 contention sets being kept on hold while
3 accountability mechanisms are pending.

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

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

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

20 There was a litigation involving Ruby Glen
21 that had commenced in July 2016, that is before the
22 ICANN auction, in which ICANN was defending on the
23 basis of the litigation waiver that it requires all
24 new gTLD applicants to accept, not defend on the
25 merits, but on the basis of a litigation waiver, a

1 procedural defense, that they certainly suggest to
2 represent otherwise in their pleadings.

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

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

19 So let's just go on to the next slide.

20 Slide 31, please, Rosey -- 32.

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

25 Well, after we filed IRP, here's what

1 Mr. LeVee wrote to me. He says, "Rather, as you
2 well know, it has not been ICANN's historical
3 practice upon the filing of an IRP to automatically
4 place, or continue, a hold on a contention set or
5 application."

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

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

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

22 All right. So -- now, it isn't
23 controversial between the parties -- next slide,
24 Rosey -- or back to Slide 30. Actually, let's go
25 to Slide 33 -- that during the pendency of the

1 DOJ's investigation of VeriSign's potential
2 acquisition of .WEB that there was no further
3 consideration given to the delegation of .WEB. And
4 we assume that this started sometime in December
5 2017, and we know that the investigation was
6 terminated on the 9th of January 2018.

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

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

18 Next slide.

19 You can see here on this slide the
20 scheduling of that conference call on December
21 12th, which is then going to happen on December
22 14th.

23 Let's go on to the next slide.

24 Clearly we have here communications taking
25 place between VeriSign and ICANN about the

1 delegation of .WEB, some consideration being given
2 to .WEB and its delegation to NDC and then somehow
3 with VeriSign's involvement, not withstanding the
4 fact that no determination has apparently yet been
5 made on the -- on whether the DAA is consistent
6 with the applicant guidebook.

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

16 February 15th, next slide, NDC
17 communicates with ICANN regarding .WEB. Mr. Rasco,
18 "Dear John and Akram," John being John Jeffrey,
19 ICANN's general counsel, Akram Atallah, who we
20 referred to previously, he says, "I hope this
21 message finds you well. In line with our previous
22 conversation" -- what conversation? Anyway -- "I
23 am contacting you regarding NU DOT CO signing the
24 Registry Agreement for .WEB." He goes on to say,
25 "Now that the DOJ CID has concluded and that there

1 are no pending accountability mechanisms associated
2 with our successful bid." He goes on to say,
3 "Thanks so much for all your help throughout this
4 process, and I look forward to wrapping this up."
5 What help, how much help? I thought that they had
6 deferred any consideration pursuant to the November
7 2016 meeting. Apparently they are helping him with
8 this process at this point.

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

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

18 So clearly something is going on,
19 otherwise, again, Mr. Bidzos is not going to be
20 making these statements. Mr. Rasco is not going to
21 be making -- not going to be writing emails talking
22 about all the help that he's been getting
23 throughout the process and revealing information
24 through this email that clearly he was being told
25 things that we weren't.

1 And what was happening in the same time
2 frame with Afilias? I won't go through all of
3 these, but I'll leave them for you to review, but
4 we are writing on February 23rd, around the same
5 time that Mr. Rasco is having phone calls and
6 getting information, asking for an update.

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

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

20 So we continue to ask for information and
21 we are continuously stonewalled by ICANN, leading
22 me to write to ICANN in May of 2018, saying "To
23 date, ICANN has provided no information about the
24 investigation (if any) it has undertaken regarding
25 the concerns raised by Afilias."

1 We still thought that they were
2 investigating this matter because we received no
3 information from ICANN about what they are
4 supposedly doing.

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

14 This is all we get. "Dear John, thank you
15 for contacting the ICANN team. Case 00892769 has
16 been closed. Case information, subject: Update
17 regarding contention set status for Application ID
18 1-" et cetera, et cetera. That's it. "Please
19 contact us if you have any additional questions."
20 We had a lot of questions, but a lot of good it did
21 us asking questions.

22 So then if you go to the next slide, we
23 invoke CEP with ICANN, which is the Cooperative
24 Engagement Process, in order to find out what's
25 going on and see if there's some resolution path

1 that can be created with ICANN.

2 28 August, Afilias and ICANN participate
3 in a CEP meeting. At that meeting we indicate to
4 ICANN that we'll provide them with a draft IRP
5 request. On the 10th of October we provide a draft
6 IRP request to facilitate further discussions. And
7 then on the 13th of November, when we have our next
8 CEP meeting, ICANN proceeds to terminate CEP with
9 us, probably taking into consideration what we said
10 in our IRP.

11 Now, remember the draft IRP request, and
12 14 November IRP says is filed without our knowing
13 anything about the DAA.

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

19 Next slide, Slide 48.

20 Now, one of the things -- because I am
21 running out of time -- how much time do I have
22 left? 20 minutes. I still have quite a bit to
23 cover. There are a couple of slides here that --
24 members of the Panel, that I would like you to
25 spend some time on later on when you're thinking

1 about everything that I have had to say. It is a
2 timeline of events relating to the development of
3 Rule 7.

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

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

18 In October 2018, he is now insisting --
19 they know -- by the way, everybody knows that
20 Afiliias has started CEP by this point in time.
21 ICANN knows that we are going to be filing a draft
22 IRP. Mr. McAuley is saying it is essential that a
23 person or entity has a right to join an IRP if they
24 feel that a significant -- if they claim that a
25 significant interest they have relates to the

1 subject of the IRP. They have to be able to
2 protect their interests in competitive situations.
3 ICANN facilitates VeriSign and NDC's participation
4 in the context of this particular IRP.

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

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

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

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

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

25 So this is, again, to provide context for

1 what the AGB, this massive document that's very
2 detailed, what the intentions were. "The
3 evaluation and selection procedure for new gTLD
4 registries should respect the principles of
5 fairness, transparency and nondiscrimination. All
6 applicants for a new gTLD registry should,
7 therefore, be evaluated against transparent and
8 predictable criteria, fully available to the
9 applicants prior to the initiation of the process.
10 Normally, therefore, no subsequent additional
11 selection criteria should be used in the selection
12 process."

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

18 Okay. Moving on, Slide 50.

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

1 Just to point out a couple of things.
2 "Failure to notify ICANN of any change in
3 circumstances that would render any information
4 provided in the application false or misleading may
5 result in denial of the application."

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

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

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

23 And the same go for the anti-assignment
24 rules set out in Section 2.2.3 of the applicant
25 guidebook. "Applicant may not resell, assign, or

1 transfer any of applicant's rights or obligations
2 in connection with the application."

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

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

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

21 They said that an auction -- "Resolution
22 via auction provides objectivity and transparency."
23 What ICANN wanted to ensure is that everybody would
24 be playing by a set of rules that applied to
25 everyone that was in the contention set. ICANN

1 insisted that, "only bids that comply with all
2 aspects of the auction rules will be considered
3 valid." If a Bidder submits an invalid bid during
4 a round of the auction, "the bid is taken to be an
5 exit bid at the start-of-round price for the
6 current auction round." In other words, bidders
7 that submit invalid bids could not progress to the
8 next round of the auction.

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

17 The auction rules also provide that if at
18 any time following the conclusion of the auction
19 the winner is determined by ICANN to be ineligible
20 to sign a Registry Agreement for the contention
21 string that was the subject of the auction, the
22 remaining bidders with applications that have not
23 been withdrawn will receive offers to have their
24 applications accepted one at a time in descending
25 order.

1 We absolutely believe that ICANN should
2 have determined that NDC is ineligible to sign a
3 Registry Agreement based on what NDC had done
4 insofar as its failure to disclose information and
5 the transfer of rights of its application of
6 concern and the manner in which it participated in
7 the auction.

8 So what, then, are Afiliast's claims? Let's
9 move on.

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

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

23 Next slide.

24 We say that ICANN has breached its
25 articles and bylaws by not applying its standards,

1 policies, procedures or practices inequitably -- of
2 course, "inequitably" meaning unjustly or unfairly.

3 That ICANN has failed to act justly or
4 failed to act fairly in the application of its
5 standards and policies, and specifically its
6 application of the new gTLD Program rules.

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

11 Okay. So now let's turn --

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

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

22 What claim do you make in relation to that
23 decision not to make a pronouncement on the NDC bid
24 in November 2016? What claim do you make in
25 relation to that Board decision?

1 MR. ALI: Well, first of all,
2 Mr. Chairman, I don't concede or in any way accept
3 that the Board made a decision. I don't think that
4 there's any --

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

12 MR. ALI: First of all --

13 ARBITRATOR BIENVENU: Let me just finish
14 my question.

15 MR. ALI: I apologize.

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

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

23 So there's a claim that if the -- the
24 claim is certainly one based on lack of
25 transparency, certainly one based on failure to

1 make a decision. If they did take the decision
2 that they took, then our claim is that staff have
3 violated the articles and bylaws by then proceeding
4 inconsistently with that -- with that alleged
5 decision.

6 ARBITRATOR BIENVENU: In what sense?

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

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

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

25 So they made a decision --

1 ARBITRATOR BIENVENU: Thank you.

2 MR. ALI: -- without being transparent.

3 They made a decision without due process. If they
4 didn't make a decision, then certainly staff were
5 proceeding in a way that was not in accordance with
6 what the Board apparently decided, about which we
7 know nothing.

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

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

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

20 Well, we certainly don't think that the
21 business judgment rule applies at all here. Albeit
22 this was language -- that this was a finding that
23 was made by the ICM Panel under a different set of
24 bylaws that didn't refer specifically to the
25 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.

1 Moreover, the business judgment rule can't
2 apply to ICANN's staff's conduct.

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

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

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

21 What does the CCWG-Accountability tell
22 you? They tell you that with respect to a
23 particular IRP, "The IRP Panel shall decide the
24 issues presented based on its own independent
25 interpretation of ICANN's Articles of Incorporation

1 and Bylaws in the context of applicable governing
2 law," including international law, "and prior IRP
3 decisions." "Decisions will be based on each IRP
4 panelist's assessment of the merits of the
5 claimant's case. The Panel may undertake a de novo
6 review of the case, make findings of fact, and
7 issue decisions based on those facts."

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

16 At the end of the day, Mr. Chairman and
17 members of the Panel, I will say this: Given the
18 position that ICANN has taken in this IRP and
19 given -- Rosey, next slide, please -- and given the
20 position that ICANN has articulated in its
21 pleadings, where ICANN has called us hypocritical
22 and talked about the inequity of Afilias' claims --
23 look at what they say, "The hypocrisy and inequity
24 of Afilias' claims against ICANN are palpable."
25 They have been shameless, fundamentally unfair and

1 self-serving. They have been tone-deaf. This is
2 position -- these are positions that ICANN is
3 taking.

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

10 Next slide.

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

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

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

23 ARBITRATOR BIENVENU: Thank you very much
24 indeed, Mr. Ali, for your oral remarks, and our
25 thanks also to your team behind you for assisting

1 you in preparing the PowerPoint presentation that
2 you used to support your remarks.

3 So we have a 15 -- we will have a
4 15-minute break, and then we will resume to hear
5 the opening presentation of ICANN. I am looking to
6 our friends at Trial Lawyer -- sorry,
7 TRIALanywhere, do we all -- what are our marching
8 orders for the break, JD?

9 (Discussion off the record.)

10 (Whereupon a recess was taken.)

