INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,)
Claimant,

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

ICDR Case No. 01-18-0004-2702

VOLUME IV
ARBITRATION
AUGUST 6, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
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THURSDAY, AUGUST 6, 2020

ARBITRATION HEARING HELD BEFORE
PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME IV
(Pages 589-785)

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ARBITRATOR BIENVENU: Welcome, everyone, to Day 4 of our hearing.

Before I ask our colleague JD to bring the witness back into the hearing room, I would like to convey to the parties the Panel's decision on the request by the claimant to add three documents to the record.

I begin by recalling that in Mr. De Gramont's email dated 21st July 2020, counsel for Afilias wrote, and I quote, "Both parties have agreed that only materials in the record may be used to examine witnesses," end of quote.

This followed up on a letter dated 20 July from Jones Day proposing 23rd July as a cut-off date to supplement the record for the purpose of the cross-examination of witnesses.

The document proposed to be added as Exhibit C-186 is a letter authored by Meredith Baker dating back to 2008, described as the cover letter through which the NTIA transmitted to ICANN the so-called Garza letter marked as Exhibit C-125.

The claimant avers in support of its request to add this document to the record, and I
quote, "The Baker letter provides crucial clarification regarding how the Garza letter came to the attention of ICANN," close quote.

The claimant spent considerable time cross-examining Ms. Burr about the Garza letter. The claimant, therefore, knew of the use it intended to make of the Garza letter. Had the claimant felt it relevant to rely on the Baker letter to provide context for the Garza letter, it ought to have added this document to the record before the agreed cut-off date of 23rd July.

The same reasoning applies in the opinion of the Panel to proposed Exhibit C-185, which consists of ICANN's answering brief in the Ruby Glen litigation before the U.S. Federal Courts, litigation to which reference is made in the parties' pleadings.

The Panel takes a different view in regard to proposed Exhibit C-184, which consists of Board resolution relating to the CCWG-Accountability Work Stream 1 report. These documents are directly responsive to questions from the Panel and, indeed, the Panel expected that ICANN would offer to provide its position on the issue so raised by the Panel by reference to documents even if those
documents were not already part of the record. Accordingly, Afilias's request is granted
in part. The addition of proposed Exhibits C-185 and C-186 is denied, but the addition of proposed
Exhibit C-184 to the record is allowed.

So thank you, all.

MR. ALI: Mr. Chairman, if I may.

ARBITRATOR CHERNICK: Oh, come on.

MR. ALI: Sorry, was that -- I think somebody just said, "Oh, come on" to me. Should I proceed?

ARBITRATOR BIENVENU: I don't know who said that, but it wasn't a member of the Panel.

MR. ALI: Right. So, Mr. Bienvenu, just a couple of points. We wish to thank the Panel for accepting into the record the Board minutes relating to the CCWG-Accountability. And with respect to the two other documents which you have denied, we will note our objection to the ruling on the following. Just to make two points in connection with that.

Number one is I thought that the Panel was going to give us an opportunity to address ICANN's submission in writing yesterday. I believe that was something that had been indicated, which is why
we didn't simply go ahead and respond to what ICANN had submitted.

And secondly, I accept that there was a cut-off, but we are within the context of an international arbitration, and within international arbitration it is frequently the case that during the course of hearings, as when issues are raised by the questioning of witnesses by counsel and in particular by questioning of a -- of a member of the Tribunal or the Panel, that documents will be admitted.

Now, a balancing act can be achieved by instructing that a document not be put to a witness because the issue here is of fairness.

We are not -- it would be entirely appropriate for the Panel to say that such a document cannot be put to a witness.

But insofar as the Ninth Circuit brief is concerned, there is no surprise here to ICANN, I mean, Mr. LeVee and Mr. Enson, counsel to ICANN in the Ninth Circuit. They know exactly what they said.

These are representations to a United States Court that are inconsistent with representations that they are making before you, or
potentially not, but we are happy to let them put
into the record anything else that they want to
give that document context.

But a very important issue here -- and you
could even admit this document as a legal
authority -- is the fact that it is in your
jurisdiction, and that jurisdiction is based on
what it is -- what the scope of the litigation
waiver is.

In fact, Mr. Chairman, you, yourself,
raised a question with Ms. Burr, and I note in your
rationales that you just gave us for denying the --
sorry, accepting the CCWG report was the fact that
questions had been raised by the Panel.

You, yourself, raised the question
regarding the issue of gap-filling role or the
gap-filling effect of the litigation waiver and the
IRP's jurisdiction, specifically you asked
Ms. Burr.

So if a claimant -- if an IRP doesn't have
jurisdiction to decide a claim, then you have to be
able to bring it to court, right, because it is not
arbitrable. If it is not arbitrable, you have to
be able to bring it to court.

You also went on, and you asked Ms. Burr,
"Ms. Burr, was there, so far as you can recollect, a discussion of the effect of a gap between the litigation waiver, the scope of the accountability mechanisms, including any possible limitation on the remedies that an IRP Panel could award?"

So a careful balancing here. In the context of international arbitration, I would instruct you cannot put these documents to any witness because that would be unfair.

It is certainly a document that could be added to the record together with any documents from the litigation proceedings that we see fit so that we can refer to these documents in our discussions with you.

We can refer to these documents in post-hearing briefing and potentially then oral argument because it goes to the critical issue of your jurisdiction in what is ultimately a precedent-setting proceeding.

So with that, I will rest. Thank you.

ARBITRATOR CHERNICK: Mr. Chairman, I was the person who made the comment, "Oh, come on." I apologize to Mr. Ali, but my impression was that the matter had been submitted and fully argued and that we were going to proceed with the witness.
So my comment was simply directed to my expectation that we were done with this issue and that there would not be effectively a request to reconsider.

MR. ALI: I don't think I was making a request to reconsider. I was simply raising a point based on our understanding of what the Chairman had said yesterday. But I will say no more, as it seems to be irritating you.

ARBITRATOR CHERNICK: So be it.

ARBITRATOR BIENVENU: Mr. Ali, thank you for your comments. They are reflected in the transcript.

And I will now ask you if either party has any preliminary matter to raise before we bring the witness back for the continuation of her cross-examination?

MR. LeVEE: I do not, Mr. Chairman.

ARBITRATOR BIENVENU: Mr. Ali?

MR. ALI: Nothing other than to just confirm that everything that we just discussed has been on record.

Is that correct, Balinda?

THE REPORTER: Yes.

ARBITRATOR BIENVENU: Yes, of course.
MR. ALI: Yes. Thank you.

ARBITRATOR BIENVENU: Of course.

Very well. Can we then ask that Ms. Willett be brought back into the hearing room, please?

Good morning, Ms. Willett. This is Pierre Bienvenu, Chair of the Panel.

THE WITNESS: Good morning, Mr. Chairman.

ARBITRATOR BIENVENU: So, Ms. Willett, under the same solemn affirmation, we will continue your cross-examination.

Mr. De Gramont, your witness.

MR. De GRAMONT: Thank you, Mr. Chairman.

CROSS-EXAMINATION (Cont'd)

BY MR. De GRAMONT

Q. And good morning, Ms. Willett. Thank you again for being with us, particularly so early in the morning. I have a few follow-up questions from yesterday.

First of all, have you discussed your testimony from yesterday with anyone?

A. No.

Q. Okay. Yesterday you testified that you studied the guidebook upon assuming your position at ICANN; is that correct?
A. That's correct.

Q. And did anyone tell you that you should also study the bylaws and articles?

A. Not that I recall, no.

Q. Did anyone tell you that the guidebook had to be applied consistently with the articles and bylaws?

A. So in terms of any conversation with counsel?

Q. No, just anyone. Did anyone at ICANN say to you the articles and bylaws need to govern the application of the guidebook?

MR. LeVEE: At what time?

Q. BY MR. De GRAMONT: Why don't we start when you first arrived at ICANN.

MR. LeVEE: I am trying to interpose an objection. I am concerned that the witness has now identified that she may have had conversations with counsel. So if it's okay, I'd like to warn her not to disclose the contents of conversations with counsel. Beyond that, I have no further objection.

MR. De GRAMONT: Thank you, Mr. LeVee.

Q. So let me ask it this way, and this is just yes or no: Did anyone advise you when you started at ICANN that the articles and bylaws
inform the application of the guidebook?

A. Not that I recall.

Q. Did anyone tell you at any point during your time at ICANN that the articles and bylaws should inform the interpretation and application of the guidebook?

A. I don't recall anyone telling me that the bylaws would inform the application of the guidebook.

Q. Okay. Thank you. And if you don't remember something when I ask you, just -- it is perfectly fine to say you don't remember.

Okay. So let's pick up where we left off yesterday. And -- I'm sorry, one more question before we do that.

You said yesterday that there was no separation agreement providing for you to give testimony in this IRP.

Do I remember that correctly?

A. So the terms of that agreement are confidential. So -- but it did not -- I will go so far to say that it did not mention providing testimony, no.

Q. So there was a separation agreement, but it's confidential?
A. Correct.

Q. Okay. And do you have any other sort of consulting agreement with ICANN that covers your provision of testimony or assistance in this IRP?

A. No, nothing.

Q. Okay. So, again, going back to where we left off yesterday, and we were looking at Exhibit C-35, which is behind Tab 12 of your binder.

A. I am there.

Q. You are there?

A. Yes.

Q. And, again, this is the exchange of emails between Mr. Nevett and Mr. Rasco in early June 2016. And, again, just to put this in context, Mr. Nevett was an executive at Donuts, and Donuts owned Ruby Glen and Ruby Glen was a member of the .WEB contention set; is that correct?

A. That's correct.

Q. All right. So let me read Mr. Nevett's email again. June 6, 2016. "Hi, guys. Jose and I corresponded last week, but I wanted to take another run at the three of you. Not sure if you three are still the Board members of your applicant, but I wanted to reach out to discuss a couple of ideas. Until Monday, I believe that we
have a right to ask for a two-month delay of the ICANN auction with the agreement of all applicants. Would you be okay with an extension while we try to work this out cooperatively?" End of quote.

Again, do you recall seeing Mr. Nevett's email?

A. I may have seen it. I don't specifically recall seeing this email until we discussed it yesterday.

Q. Mr. Nevett is asking for a two-month delay of the ICANN auction to see if the members of the contention set could reach an agreement among themselves to resolve the contention set; is that your understanding?

A. Yes.

Q. And, again, the guidebook encourages members of the contention set to resolve contention among themselves, right?

A. Yes, it does.

Q. Okay. So there's nothing about Mr. Nevett's request in that respect?

A. Correct. As long as it is prior to the deadline of the request or prior to the blackout period, the contention set members aren't supposed to be discussing then, I would see nothing wrong
with that email.

Q. Okay. And you explain in your witness statement that under the auction rules, applicants can request a delay of the ICANN auction, but they are all supposed to do that within 45 days of the ICANN auction; do I have that right?

A. That's correct.

Q. So his reference to, quote, until Monday, is probably a reference to that cut-off; is that your understanding?

A. I would believe so.

Q. So on 7 June Mr. Rasco writes back to Mr. Nevett, and this is what he says, quote, "John, thanks for the message. Sorry for the delay. The three of us are still technically the managers of the LLC, but this decision goes beyond just us. Nicolai is at NSR full-time and no longer involved with our TLD applications. I'm still running our program, and Juan sits on the Board with me and several others. Based on your request, I went back to check with all of the powers that be and there was no change in the response, and we will not be seeking an extension. It pains me personally to stroke a check to ICANN like this, but that's what we're going to have to do, just like others did on
.APP and .SHOP," end of quote?

Just to put this in context at the outset,

Nicolai is a reference to Mr. Bezsonoff; is that
your understanding?

A. I forget the names of the three
individuals on .WEB or NDC.

Q. Okay. You don't recall that it's -- you
recall that Mr. Rasco was one of them?

A. Yes.

Q. And that -- do you recall that Mr. Calle
was one of them?

A. I -- yeah, I recall that we looked at that
yesterday.

Q. Yes. And Mr. Bezsonoff was the third, we
looked at that yesterday?

A. I trust you, yeah.

Q. Okay. We can go back and take a look at
the document, but I'll represent to you that that's
what it says.

A. Very good.

Q. And do you know what NSR is a reference
to? It says, "Nicolai is at NSR full time."

A. I do not.

Q. And do you understand Juan to be a
reference to Juan Diego Calle?
A. I would believe so.

Q. Okay. Now, based on this email -- you saw this email at the time in June, July 2016, I think that's what you testified to yesterday?

A. At some point, it was four years ago, so June, July, August, I would have to refer to my testimony to determine the date when I --

Q. Sometime during that summer?

A. Yes.

Q. All right. And based on this email, Mr. Nevett raised a concern that there might have been a change of ownership or control over NDC. Do you recall that?

A. Could you say that again?

Q. Yes. Based on the email, Mr. Nevett raised a concern that there might have been a change in ownership or control over NDC?

A. I don't see that in this email. Are you referring to a different email?

Q. No. I am asking if you recall that based on this email, after this email, Mr. Nevett raised that concern?

A. Yes. I recall Mr. Nevett raising that concern with me in June of 2016. I believe -- I came to understand it was based on this email...
Q. And reading Mr. Rasco's email, you can see why Mr. Nevett had that concern, would you agree?

MR. MARENBERG: Objection; calls for speculation, no foundation.

MR. De GRAMONT: I am asking for the witness' understanding, and I don't think it is appropriate for Amici to object in any extent.

ARBITRATOR BIENVENU: I will allow --

MR. MARENBERG: May I briefly respond?

He's asking her to speculate on what Mr. Nevett was thinking and what Mr. Rasco was thinking.

MR. De GRAMONT: I am asking -- first of all, it is totally inappropriate for Amici to object. This is not an Amici witness, and I will ask the Chairman to instruct the Amici counsel not to interject objections to witnesses that are not being presented by the Amici. That's beyond the scope of what the Panel ordered and what we agreed to. So that's number one.

Number two, I am not asking the witness to speculate. I'd also ask for objections to be made in a form that doesn't suggest the answer to the witness.

Number three, I am simply asking for the
witness' understanding of the text of the document
that we are showing to her.

ARBITRATOR BIENVENU: So as to Mr. De
Gramont's first point, we recalled yesterday the
parties' agreement on a one-counsel rule subject to
the possibility for the counsel cross-examining a
witness to consult with his team.

So the rule applies to all, and the
witness is -- has been introduced by Mr. LeVee. If
there are objections to be raised, he should raise
them himself. And my ruling stands, I will allow
the question.