11 ARBITRATOR BIENVENU: Please proceed.

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

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

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

21 You will also meet tomorrow two other law
22 partners working with us, each of whom you have
23 already met by phone, Eric Enson here with me in
24 Los Angeles, who will be representing ICANN Board
25 member Becky Burr. And David Wallach, who is with

1 Mr. Smith in San Francisco and will be representing
2 ICANN Deputy General Counsel Samantha Eisner. Also
3 with me in my office are my colleagues Kelly
4 Ozurovich and Mina Saffarian.

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

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

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

22 This IRP will have the greatest number of
23 hearing dates of any IRP ever. Members of the
24 Panel, we appreciate both your diligence and your
25 patience.

1 Let me describe for you the outline of
2 their opening statement. I will provide the
3 production, during which we will discuss, among
4 other things, a bit of ICANN's history, creation of
5 the new gTLD Program, the nature of ICANN's
6 accountability mechanism, such as this one, and a
7 timeline of events associated with .WEB.

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

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

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

22 Mr. Smith will then return the microphone
23 to me, and I will discuss the competition issues
24 that Afilias has raised, not in too much detail,
25 but I will discuss ICANN's mission with respect to

1 creating the Domain Name System and how ICANN has
2 undoubtedly met that mission from a competitive
3 standpoint, how ICANN addresses claims that a
4 particular action were meant maybe anticompetitive,
5 including the facts, as our witnesses explain, that
6 ICANN is not an economic regulator, and then I will
7 explain how ICANN's experts and NSI's experts --
8 actually, we won't need to use NSI's experts at
9 all, whose statements ICANN has largely endorsed,
10 confirm that there would be no basis for ICANN to
11 reject on competition grounds the possibility that
12 VeriSign might one day wind up operating the
13 registry for .WEB.

14 So the introduction is broken up into five
15 parts.

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

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

23 ICANN is a California not-for-profit
24 public benefit cooperation, and its mission is to
25 oversee the technical coordination of the DNS.

1 It is a little difficult to read, but the
2 point is ICANN has a Board that consists of 16
3 members. They are selected in a variety of ways
4 under ICANN's bylaws. Article 7 of the bylaws
5 actually requires the creation of a diverse and
6 very international group of directors. ICANN has
7 approximately 400 staff members. They are based
8 here in Los Angeles, but also around the world.

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

16 There are also four advisory committees,
17 one ombudsman and an extraordinarily large group of
18 diverse stakeholders literally from all over.

19 Article 7 of ICANN's bylaws, in particular
20 Section 7.3, requires that members of the ICANN
21 Board be very knowledgeable about ICANN's mission
22 and the Domain Name System generally. Board
23 members must understand and consider the potential
24 impact of ICANN decisions on the global Internet
25 community.

1 They must be personally familiar with the
2 items on that slide, registry and registrar
3 operations, technical standards and protocols,
4 policy development and a broad range of business,
5 individual, academic and non-commercial uses are
6 built right into the Board bylaws. Board members
7 have the duty to act in what they have reason to
8 believe are the best interests of ICANN from its
9 bottom-up, consensus-driven, multistakeholder
10 model.

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

19 What I want to also mention is that
20 Section 4, Article 4, provides for the
21 reconsideration requests, and you will also hear
22 much in this IRP about reconsideration requests,
23 including the fact that Afilias had multiple
24 opportunities to file reconsideration requests
25 related to .WEB as soon as the action for .WEB was

1 completed in 2016, but it elected not to do so. It
2 elected not to file reconsideration requests for
3 two years. We'll talk about the consequence of
4 that in due course.

5 Slide 9, please.

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

14 Next slide.

15 "IRPs Are Not Intended to Supplant the
16 Decision Making of the Board." Section
17 4.3(i)(iii), says, "For Claims arising out of the
18 Board's exercise of its fiduciary duties, the IRP
19 Panel shall not replace the Board's reasonable
20 judgment with its own so long as the Board's action
21 or inaction is within the realm of reasonable
22 business judgment."

23 Mr. Smith will describe this and discuss
24 this in more detail, but I wanted to give the
25 overview.

1 Slide 11.

2 I want you to know that Afilias is
3 extremely familiar with ICANN's accountability
4 mechanisms. I know this slide is hard to read. My
5 point for you is not to read it. My point is for
6 you to see the two exhibit numbers, because on the
7 left, my left, Exhibit R-43 is a reconsideration
8 request that Afilias submitted in September of 2014
9 with respect to its application for .RADIO,
10 R-A-D-I-O. Exhibit R-28 reflects that in October
11 2015 Afilias initiated an IRP, also with respect to
12 .RADIO, although it then withdrew its request
13 shortly thereafter.

14 Slide 12.

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

1 2016.

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

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

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

21 Had Afilias submitted a reconsideration
22 request from 2016, the ICANN Board would have been
23 immediately involved because the ICANN Board or a
24 committee of the Board immediately is involved in
25 the reconsideration requests, both at that time and

1 under the new bylaws that came into effect in
2 October 2016.

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

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

10 Next slide.

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

14 Next slide.

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

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

25 Now, Afilias has made allegations and a

1 large chunk of the opening statement is based on
2 the notion that ICANN and VeriSign have been
3 conspiring with respect to .WEB and in this IRP.

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

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

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

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

25 Network Solutions liked being the only

1 registrar for top-level domains back then, but the
2 United States government created ICANN and told
3 ICANN to create policies that would create
4 competition, first at the registrar level.

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

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

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

23 As for competition at the registry level,
24 ICANN proceeded a little bit more slowly because it
25 needed to. The first thing it did in the year 2000

1 was to conduct a trial to make sure that the
2 introduction of new top-level domains would not
3 affect the security or the stability of the
4 Internet, and I am pleased to tell you that it did
5 not.

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

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

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

22 What ICANN then did was to create what was
23 originally the first version of the guidebook. You
24 know it well today as a 338-page document that has
25 tried to anticipate virtually everything it could.

1 But the point was that the staff published a
2 guidebook. The draft was revised multiple times.
3 ICANN received hundreds and hundreds and hundreds
4 of public comments over those years. And in 2012,
5 June, the ICANN Board adopted the operative
6 guidebook.

7 Slide 16.

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

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

20 Slide 17.

21 Under Section 4.1 of the guidebook, when
22 you have two or more applicants that have submitted
23 for the same string, this results in a contention
24 set. You have heard this phrase many times. And
25 the guidebook provides two ways to resolve the

1 contention set. As indicated in this provision,
2 one of the ways is if the parties settle on their
3 own, but if they cannot, ICANN conducts an auction.
4 You read about that a lot as well. I want to be
5 clear, this is not a public auction. It is an
6 ICANN auction. It is limited to members of the
7 contention set.

8 Slide 18.

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

13 Continue with the slide, Kelly.

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

20 Next slide, please.

21 Many of the applications had obstacles.
22 More than 200 contention sets were created. So
23 what that means is two or more applicants
24 submitting for the same string. Had to be ways of
25 resolving it. Hundreds and hundreds -- this slide

1 doesn't really explain -- were subjected to
2 objection proceedings, that there were intellectual
3 property claims or other claims, all of which had
4 to be worked out, and a little more than 20 new
5 gTLDs have been subject to the IRP or litigation.

6 Next slide.

7 ICANN anticipated there would be disputes,
8 no question. As the last slide showed, there were
9 lots of disputes and lots of contention sets.
10 ICANN also knew that the bylaws contained
11 accountability mechanisms.

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

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

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

23 Here's what our witnesses said on that
24 subject.

25 This is Mr. Disspain, ICANN Board

1 director. You will meet him likely Thursday.
2 "ICANN adhered to, and continues to adhere to, the
3 procedures set forth in the Bylaws and the New gTLD
4 Program's Applicant Guidebook that require requests
5 for ICANN to take action or not take action with
6 respect to a particular application being made
7 within ICANN's Accountability Mechanisms, rather
8 than private lobbying or letter-writing campaigns."

9 Next slide.

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

17 Next slide.

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

25 This is what Mr. Disspain says, "As a

1 matter of procedure, ICANN places new gTLD
2 applications or contention sets on hold, and
3 generally takes no action on those applications or
4 contention sets while Accountability Mechanisms are
5 pending, although with respect to IRPs, claimants
6 are typically required to submit a request for
7 interim measures in order for the hold to be
8 instituted."

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

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

23 As I said -- and we predicted that Afiliias
24 will argue that ICANN does not put contention sets
25 on hold. What I have done is give you Exhibit

1 R-22, which is an April 2014 termination of the
2 ICANN Board governance on a reconsideration
3 request. Remember, most issues at ICANN bubble up
4 to the Board via reconsideration requests. That's
5 the evidence you will hear.

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

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

24 As I mentioned, there was a string
25 contention objection because of .WEB and .WEBS with

1 the argument that they were substantially similar
2 and that resulted in a contention set.

3 Next slide.

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

7 Next slide.

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

15 Next slide.

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

23 Next slide.

24 Ms. Willett and the ICANN ombudsman did
25 investigate claims that NDC's ownership and control

1 had changed. She addresses this in her witness
2 statement. On July 13th they complete their
3 investigation, finding no reason to postpone the
4 auction.

5 Next slide.

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

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

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

25 Let's stay there a minute. I want to be

1 clear, because there's suggestions to the contrary.
2 This was the very first time ICANN knew anything
3 about any agreement between VeriSign and NDC. We
4 are accused of conspiring to keep something
5 hush-hush. Ask all of our witnesses, this is the
6 first time.

7 Next slide.

8 Donuts, the next day, invoked ICANN's CEP,
9 Cooperative Engagement Process, regarding .WEB.
10 Mr. Ali talked about a cooperative engagement
11 process. I will tell you that I understand the
12 discussions that occurred during CEPs are intended
13 to be privileged, and I am not going to comment on
14 privileged communications, but the important point
15 is that because Donuts invoked the CEP, that put
16 the .WEB contention set back on hold.

17 Next slide.

18 Afiliias' general counsel wrote to ICANN,
19 demanding that ICANN deny NDC's application. And I
20 am calling out this letter and the next so that you
21 can see that Afiliias' claims are strikingly similar
22 and virtually identical to the claims Afiliias makes
23 today. Afiliias says, hey, we think that there's
24 been a transfer of rights and obligations, and we
25 think there's been a material change in the

1 applicant's financial condition.

2 Next slide.

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

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

21 So the record shows that rather than
22 filing reconsideration requests, CEP or filing --
23 invoking a CEP or filing an IRP, Afiliias sent ICANN
24 letters. They continued to do that in 2018. It
25 did not initiate an accountability mechanism, which

1 is what they could easily have done.

2 Next slide.

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

7 Next slide.

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

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

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

25 MR. LeVEE: Thank you, Mr. Chairman, for

1 the question. I believe that when you look at the
2 totality of the facts, where we have one letter
3 responding to Afiliias saying that we are looking at
4 this and then time passes and Afiliias still does
5 not file accountability mechanisms, that they
6 should have, could have and in normal circumstances
7 I believe would have filed a reconsideration
8 request because they knew, everyone knew, that
9 that's how you bring -- you force the Board to act.

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

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

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

1 ARBITRATOR BIENVENU: Thank you.

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

10 So now look at the next letter.

11 Slide 48.

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

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

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

25 Slide 49.

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

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

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

24 Next slide.

25 We do know that in January of 2017 the

1 United States Department of Justice Antitrust
2 Division sent a civil investigation demand. It is
3 essentially a subpoena. And they sent it to
4 VeriSign and others. They also sent it to ICANN.
5 And the CID sought material in connection with the
6 investigation of VeriSign's proposed acquisition of
7 NDC's contractual rights to the .WEB generic
8 top-level domain. So it is clear the DOJ was
9 investigating this precise matter.

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

20 Slide 52, please.

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

25 Next slide.

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

10 Next slide.

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

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

20 Next slide.

21 Now, we haven't discussed much the
22 so-called DIDP, D-I-D-P, process. It stands for
23 Documentary Information Disclosure Policy, a policy
24 designed to permit members of the public to get
25 certain documents that are in ICANN's possession

1 that are not otherwise privileged or confidential.
2 And Afilias has submitted two of these requests.
3 They then filed a reconsideration request on the
4 DIDP projections of our decision. ICANN denied the
5 reconsideration request on June 5.

6 Next slide.

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

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

21 Next slide.

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

1 Next slide.

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

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

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

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

21 ARBITRATOR BIENVENU: Mr. LeVee, I would
22 like, if I may, to ask a question which I raised in
23 one of our prior hearings, and that question is:
24 Is there not tension between the sending by ICANN
25 of a Registry Agreement to NDC for execution and

1 the statement in your pleadings -- and I was
2 actually reacting to a statement in one of your
3 letters that the ICANN Board has never pronounced
4 on whether the NDC bid was compliant.

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

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

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

15 What had happened to that point was that
16 Afiliias had sent letters and the Board had
17 determined that it would wait for accountability
18 mechanisms to play out.

19 I don't know, and you can ask Mr. Disspain
20 whether the Board envisioned or assumed that
21 Afiliias would initiate the accountability
22 mechanism, but the bottom line is that it had not
23 done so. And yes, they had sent letters
24 complaining, but you will hear from Ms. Willett,
25 who will testify on Wednesday, that ICANN has a

1 process under the guidebook, and the process is we
2 go from Stage 1 to Stage 2 to Stage 3, et cetera.

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

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

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

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

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

23 And by raising the question, I express no
24 view on whether it was. I just see -- I find it
25 difficult to reconcile the decision to send it out

1 and the statement that you made on behalf of ICANN
2 that ICANN never pronounced on the compliant nature
3 of the bid.

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

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

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

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

23 I can't tell you what would have happened
24 in the event that Afilias had not done what it had
25 promised to do.

1 I understand the tension you are
2 identifying, and my -- the core of my response is
3 that ICANN followed the guidebook in telling -- in
4 doing what it was supposed to do under the
5 guidelines and knowing that Afilias did have
6 concerns and still had not raised reconsideration
7 requests, CEP and IRP and done what they could
8 easily have done two years earlier.

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

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

17 MR. LeVEE: Anything else?

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

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

22 MR. BIENVENU: Thank you very much,
23 Mr. LeVee. We will hear from you later in the
24 presentation.

25 Mr. Smith.

1 MR. SMITH: Can everybody see and hear me?

2 ARBITRATOR BIENVENU: I certainly can.

3 Welcome.

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

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

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

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

25 The Panel's jurisdiction is limited by,

1 first, the types of disputes that can be heard, the
2 extent to which the Board's judgment can be
3 challenged, the limitations and repose periods that
4 restrict the claims that can be considered, and
5 then also the remedies that are available.

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

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

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

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

1 to a Dispute."

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

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

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

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

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

1 a particular DISPUTE."

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

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

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

14 MR. SMITH: Yes.

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

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

22 So it would have to be a separate request
23 and consent by ICANN, but it is not something
24 that's automatically contemplated -- or
25 contemplated as automatic in the bylaws.

1 ARBITRATOR CHERNICK: Thank you.

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

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

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

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

23 ARBITRATOR BIENVENU: Thank you.

24 MR. SMITH: Turning now to the standard of
25 review and Section 4.3(i), it provides that, "Each

1 IRP Panel shall conduct an objective, de novo
2 examination of the Dispute." I don't think there's
3 any disagreement regarding that.

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

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

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

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

23 Now, the bylaws do not define the Board's
24 fiduciary duty, which is referenced in 4.3(i).

25 ICANN's a California non-profit corporation,

1 therefore, this term has been construed in the
2 courts of California law. Under California law,
3 all actions of the Board on behalf of ICANN are
4 subject to a fiduciary duty to act in good faith
5 and in the interest of ICANN.

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

11 So all actions or inactions of the Board
12 addressing matters relating to ICANN are in the
13 exercise of the Board's fiduciary duties.

14 So regardless whether the action or
15 inaction resulted in a formal Board resolution or
16 not, when the Board meets and discusses issues
17 relative to ICANN, the directors and the Board in
18 general are exercising their fiduciary duties.

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

23 ARBITRATOR KESSEDJIAN: Mr. Smith, I am
24 getting at this stage -- hopefully you can answer
25 that question, if not immediately, then we can

1 revert to it later on. But how do you reconcile
2 what you have just described under California law
3 with the fact that ICANN is a body that has the
4 kind of duty -- I don't know whether we can call it
5 fiduciary or not -- to the Internet community? And
6 the accountability principle that you find in the
7 ICANN mission is also to be considered under
8 fundamental rights and international law
9 principles.

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

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

22 They also make reference here and there to
23 ICANN acting in accordance with ICANN's bylaws,
24 which include its mission and its core values. And
25 your duty in considering the claims is to consider

1 whether ICANN or its Board acted in violation of
2 either its bylaws or its articles of incorporation.

3 But when you do so, when you do so, you
4 have to act within the jurisdictional limits that
5 are very clearly applicable to you through Section
6 4.3 of the bylaws and the interim supplementary
7 procedures.

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

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

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

22 ARBITRATOR KESSEDJIAN: Let me just give
23 precision here. 4.3 that you are invoking must be
24 read in the context. So my question was really the
25 context in which 4.3 must be applied.

1 I do agree with you that we have to act
2 within our jurisdiction. This is a fundamental
3 principle.

4 MR. SMITH: Thank you.

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

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

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

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

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

22 MR. BIENVENU: Right. But you are not
23 answering my question. My question was: Aren't
24 you, in fact, saying that this applies all the
25 time? Because what actions or inactions of the

1 Board would not be on behalf of ICANN? This
2 amounts to saying that the rule you say applies
3 here applies to all Board decisions.

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

9 ARBITRATOR BIENVENU: Thank you.

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

23 The claimant has the burden that's showing
24 that any actions or inactions of the Board that it
25 challenges do not comply with this standard.

1 The second prong is not at issue here
2 because Afiliias has made no attempt to show a
3 conflict of interest, improper motive or other
4 circumstances vitiating the presumption that the
5 Board complied with its fiduciary duties.

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

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

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

22 MR. SMITH: Well, I don't have one off the
23 top of my head. I will tell you, though, that I
24 think that the Board's decision not to take action
25 while accountability mechanisms were pending or

1 anticipated is objectively reasonable in the
2 circumstances of this particular case.

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

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

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

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

21 So if it acts in direct derogation of its
22 bylaw responsibilities, knowing what those bylaw
23 responsibilities are, that is something that begins
24 to gravitate into the realm of objectively
25 unreasonable.

1 ARBITRATOR KESSEDJIAN: Thank you. But
2 still think about a concrete example.

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

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

12 One, it limits the period for bringing the
13 claims and also a repose period. And this first
14 slide highlights the limitations period. So, "A
15 CLAIMANT shall file a written statement of a
16 DISPUTE," that's the request for IRP, here the
17 amended request, "with the ICDR no more than 120
18 days after a CLAIMANT becomes aware of the material
19 effect of the action or inaction giving rise to the
20 DISPUTE."

21 That's the limitations period.

22 And then here is the repose period that is
23 set forth in Rule 4, "A statement of a DISPUTE may
24 not be filed more than 12 months from the date of
25 such action or inaction."

1 So the 120-day limitation period turns on
2 the date that the claimant became aware of the
3 material effect of the action or inaction at issue,
4 but the claimant's state of mind is irrelevant to
5 the repose period. Under the repose provision, an
6 IRP may not be initiated more than 12 months from
7 the date of the action or inaction at issue. Only
8 the date of the action or inaction being challenged
9 matters.

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

18 Then in the Resolute Forest Products case,
19 which is another NAFTA proceeding, the Panel there
20 stated, "Although the time limit specified in"
21 those articles of NAFTA "is not itself a procedure,
22 compliance with it is required for the bringing of
23 a claim, which is certainly a procedure. This is
24 enough to justify the conclusion that compliance
25 with the time limit goes to jurisdiction."

1 Now, the Panel's jurisdiction is also
2 limited with respect to available remedies. And
3 the Panel's remedial authority is defined by
4 Section 4.3(o), and it provides, "Subject to the
5 requirements of this Section 4.3, each IRP Panel
6 shall have the authority to," and then we have
7 highlighted the only provisions that have any
8 application in this IRP. It is 4.3(o)(iii),
9 "Declare whether a Covered Action constituted an
10 action or inaction that violated the Articles of
11 Incorporation or Bylaws."

12 And then indirectly Section 4.3(o)(iv)
13 gives the Panel the authority to "Recommend that
14 ICANN stay any action or decision, or take
15 necessary interim action, until such time as the
16 opinion of the IRP Panel is considered."

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

24 The only affirmative relief is under
25 Subsection (iv), and that's the provision that we

1 just read that gives the Panel authority to
2 recommend that ICANN stay any action or take
3 necessary interim action during a very short period
4 of time.

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

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

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

20 Here in this call-out we have a statement
21 of black letter law in California, but I think this
22 principle is recognized almost in all legal
23 systems, and it is that the rule of *expressio unius*
24 *est exclusio alterius* "creates an assumption that
25 when a statute designates certain persons, things,

1 or manners of operation, all omissions should be
2 understood as exclusions."

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

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

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

20 This is really a non-sequitur. The
21 Panel's decision will be binding and final only if
22 it's within the limits of the Panel's prescribed
23 jurisdiction. A decision by the Panel dealing with
24 a difference not contemplated by or not falling
25 within the terms of the submission to arbitration

1 here, the bylaws and supplementary procedures is
2 subject to vacatur under the New York Convention
3 Section V(1)(c), implemented through Sections 67
4 and 68 of the English Arbitration Act of 1996,
5 which is inferred by the fact that London is the
6 place where the arbitration is set.

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

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

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

25 When I say it is within its jurisdiction,

1 I mean that that is a remedy that the Panel can
2 give. It is outside the Panel's jurisdiction to
3 the extent those claims were not timely brought.

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

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

22 Request No. 7 here on the slide is
23 requesting other relief as the Panel may consider
24 appropriate in the circumstances. Doesn't specify
25 any particular form of relief.

1 The only thing I will say about it is that
2 any additional relief that the Panel may consider
3 must be within the limits of the Panel's authority
4 as described by Section 4.3(o). It must be related
5 to a claim that was asserted in the amended IRP and
6 is not time-bolted.

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

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

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

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

25 In Afilias' briefs, they are replete with

1 strident rhetoric, but Afiliias makes little effort
2 to show that any particular action or inaction by
3 ICANN violated a particular provision of the bylaws
4 or articles.

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

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

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

21 And (b)(iii) is, "Where feasible and
22 appropriate, depending on market mechanisms to
23 promote and sustain a competitive environment in
24 the DNS market." So the emphasis there is
25 depending on the market.

1 And then (b)(iv) is, "Introducing or
2 promoting competition in the registration of domain
3 names where practicable and beneficial to the
4 public interest as identified through the
5 bottom-up, multistakeholder policy development
6 process."