Q. BY MR. De GRAMONT: So, Ms. Willett, just
reading Mr. Rasco's email, you can understand why
Mr. Nevett had raised a concern about the change of
ownership or control in NDC, can't you?

A. Well, I really -- I don't know what
Mr. Nevett was thinking, but this would not have
raised concerns to me about the ownership interest.
He says that the three of them are still
technically the managers of the LLC. That was what
was on their application. ICANN was concerned
about what was technically the case.

Q. Well, he says the decision as to whether
to participate in an ICANN auction or a private
auction, quote, "goes beyond just us," unquote. He says that there are now additional Board members beyond those identified in the application. He says that in order to be able to answer whether he can participate in a private auction or in an ICANN auction, he has to check with all of the powers that be.

In your view, that doesn't indicate that someone else is -- now has an ownership or control interest in NDC?

MR. LeVEE: Mr. Chairman, I do think that this is starting to be very argumentative. The witness has provided an answer.

MR. De GRAMONT: Again, I am asking for the witness' understanding of the document and how ICANN reacted to it at the time.

MR. LeVEE: She gave you an answer to the question, and then what you did was you read more of the paragraph and asked the same question.

MR. De GRAMONT: I am asking whether these particular issues raised a concern that there had been a change of ownership in the company. I am simply pointing her to particular statements to follow up on my earlier question.

ARBITRATOR BIENVENU: The question is
allowed.

THE WITNESS: So I can speak to my -- does this raise an issue for me. Since it says that Mr. Rasco was still managing, running the program, managing the application, the fact that he had to check with other individuals, that was sort of common practice amongst applicants.

They often had dozens of people on a Board of Directors, maybe a governing Board, an advisory Board. They had all sorts of other executives they would have to check with. So it wouldn't surprise me that an individual like Mr. Rasco would have to check with others.

Q. BY MR. De GRAMONT: So this communication did not raise any concerns for you that there was a change of ownership or control in NDC's ownership or, for that matter, in NDC's application?

A. So, again, I didn't get this email until some late date, but it did not drive me -- this email alone would not have -- I guess I am sort of talking about a hypothetical, but since I did receive it, it didn't drive action in it. I am just saying hypothetically it wouldn't have beyond, you know, the action my team did take in June of 2016.
Q. Okay. Well, let's move on to that.

In Paragraph 19 of your witness statement, again, that's behind Tab 1, the first sentence reads, quote, "ICANN was first notified that Ruby Glen had concerns that NDC had undergone a change of control or ownership on 23 June 2016 by way of an email from then Donuts Inc.'s cofounder and executive vice president of corporate affairs, John Nevett, sent to ICANN's customer portal."

And then you cite to Exhibit A of your witness statement. So let's take a look at that email, which is behind Tab 13 of your binder. It is Willett Witness Statement Exhibit A, Page 2.

A. Yes.

Q. And it's the longer email in the middle of the page, and it's very small. But Mr. Nevett writes, "It has come to our attention that one of the applicants for .WEB has failed to properly update its application. Upon information and belief, there have been changes to the Board of Directors and potential control of NU DOT CO LLC (NDC) that has materially changed its application. To our knowledge, however, NDC has not filed the required application change request," unquote.

He goes on to say, "We" -- this is the
second-to-last paragraph, quote, "We request that ICANN investigate the change in NDC's Board and potential control and that the ICANN auction scheduled for July 27th be immediately postponed. The auction should be scheduled after the final investigation is complete and NDC's requisite change request is resolved. We do not make this request lightly and haven't done so in well over 100 other scheduled ICANN auctions," unquote.

In light of the email from Mr. Rasco that we just looked at, this was a reasonable request, don't you agree?

A. Based on subsequent conversations I had with Mr. Nevett, I believe that this was a sincere concern of his. I would be presuming what was the basis of this email.

Q. And Mr. Nevett is correct when he writes that if the ownership or control of NDC had changed, NDC was required to report that and ICANN needed to evaluate that change, he's citing to Section 1.2.7 of the guidebook; is he correct in that assertion?

A. Section 1.2.7 of the guidebook does govern the changes that ICANN needs to be informed of, yes.
Q. Going back to your witness statement, Paragraph 20, Page 7. Tell me when you're there.

A. Yes.

Q. In reference to Exhibit A that we just looked at, you write in Paragraph 20, quote, "The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought VeriSign might be involved with NDC's application and, in fact, did not mention VeriSign at all."

Do you see that?

A. I do.

Q. My first question is: Do you have any reason to believe that Mr. Nevett knew that VeriSign might be involved in NDC's application?

A. I don't have any information on that.

Q. Are you suggesting that he was somehow at fault for somehow not mentioning VeriSign in that communication?

A. No, not at all.

Q. And you seem to draw a distinction between the concern that NDC may have undergone a change of ownership or control on the one hand and the possibility that VeriSign might be involved with NDC's application on the other.
Do I understand that correctly?

A. I'm sorry, I am not sure I understand the question. Could you repeat that?

Q. Sure. So you say, "The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought VeriSign might be involved with NDC's application," end of quote.

So is there a distinction between the concern that NDC may have gone -- undergone a change in ownership or control from a concern that VeriSign might be involved with NDC's application?

A. I wouldn't say that there was a concern or a distinction. It was more -- it would have been -- if VeriSign or any other entity had been shared with me, it would have given my team another direction to pursue and additional questions to ask about, but insomuch it was about control and ownership, we just followed up with NDC about those matters.

Q. But if VeriSign had been involved with NDC's application, that would suggest a resale or transfer or assignment of NDC's rights and obligations in the application.

Do you disagree?
A. Not necessarily.

Q. Okay. In paragraph -- let me back up.

So if -- you're saying that if Mr. Nevett had mentioned VeriSign, it would have given you another avenue to pursue and investigate?

A. We would have asked a question about that, yes.

Q. Okay. In Paragraph 21, you write, quote, "In view of Ruby Glen's concerns, ICANN immediately investigated. Upon receipt of Mr. Nevett's 23 June 2016 email, I instructed my staff to investigate the claims raised therein," unquote.

And you refer to an email dated 27 June 2016, which is Exhibit B. So let's take a look at that, and that's at Tab 14 of your binder. Tell me when you're there, Ms. Willett.

A. I am there.

Q. So the bottom -- the email at the bottom is from Mr. Jared Erwin to Mr. Rasco. Who is Mr. Erwin?

A. He was a member of the new gTLD Program team.

Q. Do you recall what his title was?

A. I don't. I know that he was involved in administering the auctions and contention set at
that time.

Q. How many investigations of this type had he done before, do you know?

A. I don't know.

Q. How big was your staff at this time, do you recall that?

A. June of 2016, approximately 35, perhaps 40.

Q. Okay. Were they all direct reports to you?

A. They were not.

Q. Was Mr. Erwin a direct report to you?

A. He was not.

Q. Do you recall to whom he directly reported?

A. As of that date, I was uncertain.

Q. So the first two sentences of Mr. Erwin's email to Mr. Rasco read, quote, "We would like to confirm that there have not been changes to your application or the NU DOT CO LLC organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts),"
Do you recall that?

A. Yes.

Q. And did you see that email at the time that Mr. Erwin sent it out?

A. It was four years ago. I don't recall.

Q. Now, Mr. Rasco appears to respond very quickly, within about 48 minutes, but there are different time zones. Do you know if all these times are Pacific time?

A. I believe them to be Pacific time.

Q. In any event, Mr. Rasco responds, quote, "I can confirm that there have been no changes to the NU DOT CO LLC organization that would need to be reported to ICANN."

Do you see that?

A. Yes.

Q. So he answers Mr. Erwin's questions about whether any changes had been made to the NDC organization, but he doesn't answer whether there had been any changes to the application, correct?

A. Correct.

Q. And then Mr. Erwin responds very soon thereafter, quote, "Thank you for confirming. No further action is required of you at this time,"
Just so I'm clear, when you write in your witness statement that you asked your staff to investigate the claims raised by Mr. Nevett, you're referring to this exchange of emails here on Willett Exhibit B; do I understand that correctly?

A. Yes, that was one of the steps. That was the investigation as of June.

Q. Okay. Let's go back to this witness statement. And at Paragraph 23 you state that on 29 June 2016, the next day, you met with Mr. Nevett -- sorry. It is two days later. You met with Mr. Nevett at the ICANN meeting in Helsinki.

Do you recall that meeting?

A. I do.

Q. And Mr. Nevett again asked that the auction be postponed based on his concerns about NDC's ownership or management.

Do you recall that?

A. I do recall that.

Q. Okay. And according to your witness statement -- I am looking at the middle sentence, four lines down. It says, quote, "During this meeting, I informed Mr. Nevett that my team had
already investigated the alleged management changes with NDC's representative and that NDC asserted that no such changes had occurred. I further informed Mr. Nevett that, based on the fact that ICANN had found no evidence of such a management change, ICANN was continuing to proceed with the auction as scheduled," unquote.

And, again, just so I'm clear, when you told Mr. Nevett that the team had already investigated and found no evidence of a management change, you're referring to the exchange of emails that we just looked at between Mr. Erwin and Mr. Rasco; is that correct?

A. That's correct.

Q. And you again say, "At no time did Mr. Nevett mention VeriSign."

Again, this is only a few days later, but at this point you had no reason to believe that Mr. Nevett should have been aware of VeriSign's involvement in the application; is that correct?

A. I don't know what Mr. Nevett was aware of.

Q. But you have no reason to believe he should have been aware of any involvement by VeriSign?

A. That he should have been, no.
Q. Okay. Now, you go on to say in Paragraph 24 that you told Mr. Nevett in Helsinki that if he was not satisfied with ICANN's course of action, he had the option to invoke one of ICANN's accountability mechanisms, and that's what Mr. Nevett proceeded to do.

Do you recall that?

A. Yes. He contacted the ombudsman.

Q. And the ombudsman at that time was Mr. Chris LaHatte. How do you pronounce that, LaHatte?

A. I believe he says LaHatte.

Q. LaHatte. And you go on to say in Paragraph 24, quote, "On 6 July 2016, the ombudsman sent an email to NDC on which I was blind-copied inquiring as to whether any changes in ownership/control had taken place and noting that he had," quote, "opened an ombudsman complaint file about this matter," unquote. And that's at Exhibit C of your witness statement.

So let's take a look at that. It is Tab 15 of your binder. Again, this is Willett Exhibit C, Page 2, an email from Chris LaHatte dated July 6, 2016. Quote, "Dear, Mr. Rasco. I have received a complaint from one of the applicants for .WEB as
follows: One or more applicants for .WEB made a complaint to the ombudsman about changes to the .WEB application by one of the applicants, being NU DOT CO LLC. There is evidence from them (which I have seen) which reveals that there have been changes to the composition of NU DOT CO LLC's Board that require it to go through an ICANN change process," unquote.

Was the evidence that Mr. LaHatte was referring to the exchange of emails between Mr. Rasco and Mr. Nevett that we looked at earlier?

A. Mr. LaHatte didn't tell me specifically what evidence he was basing that on.

Q. Were you aware of any evidence beyond that exchange of emails?

A. No, I was not.

Q. Okay. Even though Mr. LaHatte decided to open an ombudsman complaint, you decided that you would speak to Mr. Rasco yourself; is that correct?

A. So I had a variety of conversations of exchanges with Mr. LaHatte over the course of the program, and all of which I believe were with counsel and would have been privileged, but I could speak to generally the nature of why I would have sent an email -- contacted Mr. Rasco.
Q. In any event, two days after Mr. LaHatte's letter to Mr. Rasco, you did send an email to Mr. Rasco asking him to call you. Do you remember that?
A. Yes. In essence, I was endeavoring to gather additional information to inform Mr. LaHatte's investigation that I could share with him.
Q. And did you tell Mr. LaHatte that you were reaching out to Mr. Rasco?
A. I may have. I don't recall specifically.
Q. Let's take a look at Tab 16, which is Exhibit F to your witness statement. Tell me when you're there.
A. Yes, I am.
Q. At the bottom we can see that you sent an email to Mr. Rasco on 8 July 2020 asking him to call you at his earliest convenience, right?
A. Yes.
Q. And you don't recall if you told the ombudsman that you were going to send Mr. Rasco this email?
A. I don't recall specifically telling him one way or another.
Q. Do you recall telling anyone else at ICANN
that you were going to send this email to Mr. Rasco?

A. In terms of conversations with counsel?

Q. For now let's leave it at yes or no. Did you tell anyone at ICANN that you were going to send this email to Mr. Rasco, that you recall?

A. Yeah, it's been four years. I don't recollect.

Q. Do you recall if anyone at ICANN asked you to send this email?

A. Not that I recall.

Q. In any event, Mr. Rasco called you later that day; is that correct?

A. That's correct.

Q. And do you remember how long the telephone -- he called you by telephone, I assume?

A. Yes.

Q. And do you remember how long the conversation lasted?

A. I don't.

Q. Was anyone on the call besides you and Mr. Rasco?

A. I believe I had one or two other staff members from our team with me.

Q. Do you recall who they were?
A. I believe that it was Christopher Bare, and I believe at the time it may have been Ms. Christina Flores.

Q. Was anyone from ICANN listening to the call?

A. Not that I recall, no.

Q. Okay. Did anyone take notes of the conversation?

A. Ms. Flores did.

Q. Do you recall if she took them by hand or were they typed?

A. Her practice was by hand. That's what I recall.

Q. And what did she do with the notes, do you recall?

A. I don't know.

Q. Do you know -- do you know if they still exist?

A. I don't.

Q. Do you know if they were sent to the legal department?

A. They may. I don't know.

Q. Okay. Your conversation with Mr. Rasco took place on 8 July. Do you remember that that was a Friday?
A. I don't recall what day of the week it was, no.

Q. Well, the next day, Saturday, 9 July, you wrote to the ombudsman to report on your conversation with Mr. Rasco.

Do you remember that?

A. Yes.

Q. Okay. The email you sent to the ombudsman is Exhibit D to your witness statement. It is behind Tab 17 of your binder. So let's take a look at it.

Again, it is Willett Witness Statement Exhibit D, Saturday, July 9, 2016, and you copied Amy Stathos and Herb Waye.

Can you tell us who Ms. Stathos is or what her position was at the time?

A. She's deputy general counsel at ICANN.

Q. And when did Ms. Stathos get involved in this process?

A. So Ms. Stathos is -- I believe she was involved with the communications between the -- with the ombudsman from the beginning. That was the standard practice, but I suppose maybe that's privileged.

Q. I don't think it is.
A. Okay.

Q. Who was Herb Waye?

A. Mr. Waye was the -- don't know what his formal title was. He was the assistant ombudsman, secondary ombudsman.

Q. And when did he get involved?

A. I would have to review the emails, but I believe it would have been part of the email thread.

Q. Okay. So you write in the first paragraph to Mr. LaHatte, quote, "I hope that this email finds you well. I know that you have been in communication with NU DOT CO LLC to inquire about the recent complaint filed by Donuts regarding its ownership and potential impact on the .WEB/.WEBS auction," unquote.

Does this reflect your recollection as to whether you had communicated with Mr. LaHatte before contacting Mr. Rasco on Friday, July 8?

A. If I may review this.

Q. Yes.

A. Yes, I believe through this entire exhibit, it goes back July 6, yes, I had been in communication with Mr. LaHatte about this matter.

Q. Now, is it your understanding that the
ombudsman is supposed to be independent?

A. Yes.

Q. And so why are you gathering information under the ombudsman under the oversight of the deputy general counsel?

THE WITNESS: Should I be disclosing conversations and direction?

MR. LeVEE: I will caution you not to disclose communications with counsel, and I am going to object to the statement in the question that anything you were doing was under the direction of the deputy general counsel.

Q. BY MR. De GRAMONT: Had someone asked you to write this email to Mr. LaHatte?

A. Mr. LaHatte had -- in this matter, as in many other matters, had asked me to provide information -- the program team that I might have to help inform his investigation so he could pursue that independent investigation.

So he gathered information -- it is a common practice. My understanding is he gathered information from a variety of sources, including asking me to provide information on certain matters.

Q. Had you ever read the ombudsman charter
stated in ICANN's bylaws?

A. I don't specifically recall reading a charter.

Q. Well, maybe we can put it up on the screen. This is from the current bylaws, but it is identical -- virtually identical to the bylaws in place at the time. It is Exhibit C-1, Section 5.2.

MR. LeVEE: Is this in the binder?

MR. De GRAMONT: It is not in the binder.

Chuck, could you put that up and enlarge Section 5.2?

It says, "The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Independent Review Process set forth in Section 4.3 have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate, and where possible, resolve complaints about unfair or inappropriate treatment by ICANN staff, the Board,
or ICANN constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and 'shuttle diplomacy' to achieve those results," unquote.

Have you ever seen that before?

A. I may have. I don't specifically recall an occasion.

Q. And here Mr. Nevett was asking the ombudsman to look at a question which your staff had already investigated and where Mr. Nevett was unsatisfied with the results.

Do I understand that correctly?

A. Correct.

Q. Okay. So in the second sentence you write, quote, "As you know, my team had reached out to NU DOT CO LLC previously, and we received confirmation that NU DOT's application materials were still true and accurate."

Again, you're referring to that exchange of emails between Mr. Erwin and Mr. Rasco that we looked at earlier, right?

A. That's correct.

Q. You continue, quote, "In an effort to be extremely cautious, I reached out to Mr. Jose Ignacio Rasco (the application's primary contact
for NU DOT's .WEB application) again today to ensure our understanding of his previous response was accurate. During the call, he explained the following:"

And then he goes through five different points.

Do you see that?

A. Yeah, those were my points, yes.

Q. These were five points that Mr. Rasco had conveyed to you and were summarized and notes taken by your staff member?

A. Yes.

Q. Okay. And I think everyone can read the first four points on his or her own.

I want to focus on Point 5, quote, "He,"

meaning Mr. Rasco, "was contacted by a competitor who took some of his words out of context and is using them as evidence regarding the alleged change in ownership," period. "In communicating with that competitor, he used language to give the impression that the decision to not resolve contention privately was not entirely his. However, this decision was, in fact, his. He does not believe that it is appropriate that this email conversation is being used as evidence."
He goes on to say, quote, "Mr. Rasco indicated that he provided you with similar information, but I wanted to share the details of our conversation in case they can provide you with a more complete picture."

Do you recall that?

A. Yes.

Q. Now, did Mr. Rasco tell you during the conversation that the decision to enter the ICANN auction was, in fact, his decision; is that what he told you?

A. Yes.

Q. And by this time, you had seen Mr. Rasco's email to Mr. Nevett. Do I understand that correctly?

A. I may have. Again, I don't -- I don't recall when I specifically saw that email exchange.

Q. How could you possibly interview Mr. Rasco without having that email in front of you, Ms. Willett? Let's go back to Tab 12, which is Exhibit C-35.

And Mr. Rasco has told you that the decision to skip the private auction and go to the ICANN auction was, in fact, his. But here in Exhibit C-35, he is saying that the decision "goes
beyond just us."

   Did you or anyone else at ICANN ask him what he meant when he said the decision to go to the ICANN auction, quote, "goes beyond just us," unquote?

   A. Again, I don't recall having this email at that time. You asked me the question how could I have had the conversation with Mr. Rasco. But I was having a conversation with Mr. Rasco based on my conversation with Mr. Nevett in Helsinki and based on Mr. LaHatte's general practice and request that I provide him with information that I had. That was the basis of my, again, reaching out to Mr. Rasco.

   Q. Ms. Willett, do you know if you or anyone else at ICANN ever asked Mr. Rasco what he said -- what he meant when he said the decision to go to the ICANN auction, quote, "goes beyond just us," unquote? Do you know if anyone ever asked that question?

   A. Again, I don't believe -- I don't recall asking that question because I don't recall having this email. The nature of the conversation with Mr. Rasco, the way he described it, was like when someone asks me if I'm available to go out to
dinner and I don't really want to go to dinner, but I say, "Let me check with my husband. I need my" --

Q. Ms. Willett, you are straying far from my question, and I only have limited time.

MR. MARENBERG: Mr. Chairman, this is Steve Marenberg. I believe that the witness is entitled to finish her answer to the question.

MR. De GRAMONT: Mr. Chairman, we have had an instruction that the Amici counsel not intervene. The Amici counsel is only participating in this hearing at the discretion of the Tribunal. Are we going to have to ask for the Amici counsel to be removed or will Amici counsel be able to follow the Chairman's instructions?

ARBITRATOR BIENVENU: Mr. LeVee and Mr. Marenberg, could you, one after the other, respond to the objection that's just been made, starting with you, Mr. LeVee?

MR. LeVEE: I did understand that there's only one lawyer who is supposed to be raising objections in this context, and that lawyer would be me.

ARBITRATOR BIENVENU: Mr. Marenberg?

MR. MARENBERG: Mr. Chairman, I do believe
that we are different parties than Mr. LeVee
represents. In other words, he and I represent
different parties. So I don't believe that there
are two lawyers for one party objecting here.

Now, this is a matter in which Mr. De
Gramont is interrogating the witness about her
conversation with my client, and she is giving an
explanation of that conversation, and Mr. De
Gramont interrupted her in the middle of that
answer.

This answer bears on my client's rights,
and I believe that I appropriately have the right
to at least ask that her answer be heard in its
entirety before she's cut off, as is proper in
these types of proceedings.

Now, if you're going to tell me to be
quiet and I cannot represent my client even though
its interests are implicated in this question and
this line of inquiry, I will be quiet and not raise
any other objections, but that is why I interrupted
and interjected myself here.

I don't believe that I am representing the
same interest as Mr. LeVee and, therefore, we are
not subject to the one-counsel rule.

ARBITRATOR BIENVENU: Mr. Marenberg, you
are aware of the status granted to the Amici in this proceeding under the Panel's decision in Phase I. The status is that of an amicus curiae whose contribution to the work of the Panel takes the form of written submissions.

So I would indeed ask you to refrain from making objections in the course of the cross-examination of witnesses presented by the respondent.

MR. MARENBERG: So noted, Mr. Chair, and I will not make any more objections.

ARBITRATOR BIENVENU: Thank you, Mr. Marenberg.

Q. BY MR. De GRAMONT: Now, Ms. Willett, since Mr. Marenberg did intervene, you were going to say that this was like being asked to a dinner party and you wanted to make an excuse not to go to have dinner with the person; is that what you were going to say?

A. Yes, sort of using my husband as an excuse as to being the decision maker about whether we go to a dinner party or not when ultimately it's my decision.

Q. And you know that's exactly the example that Mr. Marenberg gave during his opening argument
to the Panel, did you know that?

   A. No. No, I'm sorry, I didn't.

   Q. Okay. So going back to Exhibit C-35 -- so to your recollection, no one asked Mr. Rasco what he meant when he said that the decision to go to the ICANN auction, quote, "goes beyond just us," unquote?

   A. I only know what I asked Mr. Rasco.

   Q. Do you know if you or anyone else at ICANN asked him who the several new Board members were?

   A. Again, I don't recall having this email in this time frame, so I don't believe that I would have asked him about that.

   Q. Okay. Did you or anyone else at ICANN ask him whom he meant by, quote, "all the powers that be," unquote?

   MR. LeVEE: Can I just object? I don't know how she has any way of knowing if anyone else at ICANN --

   Q. BY MR. De GRAMONT: To your knowledge. To your knowledge, Ms. Willett.

   A. Again, I can't speak to any other conversations. I believe that in terms of program interactions, it was my team and I that were the channel for communicating with applicants, but I
don't know what anyone else might have conveyed.

Q. Even after an applicant had raised a complaint to the ombudsman about your team's investigation of the matter, you believe it was your team's responsibility to continue communicating with applicants about such matters?

A. Well, insomuch as the ombudsman, I don't specifically recall in this situation, but my general recollection is that the ombudsman asked me to provide whatever information we had about the matters he was investigating pertaining to new gTLD applicant disputes.

So it was a matter of gathering that information, fact-finding where we could to support to provide that information in support of his investigation.

Q. Did you coordinate your phone call to Mr. Rasco with the ombudsman?

A. No.

Q. Let's go back to your witness statement. And at Paragraph 29 on Page 9 you write, quote -- tell me when you're there.

A. I am there. Thank you.

Q. So you write, again, Paragraph 29, quote, "On 12 July 2016, the ombudsman informed me that he
had determined that there was no reason to postpone
the auction because he found no evidence of a
change to the ownership or control of NU DOT CO,"
unquote.

Did you write this witness statement, by
the way?

A. I worked with ICANN's legal counsel to
draft this.

Q. Okay. And was "determined" your choice of
words, do you recall?

MR. LeVEE: Object; invades the privilege.

Q. BY MR. De GRAMONT: Let me ask it this
way: Do you recollect that the ombudsman informed
you that he had determined that there was no reason
to postpone the auction because he found no
evidence of a change to the ownership or control?

A. May I look at his email?

Q. Yeah, let's take a look at it. That's a
good idea.

Exhibit G is behind Tab 18 of your binder.

Tell me when you're there. Are you there,
Ms. Willett?

A. Yes. Thank you.

Q. So this is Mr. LaHatte's email to you,
Ms. Stathos is in copy. It's dated July 12th,
2016. He writes, quote, "I have not seen any
evidence which would satisfy me that there has been
a material change to the application, so my
tentative recommendation is that there is nothing
which would justify a postponement of the auction
based on unfairness to the other applicants;"
unquote.

So do you see a difference between the
terms "determination" and the term "tentative
recommendation"?

A. Certainly.

Q. He goes on to write, quote, "Is there any
particular reason why a postponement could not be
made anyway, or is the preparation for the auction
too far advanced? I make that suggestion not
because I agree with the complaint made by Donuts,
but because it would prevent them from perhaps
taking further accountability action based upon a
refusal to postpone, as, of course, this company
has demonstrated that they will be aggressive about
use of such accountability functions."

Do you recall that?

A. Yes.

Q. Did you sense any discomfort on the part
of Mr. LaHatte in having the public auction going
forward as scheduled based on this email?

A. I took this email to mean that he was trying to help ICANN avoid having to deal with further accountability mechanisms.

Q. And did you take this email to mean that he had made a determination that resulted in closing the ombudsman complaint on this matter?

A. I did. That's my recollection.

Q. Yeah, notwithstanding the words "tentative recommendation"?

A. Well, I took that as being sort of mitigated, suggesting that we delay the auction anyway, which would have just been completely inconsistent with program practices and all of the rules of the auction that had been in place for three years by that point.

Q. Did you speak to him in person or by telephone or were all your communications in writing?

A. Do you mean about this matter specifically?

Q. Yes, about this matter specifically.

A. So at this juncture, I believe -- because I was in LA, and I am not sure where he was, my recollection is that any communication at this
juncture, July 12, 2016, would have been via email, but given that we were at the public ICANN meeting in Helsinki in late June, I don't recall specifically meeting with him, but I expect I may have had a conversation with Mr. LaHatte in Helsinki about the .WEB matter in general.

Q. And that would have preceded this 12 July email; is that correct?

A. Correct.

Q. Okay. So you don't recall any conversation with Mr. LaHatte specifically about this July 12 email?

A. I do not.

Q. Do you know if anyone responded to his question, quote, "Is there any particular reason why a postponement could not be made anyway, or is the preparation for the auction too far advanced?"

A. I hope that respectfully I would have responded, but I don't recall.

Q. And you don't recall whether anyone else did either?

A. No, I don't know.

Q. In any event, the next day, 13 July, you wrote to the contention set to advise them that the ICANN auction would proceed as scheduled.
Do you recall that?

A. Is there another document I can look at?

Q. There is. It is not in your binder, but VeriSign Exhibit 10. It is also Exhibit P to the Rasco witness statement.

Chuck, could you put up VeriSign Exhibit 10. If you could go to the bottom, I think it is the second-to-last paragraph on Page 1 -- on the first page, sorry. If you could blow up the second-to-last paragraph.

Quote, "The date to submit the postponement form passed on 12 June 2016, and we did not receive consensus from the contention set. As such, no postponement was granted."

And then the next paragraph, "Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction."

You can see at the top -- I think you can see at the top it is dated July 13.

Do you recall writing that?

A. Let's see. I am just going to --

Q. Yeah, take your time. You can ask Chuck
to blow up any portions of the document that you need to read.

A. It would be helpful if nothing was blown up and I could just read through it.

Q. You can read that?

A. Yeah, thank you.

Could I ask to see the second page? Thank you.

I have forgotten the question, sorry.

Q. It was simply do you recall that on July 13th -- is that the date of the letter -- July 13th you wrote to the contention set to advise them that the ICANN auction would go forward as scheduled?

That was simply my question.

A. Yes. Thank you.

Q. And that was the day after you had had that exchange with the ombudsman where he wrote about his tentative recommendation?