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

16 It goes on to state that, "ICANN failed to
17 fully investigate rumors that NDC had reached an
18 agreement with VeriSign prior to the .WEB Auction,"
19 what I'll refer to as the pre-auction period, that
20 "ICANN failed to sanction NDC for lying to ICANN"
21 during that investigation, that "ICANN further
22 violated its policy of transparency by refusing to
23 update Afilias as to the status of its
24 investigation," and then, "Once the DAA was
25 disclosed to ICANN, ICANN failed to disqualify NDC

1 on the basis that its bids submitted at the .WEB
2 Auction were all invalid."

3 So Afiliias' claim is very extreme.
4 According to Afiliias, ICANN's Board had no
5 discretion under its bylaws but to disqualify NDC
6 in the fall of 2016 based on NDC's alleged
7 violations of the guidebook in entering the DAA.

8 In other words, Afiliias is arguing that
9 the Board violated the bylaws by not disqualifying
10 NDC and instead opting not to take action on the
11 claims being asserted by Afiliias and others while
12 the related accountability mechanism was pending.
13 That's their core claim.

14 Now, ICANN allegedly violated its mandate
15 to promote competition by enabling VeriSign to gain
16 control over .WEB. This is from Afiliias' amended
17 request for IRP at Paragraph 83, Section 5,
18 Paragraph 83. Here it states, "ICANN's failure to
19 apply its documented policies consistently,
20 neutrally, objectively and fairly -- and its
21 failure to carry out its activities through open
22 and transparent process -- have also resulted in
23 the violation of ICANN's mandate to introduce and
24 promote competition." "By violating its
25 Commitments and Core Values in its Bylaws, thereby

1 enabling VeriSign to gain control over .WEB, ICANN
2 has all but destroyed the last best chance to
3 create a truly competitive environment within the
4 DNS -- i.e., one of the principal purposes of the
5 New gTLD Program, and indeed, of ICANN's
6 existence."

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

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

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

22 Now the Panel's Phase I decision -- I am
23 going to turn now to the brunt of the Rule 7 claim.

24 The Panel's Phase I decision rejected most
25 of the Rule 7 claim as beyond the Panel's

1 jurisdiction. The surviving part of the claim is
2 limited to Afiliias' allegation that ICANN staff
3 acted improperly in the development of Rule 7.
4 This is Paragraph 182 of the Panel's decision on
5 Phase I, and it provides, "For the reasons just
6 given, the Panel declines in this decision to make
7 a finding as to the propriety of the involvement of
8 ICANN's staff in the development of the amicus
9 provisions of Rule 7, and Afiliias' contention that
10 its action violated the Articles of Incorporation
11 and Bylaws" of ICANN.

12 Now, the Panel did not allow Afiliias' Rule
13 7 claim to prevent the Amici from participating in
14 this IRP, which was the principal purpose of the
15 claim. So as far as ICANN's concern, what little
16 remains of this claim is a time-consuming sideshow.

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

23 As I just explained, Afiliias' principal
24 claim, its core claim is that ICANN had an
25 immediate, absolute and unqualified obligation to

1 disqualify NDC and reject its application in
2 August, September, October, November 2016, when
3 Afiliias first asserted its allegations against NDC
4 in the two letters to ICANN that Mr. LeVee referred
5 to earlier.

6 And in their reply memorial, Afiliias
7 emphasizes this. "ICANN knew that NDC committed
8 these material breaches of the New gTLD Program
9 Rules by (at the latest) August 2016, when VeriSign
10 provided ICANN with the DAA (and also the 26 July
11 2016 letter from Livesay to Rasco)." That's the
12 related letter agreement. "Yet ICANN failed to act
13 in accordance with the New gTLD Program Rules and
14 its Articles and Bylaws."

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

21 As Mr. LeVee stated, the claims that
22 Afiliias asserted then back in August and September
23 2016 are the same claims that it's asserting in
24 this IRP.

25 And what the next slides do, for purposes

1 of this comparison, on these slides, we are using
2 the September 9, 2016, letter from Scott Hemphill,
3 the general counsel of Afilias, to ICANN and then
4 their claims as they have been asserted in this
5 IRP.

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

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

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

1 to transfer NDC's rights and obligations regarding
2 its .WEB application to VeriSign."

3 So it is simply making the point, we don't
4 need to see the DAA to know that they entered into
5 an arrangement that violated the guidebook in the
6 ways that we specified in this letter October 8,
7 2016, and September 9, 2016, which are exactly the
8 same claims that are asserted here.

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

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

25 Its claims regarding the inadequacy of

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

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

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

24 But whether we are talking about the
25 pre-auction investigation claim that they actually

1 asserted in their amended request or this belatedly
2 asserted post-auction claim, both are time-barred.

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

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

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

20 So this next slide shows what they
21 actually say they rely on for their equitable
22 estoppel defense. It is a letter from Akram
23 Atallah to Scott Hemphill. And he says in that
24 letter on September 30, 2016, "As an applicant in
25 the contention set, the primary contact for

1 Afiliias' application will be notified of future
2 changes to the contention set status or updates
3 regarding the status of relevant Accountability
4 Mechanisms. We will continue to take Afiliias'
5 comments, and other inputs that we have sought,
6 into consideration as we consider this matter."

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

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

25 And finally, there's no evidence of

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

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

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

19 The next slide simply shows that at this
20 time, Afiliias was represented by counsel, Mr. Scott
21 Hemphill. He signed the letter on September 9,
22 2016, and then he cc'd our friend Arif Ali at
23 Dechert.

24 Now, I am going to briefly describe --
25 because I am aware of the time -- how Afiliias'

1 claims lack merit, that ICANN actually complied
2 with its articles and bylaws. I am going to go
3 through this very quickly and leave some of this
4 for you to review once the hearing today is over or
5 at some later point.

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

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

23 Now, the Board's decision to let related
24 accountability mechanisms run their course was made
25 in the exercise of the Board's fiduciary duties.

1 Given the surrounding circumstances that we just
2 very briefly touched upon and ICANN's established
3 practices, that decision was objectively reasonable
4 and is entitled to deference under the business
5 judgment rule.

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

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

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

1 submission. It wasn't in their reply.

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

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

13 So the technical arguments that Afilias
14 has only just made as to why the Board's judgment
15 is not entitled to deference under the business
16 judgment rule is contrary to the text of Section
17 4.3(o) -- sorry, 4.3(i)(iii), which contains the
18 business judgment and standards and the other bylaw
19 provisions that Afilias cites.

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

23 At Page 45 of the slides, when he
24 identified the ICANN Board decision of which you
25 are speaking, I think he said in India, he was

1 explaining that the Board meets all over the world,
2 and 3rd November, that's the date of the workshop.
3 So do I understand that the workshop happened on
4 the same day as the actual Board meeting?

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

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

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

22 The remainder of my slides, they address
23 very specifically the contentions Afiliias makes as
24 to why NDC violated the guidebook as a result of
25 the main acquisition agreement, and they set out

1 the Afiliias charge and then the NDC-VeriSign
2 counter argument.

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

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

21 So with that, ICANN hasn't made a decision
22 on any of this. We reserve our position, but I
23 just wanted to point out that ICANN does have
24 discretion with respect to these matters. Afiliias
25 is wrong in saying ICANN has no choice but to

1 disqualify NDC. And that these are all matters
2 that are within ICANN's discretion.

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

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

7 Mr. LeVee.

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

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

20 At this particular meeting, there was a
21 Board workshop. And Mr. Disspain and Ms. Burr can
22 describe the intensity of these workshops as a
23 generic matter, but the next two Board meetings
24 were November 5th and November 8. So the workshop
25 occurred probably on a -- a typical session ICANN

1 meeting ends on a Thursday with a Board meeting.
2 So if I work backwards, the session that was the
3 workshop that Mr. Disspain identifies was probably
4 about five days sooner, perhaps even older.

5 But the Board and literally 2- or 3,000
6 people descend on these locations and participate
7 and attend dozens and dozens of sessions, some
8 including the Board, some not including the Board,
9 most really not including the Board. Is that
10 helpful?

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

15 MR. LeVEE: Yes, sir.

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

18 MR. LeVEE: Yes.

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

24 MR. LeVEE: Because of the way the
25 workshop was done -- I am trying to be very careful

1 because of the privilege. The purpose of the
2 workshop was to focus on .WEB and top-level domains
3 where there were issues. And the Board received
4 advice from counsel, general counsel and the deputy
5 general counsel in particular, and then as,
6 Mr. Disspain explains, the Board decided that it
7 would take no action. There was no specific
8 resolution that was passed in that -- with respect
9 to the Board's decision not to do anything.

10 ARBITRATOR BIENVENU: Thank you very much.

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

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

21 So very briefly on this page, these are
22 the core values, and we can discuss and explore
23 them a little bit more in due course, but as I
24 mentioned and I emphasized in my opening, the first
25 portion of my opening, ICANN clearly has introduced

1 and promoted competition. There's nothing in the
2 core values that says that ICANN is supposed to
3 choose between registry operators to determine
4 which registry operator may or may not create the
5 most competition.

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

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

24 And interestingly, if you read the
25 exhibit, the registry operators were arguing that

1 ICANN has very limited authority and it ought to
2 stay in its lane. This is what the regulatory
3 operators, signed by Afilias and several others,
4 said. "While ICANN's mission includes the
5 promotion of competition, this role is best
6 fulfilled through the measured expansion of the
7 name space and the facilitation of innovative
8 approaches of the delivery to domain name
9 regulatory services. Neither ICANN nor the GNSO
10 have the authority or expertise to act as antitrust
11 regulators. Fortunately, many governments around
12 the world do have this expertise and authority, and
13 do not hesitate to exercise it in appropriate
14 circumstances."

15 Next slide.

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

22 You are not going to meet Mr. Kneuer
23 because Afilias says he is irrelevant, but his
24 statement is quite relevant in our view. So it
25 goes unrebutted because of Afilias' decision not to

1 call him and cross-examine him.

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

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

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

1 competition issues.

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

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

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

24 But the point is that what ICANN would
25 have done if it had found a competition concern was

1 to ask the Department of Justice to take a look,
2 and that's what happened without ICANN referral.

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

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

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

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

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

24 The Panel should find that Afilias' claims
25 are time-barred, and Mr. Smith spent a fair amount

1 of time on that, and appropriately so. They are
2 either time-barred -- or they are time-barred and
3 they are otherwise outside the Panel's limited
4 jurisdiction or seek relief the Panel has no
5 authority to grant.

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

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

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

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

21 (Whereupon a recess was taken.)

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

25 Please proceed.

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

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

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

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

18 John, would you put up Slide 2, please.

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

25 Secondly, we will address -- I will

1 address, were the Panel to consider the claims
2 regarding the guidebook, why the Domain Acquisition
3 Agreement does not violate the guidebook or ICANN's
4 competition mandate.

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

13 Slide 3, please, John.

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

19 Afilias used this IRP since day one to
20 seek relief against NDC and VeriSign without their
21 participation in the decision. The relief Afilias
22 seeks is a reversal of the public auction award in
23 favor of NDC and an award of the .WEB registry to
24 Afilias based on claims that NDC violated the
25 guidebook and VeriSign is a monopolist.

1 Notwithstanding the substance of the
2 claims made here by Afiliias, since the IRP was
3 filed, Afiliias sought to prevent VeriSign and NDC
4 from appearing as Amici or otherwise participating
5 in any capacity in this proceeding.

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

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

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

24 VeriSign has never made a claim against
25 ICANN with respect its management of the new gTLD

1 Program and thus, under the rules, VeriSign could
2 not be a party to this proceeding.

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

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

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

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

25 Now, I heard earlier today perhaps an

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

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

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

25 Therefore, as ICANN has described its

1 decision, the issue for this Panel is whether
2 ICANN's policy-based decision to defer a
3 consideration of Afilias' objections was a
4 violation of its bylaws.

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

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

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

22 Slide 5, please, John.

23 Now, whatever the decision ICANN may have
24 made, whether it was to defer or whether the Panel
25 believes it rejected Afilias' claims, the decision

1 by this Panel in concept remains the same. The
2 decision -- the issue for the Panel is whether or
3 not as a matter of fair process ICANN acted
4 consistent with its bylaws, not to make findings of
5 fact regarding third-party conduct.

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

12 The questions by which the Panel should
13 review ICANN's actions are whether ICANN acted
14 transparently, whether it made a reasoned decision,
15 whether it acted without discrimination, whether it
16 acted impartially.

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

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

25 If the Panel decides that ICANN did not

1 act consistent with those obligations, then the
2 Panel's job is to refer to the Board of ICANN to
3 decide whether or not -- to make a decision
4 consistent with its bylaws regarding Afilias'
5 claims.

6 Jurisdiction is defined by the dispute
7 resolution agreement between the parties.

8 Jurisdiction of an IRP Panel is not decided by the
9 articulations of a clever pleader, such as Afilias
10 is, adding claims that the Panel should, quote,
11 declare, close quote, that rights of ownership of a
12 third party should be transferred to the claimant.

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

18 Slide 7, please.

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

24 Contrary to an Afilias claim, however, the
25 reports specifically confirm that an IRP Panel may,

1 quote, direct the ICANN Board and staff to take
2 appropriate action to remedy a breach of the
3 articles of incorporation or bylaws. "The Panel
4 shall not replace the Board's fiduciary judgment
5 with its own judgment." That's a critical part of
6 the report that was ignored by Afilias.

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

16 Slide 9.

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

23 The recommendations go on, "Such a
24 declaration represents a limitation to the type of
25 decision by an IRP Panel."

1 The recommendations continue that, "The
2 purpose of such limitation is to mitigate the
3 potential effect that one key decision of the Panel
4 might have on several third parties."

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

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

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

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

1 these -- go ahead.

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

4 MR. JOHNSTON: Oh, thank you.

5 In substance, the bylaws and this report
6 that's cited by Afiliias are antithetical to the
7 entire strategy underlying this IRP since its
8 beginning. The bylaws were intended to mitigate
9 against second-guessing of the judgment of the
10 ICANN Board and, importantly here, to prevent
11 findings in an IRP determining third-party rights.

12 Slide 10, please.

13 The application of these principles of
14 decision as to the scope of authority of the Panel
15 are especially important here because the claims
16 here raise important policy issues for ICANN.

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

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

1 across the Internet.

2 Slide 11, please.

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

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

12 Slide 12, please.

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

18 In its briefs in this matter, ICANN has
19 specifically recognized that a decision on the
20 Domain Acquisition Agreement requires a
21 consideration of industry practice to interpret the
22 guidebook, decisions ICANN has made in similar
23 situations and the affect on the new gTLD Program
24 overall by a decision on the claims made here.
25 That is a role for ICANN's Board, not an IRP

1 reviewing Panel in the relatively isolated scenario
2 of competitors fighting over rights to a single
3 TLD.

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

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

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

22 Thus, whatever decision the Panel might
23 find the Board made here, the Panel's authority is
24 only to decide whether the Board acted
25 transparently, without discrimination, impartially

1 or consistent with the other obligations, mostly
2 process and orientation, that Afilias has made
3 claims based on against ICANN.

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

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

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

24 Now, that may be fancy penmanship, but
25 there's absolutely no evidence of a rubber-stamping

1 or any misconduct that is produced in request that
2 the Panel take over the Board's job.

3 Afiliias can't simply ignore the ICANN
4 bylaws and IRP because it doesn't want to live by
5 the rules.

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

14 Slide 14, please.

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

24 Most fundamentally, the claim that the
25 domain acquisition violates the guidebook is a

1 perfect example of an issue that is for ICANN to
2 determine and not the IRP Panel.

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

12 Slide 15, please.

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

19 "Determining that NDC violated the
20 guidebook is not a simple analysis that is answered
21 on the face of the guidebook. It requires an
22 in-depth analysis and interpretation of the
23 guidebook provisions at issue, their drafting
24 history, to the extent it's know, how ICANN has
25 handled similar situations and the terms of the

1 DAA. This must be done by those with requisite
2 knowledge, expertise and experience, namely ICANN,
3 as ICANN's job is defined in the bylaws."

4 Slide 15, please.

5 "ICANN has to approach any such analysis
6 with an eye towards the impact a decision on these
7 issue will have on the global Internet community."
8 As set forth in ICANN's response as well as the
9 witness statements of Messrs. Livesay and Rasco,
10 there have been a number of arrangements that
11 appear to be similar to the DAA in the secondary
12 market for new gTLDs, including transactions
13 involving Afilias and other registry operators."

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

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

23 Slide 16, please.

24 Secondly, the DAA, comparing it with the
25 language of the guidebook, does not constitute a,

1 quote, resell, assignment or transfer in violation
2 of Section 10 of the guidebook.

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

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

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

25 In other words, Afiliias explains in its

1 responsive brief that whether or not there's been
2 this transfer of title depends upon the manifested
3 intention of the parties and the transfer must be
4 unconditional and complete.

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

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

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

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

1 application.

2 Mr. Marenberg will address that more
3 fully.

4 Secondly, the DAA

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6 NDC undertook obligations
7 to VeriSign, but the obligations and rights under
8 the application remain with NDC.

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

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14

15 Slide 17, please.

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

23 Furthermore, the DAA does explicitly
24 provide Redacted - Third-Party Designated Confidential Information

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

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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

1 acquisition

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

9 Mr. Marenberg will discuss the blackout
10 period.

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

22 Finally, one additional note that's
23 confirmatory of this, since the beginning of these
24 proceedings, and I believe it is in the original
25 request for a stay of delegation pending the

1 outcome of this IRP, Afilias has taken the
2 application that any attempt to assign, transfer or
3 resell rights or obligations with respect to the
4 application would be void, just would not have
5 happened.

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

13 Slide 20, please.

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

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

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

1 late.

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

6 Slide 21, please.

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

14 Next slide, please.

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

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

22 Slide 23, please.

23 There's numerous examples that we have
24 cited in our papers of pre-delegation financing
25 arrangements in exchange for post-delegation

1 assignments. We talk about the Donuts/Demand Media
2 agreement. That agreement for financing in
3 exchange for post-auction assignments covered
4 107 -- that single agreement, 107 new gTLD
5 applications. Many of those new TLDs were later
6 assigned to Demand Media pursuant to that
7 agreement.

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

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

22 Slide 24, please.

23 .BLOG is another example. This is
24 addressed in our papers. WordPress secretly bid
25 for .BLOG using Primer Nivel's application in

1 exchange for a subsequent assignment of the gTLD.

2 The assignment subsequently took place.

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

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

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

24 .TECH is another example. Afilias
25 describes .TECH as follows: Radix contracted to

1 acquire the applicant .TECH -- often there's an
2 applicant set up for each TLD application. Radix
3 contracted to acquire the applicant .TECH in the
4 event that the latter was successful in the
5 auction. In other words, if it won the auction,
6 then we will proceed in acquiring it.

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

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

14 Slide 26, please.

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

21 ICANN approved each assignment and ICANN
22 approved each assignment on the criteria that ICANN
23 normally uses, that's the important criteria of the
24 technical and financial ability to operate the new
25 TLDs. That's not an issue certainly here either

1 since VeriSign has successfully operated .COM and
2 other TLDs for 30 years.

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

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

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

20 As ICANN acknowledges, our evidence
21 demonstrates and Afilias' conduct also establishes
22 the secondary market for new gTLDs is rife with
23 examples of different ways to monetize that
24 application. Hundreds of new TLDs have been sold
25 or assigned following delegation.

1 NDC is no different in terms of its
2 transactions in this regard from Afiliias, Donuts or
3 countless other applicants.

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

9 Slide 28, please.

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

14 Afiliias first says that the DAA, my
15 shorthand for Domain Acquisition Agreement, a
16 tongue-twister after all these hours, assigned the
17 obligation to timely amend the application.
18 Afiliias states by reason of the DAA, NDC could not
19 amend the application without the consent of
20 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

1 the right to resolve string contentions. Afilias
2 objects that VeriSign would not allow NDC to use
3 VeriSign's money for a private auction that was
4 probably a violation of the antitrust laws.

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

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

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

21 Slide 31, please.

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

25 The provisions of the domain acquisition

1 cited by Afilias, as ICANN has acknowledged, are
2 mostly concerning the mechanics of the auction, not
3 substantive provisions of the guidebook.

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

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

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

18 Slide 32, please.

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

23 First of all, as I pointed out before, NDC
24 had the right to do anything required of it by the
25 application or guidebook in negotiating with ICANN.

1 Furthermore, quite obviously, VeriSign's
2 participation in those discussions with ICANN could
3 only occur with ICANN's consent. That's the way
4 negotiations of regulatory agreements occur.

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

12 Slide 33, please.

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

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

24 Furthermore, contrary to Afilias'
25 argument, there are numerous scenarios under which

1 NDC might end up operating the .WEB registry or
2 sell it to yet another party.

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10 Slide 34, please.

11 The obligations as to what to do under the
12 myriad of scenarios and different potential fact
13 patterns is addressed ultimately in the agreement
14 as one that Redacted - Third-Party Designated Confidential Information
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20 Afiliias also attacks the compensation
21 arrangement, calling it a sales price, but Afiliias
22 this morning was only able to point to Annex 1 to
23 the Domain Acquisition Agreement as showing that
24 the money was the purchase of .WEB. Annex 1 is

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1 Slide 35, please.

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

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

16 Now, here's what ICANN says about its
17 auction rules. "The auction rule violations
18 alleged by Afilias appear to be based on a strained
19 interpretation of the text of the rules." The
20 rules by and large are, quote, concerned only with
21 the mechanics of the auction. The auction rules do
22 not appear to be designed to address the extent to
23 which a non-applicant, including a financier,
24 affiliated entity or contractual counterparty may
25 be permitted to have an interest in a gTLD.

1 In other words, according to ICANN, it is
2 these rules that govern mechanical aspects of the
3 transaction. And Afilias' attempt to strain on the
4 literal language of some of these rules, another
5 potential violation -- which it took them three and
6 a half years to do -- really doesn't add substance
7 to the claim.

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

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

21 Slide 37, please.

22 The specific violations alleged by Afilias
23 of the guide rules are mostly regurgitations of its
24 basic argument that the DAA transferred the
25 application to VeriSign. So VeriSign is the

1 applicant, and therefore, these rules that talk
2 about what an applicant should do don't match with
3 what VeriSign or NDC was doing because NDC wasn't
4 the real applicant at that point, VeriSign was.

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

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

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

24 Secondly, Mr. Rasco explains what the
25 provision means, as he understood it, that NDC

1 would not also be appearing at the auction
2 attending to the interest of another or conflicting
3 party, but instead would be acting in order to
4 serve its interests and agreements with VeriSign.