A. Correct.

Q. I take it you were under a lot of pressure to make sure that the ICANN auction for .WEB went forward on 27 July; is that true?

A. Oh, no, no, I wouldn't say we were under pressure to conduct auctions at all. In fact, ICANN would have preferred that we not have to
conduct any auctions of last resort.

Q. So you would have been -- ICANN would have been pleased to postpone the auction, the ICANN auction?

A. ICANN would have been pleased if the applicants had found some way to resolve the contention in the three-plus years until this point, or we would have hoped that the applicants could have agreed to submit a request for postponement with -- in a timely manner.

But at the writing of this letter, I -- this letter saying we were proceeding could have been a basis for any of the applicants to initiate an accountability mechanism, to initiate a reconsideration request saying that ICANN should postpone the auction, and that would have put the contention set on hold as of that date.

Q. So your testimony was once the ICANN auction was scheduled for July 27, you were not under any new pressure to make sure that it went forward on that date?

A. Correct. I wouldn't say there was pressure.

Q. Okay. Let's go back to your witness statement and take a look at Paragraph 14, and it
says, quote, "The auction rules governing indirect contention sets. Auction rules set forth a prescribed and limited period of time within which members of a contention set may request a postponement of an auction," quote -- and you're quoting from the rules -- "an applicant may request an advancement/postponement request via submission of the auction date advancement/postponement request form. The form must be submitted at least 45 days prior to the scheduled auction date, and ICANN must receive a request from each member of the contention set," close quote.

And that's from Rule 10 of the auction rules; is that correct?

A. I'd have to review the auction rules.

Q. Okay. Let's take a look at them. They are behind Tab 20, which is Exhibit C-4.

ARBITRATOR BIENVENU: While the document is being pulled up, Mr. De Gramont, at a convenient time in the flow of your cross-examination, we could take our first break.

MR. De GRAMONT: Mr. Chairman, may I suggest I finish my questioning on this document and then we can take our break then?

ARBITRATOR BIENVENU: Absolutely. If it
is convenient for you, we will take it then.

MR. De GRAMONT: Thank you, sir.

Q. Ms. Willett, we are at Tab 20 of your binder, C-4, is this the auction rules that were in effect in the summer of 2016?

A. I believe so.

Q. Now, if you turn to Page 4, bracketed Page 4, you'll see Rule 10 in about the upper half of the page.

And maybe we can highlight the language that starts, "The form must be submitted."

"The form must be submitted at least 45 days prior to the scheduled auction date and ICANN must receive a request from each member of the contention set," unquote.

So that's the language that you quoted in your witness statement, right?

A. Correct.

Q. But then the sentence that you didn't include in your witness statement says, quote, "Without limiting the foregoing, ICANN reserves the right at its sole discretion to postpone the auction for any contention set due to a future date regardless of whether each and every member of the contention set has submitted a postponement
request," unquote.

Do you see that?

A. I do.

Q. So ICANN had within its discretion the possibility of postponing the auction even though not each and every member had submitted a postponement request; is that correct?

A. That's correct.

Q. Was there any discussion of postponing the auction beyond the discussion by the ombudsman that we looked at in his email?

A. Again, I don't recollect a specific conversation, but there may have been.

Q. But you don't recall?

A. Correct.

MR. De GRAMONT: Okay. This would be a good time to take a break, Mr. Chairman.

MR. LeVEE: Mr. Chairman, very briefly, could I ask that the witness be excused but that the Panel and Mr. De Gramont remain for 30 seconds?

ARBITRATOR BIENVENU: Yes, of course.

This is Mr. LeVee speaking?

MR. LeVEE: Yes.

ARBITRATOR BIENVENU: Yes, very well.

So, Ms. Willett, under the same
restrictions as yesterday, that is, not to discuss your testimony with anyone during the break. Thank you very much, indeed.

Yes, Mr. LeVee -- sorry -- let's wait to get confirmation from JD that the witness has been removed.

MR. ENGLISH: Yes, the witness has been removed.

ARBITRATOR BIENVENU: Thank you very much.

Please proceed.

MR. LeVEE: Yes. Yesterday, Mr. Chairman, you said that we had a hard stop yesterday at a particular time, and I wanted to let the Panel know that the witness following Ms. Willett, Mr. Disspain, is in the United Kingdom. And so he said to me that he would not be terribly comfortable -- if the Panel chose to stay late, he would ask that he not be asked to testify.

He works during the day. So he will be testifying later today, presumably, and it would be until roughly 9:00 o'clock his time, and he would not be comfortable testifying beyond that.

I raise it not because the Panel made any decision whether it was going to extend this particular day, but just to advise everyone. I am
not trying to influence the extent of the Willett cross, not trying to have any other impact. I am just alerting the Panel that today we would make a request that we would not go late.

ARBITRATOR BIENVENU: Very well. It is a comment that is made at an opportune time because we had -- we had decided as a Panel that we would offer the parties today to sit longer hours precisely to -- well, to try to catch up on our schedule.

So you're saying that if Mr. Disspain is the witness being examined at this point, that would be a problem for him?

MR. LeVEE: Yes. He is under the original schedule. He was to be finished today, but it looks quite unlikely because we are running a little late. And I know that the estimate on Ms. Willett is four hours, but we have already gone two and a half and the binder is pretty thick. I have no idea if we are stopping at four hours or not.

Be that as it may, I have been looking at the schedule and thinking that we would be in the middle of Mr. Disspain's cross-examination if, in fact, that's how it occurs.
ARBITRATOR BIENVENU: All right. Well, thank you for advising us of this.

MR. MARENBERG: Mr. Chairman, this is Steve Marenberg. I would suggest that all counsel need to talk about scheduling. Because we had mentioned a while ago last week that Mr. Rasco is scheduled to testify on Friday, and he is not available the following week because he's on vacation.

I think before we dump this problem in the laps of the Panel, maybe counsel ought to talk about what we suggest the Panel does and we do that either on this break or the next break.

ARBITRATOR BIENVENU: Well, that would seem to me to be a sensible proposal. I know that counsel have important things to do during our short breaks, but perhaps they could find five minutes to, as you suggest, have a chat about scheduling and report back to the Panel.

MR. MARENBERG: Thank you, Mr. Chairman.

MR. De GRAMONT: I would suggest we do that at the next break, if that's -- oh, there isn't another break, is there?

MR. LeVEE: No, no, there's another break.

ARBITRATOR BIENVENU: There's another
break.

MR. De GRAMONT: Let's do that at the next break.

ARBITRATOR BIENVENU: For our guidance, Mr. De Gramont, and if you prefer to answer this after the break, that's fine, but do you have a sense of where you are in your game plan?

MR. De GRAMONT: Mr. Chairman, I would prefer to answer that after the break so I can confer with my colleagues.

ARBITRATOR BIENVENU: Perfect. So we will take our first 15-minute break. Thank you all.

MR. De GRAMONT: Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: So, Mr. De Gramont, you are ready to continue your cross-examination?

MR. De GRAMONT: I am, Mr. Chairman.

ARBITRATOR BIENVENU: Is the witness back with us?

MR. ENGLISH: Not yet. Should I call her now?

ARBITRATOR BIENVENU: Please call her, yes.

Mr. LeVee, you are there?

MR. LeVEE: I am here. I'm sorry if I'm
late. We didn't even get a signal to rejoin.

ARBITRATOR BIENVENU: Okay. Well, you're forgiven.

MR. LeVEE: Thank you.

MR. De GRAMONT: I forgive you too,

Mr. LeVee.

MR. ENGLISH: The witness is in the room with us now.

ARBITRATOR BIENVENU: Ms. Willett, we will continue your cross-examination.

Mr. De Gramont.

MR. De GRAMONT: Thank you, Mr. Chairman.

And welcome back, Ms. Willett.

Q. I'd like to direct your attention back to Tab 16 in your binder, which is Exhibit F to your witness statement, and I believe we had looked at the bottom portion of this document before, which is the July 8, 2016, email where you asked Mr. Rasco to call you.

Now I'd like to take a look at the upper portion of that document, which is an email that Mr. Rasco wrote to you. I can't tell -- there doesn't seem to be a date. Am I missing it or do you know what the date of this email is?

A. I don't see a date either. I don't
recall. It references last Friday. So I suppose it was the week after -- 9, 10 -- week of the 11th.

Q. Okay. So in the first paragraph he writes, quote, "Thank you for taking the time to speak with me last Friday, July 8, concerning the complaint that another applicant for the .WEB TLD made to the ICANN ombudsman, Chris LaHatte, relating to an alleged change in the composition of NU DOT CO LLC's," quote, "Board," unquote. "I am writing to reiterate the information I provided you on our call so that the facts are clear," unquote.

The third paragraph, he writes, "My understanding from our discussion is that ICANN is satisfied with the information I provided and has concluded there's no basis for any complaint, reevaluation or other process relating to our application, nor for any delay in the ICANN auction. Please let me know if that is not the case," unquote.

Did you tell Mr. Rasco during your conversation on Friday, July 8th, that ICANN was satisfied with the information that he had provided?

A. I honestly don't recall all of the specifics of the conversation.
Q. Okay. In the next paragraph he goes on to cite Rule 10 of the auction rules, which we discussed, and in the next sentence he writes, quote, "As we discussed, I share your understanding that the complaint was raised in order to get more time to convince us to resolve the contention set via a private auction even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN's auction as scheduled," period, unquote.

Did you tell Mr. Rasco that you believed the complaint had been raised simply to convince NDC to resolve the contention set via a private auction rather than going to the ICANN auction?

A. Again, I don't recall all of the specifics of that phone conversation with Mr. Rasco.

Q. Do you recall if you told Mr. Rasco that you thought the complaint had no merit?

A. I don't recall saying that.

Q. Had you concluded at that point that the complaint had no merit?

A. Again, I am not certain of the date of this communication and I know, as we just looked at, I was still awaiting response from Mr. LaHatte.
My general recollection is that it was --
this understanding of mine that I seem to have
shared with Mr. Rasco, this understanding that the
other applicants wanted more time to resolve
contention, I took that based on the conversation
and communications from other applicants, including
Mr. Nevett.

Q. Ms. Willett, we have limited time. So I
am going to restate my question, which was: Do you
recall telling Mr. Rasco during that conversation
on Friday, July 8th, that your understanding was
that the complaint was raised to get more time to
convince NDC to resolve the contention set via
private auction rather than ICANN auction?

A. Again, I don't recall the specifics of the
conversation from over four years ago.

Q. Do you recall telling anyone else that
you -- at that time, Friday, July 8th, that you
believed that the complaint had been raised simply
as a ploy to get NDC to proceed with the private
auction rather than the ICANN auction?

A. I have that as a general recollection, but
I don't recall a specific conversation from four
years ago.

Q. Okay. You have a general recollection
that you told others at ICANN that you thought the complaint was simply a ploy to get others to -- rather, to get NDC to participate in the ICANN auction?

A. I apologize. I have a general recollection that it was my understanding that applicants were seeking a postponement to independently resolve and avoid an ICANN auction. That is my general recollection and understanding.

I don't recall having a specific conversation with anyone about that from four years ago.

Q. Do you have any reason to believe that you did not tell Mr. Rasco that you thought the complaint was raised in order to convince NDC to resolve the contention set via private auction rather than an ICANN auction?

A. No.

Q. Have you reviewed the Domain Acquisition Agreement, Ms. Willett, that was entered into between NDC and VeriSign?

A. I have not.

Q. You have never seen it?

A. I have seen -- in preparation for this I may have seen portions of it, but I have never
reviewed it.

ARBITRATOR BIENVENU: Mr. De Gramont, can you clarify whether you are asking the question by referring to the time period just prior to Ms. Willett's testimony or back when these events were occurring?

MR. De GRAMONT: That's helpful, Mr. Chairman. Thank you.

Q. Prior to your preparation for this testimony, had you seen the Domain Acquisition Agreement?

A. I had not.

Q. You never saw the Domain Acquisition Agreement in 2016?

A. That's correct.

Q. Okay.

MR. LeVEE: Let me remind you of the issues relating to privilege, Ms. Willett, and ask you not to disclose information that you acquired from counsel.

Q. BY MR. De GRAMONT: It is a yes-or-no question.
MR. LeVEE: No, I don't think that's an appropriate question, if anything that she knows comes from counsel.

MR. De GRAMONT: Well, let's do this.

Q. Let's take a look at the DAA, which is Tab 19, Exhibit C-69 in your binder.

A. I am there.

Q. And I would direct you, please, to Page 17, Paragraph (i), and I am just going to read some of the language to you, and you can tell me if it rings any bells.

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Do you have any recollection about hearing about that provision in the DAA in 2016?

A. No.

Q. Looking at that provision, isn't it obvious that Mr. Rasco was telling Mr. Nevett the truth when he said that the decision went beyond simply us and that he had to check with the powers that be in order to answer the question?

MR. LeVEE: I object to the question.

Ms. Willett is not a lawyer. The question asks an ultimate conclusion. And she's testified that she did not see the documents during 2016, so I don't see how her views today could possibly be relevant.

MR. De GRAMONT: I am not asking for a legal opinion. I am just simply asking whether, based on the plain language of this agreement, isn't it obvious that Mr. Rasco was telling Mr. Nevett the truth when he said that the decision whether to participate in a private auction or an ICANN auction went beyond the three individuals identified in the NDC application.

MR. LeVEE: It's the same question. "Isn't it obvious" asks her for a legal conclusion. You're asking her to --

ARBITRATOR BIENVENU: Mr. LeVee.
Mr. De Gramont, it is not for me to format a question, but I think the objection goes to the substance of your question.

So perhaps you can ask your question by making an assumption as to what this provision says and then ask the witness about her understanding.

MR. De GRAMONT: Thank you, Mr. Chairman. That's very helpful.

Q. Redacted - Third-Party Designated Confidential Information

If that's the case, then Mr. Nevett -- rather, Mr. Rasco was telling Mr. Nevett the truth when he said the decision went beyond just us?

A. Again, I am only looking at part of one paragraph of a very long agreement. As Mr. LeVee said, I am not a lawyer. I don't think I can even begin to guess what Mr. Rasco meant or intended or how this whole agreement informed what Mr. Rasco was saying.

Q. Okay. That's understood.

I am going to try to ask this question in a way that won't elicit a privilege objection from Mr. LeVee. I am going to tell you that this is a
yes-or-no question.

MR. LeVEE: That is an objectionable question. There's another way of asking it. But if what she knows comes from a lawyer, then you're asking to invade the privilege by the fact that a lawyer may have said something to her.