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

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

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

25 The cooperative agreement between the

1 government, Department of Commerce and VeriSign, by
2 contrast, is quite clear as to who or what entity
3 provides oversight with respect to VeriSign.

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

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

19 I want to spend a couple of minutes on
20 competition. Between ICANN and VeriSign, we
21 provided economic reports from two of the foremost
22 economists in the world. Those two economists
23 agree that there's no evidence of any threatened
24 injury to competition by VeriSign's operation of
25 .WEB. Those two economists also agree that there's

1 no economic evidence that .WEB is unique or
2 special.

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

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

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

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

23 Dr. Murphy, among other things, looks at
24 the price of other TLDs that have been transferred
25 and the market share that attended those TLDs, and

1 by comparison with the price for .WEB concludes and
2 shows it with the numbers that .WEB could not have
3 been anticipated -- if it was going for that price,
4 could not have been anticipated to be a significant
5 competitive inroad.

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

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

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

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

23 For 18 years I have been an adversary of
24 ICANN. I have -- on behalf of VeriSign, I have
25 sued ICANN under antitrust laws and other claims.

1 I have also sat across the table from Jones Day in
2 transactions where we were always adverse parties.

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

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

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

24 I don't know where the notion of bribery
25 comes up. All the times I have been adverse to

1 ICANN, I have never accused ICANN of bribery,
2 certainly.

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

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

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

23 I'd like to comment also on the suggestion
24 that the investigation in September by ICANN, that
25 there was something wrong with that. We answered

1 all of the questions. The questions may have been
2 tailored to the Domain Acquisition Agreement, but
3 the reason's obvious. The reason for the
4 investigation was to analyze and get people's views
5 on whether the Domain Acquisition Agreement
6 violated the guidebook or was bad for the industry.

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

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

17 A couple of other quick comments.

18 One question that was asked was why was
19 this agreement made when it was and maintained as
20 confidential. Frankly, VeriSign kind of missed the
21 boat in the sense that it didn't apply for anything
22 by the application deadline. So it investigated
23 and looked for some way to participate in the new
24 TLD market. It ultimately entered the agreement
25 with NDC, an agreement that is not uncommon within

1 the industry and which VeriSign believed was quite
2 consistent, and still does, with the guidebook.

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

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

12 One final point. The claim that --
13 ARBITRATOR BIENVENU: In relation to that
14 comment, Mr. Johnston, and I am conscious that time
15 is advancing, but you have heard and you have read
16 the submissions of counsel for VeriSign.

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

25 MR. JOHNSTON: Twofold. There's no basis

1 in the guidebook to complain about another
2 applicant based on the identity of that applicant.
3 If Afiliias would have said, "Hey, VeriSign should
4 not be an applicant because it's a big competitor,"
5 ICANN would have had to ignore that objection under
6 the guidebook.

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

15 So the only basis upon which one can
16 object to another applicant based on the identity
17 of the company or the applicant for a gTLD is that
18 the applicant is guilty of past criminal conduct.
19 There is an exception for that because you have to
20 meet certain requirements. You can't have
21 committed crimes or been convicted of crimes. I
22 don't remember the precise language. But that is
23 the basis, and I believe that's the only basis upon
24 which to object to another applicant because of who
25 the applicant is.

1 Finally, I make a very quick comment about
2 Afilias' claim that they offered us a chance to
3 arbitrate.

4 This is an IRP proceeding. This is a
5 special accountability proceeding where ICANN -- it
6 is addressed whether ICANN has complied with its
7 bylaws. An arbitration of claims is an entirely
8 different kind of proceeding.

9 We have claims against Afilias. We have
10 no intention of arbitrating those claims. We want
11 to use a court of law if we bring these claims, and
12 we shouldn't have to submit them to arbitration in
13 order to not be -- not have to put them into an
14 IRP. In other words, the IRP is a special
15 proceeding quite, quite different than what Afilias
16 was proposing.

17 Furthermore, we had been excluded from all
18 the decisions in this IRP up to that point in time,
19 and the purpose of the IRP is really not at all
20 designed to assess our claims. I don't even know
21 how -- what it would look like.

22 But I would like to point out that Afilias
23 is talking out of both sides of its mouth here.
24 Because in Afilias' request for IRP, it
25 specifically stated that it reserved all rights to

1 challenge any result in the IRP based on the nature
2 of the process. So Afiliias is participating in the
3 IRP, but it's reserving its rights to challenge
4 what this Panel would do based on the express
5 statement in the IRP.

6 Now, the Amici have raised questions about
7 due process because of the way Afiliias has tried to
8 misuse the IRP process in order to adjudicate
9 third-party claims against people who aren't part
10 of the IRP and by definition under the IRP rules
11 cannot be part of the IRP unless they want to do
12 what Afiliias did, which is make a claim against
13 ICANN.

14 So I can't imagine ICANN would have ever
15 consented to turn this IRP into an arbitration
16 either, but we weren't prepared to either waive our
17 claims against Afiliias or submit them to
18 arbitration, which was part of the deal that was
19 offered by Afiliias.

20 Subject to any questions the Panel has, I
21 would like to turn it over to Mr. Marenberg. Thank
22 you.

23 ARBITRATOR BIENVENU: Thank you,
24 Mr. Johnston, for your oral presentation.

25 Mr. Marenberg, we call upon you to present

1 your oral statement on behalf of NDC.

2 MR. MARENBERG: Thank you, Mr. Chairman.
3 Give me one second to get myself organized here.

4 ARBITRATOR BIENVENU: Just to guide you, I
5 think Mr. Johnston has used about an hour and 20
6 minutes of your time, so -- of the time given in
7 total to the Amici.

8 MR. MARENBERG: Very well.

9 ARBITRATOR BIENVENU: While you get set
10 up, may I mention that the paper copy I have of
11 your opening statement is the one that was
12 circulated yesterday. So if it is possible to give
13 me the old numbering at the same time as the new
14 one and if it is not too burdensome for you to do
15 that, otherwise I will just find it looking at what
16 is displayed on the screen.

17 MR. MARENBERG: I think you'll recognize
18 the slides. Some are just gone. I had a feeling
19 I'd be in the position I am in right now and want
20 to cut it down.

21 ARBITRATOR BIENVENU: Okay. Please
22 proceed and ignore my request. I'll just find the
23 slide. Let me say first, on behalf of the Panel, a
24 warm welcome, sir, and please go ahead.

25 MR. MARENBERG: Thank you. My name is

1 Steve Marenberg. Together with my colleagues Josh
2 Gordon and April Hua of Paul Hastings, we represent
3 NDC.

4 I have given a fair number of opening
5 statements in the course of my career, but never
6 have I said what I am about to say now, which is
7 good afternoon, good evening and with apologies to
8 Professor Kessedjian, good morning. Thank you all
9 for your patience. It's gone on quite some time.
10 I represent -- and I will try to be brief.

11 I represent NDC, which is -- despite all
12 of the talk about transfers that we have heard
13 about, as we stand here today, NDC is the holder of
14 the right to enter into a Registry Agreement with
15 ICANN. There is no other party, not VeriSign, not
16 Afiliias, that can say that.

17 I want to digress for a second in light of
18 that fact to answer a question that the Chair posed
19 to Mr. LeVee. You indicated or you wondered about
20 a tension between ICANN's statement that the Board
21 had not really decided anything other than to put
22 this -- these issues on hold pending the resolution
23 of accountability proceedings, or mechanisms, and
24 the fact that staff sent an RA, Registry Agreement,
25 to NDC for execution, and wasn't there tension in

1 that.

2 I think not, and let me tell you why.
3 That is because NDC has the right to receive that
4 Registry Agreement in the absence of an
5 accountability mechanism, as ICANN suggested. And
6 letters to the Panel by Afilias don't upset that
7 right.

8 So when ICANN was sending the Registry
9 Agreement to NDC after the DOJ finished its Civil
10 Investigative Demand for investigation on
11 competition grounds and after Donuts' first CEP and
12 then its IRP were resolved and no accountability
13 mechanism was then pending, then ICANN was doing
14 exactly what it should have been doing at the time.

15 And there really isn't any tension between
16 the statement that he had cited and signing the
17 Registry Agreement.

18 It was incumbent upon Afilias to do what
19 it did, and I think what everybody understood it
20 was likely to do at the time in order to bring this
21 matter to a head, but there was no tension in what
22 ICANN was doing.

23 ARBITRATOR BIENVENU: Mr. Marenberg, I
24 don't want to labor the point, but the tension is
25 between sending the Registry Agreement and writing

1 in submission to this Panel that ICANN has never
2 taken a position on whether or not the NDC bid is
3 compliant.

4 And what I said is that I saw a tension
5 between that statement and the sending for
6 execution of the Registry Agreement. So it is
7 different than what you have postulated here.

8 MR. MARENBERG: Your Honor, I don't want
9 to belabor the point, but in my view, the question
10 becomes ripe for ICANN to resolve once it sends out
11 the Registry Agreement to NDC after there is no
12 pending accountability mechanism. And, therefore,
13 Afiliias jumped in when it did because it had not --
14 it had neglected prior to that to start any
15 accountability mechanism of its own.

16 So ICANN was doing, I think, what the
17 rules required it to do at the time because Afiliias
18 had failed to file an accountability mechanism.

19 So let's turn to my presentation. I am
20 going to really focus on three issues.

21 First, there's been a lot said, a lot of
22 ink spilled on whether NDC was honest with ICANN
23 during ICANN's investigation. Afiliias has made
24 some rather startling accusations about my client,
25 and we are going to answer them.

1 Second, I am going to focus -- but I think
2 I am going to truncate my focus in light of the
3 discussion that's taken place earlier today -- on
4 whether the DAA and NDC's .WEB application
5 conformed to the requirements of the guidebook.

6 And third, I am going to talk about
7 whether Afiliias is here with unclean hands.

8 Briefly let me just tell you about my
9 client, NDC. It was founded in 2012 for the
10 purpose of participating in ICANN's new gTLD
11 Program, but the managers of NDC were not
12 inexperienced in the gTLD -- TLD industry at all.
13 Rather, they had successfully transformed .CO, the
14 country code for Columbia, into a rather generic
15 TLD that was very successful in attracting many
16 registrants to that top-level domain.

17 In addition, NDC successfully applied
18 under the new gTLD Program, and it operates today
19 .HEALTH. It applied for approximately 13 TLDs and
20 it has participated in private resolution for many
21 of them, and as we know in this instance, the ICANN
22 batch.

23 It has an experienced management team with
24 experience in this industry, headed by Juan Calle,
25 who you will not meet, and Jose Rasco, who you will

1 meet later this week. Mr. Rasco is NDC's chief
2 financial officer. He has a Bachelor of Science
3 degree from the Wharton school of business at the
4 University of Pennsylvania, a Master's in taxation
5 and over ten years' experience in the domain
6 industry.

7 Let me also describe the DAA from NDC's
8 perspective, why we entered into it. First and
9 foremost from NDC, which is a small company, there
10 are the economics of the DAA.

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24 In exchange, what were we obliged to do?
25 We were obliged -- in language that's been

1 misconstrued by Afilias, we were obliged to act
2 exclusively with VeriSign.

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5 We
6 had committed to VeriSign, and we were going to
7 participate in the auction with the idea that we
8 were transferring -- if -- after we signed the
9 Registry Agreement, if ICANN agreed, to VeriSign.

10 A couple of other things that they are
11 mentioning.

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19 So from NDC's perspective, why enter into
20 this? Well, when we are approached in 2015 by
21 VeriSign, we know -- and by the way, I think it is
22 not contested --

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24 and,

25 therefore, we have a choice.