MR. De GRAMONT: For now I just want a yes-or-no question. If I ask a follow-up, I think Mr. LeVee can object then.

MR. LeVEE: No. Because you have asked, "Yes or no, did somebody tell you that the agreements mean something?" If someone told her that, that's a privileged communication.

MR. De GRAMONT: Not if it came from a nonlawyer.

MR. LeVEE: You didn't ask that question.

MR. De GRAMONT: I said "did anyone," "did anyone."

MR. LeVEE: Ask a nonlawyer question.

ARBITRATOR BIENVENU: Gentlemen, could I ask you both, rather than engage in a conversation,
to address the Panel?

MR. LeVEE: My apologies.

ARBITRATOR BIENVENU: Mr. De Gramont, perhaps you could ask the witness if aside from conversations that she may have had with counsel, rather than, you know, the rest of the question.

MR. De GRAMONT: Okay. Thank you, Mr. Chairman.

Q. Redacted - Third-Party Designated Confidential Information

A. No.

Q. Okay. Let's take a look at Paragraph 18 in your witness statement.

A. Yes.

Q. And you write, quote, "Even if NDC had submitted a change request indicating that it had undergone a change of control and/or ownership, NDC would not have been disqualified from the auction set to take place on 27 July 2016."

Do you recall that?

A. Yes.

Q. And we now know that VeriSign did not
acquire ownership control -- let me ask you this:
Is it your understanding -- do you have an
understanding as to whether VeriSign acquired
ownership or control over NDC the entity?
   A. Well, that's not my understanding.
   Q. Okay. Your understanding is that VeriSign
did not acquire ownership or control over NDC the
entity, correct?
   A. Correct.
   Q. So Paragraph 18 in your statement, that
even if NDC had submitted a change request
indicating that it had undergone a change of
control and/or ownership is simply a hypothetical,
right?
   A. Yes, that's a -- yes.
   Q. Under your understanding of the change
request process, could applicants submit a change
request that they were reselling, assigning or
transferring the rights and obligations in their
application?
   A. So they couldn't transfer their
application to another entity, no. But applicants
all the time had engaged third parties to act on
their behalf.
   Q. Right.
A. As part of the application processing.

Q. And have you formed a view -- well, you haven't formed a view of whether that's what happened here because you never reviewed the DAA; is that right?

A. That's correct.

Q. Okay. Let's move on to another subject. So the ICANN auction went forward as scheduled on 27 July 2016; is that correct?

A. Yes.

Q. And did the auction continue into the next day, 28 July; do I understand that correctly?

A. That's my recollection, yes.

Q. And NDC was declared the winning bidder with a bid of 142 million.

Do you recall that?

A. I don't know what NDC's ultimate bid was. I understand what the second bid was.

Q. And that's because under the auction rules, the winning bidder paid the bid that the second highest bidder had made?

A. Correct.

Q. And Afiliias submitted the second highest bid, which was 135 million, right?

A. That's come to be my understanding, yes.
Q. So NDC's bid was effectively 135 million; is that right?
A. Correct.
Q. Okay. On 28 July 2016 VeriSign published a 10-Q statement with the U.S. Securities and Exchange Commission, or the SEC, and in the footnote stated that, quote, "The company incurred a commitment to pay approximately $130 million for the future assignment of contractual rights, which are subject to third-party consent," unquote. Do you recall that?
A. I recall seeing that at some point.
Q. And the media immediately picked up on that footnote and speculated that VeriSign was behind NDC's application for .WEB. Do you recall that?
A. Not specifically.
Q. Look at what's behind Tab 21 of your binder. It is Exhibit C-98, and it is an email dated July 28, 2016, from Domain Name Wire to ombudsman@ICANN.org, "Subject: It looks like VeriSign bought .WEB domain for 135 million (SEC filing)."
Do you recall if you ever saw this particular report?
A. I don't ever recall seeing this.

Q. The fourth paragraph says, "VeriSign was rumored to be backing NU DOT CO's bid for the domain name."

Have you ever heard such rumors?

A. Prior to or during the auction, no.

Q. Prior to and during the auction you had never heard rumors that VeriSign was financially backing the NDC bid?

A. I had not, correct.

Q. Would you turn to Tab 22, which is Exhibit C-99, and this is an email from Google Alerts sent to you on Thursday, July 28, 2016. And if you turn to Page 2, you will see at the bottom of the page a title that reads, quote, "Someone (cough, cough VeriSign) just gave ICANN 135 million for the rights to .WEB."

It goes on to say, "Under the auction rules, all 135 million will now go into ICANN's coffers, to be added to the 105 million it has made from the auction of 15 other top-level domains."

Did you ever see that article?

A. Not that I recall.

Q. Is it correct that the 15 prior auctions had generated 105 million? And I should say -- let
me start over.

Is it your recollection that the 15 prior ICANN auctions had yielded $105 million in bids?

A. That sounds about right. I don't have a specific recollection without looking at the web page that reports that, but it sounds generally correct.

Q. Do you recall that .WEB generated a bid that was more than the bids in all of the 15 prior auctions put together?

A. That sounds about right.

Q. And these moneys that are generated in the ICANN auctions don't include the $185,000 application fees that each applicant paid; is that correct?

A. That's correct. The ICANN auction proceeds are kept in a separate fund, separate account, segregated from the new gTLD Program funds as well as segregated from ICANN's operating funds.

Q. How many applications did you say were filed during the new gTLD Program?

A. 1,930 applications.

Q. And we multiply that by 185 -- my math isn't good enough to do that, but it is a lot of money?
A. It is over $360 million.

Q. Do you recall -- let's do this. Let's take a look at Paragraph 33 of your witness statement.

A. Okay.

Q. It says, quote, "I am informed and believe that on 1 August 2016, VeriSign made a public announcement that it had entered into an agreement with NDC regarding .WEB," unquote. Who informed you of that?

A. I don't specifically recall.

Q. Did you see the 1 August 2016 press release on the day that it was issued?

A. I believe I did review that.

Q. Now, Paragraph 34 you write, quote, "At no time before VeriSign's public announcement did any applicant ever raise a concern to me that VeriSign was involved with NDC's application, nor was I aware of VeriSign's involvement until it publicly announced its agreement with NDC," period, close quote.

When you are speaking of the public announcement, you mean the 1 August 2016 press release issued by VeriSign?

A. That's correct.
Q. Now, do you recall that Mr. Rasco sent an email to you the night before the 1 August 2016 press release

A. Yes. I recall receiving an email from Mr. Rasco.

ARBITRATOR KESSEDJIAN: Mr. De Gramont, are you sure you are speaking of a press release of August 16? I think it was August 1st.

MR. De GRAMONT: I had meant to say 1 August 2016. I may have misspoken.

ARBITRATOR KESSEDJIAN: No, no, it may be my -- as you know, in France we speak of dates in a very different way. I may have been mistaken. Okay.

Q. BY MR. De GRAMONT: So let's take a look at that email, which is behind Tab 23. It is Exhibit C-100. And let's -- are you there, Ms. Willett?

A. I am. Thank you.

Q. And looking at the very bottom of the page, Mr. Rasco writes you on July 31st, 2016,
Q. Were you at all curious why someone from VeriSign would be contacting Mr. Atallah -- I'm sorry. Let me break it down.

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A. I don't recall, but likely, yes, probably piqued my curiosity.

Q. And similarly you were curious as to why someone from VeriSign would be contacting Mr. Atallah about the .WEB application?

A. Not that I recall.

Q. Okay. Did you forward Mr. Rasco's email to anyone at ICANN?

A. Not that I recall.

Q. Did you discuss it with anyone at ICANN?

A. No, I'm sorry, I don't recall.

Q. Redacted - Third-Party Designated Confidential Information

A. I don't know.

Q. Are you aware that NDC's lawyers stated in opening arguments that ICANN and specifically you, Ms. Willett, knew that VeriSign was financially backing NDC's bid prior to VeriSign's public announcement?

A. I am not aware of anything in the opening statements.

Q. I will read you what NDC's counsel said
and ask you to respond to it. Quote, "At this point, there was a lot of speculation in this close-knit community that VeriSign has been behind NDC's bids. This is an open secret out there, so this is not something that she's guessing about or that is it."

And by "she," NDC's lawyer is referring specifically to you.

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ICANN has not received the DAA and doesn't get it until later in the month, but they do know that the financial impetus for our winning the bid is from VeriSign. That is something -- that is not something that's hidden from her at all."

So let me ask you again, did you know prior to 1 August 2016 that VeriSign was funding NDC's bid or was financially behind NDC's bid.
A. No, I don't recall ever having that information prior to 1 August.

Q. And as you sit here today, to your knowledge, did anyone else at ICANN know that VeriSign was funding NDC's bid prior to 1 August 2016?

A. No. I don't know what everyone at ICANN knew, but to my knowledge --

Q. To your knowledge --

A. To my knowledge, no.

Q. Okay. Let's go back to your witness statement, to Paragraph 9. And Paragraph 9 reads, quote, "Prior to the filing of an IRP, potential claimants are encouraged to enter into a Cooperative Engagement Process, CEP, with ICANN in order to allow the parties to discuss resolving or narrowing the issues to be brought in an IRP proceeding. In connection with the new gTLD Program, ICANN employs a practice, depending on the circumstances, of placing a contention set, as described below, or a gTLD application on hold if it is the subject of certain accountability mechanisms, including the initiation of a CEP," unquote.

Do you see that?
A. Yes, I do.

Q. Is that practice set forth in writing anywhere?

A. I am not sure.

Q. Do you recall ever seeing that practice set forth in writing?

A. I recall explaining it. It might have been written about in terms of the program. I might have spoken about it. Honestly, I don't recall the specifics.

Q. You say you recall explaining it -- explaining it to whom?

A. So as the head of the new gTLD Program, I spoke on behalf of the program and provided public updates on a regular basis through monthly webinars. In 2012, 2013, I typically gave one or more updates on the program at every public ICANN meeting.

So I spoke about how the program endeavored to respect the applicants, the community's opportunity to invoke those accountability mechanisms and to respect those by putting contention sets on hold -- or putting applications on hold or contention sets on hold to allow those accountability mechanisms to transpire,
to allow that dispute to be handled through one of those accountability mechanisms.

Q. And if the practice wasn't set forth in writing anywhere, what was the basis for your providing the information to certain applicants?

A. So when I took over the program, there were a number of all -- all of the applications, nearly all of the applications were still active and the program processing was still in its early days and there were many, many disputes about applications.

And although the applicant guidebook had described actually multiple objection mechanisms, types of objections, whereby community members or governments or interested parties could object to an application, the guidebook didn't specify an appeals process or any other mechanism by which applications could complain or dispute how ICANN was handling their applications.

So after internal discussions, it became clear that we needed to -- these are described -- these mechanisms are described in the bylaws, that we need to encourage applicants and the community to utilize those mechanisms. So it became a very familiar refrain of mine in public presentations to
guide those complaints using one of the accountability mechanisms, as there was no other mechanism described in the applicant guidebook.

Q. You say in your witness statement that the practice applies to certain accountability mechanisms. Which accountability mechanisms does the practice apply to?

A. So as a general practice, we evaluate each accountability mechanism on a case-by-case basis. But in general, when a reconsideration request was triggered about an application pertaining to an application or contention set, that application was put on hold.

Ombudsman inquiries, when the ombudsman informed us of such, that drove us to put something on hold. CEP being initiated put something on hold. And the actual filing of an IRP, we had a few different practices over time about that, but the IRP, I believe, has another mechanism to -- component to request relief, which could be putting the contention set on hold.

Q. You said that each accountability is evaluated on a case-by-case basis to determine whether to put it on hold. Are the criteria that ICANN uses for that determination set forth
anywhere in writing?

    A. Not that I am aware of.

    Q. And you said that you made presentations
    in which you referred to advising applicants that
    accountability mechanisms would sometimes lead to
    contention sets being put on hold. Are you aware
    if any of those presentations are exhibits in this
    IRP?

    A. Oh, I am not -- I am not sure.

    Q. Okay. Do you know whether those
    presentations are posted anywhere on the ICANN
    website?

    A. I believe a number of my presentations are
    available by video recordings. I am not sure how
    far back that goes. But at one point, they were
    available on the ICANN website.

    Q. Specifically the presentations where you
    said that accountability mechanisms would sometimes
    lead to contention sets being put on hold?

    A. Yes. I believe -- as a general practice,
    ICANN records sessions from its public meetings and
    posts those recordings, but I don't know how long
    they retain them and where they might be available
    at this juncture.

    Q. Are you familiar with the provision in the
bylaws that requires ICANN to, quote, "Make
decisions by applying documented policies
consistently, neutrally, objectively and fairly,"
unquote?

A. Sorry, can you repeat that?

Q. Yeah. Are you familiar with the provision
in the bylaws that requires ICANN to, quote, "Make
decisions by applying documented policies
consistently, neutrally, objectively and fairly,"
unquote.

A. I think you may have showed that to me
yesterday.

MR. LeVEE: Alex, since you're quoting,
would you mind showing it to her?

MR. De GRAMONT: Sure, sure.

Q. This is Tab 39 in your bylaws. It's
Exhibit C-1, and I am going to point you to a
provision at bracketed Page 6. Now, these are not
the bylaws that were in effect as of 2016, but the
language that I am going to point you to is
identical to the language that was in the bylaws
that were in effect in 2016.

Let's actually start at Page 5 under
Section 1.2, "Commitments and Core Values." It
says, quote, "In performing its Mission, ICANN will
act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, each as described below," unquote.

And then if you turn the page, Subparagraph Roman Numeral v, and this is the language that's also in the bylaws that were in effect in 2016, "Make decisions by applying documented policies consistently, neutrally, objectively, and fairly."

Were you familiar with that principle contained in the bylaws?

A. I don't recall reading it from the bylaws.

Q. Were you familiar with the principle otherwise?

A. Yes, I -- yes.

Q. And are you familiar with the requirement of transparency in the bylaws?

A. Generally familiar, yes.

Q. So if you'll turn to Page 8, and this is language that was also in the bylaws in effect in 2018, it says, quote, "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness," unquote.
Were you familiar with those provisions of the bylaws?

A. Generally familiar.

Q. And the purpose of those rules is to ensure that everyone knows what the rules and practices are so that everyone is treated as being on the same playing field, do you agree?

A. Well, I believe that both of those provisions are really -- you know, this is my interpretation of bylaws, and I am not a lawyer, but I believe that those are intended to describe ICANN's approach to policy implementation and applying Internet policy and in policy development, as, you know, Section 3.1(a), (b) and (c) are all talking about policy development work, but it was my general understanding that operationally we tried to be as transparent as possible.