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And so we sign the agreement.

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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

1 else besides NDC -- that all of the parties were
2 agreeing to go to the private auction other --
3 other than NDC. That was probably something that
4 upset -- in fact, it was undoubtedly something that
5 upset other members of the contention set who were
6 relying on a private auction, as they had in other
7 instances in order to get some compensation from
8 the auction for this TLD.

9 And if you look at the documentation here,
10 there is almost uniformity, a word-for-word
11 objection of ICANN accusing NDC of undergoing a
12 change of control for the purpose of either, one,
13 delaying the auction, or two, trying to coerce NDC
14 to change its mind and go to a private auction.

15 The complaints to ICANN are the same, and
16 they all stem out of a discussion that Mr. Rasco
17 had with Jon Nevett of Donuts in which he called
18 him up and said, "I don't understand why you're not
19 going to a private auction. You seemingly have in
20 the past."

21 Afilias has made a lot of claims about
22 this conversation, but my response is you need to
23 have -- you need to view this conversation in
24 context, and let me see if I can put it in these
25 terms.

1 Mr. Johnston and I are old friends. In
2 fact, our friendship goes back to the days when his
3 hair was blonde and I actually had some.

4 We have often talked about going to the
5 theater together. He's invited me to go to the
6 theater with him on Friday night. I in the past
7 had always gone to the theater with him on Friday
8 night.

9 But when he calls me up for this Friday
10 night, I know I'm committed to go with someone
11 else, maybe Mr. Ali, and I know that that will
12 bother Mr. Johnston if I say that. So I tell him a
13 little white lie. I say I have got to check with
14 others. I have got to check with my wife. And the
15 truth is my wife says we have other things to do
16 that night.

17 It's a white lie that Mr. Rasco is telling
18 Mr. Nevin at the time in that conversation. They
19 had been colleagues in the Internet industry, and
20 Mr. Rasco says, when Mr. Nevin was pressing him on
21 who was making this decision, I just wanted to
22 deflect. It is a natural thing to do. And out of
23 that comes the complaints to ICANN.

24 And the complaints all concern the same
25 thing, which is that NDC has undergone the change

1 of management or a change in control. That is what
2 ICANN is investigating pre-auction. They are not
3 investigating the DAA. No one knows about
4 VeriSign's agreement with NDC.

5 The investigation and the response that
6 Mr. Rasco gives to ICANN prior to the auction
7 relate to the issue that has been raised by other
8 members of the contention set, specifically, has
9 NDC undergone a change in control.

10 A couple of things to say about that.
11 One, the accusations made by everybody else were
12 not true. NDC did not undergo a change in control.
13 The directors in the context of the LLC, the
14 managers were all the same. There's been no change
15 in shareholders or the member level of an LLC that
16 requires anything in the application to be changed.

17 And so when there are repeated inquiries
18 from ICANN all to the same effect, has there been a
19 change of control, Mr. Rasco deals with those
20 inquiries directly and says no.

21 Now, Mr. Ali in his well-crafted opening
22 this morning -- I think I wrote this down
23 correctly -- says that Mr. Rasco assiduously
24 crafted his response to Mr. Erwin on June 26 and
25 points to Exhibit C-96 as proof of that.

1 If you look at Exhibit C-96, Mr. Rasco,
2 assuming he picked up the email the moment that
3 Mr. Erwin sent it to him, which is, of course,
4 quite an assumption, responded only 48 minutes
5 later, hardly enough time to assiduously craft
6 anything.

7 What Mr. Rasco said was, I understood that
8 he was asking about a change of control in the
9 management of NDC, and I told him no, the same as
10 the inquiries he got from Mr. Waye, the ICANN
11 ombudsman, and Ms. Willett, the ICANN vice
12 president later before the auction.

13 That's what ICANN was inquiring about, and
14 Mr. Rasco responded promptly. They were not
15 inquiring about VeriSign. And even if they were,
16 Mr. Rasco had no obligations to tell them about
17 VeriSign.

18 Here's the interesting thing, is that we
19 are going to hear a lot about Mr. Rasco's
20 conversations with -- or email conversations with
21 Mr. Erwin and Mr. LaHatte, telephone conversation
22 and email conversations with Ms. Willett, but the
23 fact of the matter is that the contention that NDC
24 underwent a change of control, which was front and
25 center prior to the auction, the basis upon which

1 everybody was demanding that the auctions be
2 delayed, the basis upon the Court proceedings were
3 started, is no longer part of this IRP.

4 If you look at Paragraph 78, which
5 Mr. LeVee put in front of you today, of Afiliias'
6 amended IRP, there is no complaint that ICANN or
7 this Panel should disqualify NDC's application
8 because NDC underwent a change of control. It is
9 no longer in the case, and one wonders why we are
10 going to hear so much about it.

11 Now, as I said, ICANN never inquired about
12 VeriSign or the DAA prior to the auction, but
13 there's no reason to think that even if they had,
14 they care. Because after all, we have an indicia
15 of what ICANN thought about the VeriSign
16 involvement and NDC's winning bid in the auction
17 from the correspondence that's in the record.

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3 ARBITRATOR KESSEDJIAN: Mr. Marenberg, at
4 this stage on this very slide, which was 11 in your
5 previous copy that we received, I guess, yesterday,
6 I am a bit surprised by the way you relate the
7 conversation between Ms. Willett and your client.

8 When was this message from Ms. Willett
9 sent to Mr. Rasco?

10 MR. MARENBERG: I believe it was either
11 August 1st or August 2nd. I can check that for
12 you.

13 ARBITRATOR KESSEDJIAN: Well, I checked.
14 I checked. It is 31st July.

15 MR. MARENBERG: Okay. I am one day off.

16 ARBITRATOR KESSEDJIAN: Well, well, wait.
17 That's quite important. Because you seem to say
18 that Ms. Willett, knowing of the existence of your
19 agreement with VeriSign, still doesn't see any
20 problem with it. That's what you just said to us,
21 unless I am not understanding what you are saying.

22 But on the 31st of July, Ms. Willett had
23 no knowledge of what has happened between NDC and
24 VeriSign. Am I wrong on that?

25 MR. MARENBERG: I believe so. And

1 Mr. Rasco will provide his testimony about what he
2 said. But as I understand it, Mr. Rasco was giving
3 Ms. Willett a heads-up that there was going to be
4 an announcement by VeriSign, in other words, the
5 announcement that they are talking about here and
6 that she is referencing when she says, "Thanks for
7 letting me know about the announcement," is an
8 announcement that's coming from VeriSign, not NDC,
9 and, therefore, he has told her that VeriSign has
10 been involved in this.

11 By the way, there's also evidence -- I
12 think it's been withdrawn by Afiliias, but at this
13 point there is a lot of speculation in this
14 close-knit community that VeriSign has been behind
15 NDC's bids. This is an open secret out there so
16 that this is not something that she's guessing
17 about or that is it.

18 Mr. Rasco is calling to confirm that for
19 her, and the announcement that's coming is
20 VeriSign's. She's not upset with -- so she does
21 have the knowledge she needs to have to react --
22 the involvement of VeriSign in this transaction.

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1 Now, I will -- she does not know of the
2 DAA. ICANN has not received the DAA and doesn't
3 get it until later in the month, but they do know
4 that the financial impetus for our winning the bid
5 is from VeriSign. That is something that's not
6 hidden from her at all.

7 ARBITRATOR KESSEDJIAN: Thank you.

8 MR. MARENBERG: So now having gone through
9 or explained that we did not mislead ICANN in the
10 investigation, pre-auction or post-auction, I want
11 to talk about the specific contentions that Afilias
12 has made here that our application violated the
13 guidebook in light of the DAA.

14 Essentially Afilias has made two broad
15 contentions. First, there is a contention that we
16 have transferred some rights in violation of Module
17 6 and in violation of other provisions of the
18 guideline, particularly Module 6, that we may not
19 resell, assign or transfer any of the applicant's
20 rights or obligations in connection with the
21 application.

22 The DAA does not violate this provision of
23 the guideline. For one, I think we have heard all
24 we need to know from Mr. Johnston and Mr. LeVee
25 that as a matter of law and as a matter of the

1 agreement itself, there has been no transfers of
2 the application itself. Rather, the DAA

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5 So
6 there would be no way to fulfill this agreement
7 ultimately by pulling the wool over ICANN's eyes.

8 They are going to -- when the question is
9 right, after we have signed the Registry Agreement,
10 they are going to get the opportunity to review
11 that transaction and consent to it or not. This
12 could not have been, much less was it not intended,
13 as a secret conspiracy.

14 ARBITRATOR CHERNICK: Mr. Marenberg, do
15 you see a distinction between an intention to
16 assign or transfer the application and the transfer
17 of applicant's rights or obligations in connection
18 with the application?

19 MR. MARENBERG: There is a possible
20 distinction, but neither has happened. And I think
21 as to the rights and obligations, you would have to
22 figure out: One, what rights are allegedly
23 transferred; and, two, is that a violation; and
24 three, if it is a violation, is it material? But
25 certainly the application itself has not been

1 transferred, and I believe that that's really the
2 core of this.

3 You're sort of anticipating my next slide,
4 which is that Afiliast's argument really is
5 disaggregating all of the pieces or the bones that
6 make up an application and saying have you
7 transferred any of these bones or these rights.

8 I think the answer there is, one, as a
9 matter of their looking at the DAA and saying, "We
10 see there's all these consents and revisions that
11 seem to us to be transferable," but the fact of the
12 matter is: One, I don't believe that's the right
13 way to look at the question; and two, if you'd look
14 at the document itself, there are no rights in the
15 application that have been transferred.

16 That's because of this:

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5 So, therefore, even if, on the one hand,
6 there was an arguable consent obligation that may
7 have given VeriSign an interest, on the other hand
8 that is taken back in the final analysis and
9 nothing is transferred. And in the letter of
10 confirmation, that is made plain again in
11 Subsection (m).

12 So although Afiliias likes to pick apart
13 this DAA, the one thing they ignore is the

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21 And, of course, the DAA will ultimately be
22 disclosed to ICANN, as I mentioned. There's no way
23 to accomplish this transaction without disclosing
24 the DAA to ICANN, and that was never anybody's
25 intent.

1 So we didn't transfer any rights under the
2 DAA that would make our application a violation of
3 the guidebook.

4 The second contention that Afiliias makes
5 is that we failed to advise ICANN about the change
6 in any circumstances that would render any
7 information provided in the application false and
8 misleading.

9 Again, this contention is wrong.

10 First and foremost, all of the responses
11 relating to NDC's qualifications to operate .WEB
12 remain accurate to this day in our application. As
13 I mentioned, there's been no change of management
14 or control to this day.

15 And the other scoring elements or scoring
16 questions relate to our financial ability to
17 operate .WEB, which is intact today and doesn't
18 require any change.

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21 And two, our technical ability to operate
22 .WEB also remains intact. As we mentioned in our
23 application, we made arrangements, as we had when
24 we operated .CO, for a company called Neustar to
25 operate the back end and provide the back-end

1 infrastructure when we operated the registry. We
2 mentioned in our application that we are
3 contracting with Neustar to do that for .WEB and
4 that contract remains in place today. I want to
5 emphasize that.

6 If we need to operate .WEB tomorrow, we
7 have the back-end resources and the technical
8 resources to do it and nothing has changed with
9 respect to our application on that.