Q. Let's assume for the sake of argument that there was this practice. If it was not stated anywhere in documentation, some applicants would know about it and others would not, right?

MR. LeVEE: Calls for speculation.

Q. BY MR. De GRAMONT: Isn't the idea that the policies and practices be documented to ensure that everyone knows what the policies and practices
are so that insiders won't have benefit that newcomers will not have; was that your understanding?

A. We endeavor to document a whole lot about our practices. The entire new gTLD website is largely our effort to be transparent and to share as much information publicly as possible.

Q. But as far as you know, the practice you describe in your witness statement of sometimes putting contention sets on hold depending on the circumstances wasn't documented anywhere for the public?

A. I am not certain.

Q. You don't recall any such documentation?

A. I don't.

Q. Okay. Are you aware that Donuts and Ruby Glen filed for CEP on 2 August 2016?

A. I am aware they filed and initiated CEP.

The date sounds about right.

Q. Okay. And if you -- just to be sure, if you look at Tab 25 in your binder, this is a hyperlink in Mr. Atallah's 30 September 2016 letter to Mr. Hemphill, which is Exhibit C-61.

For the record, the parties agreed that we could use hyperlinked documents that we identified
to one another, and this is one of them.

Are you familiar with this Cooperative Engagement and Independent Review Processes Status Update?

A. Yes.

Q. You have seen these before?

A. Yes.

Q. You can see that Donuts and Ruby Glen filed for CEP regarding .WEB in 2 August 2016?

A. I can see that, yes.

Q. On August 5th you wrote to Mr. Rasco to say that NDC would receive an invitation to contract being later that day.

Do you recall that?

A. What date?

Q. 5 August.

A. Is there a --

Q. It is Tab 23, C-100. Tell me when you're there.

A. I am. Thank you.

Q. Okay. This is a continuation of the email string in which Mr. Rasco advised you about the press release that was coming from VeriSign, and in the middle of the page first Mr. Rasco writes to you on August 6th, and he writes, quote, "Hi,
Christine. I understand Power Auctions confirmed to ICANN that it received the full winning bid proceeds from us for the .WEB auction. With that step complete, I was hoping to find out when ICANN might provide us with the CIR," unquote.

Do you see that?

A. Yes.

Q. First of all, tell us what "CIR" means?

A. It stands for Contracting Information Request.

Q. So that's what you send out to start the process of delegating a string; do I understand that correctly?

A. Not quite. May I explain?

Q. Please.

A. So a Contracting Information Request is essentially a set of questions that the new gTLD Program team extends to an applicant who is -- once contention has been resolved -- who is moving forward and is proceeding into contracting. So once -- it is essentially sort of like an invitation to begin contracting discussions. It is one of the very first steps in a multiweek, multimonth process.

Q. Okay. So the next day, August 5th, we can
see from the email above, you write to Mr. Rasco, quote, "Hi, Jose. Yes, we have confirmed that the full auction payment was received by Power Auctions. Based on ICANN's standard registry contracting process, NU DOT CO should expect to receive an invitation to contracting (CIR) today. In addition to engaging with the new gTLD Program team via the GDD portal, feel free to contact me if you have any other questions," close quote.

Do you recall sending that email?

A. Well, reading it here, yes, I recall that.

Q. And do you recall if ICANN sent the invitation to contracting to NDC later that day?

A. I believe we did. Is there another document I might look at?

Q. I don't have another document.

A. Okay.

Q. I'm sorry.

Now, if -- sorry, if Donuts and Ruby Glen had filed for CEP on 2 August, why did that not put the contention set on hold?

A. So there were a lot of things happening in that week. So the CEPs are -- that notice goes to someone in ICANN's legal department, not my team. So it is a matter of when that -- the notice might
have come in for the CEP on the 2nd, and that
reflects the date that's published on that previous
document. But I didn't become aware of it until, I
believe, later on August 5th, or shortly
thereafter.

Q. Do you recall that on August 8, 2016, the
general counsel of Afilias, Mr. Scott Hemphill,
wrote to Mr. Atallah about the .WEB application and
auction process?

A. I recall Mr. Hemphill wrote a couple of
letters. Is it possible to look at the --

Q. Yes, absolutely. So that's Tab 26. It is
Exhibit C-49.

Did you see that letter at the time it was
sent by Mr. Hemphill to Mr. Atallah?

A. I expect I would have seen it shortly
after Mr. Atallah received it.

Q. And did you read it?

A. I expect I did. I believe I did, yes.

Q. And do you remember that in the fourth
paragraph, second sentence, Mr. Hemphill wrote,
quote, "We have not been able to review a copy of
the agreement(s) between NDC and VeriSign with
respect to this arrangement, but it appears likely,
given the public statements of VeriSign, that NDC
and VeriSign entered into an agreement in the form of an option or similar arrangement with respect to the rights and obligations of NDC regarding its .WEB application," unquote.

Do you remember that Mr. Hemphill made that statement?

A. I recall that, yes.

Q. And if you look at Page 2, the second paragraph from the bottom, quote, "We request that ICANN promptly undertake an investigation of the matters set forth in this letter and take appropriate action against NDC and its .WEB application for violations of the guidebook, as we had requested," unquote.

Do you remember that Afilias had asked for an investigation?

A. Yes, in this letter.

Q. And did ICANN undertake an investigation in response to this letter?

A. Not that I'm aware.

Q. Are you aware that at some point in August 2016, ICANN's outside counsel, Mr. Eric Enson at Jones Day, called VeriSign's outside counsel, Mr. Ronald Johnston at Arnold & Porter, about this matter?
MR. LeVEE: Please do not answer if the information you know is privileged. I will object that the question invades privilege.

THE WITNESS: I have no knowledge about that.

Q. BY MR. De GRAMONT: Okay. I am just going to show you the letter and ask you if you've ever seen it.

A. I apologize, I thought you said "called."

Q. Oh, I did. Okay. You're right.

Tell you what, let's take a look at the letter, Tab 27, Exhibit C-102.

Have you seen this letter before?

A. No, I have not.

Q. Okay. And in this letter Mr. Johnston forwarded the DAA and several other documents to ICANN's outside counsel. Were you aware that that had happened?

A. I'm sorry, who is Mr. Johnston? Oh, counsel for VeriSign.

Q. Yes.

A. Okay.

Q. Were you aware that VeriSign's outside counsel had written to ICANN's outside counsel forwarding the DAA and other materials attached
MR. LeVEE: Can you ask her if she's aware from anyone other than a lawyer?

Q. BY MR. De GRAMONT: Are you aware from anyone other than a lawyer?

A. No.

Q. Okay. And you never saw these materials?

A. No.

Q. Okay. Let me ask you a question about the "Confidential Business Information. Do Not Disclose" heading. Have you seen that before on communications to ICANN?

A. On occasion parties would write to ICANN and ask their communications to ICANN to be held confidentially, meaning ICANN has a practice of publishing correspondence. So in order to indicate to ICANN that a party didn't want their correspondence published, they would indicate that it was confidential.

Q. And do you know if ICANN evaluates those requests, or does it simply keep it confidential if the sender has asked ICANN to do so?

A. Insofar as I administered and oversaw the handling of correspondence for several years during my tenure at ICANN, our practice was that we
respected those requests for confidentiality and we did not post those -- such correspondences, with one exception.

At some point if some other party asked for something to be published or it became desirable and relevant to something else, I recall, again, it's been years, so I don't recall a specific example, but as a general practice, I recall that ICANN might ask the sender if it would be possible to publish a letter, but we respected their requests for confidential correspondence.

Q. So you didn't ask anyone to undertake an analysis whether it was, in fact, sensitive business information or anything like that?

A. No. Any further discussions of that would have been with counsel.

Q. Are you aware that Mr. Atallah did not respond to Mr. Hemphill's 8 August 2016 letter? Let me withdraw the question.

Are you aware that he didn't respond to Mr. Hemphill's 8 August 2016 letter prior to late September?

MR. LeVEE: Alex, could you put that letter on the screen?

MR. De GRAMONT: Yeah, yeah, let's start
with this.

Q. Do you recall that Mr. Hemphill sent a second letter on 9 September 2016 to Mr. Atallah?
A. Yes, I do.

Q. Okay. And that's behind Tab 28, Exhibit C-103. Did you read this letter?
A. Yes, I believe I did.

Q. And did you discuss it with Mr. Atallah?
A. I may have. I don't recall a specific conversation.

Q. Do you recall discussing it with anyone outside of ICANN's legal department?
A. I don't recall a specific conversation.

Q. Do you recall that both this letter and Mr. Hemphill's 8 August 2016 letter were posted on the ICANN website?
A. I believe so, yes.

Q. And do you recall that Mr. Hemphill on Page 2 again said that Afilias hadn't seen the specific terms of the agreement because they had not been disclosed? Do you recall that?

ARBITRATOR BIENVENU: Do you want to draw the witness' attention?

MR. De GRAMONT: Yes, sure.

Q. First paragraph on the second page, first
full paragraph, he says, quote, "Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from VeriSign's own press release and its disclosure in its Form 10-Q filed with the U.S. Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign," unquote.

Do you remember that Mr. Hemphill said that?

A. This has refreshed my memory, yes.

Q. But not having the terms of the agreement, he was left to speculate as to which rights and obligations may have been transferred; is that a fair assessment, a fair interpretation?

A. I mean, I guess that's what the rest of the letter is about.

Q. And then do you recall that on Page 4, and this is the last paragraph before the conclusion, Mr. Hemphill requested that ICANN provide Afilias with an undertaking that it has not and will not enter into a Registry Agreement for .WEB with NDC until ICANN's Board has reviewed NDC's contact --
conduct and reached a considered decision on
whether or not to disqualify NDC's bid and reject
its application?

Did you recall that?

A. Yes.

Q. And do you recall that Afilias had
submitted an ombudsman complaint?

A. I don't recall that. In September I don't
recall.

Q. Do you recall if -- strike that.

Do you recall that Mr. Hemphill asked to
receive a response from ICANN by no later than 16
September 2016?

A. Yeah, I see that.

Q. Okay. Do you recall that that request was
made?

A. Yeah, I recall that was part of the
letter, yes.

Q. And did ICANN undertake an investigation
in response to Mr. Hemphill's 9 September 2016
letter?

A. Well, ICANN initiated -- sent a set of
questions to four of the parties in mid -- in
September or October, I forget the exact date, not
just about what Afilias was claiming, but also
because there was a CEP. So there was a set of
questions distributed to collect information.

Q. And if you turn to Tab 29 of your bundle,
this is Exhibit C-50, it is your letter dated 16
September 2016 to Mr. John Kane at Afilias. You
sent an identical letter to Ruby Glen, NDC and
VeriSign, albeit obviously personally addressed.

Do you recall that?

A. That's correct, yes.

Q. You say, "Dear, Mr. John Kane. In various
fora Ruby Glen LLC (Ruby Glen) and Afilias Domains
No. 3 Limited (Afilias) have raised questions
regarding, among other things, whether NU DOT CO
LLC (NDC) should have participated in the 27-28
July 2016 auction for the .WEB contention set and
whether NDC's application for the .WEB gTLD should
be rejected. To help facilitate informed
resolution of these questions, ICANN would find it
useful to have additional information."

Did you write this letter?

A. I worked with counsel to draft this
letter.

Q. And to be clear, the only forum,
quote/unquote, in which Afilias had raised the
questions were in the two letters sent by
Mr. Hemphill; is that correct?

A. Well, I suppose there was also the ombudsman complaint.

Q. Oh, that's a good point. You're right. That's a good point. Right. Good point.

By the way, do you recall how the ombudsman complaint was resolved?

A. I'm sorry, I don't.

Q. Okay. You don't recall -- do you recall that the ombudsman declined to consider it because of the pending litigation and CEP that had been brought by NDC -- sorry, Ruby Glen?

A. That rings a bell, yes, thank you.

Q. What did you mean by the words, quote, "informed resolution," unquote?

A. So asking questions to gather information, to resolve the questions raised. So there was the Ruby Glen CEP. There was the Afilias request to the ombudsman. So we were endeavoring to gather information.

Q. Okay. This sounds like an investigation at the end of which ICANN would resolve the questions that had been raised, do you agree?

A. So I was not undertaking an investigation. ICANN counsel handled and administered the CEP
process. So the responses which I received to these letters I passed along to counsel.

Q. When you wrote to the recipients of this letter that ICANN was seeking to facilitate informed resolution of these questions, you were being truthful, right?

A. Of course.

Q. And there's nothing in the letter to indicate that ICANN was not going to seek, quote, "informed resolution," unquote, of these questions; is there?

A. No. I mean, ICANN resolves -- takes very seriously its bylaws responsibilities for all of its accountability mechanisms.

Q. Now, if ICANN's practice was to defer decisions on contention sets while accountability mechanisms are pending, why did ICANN undertake this effort to facilitate informed resolution of the questions?

A. Oh, okay. So there's the -- when we put an application on hold or a contention set on hold, it doesn't mean that all work ceases. In fact, what it means is that it prevents that applicant or that contention set -- we are committing that it won't move to the next phase of work, meaning we --
while on hold, we wouldn't, for instance, send a
Registry Agreement to NU DOT CO for execution. We
wouldn't -- it was on hold and the contract had
been signed, we wouldn't delegate the top-level
domain until the issue of the matter was resolved
and the hold was taken off.

But, you know, in order to resolve a
variety of matters and to get information to assist
in the CEP, that's -- we were trying to gather
information. So communications continued.

Q. Let's turn to the questions themselves.

Who drafted the questions?

A. In terms of -- I am not sure I should be
commenting or responding because of counsel.

Q. Let me ask it this way: Did you draft the
questions?

A. I created an early draft of questions.

Q. And who assisted you in -- well, strike
that.

Who else was involved in the drafting of
the questions?

MR. LeVEE: Ms. Willett, you can say
counsel if that's the answer, or if it is not
counsel, whoever is the noncounsel.

THE WITNESS: I worked with counsel on
drafting the questions.

Q. BY MR. De GRAMONT: Did you work with anyone besides counsel in drafting the questions?
A. Not that I recall.

Q. Now, at this point in time, ICANN, VeriSign and NDC had the following materials in their hands: They had the DAA and the other materials forwarded by Mr. Johnston in his 23rd August letter to Mr. Enson, right?
A. I -- yes. That was the letter you just showed me.

Q. Yes.
A. From Mr. Johnston, and I didn't get a chance to read all of that, but did that include --
Q. It did forward the DAA, yeah.
A. Okay. Okay.

Q. And ICANN and VeriSign and NDC had the two letters that Mr. Hemphill had sent to Mr. Atallah since they were publicly posted, right?
A. Yes.

Q. And VeriSign and NDC knew the whole history underlying the DAA and how VeriSign and NDC interacted after the DAA was signed, right?

MR. LeVEE: I'm sorry, I didn't understand that question. Can you read it back?
MR. De GRAMONT: Yes.

THE WITNESS: I'm sorry.

MR. De GRAMONT: I'll just read it. I'll restate it.

Q. So VeriSign and NDC, of course, knew the whole history of the DAA and how they had acted under its terms, right?

A. Well, since it's an agreement between them, I would guess they are the only two who would see it.

Q. And all Afilias had was VeriSign's press release and footnotes in VeriSign's SEC filings, right?

A. I don't know what Afilias had.

Q. When you created the early draft of the questions, had you reviewed the -- you never reviewed the DAA; is that correct?

A. Correct.

Q. And you never reviewed Mr. Johnston's letter, correct?

A. Correct.

Q. And let me ask you this: Did you do the very first draft of the questions?

A. I created a draft of questions, yes.

Q. And what did you use to create the
questions?

A. The information that had been made available to me from the Donuts/Ruby Glen complaints prior to the auction. I may have looked at Mr. Hemphill's letters. I don't recall specifically. It was more my personal knowledge.

Q. And were -- do you recall how many drafts after your first draft were created?

A. I don't recall.

Q. Okay. And were you involved in any of the subsequent drafts, or did you turn the first draft over to counsel and they did the rest?

A. I worked with counsel on multiple drafts.

Q. And were you working both with in-house counsel and outside counsel?

MR. LeVEE: Mr. Chairman, I don't think that's an appropriate question. I object on the basis of privilege.

MR. De GRAMONT: I don't see why it matters which counsel she's interacting with. It is just a yes-or-no question or one or the other, and/or both question.

MR. LeVEE: I don't --

ARBITRATOR BIENVENU: Mr. LeVee.

MR. LeVEE: I don't see how identifying
who the lawyers are is appropriate under the privilege. She has stated that she worked with counsel, and -- well, yeah, that's my objection.

    MR. De GRAMONT: The privilege log identifies both inside counsel and outside counsel corresponding with ICANN personnel at this time. So, again, the question is simply did you work with solely in-house counsel, or were outside counsel also interacting with you in the preparation of these questions?

    MR. LeVEE: I'll let that -- I will withdraw my objections. Ms. Willett can answer if she recollects.

    THE WITNESS: My recollection is I worked exclusively with inside counsel, but it's been a long time. That's my recollection.

    Q. BY MR. De GRAMONT: And do you recall how the questions you drafted differed from those that went out finally?

    A. I don't recall.

    Q. Were they very different, only slightly different?

    A. I believe I drafted a handful, maybe six questions, a handful of questions, and they were less formal.
Q. Let's look at a few of the questions.

MR. LeVEE: Mr. Chairman, this is a good time to break. I want to raise a matter that I doubt you want Ms. Willett on the screen for.

MR. De GRAMONT: May I just get through this document and then we can take a break?

MR. BIENVENU: Unless the matter relates to this document. Does it?

MR. LeVEE: No, it does not.

ARBITRATOR BIENVENU: Okay. So yes, proceed with your questions on this document, Mr. De Gramont, and then choose when would be a good time without breaking the flow of your cross for our second break.

MR. De GRAMONT: Thank you, Mr. Chairman.

Q. So if we look at the first question, the last sentence, it says, quote, "Please provide or describe any evidence of which you are aware regarding whether ownership or control of NDC changed after NDC applied for the .WEB gTLD,"

period, close quote.

Do you see that?

A. Yes.

Q. Now, at this point ICANN, VeriSign and NDC all knew that there had been no change of ownership
or control of NDC the company, right?

A. Yes, that was my understanding.

Q. But Afilias, not having seen the DAA, had no idea what had happened, right?

A. Again, I don't know what Afilias knew or didn't know.

Q. So if you knew that -- if you knew that there had been no change of ownership or control of NDC the company, why were you asking Afilias to present evidence of that?

MR. LeVEE: I do think that invades the privilege. I object on that basis.

ARBITRATOR BIENVENU: Mr. De Gramont, do you want to respond to the objection?

MR. De GRAMONT: I am not sure I understand it well enough to respond to it.

MR. LeVEE: I am happy to say I am trying to keep my objections short.

MR. De GRAMONT: Let me try to rephrase it.

Q. Did you draft this particular question?

A. I did not.

Q. Okay. Question 2 states -- well, in Question 2 ICANN asks for evidence that Mr. Rasco and Mr. Bezsonoff gave false testimony when they
said there was no change of ownership or control of NDC the entity, right?

A. I see that.

Q. And, again, at this point, NDC and VeriSign and ICANN all knew that there had been no change of ownership or control of NDC the company, right?

A. So you asked me that earlier. Let me clarify. I still had that informed perception. I can't speak to all of ICANN. My belief is that NDC -- and still is -- that there was no change of control of NDC based on what Mr. Rasco had told me in his responses because I had never seen the DAA. So that is what informed my perspective.

Q. The questions are filled with references to Mr. Hemphill's letters; is that right?

A. There are several, yes.

Q. Yeah. So, for example, Question 4 says, "In his 8 August 2016 letter Scott Hemphill stated," quote, "a change in control can be effected by contract as well as by changes in equity ownership. Do you think that an applicant's making a contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a 'change in control' of the
applicant," unquote.

How could Afilias possibly answer that question without having the DAA?

A. Again, these questions as they stand were work product from counsel, and the rationale about responses was something that I discussed with counsel.

Q. And while there are references to Mr. Hemphill's letter, there are, of course, no references to arguments attributed to Mr. Johnston's letter, right, because that was still confidential?

A. I hadn't seen it, and yes, it was confidential. I don't know the rationale as to why anything -- I just glanced at it here. I don't know what was or wasn't included based on that letter.

Q. Did you at any -- why didn't you ask to see a copy of the DAA in preparing these questions?

A. Honestly, I don't even -- I don't recall exactly when I became aware of a DAA or a side agreement between NU DOT CO and VeriSign. It is somewhere in August, September I generally became aware of that based on the information from counsel, but I hadn't read the agreement, and
personally, I viewed any agreement between those parties would have been confidential amongst themselves.

Q. You didn't think the agreement had any relevance to ICANN or ICANN's determination of whether the agreement violated the gTLD rules?

A. I don't -- I don't recall -- since I hadn't read the agreement, I don't think I had an opinion on its relevance.

Q. Well, isn't that a little bit circular, Ms. Willett? How could you possibly determine whether the agreement was relevant to whether NDC had violated its rules without reviewing the agreement?

A. So, okay, generally we talked about the auction rules, and my general understanding based on VeriSign's press release is that they had some future intention, hopes, aspirations to operate the TLD if ICANN approved of a TLD assignment. I also understood from the press release that they had committed funds that were put forward towards the auction.

So to me that was akin to and consistent with the auction rules and an applicant being able to designate a bidder to apply -- to act on their
behalf in an action and to submit bids and to submit the funds and do the bidding during an ICANN auction.

Q. But, Ms. Willett, not having read the DAA, you have no idea whether the press release and NDC statements accurately reflected what the DAA required?

MR. LeVEE: Chairman, this is becoming very argumentative, and it is --

ARBITRATOR BIENVENU: Overruled. I'll allow the question.

THE WITNESS: So applicants had agreements with a variety of vendors and third parties regarding all sorts of aspects of their application and future gTLD operations.

There were applicants -- more than a handful of applicants who signed a Registry Agreement and then immediately transferred a TLD to another registry operator, requested such an assignment from ICANN.

So just having some sort of agreement, I didn't -- you know, again, I wasn't a lawyer, but they -- I was looking at the applicant's statements that the applicant had made, the information they had provided in the application and the subsequent
Questions, and that's how I was reviewing and considering the matter.

Q. BY MR. De GRAMONT: But not knowing the DAA's terms, you had no way of knowing whether the DAA was comparable to the other arrangements that you just described; isn't that fair?

A. I had no way of knowing what was in the DAA or any of those other third-party agreements.

Q. You could have asked for the DAA, right?

A. Perhaps.

Q. Did you ever ask for the DAA?

A. I did not.

Q. And since you never reviewed the DAA, you don't know whether the questions and the questionnaire reflected any of the terms of the DAA; is that correct?

A. That's accurate.

Q. And who asked you to draft the questionnaire in the first place?

A. It was based on a discussion with counsel.

Q. It wasn't Mr. Atallah or any other nonlawyer at ICANN?

A. No.

Q. And was it your idea to send out the questionnaire?
A. Not that I recall.

MR. De GRAMONT: Okay. This would be a good time to break, Mr. Chairman.

ARBITRATOR BIENVENU: Very well, Mr. De Gramont. Thank you very much.

So could we ask our friends to remove the witness from the hearing room.

And then, Mr. LeVee, you wanted to raise a point of order?

MR. LeVEE: Yes, and I'll wait for Ms. Willett to be temporarily excused.

(Discussion off the record.)

MR. ENGLISH: She has left the room.

ARBITRATOR BIENVENU: Mr. LeVee.

MR. LeVEE: Thank you, Mr. Chairman. By my watch, Mr. De Gramont has now cross-examined Ms. Willett for over four hours. The Afilias estimate was four hours.

Again, I am not necessarily saying that people have to stick within the estimate, but I do believe Afilias has gone over with respect to all of the witnesses, and so we find ourselves faced with a situation where Mr. Ali is emailing me and my team -- it is very difficult for me to respond to email when I am trying to defend a witness --
asking about Mr. Disspain's availability next week
when I told the Panel yesterday that he wasn't
available next week.

    Candidly I didn't ask him originally if he
was available next week because the schedule made
it clear ICANN's witnesses were going first and
Mr. Disspain was going to be finished today.

    At this point, it is not even clear we are
going to get to Mr. Disspain today, so we will do
it tomorrow, but that creates a problem for
Mr. Rasco.

    My concern is you had asked for a
cross-examination estimate at the end -- at the
beginning of the next session, and you were not
provided that. I did not interrupt. But we still
don't have an estimate, and we are now past the
number of hours originally estimated for this
witness.

    I am not saying we have to establish, but
I think you understand my point. We find ourselves
in a difficult position, and it is utterly unfair
that I am being asked about the availability of a
witness next week when I said yesterday that he was
not available.

    MR. ALI: Mr. Chairman.
ARBITRATOR BIENVENU: Mr. Ali, just before you respond, if I may.

Mr. LeVee, we hear you, and we are conscious of the problem that you allude to, but have you had a chance, you and your colleagues, to speak with counsel for the claimant and counsel for the Amici to try to, as Mr. Marenberg helpfully suggested, to try to find a path forward, has that taken place or not?

MR. LeVEE: We have not spoken, but I have received email subsequent to the last time we had this conversation asking me if Mr. Disspain could go next week, and the answer was no. That seems to be their proposed resolution.

ARBITRATOR BIENVENU: My suggestion at this point in time, and I know that our breaks are short, but I think counsel should have a conversation and try to find a constructive solution to the problem that we are facing.

MR. LeVEE: May I -- sorry.

ARBITRATOR BIENVENU: Yes.

MR. LeVEE: It is not me. I thought you were done.

May I ask the members of the Panel if they were -- if they had flexibility to go a little
later tomorrow?

ARBITRATOR BIENVENU: I haven't discussed that with my colleagues, but we have discussed possible solutions to the problem that we face, and without in any way encouraging parties to revise their estimates, we are able to offer the parties an additional day on the 14th of August. We are not available on the 13th, but we can make ourselves available on the 14th.

ARBITRATOR KESSEDJIAN: In addition, Pierre, are we flexible for tomorrow night?

ARBITRATOR BIENVENU: I wasn't going to answer that question before I had consulted with my co-panelists.

ARBITRATOR KESSEDJIAN: Because I am.

ARBITRATOR CHERNICK: I would be available to start earlier but not to go later.

ARBITRATOR KESSEDJIAN: That's fine with me.

ARBITRATOR BIENVENU: I am available at both ends.

ARBITRATOR KESSEDJIAN: And by the way, I am available on Saturday. I don't know if anybody is working on Saturdays, but that could be also an option. Mr. Rasco is not available next week, so
perhaps he's available Saturday.

    ARBITRATOR CHERNICK: I am not.

    ARBITRATOR KESSEDJIAN: You are not.

    ARBITRATOR BIENVENU: So I hope that the
    parties, with the additional availability of the
    Panel, can work this out, but I am very reluctant
    to direct these discussions before they have taken
    place.

    The parties are fortunately represented by
counsel who have experience, know each other and
are solution-oriented. So I would just invite them
to have a first crack at finding a path forward and
to report back to the Panel.

    MR. LeVEE: We will do that, Mr. Chairman.
    Is it possible for Mr. De Gramont to give us a time
    estimate of his remaining time?

    ARBITRATOR BIENVENU: He will do that in
    the course of your discussions with him.

    MR. LeVEE: Thank you.

    ARBITRATOR BIENVENU: Thank you. So we
break for 15 minutes, and maybe our friend JD can
tell Ms. Willett that it will be 15 minutes more.

    MR. De GRAMONT: Thank you, Mr. Chairman.

    MR. ENGLISH: Will do.

    (Whereupon a recess was taken.)
MR. LeVee: Chairman, members of the Panel --

ARBITRATOR BIENVENU: Please, Mr. LeVee, a little bit louder.

MR. LeVee: Sorry. The parties have spoken, and I think we have an agreement. We will accept the Panel's offer, generous offer to start one hour earlier tomorrow. So we will start 8:00 a.m. -- sorry, 7:00 a.m. Pacific, 10:00 o'clock Eastern and must be 4:00 o'clock or so in Paris.

And then Mr. Rasco will go first and Mr. Disspain will go second.

But the agreement of counsel is that Afilias will finish both witnesses tomorrow. So they will agree they are going to try to cut their examinations a little shorter and get an extra hour tomorrow. I know that we need to finish tomorrow at the normal time to accommodate the panelists.

Afilias has agreed that they will finish both examinations tomorrow, giving a reasonable amount of time for redirect examination of the witnesses.