10 Now, what we didn't disclose is that we
11 had a powerful funding source in VeriSign for the
12 .WEB auction. But, of course, that's not something
13 that needs to be disclosed any more than Afilias
14 needed to disclose to us that they had gone out to
15 the Bank of America or the Bank of Ireland or
16 whatever bank they went to to get funding for their
17 bids. That's confidential information that's not
18 subject to third-party disclosure.

19 There has been a suggestion earlier today
20 in Afilias' presentation that there was some
21 obligation to disclose information that had, quote,
22 an impact on other applicants. That suggestion is
23 wrong.

24 If you pierce that requirement, there's an
25 impact -- there's an obligation to disclose

1 materials that have an impact on other applicants,
2 means something like if there's a change in
3 application to a community, priority application
4 which would advance us above and ahead of other
5 applicants, we need to disclose that.

6 But that's not referring to who's backing
7 you, what financial resources you have backing us.
8 Just because they might be effective, because we
9 might have a bigger ability to win the auction,
10 that's not something that you disclose under the
11 guidebook.

12 And by the way, whether it is or is not,
13 as ICANN has mentioned and as VeriSign's mentioned,
14 that's a question really remitted to the expert
15 piece of the ICANN litigation, and with all
16 respect, not in this.

17 In any event, there was no duty on us to
18 disclose to our competitor that we had financial
19 backing and that we might win the auction. That's
20 not needed to be disclosed under the guidebook
21 rules.

22 Finally, Afilias spends a lot of time
23 arguing that once we signed the DAA with VeriSign,
24 that the answer that we gave with respect to the
25 mission or the purpose that we saw for .WEB no

1 longer was active.

2 Well, as we sometimes said in first-year
3 procedure, when you file a motion to dismiss, the
4 answer to that is so what.

5 This question, 18, relating to mission and
6 purpose, has nothing to do with qualifications
7 relating to .WEB and the ability to operate .WEB.
8 And how do we know that? Because the attachment to
9 Module 2 of the guidebook tells us just that. It
10 says this -- the information gathered in response
11 to Question 18 is intended to inform the postlaunch
12 review of the new gTLD Program, not assessing your
13 ability to operate a TLD.

14 In fact, this explanation goes on to say,
15 "This information is not used as part of the
16 evaluation or scoring of the application."

17 And by the way, we'll get to this one more
18 time before I finish. There's a good reason why
19 you don't have to update this section and it
20 doesn't matter. Because as I said, it is not used
21 to determine the qualifications and operate the
22 TLD, which is what ICANN is evaluating during this
23 process.

24 Now, there's another reason why we didn't
25 need to change this or we shouldn't have changed it

1 because, as Mr. Johnston has mentioned, and if you
2 read the DAA it becomes apparent, is that there are
3 instances, real instances in which we may be or
4 could have been or still might be the party that
5 operates .WEB.

6 Now, I don't want to mislead you. Plan A
7 is for us to sign the Registry Agreement to submit
8 it to ICANN for approval so that it can be assigned
9 to VeriSign.

10 But if ICANN rejects the assignment, then
11 the DAA then provides Redacted - Third-Party Designated Confidential Information

12 In other words, in that
13 instance, we would have to decide what to do.

14 Now, we have to decide along with
15 VeriSign. We couldn't do it without them and shove
16 it down their throats. But we'd be in the position
17 as the holder of the Registry Agreement to decide
18 what to do with our rights at that time.

19 What we would do at that time can't be
20 predicted because it would really depend on the
21 value or the perceived value of the .WEB TLD.

22 Now, if we believe some of the sources
23 that Afiliias' experts quote and .WEB is worth \$500
24 million, well, then any good businessman will tell
25 you, "If I have to pay back \$135 million to acquire

1 an asset worth 500 million, I'll find a way to do
2 it. I'll find alternative financing to pay back
3 VeriSign," and at that point all of the statements
4 I made, mission and purpose, are still operative.
5 So that's another reason why Afiliias' harping on
6 our response to Question 18, doesn't disqualify our
7 application under the guidebook.

8 Let's talk about Afiliias for a second and
9 whether it comes to the Board or this Panel.

10 Afiliias has very adept lawyers. I respect the
11 ability of counsel to construct these arguments.
12 They very adeptly construed my client's statements
13 as sinister and fraudulent, but when it comes to
14 Afiliias' statements, they have a very different
15 attitude.

16 Let's talk about the blackout period. The
17 ICANN rules prohibit members of a contention set
18 from cooperating or deliberating with each other
19 with respect to bidding strategy and negotiating
20 settlement.

21 Prior to the blackout period, Mr. Kane
22 approached Mr. Rasco with the following orders --
23 offer, which is a communication about bidding
24 strategies and settlement agreements because that's
25 how you'd have to accomplish this, with a

1 settlement agreement. We'll give you 17.01 million
2 to settle this and go to a private auction so that
3 we can get the TLD. That's okay because it is
4 outside the blackout period.

5 But within the blackout period, Mr. Kane
6 sends to Mr. Rasco this message. "Talk?" And
7 remember, that's the same thing, same opening as
8 the last one. "Talk? If ICANN delays the auction
9 next week, would you again consider a private
10 auction?"

11 This is an attempt to make a deal with NDC
12 during a time when the parties are in a blackout
13 period and they can't be discussing settlement.

14 Now, Afilias offers two explanations to
15 try to take the sting out of this improper
16 communication. The first is that the message did
17 not discuss estoppel. My reaction to that is:
18 Really? Does anyone have any doubt that this
19 message was discussing .WEB?

20 Was Mr. Kane willing to come here before
21 his witness statement was withdrawn and subject
22 himself to cross-examination that this message
23 didn't involve .WEB? Of course not.

24 Then they say it doesn't refer to a
25 settlement. Of course it does. Everybody

1 understands that this message during the blackout
2 period has been referring back to this one, which
3 is why don't we settle up and you'll take \$17
4 million. This is a violation of the blackout
5 period. This should be disqualifying Afiliias' bid.

6 Now, Afiliias has also made a lot of
7 statements that NDC violated the bidding
8 requirements.

9 I don't have much time, so I will just
10 remit you -- I looked at ICANN slides earlier
11 today, particularly Slide 116, 121, which do a very
12 good job of explaining why, in fact, we did not
13 violate that.

14 Again, this is Afiliias saying that
15 different rules apply to NDC than apply to Afiliias.

16 Our bids were constrained by the financial
17 support we were getting from VeriSign, that is
18 true. Afiliias' bids were constrained from the
19 financial support that they got from their banker.
20 In fact, if there's anyone who was constrained more
21 by outside third-party financial interests that
22 were never disclosed to anyone until this
23 proceeding when Afiliias 'fessed up and said it had
24 third-party financing -- by the way, when they
25 really 'fessed up -- I forget the footnote number,

1 I think Footnote 365 in there replied to our Amici
2 brief. Maybe they thought we were only using 50
3 footnotes, but it was in there, admitting that
4 there were limitations on what they could bid
5 imposed on them by a third-party bank.

6 Neither one of us, I believe, violated the
7 bidding guidelines. We did nothing different than
8 they did.

9 As you already heard, and I won't belabor
10 the point, in 2006 Afilias is saying neither ICANN
11 nor the GNSO have the authority to act as antitrust
12 regulator. And today they are saying ICANN must
13 regulate competition and preclude VeriSign from
14 operating .WEB. Again, different rules apparently
15 that apply to that.

16 And then I want to end up with this one,
17 which, again, goes back to the mission/purpose
18 questioning. Afilias has bought and sold gTLDs
19 without ever amending questions, in response to
20 questioning the TLD. A good example is .MEET.
21 When Afilias applied for .MEET, they described the
22 purpose of .MEET as a popular, accessible,
23 innovative destination for people seeking online
24 dating and companionship services. And they got
25 the .MEET domain name.

1 Once they acquired .MEET, they sold it to
2 Google, who is using .MEET for the very purposes we
3 are here today, as a competitor for Zoom or Webex
4 or those kind of services.

5 Now, obviously that's not consistent with
6 Afiliias' statement of the mission or purpose of
7 .MEET when it applied for it.

8 Afiliias says, well, that's true, but we
9 transferred .MEET after we signed the registry and
10 wasn't in a pre-auction or pre-Register Agreement
11 application.

12 Well, one, we don't even know if that's
13 true. That's just ipso-dipsy from their accounts
14 at this time. There's no evidence to support that,
15 and more importantly, within the contours of this
16 proceeding and our limited role in that proceeding,
17 my client, NDC, can't even challenge it,
18 particularly can't even challenge it because
19 Afiliias has withdrawn all their witnesses so we
20 can't cross-examine anybody.

21 Even if it was true, there's no functional
22 difference between transferring the Registry
23 Agreement after it's signed and before it's signed
24 when the purpose of that TLD is completely
25 changing. There's no functional difference at all.

1 And if there is, again, a difference, if there's a
2 reason to approve it post-signing the agreement, as
3 opposed to pre-signing it, it all goes back to
4 suggest ICANN, with its experience in regulating
5 the industry, ought to be the persons deciding this
6 rather than this Panel.

7 Let me just summarize, and thank you
8 before I do for your extraordinary patience. This
9 has been a very long day. You have heard a lot
10 from a number of us, and it is very late.

11 On behalf of all of the parties at Amici,
12 I know that we really appreciate the time that you
13 have put in today and will put into the hearing,
14 and we thank you for that.

15 So I'll conclude by saying the
16 NDC-VeriSign arrangement is authorized by the
17 guidebook. Entering into the DAA it was a smart
18 decision for NDC. It allowed us to maximize the
19 value in the circumstance of our .WEB application
20 and even gives us the possibility -- although, as I
21 said, it is not Plan A. Plan A is to sign the
22 Registry Agreement and sign it and send it to
23 VeriSign, but should that be rejected, we may have
24 the option of operating .WEB after all.

25 ICANN should be the one to decide and

1 should be given the latitude to decide whether they
2 are going to permit the assignment of the Registry
3 Agreement to VeriSign.

4 And this Panel, with all deference, does
5 not have, in the context of the proceeding, the
6 ability to strip Amici of what is a very valuable
7 property interest.

8 Thank you for your patience, and I look
9 forward to the presentation of the evidence over
10 the next week.

11 ARBITRATOR BIENVENU: Thank you very much,
12 Mr. Marenberg.

13 So it is very late for one of us, so I
14 will be brief in reiterating on behalf of the Panel
15 our thanks to all of those who have presented and
16 all of those who supported them.

17 We will reconvene tomorrow at 11:00 a.m.
18 Standard -- Eastern, and we need to hear the
19 evidence of Ms. Burr and Ms. Eisner.

20 So thank you all, and we adjourn until
21 tomorrow.

22 (Whereupon the proceedings were
23 concluded at 3:30 p.m.)

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COURT REPORTERS CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

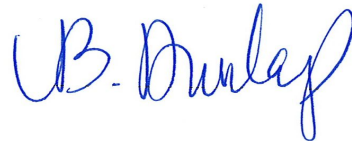
I, BALINDA DUNLAP, hereby certify:

I am a duly qualified Certified Shorthand Reporter, in the State of California, holder of Certificate Number CSR 10710 issued by the Court Reporters Board of California and which is in full force and effect.

I am not financially interested in this action and am not a relative or employee of any attorney of the parties, or of any of the parties.

I am the reporter that stenographically recorded the testimony in the foregoing proceeding and the foregoing transcript is a true record of the testimony given.

Dated: 08/10/20



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