MR. ALI: If I may just add on that particular point that I believe the agreement necessarily contemplates that Mr. Marenberg will
also observe the commitment I made that ICANN will have sufficient time for redirect of Mr. Disspain. We can finish our crosses, but the agreement could get busted if Mr. Marenberg's redirect goes too long. So it necessarily means that we are all working towards the goal that we have -- that you just laid out, Jeff, correct?

MR. LeVEE: Yes. Our understanding is we are starting early because we understand that Mr. Chernick needs to leave at the normal 1:00 o'clock time, and that's good. He has a commitment.

So our agreement is that we are going to get those two witnesses done between -- I am going to do it on Pacific time, which will be 7:00 a.m. Pacific and 1:00 p.m. Pacific.

MR. ALI: My understanding is we would have an extra hour tomorrow, right?

ARBITRATOR CHERNICK: Yes.

MR. LeVEE: 7:00 a.m. start time.

ARBITRATOR BIENVENU: Okay. All right. We commend the parties for their cooperative approach to solving this problem. That probably will require Panel members to be restrained in their own questions, but so be it.
So then do we bring any other points that the parties wish to discuss? No, so we'll bring Ms. Willett back.

ARBISTRATOR CHERNICK: Could I ask if we are to hold August 14th or not?

MR. LeVEE: I don't think that will be necessary at all.

ARBISTRATOR CHERNICK: Okay.

MR. ALI: I think that's right.

ARBISTRATOR BIENVENU: Okay. I will exercise my prerogative to say that we should all pencil it in in case. Because I think on Monday no one would have predicted where we find ourselves on Thursday afternoon. So let's pencil it in in case.

Okay. Let's bring Ms. Willett back in.

Mr. De Gramont, are you ready to continue your cross-examination? We cannot hear you, sir.

MR. De GRAMONT: I'm sorry, can you hear me now?

ARBISTRATOR BIENVENU: We can.

MR. De GRAMONT: Thank you, Mr. Chairman.

Q. Welcome back, Ms. Willett. I have a couple more questions about the questionnaire. As you saw counsel changing your questions, were you curious about the basis on which they were changing
MR. LeVEE: That invades the privilege clearly.

Q. BY MR. De GRAMONT: Let me ask it this way: Did you wonder why counsel was changing the questions in the manner that they changed them?

MR. LeVEE: I don't understand how that changes things. The witness sees something that counsel gives her, and then you're asking for her mental impressions following receipt of information from counsel.

MR. De GRAMONT: Yes. It is not her mental impressions that are privileged.

MR. LeVEE: That's exactly what it is. Were you surprised?

MR. De GRAMONT: Well, the communications are privileged and the work product is privileged, but Ms. Willett's frame of mind is not privileged.

MR. LeVEE: Mr. Chairman, I object to the question.

ARBITRATOR BIENVENU: Mr. De Gramont, can you comment on the relevance of that question?

MR. De GRAMONT: In the interest of moving forward, I will move forward and withdraw the question.
ARBITRATOR BIENVENU: Thank you.

Q. BY MR. De GRAMONT: Ms. Willett, what did you do with the -- well, let me ask you this: Did you receive responses from all of the recipients of the questionnaire?

A. I recall there was someone who did not respond.

Q. It was Ruby Glen that did not respond, right?

A. Donuts, that sounds right.

Q. So you received responses from Afilias and VeriSign and NDC; is that correct?

A. That's my recollection.

Q. And what did you do with them upon receiving them?

A. I passed those responses on to ICANN's legal team.

Q. Did you read the responses?

A. I believe I did.

Q. And did you undertake any analysis of the responses yourself?

A. I did not.

Q. Do you know if ICANN counsel did?

A. So any knowledge I have of what counsel did is based on communication I had with counsel.
Q. So let me just ask, do you know if they did any analysis, without telling me the substance of that?

Did I just check out --

(Discussion off the record.)

THE WITNESS: I said I provided the responses to counsel. I am not exactly sure what counsel did with them.

Q. BY MR. De GRAMONT: Were you aware -- are you aware that ICANN has asserted in these proceedings that its Board held a workshop in early November 2016 at which .WEB was discussed?

A. In preparation for this hearing, I had discussions with counsel.

Q. Were you aware in 2016 that there was a Board workshop at which .WEB was discussed?

A. I was not.

Q. Were you asked in 2016 to help prepare materials for the Board to consider the .WEB issue?

A. Not that I recall, no.

Q. To your knowledge, did ICANN ever reach a decision on what to do with the concerns that Afilias made regarding .WEB, either before or after November 2016?

A. Could you repeat the question? I want to
make sure I am answering correctly.

Q. Yeah. Do you know if ICANN ever reached a decision regarding the concerns that Afilias had made regarding .WEB?

A. Well, I mean, ICANN's a whole bunch of people, but I am not aware of a specific decision regarding Afilias' letters.

Q. Were you ever told that once the contention set comes off hold, you should proceed to delegate to NDC?

A. No.

Q. Were you ever told that the contention set should stay on hold until any pending and anticipated accountability mechanisms were completed?

A. That isn't something I would have been told. That would have been our practice. If there were any discussions, it would have been with counsel about that, but I can speak to our general practice within the GDD, Global Domains Division, and the new gTLD Program, our practice was to keep contention sets or applications on hold until accountability mechanisms had been resolved.

Q. But you testified that that practice was made on a case-by-case basis depending on the
particular circumstances. Do you know if, based on the particular circumstances here, ICANN decided to implement that practice?

A. So when I was discussing a case-by-case basis, it was about looking at that particular accountability mechanism, and it was about making the decision to put the application on hold.

But once it was on hold, to my recollection, we kept things on hold, and it was a matter of program operations, operational practice to keep them on hold until we became aware and informed that those accountability mechanisms were resolved.

Q. In late 2016 or early 2017 the U.S. Department of Justice commenced an antitrust investigation of the VeriSign-NDC arrangements.

Do you recall that?

A. I became aware of it, yes.

Q. And were you told that you should take no action regarding .WEB pending that investigation?

A. The conversations I recall were with counsel.

Q. Do you recall that there was a long hiatus until the DOJ investigation concluded in January 2018?
A. Well, the program wasn't on hiatus. My recollection -- if you mean the application and contention set remained on hold in that whole period, it did until 2018 June.

Q. Okay. Did you know that in January 2018 VeriSign contacted ICANN staff to inquire about the process for NDC to assign its .WEB Registry Agreement to VeriSign?

A. I was unaware of that prior to preparing for this hearing.

Q. Let me just quickly show you -- let's quickly take a look at what is behind Tab 31, Exhibit C-115. It is an exchange of emails between Jessica Hooper of VeriSign and ICANN staff members and then several internal emails.

If you look at Page 2, this is the email from Jessica Hooper at VeriSign. Do you know Ms. Hooper or do you know who she is?

A. I do not.

Q. And it is to Karla Hakansson at ICANN. Do you know Ms. Hakansson?

A. Yes, I do.

Q. Is she a member -- was she a member of your team?

A. She did not report up to me. She was part
of the Global Domains Division under another executive.

Q. And if you look at the second page, she writes, "I am beginning to take a high-level look at the documents we would need to fill out to assist NU DOT CO with the assignment process for .WEB when the time comes."

Then if you turn to Page 1, Ms. Hakansson says, "Great timing on Jessica's part! VeriSign's ears must have been burning," and there's a little smiley face emoji. You were not aware of these emails at the time?

A. No, I was not.

Q. You didn't hear anything about them?

A. Not that I recall.

Q. Were you aware that Mr. Rasco had had a phone call with Mr. Atallah and Mr. John Jeffrey in around this time frame?

A. Not that I recall.

Q. Can you turn to Tab 2 in your binder, which is Exhibit C-182? And you'll see on December 12th, 2017, there's a reference to Peg Rettino. Who was Ms. Rettino?

A. She's Mr. Jeffrey's executive assistant.

Q. And John Jeffrey is the general counsel of
ICANN; is that correct?

A. That's correct.

Q. And then there's an email from Mr. Rasco dated December 12, 2017, "Thank you. I look forward to speaking on Thursday."

Do you know anything about that telephone conference?

A. I don't.

Q. Then Mr. Rasco writes again on February 15th, 2018, quote, "Dear John and Akram, I hope this messages finds you well. In line with our previous conversation, I am contacting you regarding NU DOT CO signing the Registry Agreement for .WEB. Now that the DOJ CID has concluded and that there are no pending accountability mechanisms associated with our successful bid at the auction for this string in 2016, the next step in the process is for us to execute the Registry Agreement. Please let me know if you'll have sufficient time to get that to me this week. Thanks so much for all your help throughout this process, and I look forward to wrapping this up," unquote.

You were unaware of that communication in February 2018?
A. Yes, I was unaware of that.

Q. Did you have any communications with anyone from NDC after NDC submitted the questionnaire?

A. And by "questionnaire," you mean that September 2016 twenty questions?

Q. Yes, ma'am.

A. I don't recall any conversation.

Q. Okay.

A. Sorry.

Q. Did you know that the Ruby Glen CEP terminated on 30 January 2018?

A. That sounds about right. I would have been informed of that.

Q. And Ruby Glen had until 14 February 2018 to file an IRP but failed to do so.

Do you remember that?

A. I do recall that.

Q. Okay. And were you aware that Afilias had filed a DIDP request on 23 February 2018?

For the court reporter, it is D-I-D-P. It stands for Document Information Disclosure Policy.

A. Yes, I do recall that request.

Q. And did you see the DIDP request?

A. I don't believe I did.
Q. Okay. Were you involved in responding to
the DIDP request in any way?
A. I don't recall. My only involvement would
have been with counsel, but I don't recall
supporting that request.

Q. Does a DIDP request put a contention set
on hold under the practice you described?
A. Generally no. We considered a DIDP to
be -- it was not one of those other three
accountability mechanisms.

Q. And are you aware that ICANN denied most
or all of the DIDP requests?
A. Of that specific DIDP request?
Q. Yes, yes.
A. I don't recall the specifics of that
request or the response.

Q. Do you recall that Afilias submitted a
request for reconsideration of the Board's denial
of the DIDP request?
A. I do.

Q. And you're aware that in early June 2018
the Board denied the request for reconsideration?
A. Yes. I believe they dismissed that
reconsideration request.

Q. And that apparently caused the contention
set to come off hold; is that correct?

A. Yes. That was -- on that basis, after the Board's consideration there, we did take the contention set off hold.

Q. When you say we took the contention set off hold, whom do you mean by "we," who is "we"?

A. The program team is responsible for managing, administering the applications and the contention sets.

Q. So someone notified you that the request for reconsideration was denied, and your team took the contention set off hold?

A. That's accurate.

Q. All right. So take a look at Tab 33, which is Exhibit C-166.

ARBITRATOR KESSEDJIAN: Mr. De Gramont, I am terribly sorry, but I don't see Pierre Bienvenu on the screen.

ARBITRATOR BIENVENU: I am still here, and you will see me in a second.

ARBITRATOR KESSEDJIAN: Okay. Good.

Sorry.

MR. De GRAMONT: Thank you, Professor, for that. We don't want to lose the Chairman or any other members of the Panel. Thank you.
ARBITRATOR BIENVENU: I was there.

Q. BY MR. De GRAMONT: So, Ms. Willett, we are looking at Tab 33, Exhibit C-166. Do you have that?

A. Yes, I see that.

Q. And it is an email from Russ Weinstein dated June 6, 2018, to Lisa Carter, Linett Nardone and Karla Hakansson. What department were they in?

A. They reported to Russ Weinstein in the Global Domains Division. I believe it was contracted party -- they were on the engagement side of the division.

Q. When you say "the engagement side," that's the side of ICANN that engages with parties to enter into registry agreements?

A. Well, they engage with contracted parties for the most part. They did have some applicant engagement function, but they weren't involved in administering the new gTLD Program functions.

Q. Okay. Then you are copied, as are Amy Stathos, Christopher Bare and Cyrus Namazi. I think we have identified the others. Who is Cyrus Namazi?

A. In this period of 2018 he was a peer of mine. He was overseeing that portion of the gTLD
division.

Q. Okay. So Mr. Weinstein writes, "Lisa, Linett and Karla, wanted to give you an update re: .WEB/.WEBS. The question for reconsideration from Afilias has been denied and the contention set has been taken off hold."

It goes on to say, quote, "Please let me know if any questions come from your accounts regarding next steps. Those should continue to be managed by the program team," unquote.

And the program team is your team?

A. That's correct.

Q. Now, the email below is from you, and it refers to an updated scorecard for .WEBS. Just very briefly, what is a scorecard?

A. In this context, I believe the scorecard was a summarized chart of the current state, some background information. We prepared those to inform executives about various matters.

Q. Did the scorecard contain information about the status of whether contention sets were on hold or not?

A. Yes. It would provide an update as to the current status of that application or contention set.
Q. So Mr. Atallah and these other executives would have seen that the .WEB contention set was taken off hold in the scorecard?

A. Well, Ms. Stathos is copied on here. My understanding is that that scorecard and the communications around it were privileged, but I don't know if that's been -- no longer the case.

MR. De GRAMONT: Mr. LeVee, are you raising an objection to my question?

MR. LeVEE: Now that I understand what your question is, I do raise a privilege objection because the scorecards are maintained by the legal department.

Q. BY MR. De GRAMONT: But your understanding is that the scorecard reflects the on-hold status of the contention sets and that it is sent to executives, including Mr. Atallah?

A. Yes. It is shared with executives to make sure that they are informed of the current state of certain matters.

Q. Would you turn to Tab 34, which is Exhibit C-167, and it's an email from Jared Erwin, and Mr. Erwin, again, is the gentleman who corresponded with Mr. Rasco in June of 2016; is that correct?

A. That's correct.
Q. So he's still part of your team in June 2018?
A. Yes.

Q. And he's writing to you and Mr. Bare and he copies Grant Nakata. Who is Mr. Nakata?
A. He was another member of the program team. Mr. Erwin and Mr. Nakata reported to Mr. Bare, who reported to me.

Q. Mr. Erwin writes, "Hi, Christine and Chris. We have made the contention set updates (on-hold arrow resolved) and notified the applicants. By the end of the day, Grant will be conducting outreach to the prevailing applicants (NU DO and Vistaprint) to confirm/provide updated signatory contact information," unquote.

Now, Vistaprint is the winner of the .WEBS contention set, right?
A. .WEB and .WEBS were put in one contention set, but Vistaprint was the prevailing party for the string .WEBS, W-E-B-S.

Q. So Mr. Erwin is informing you that the delegation process is -- of .WEB to NU DOT CO is proceeding?
A. So this -- no, this didn't pertain to delegation. This was essentially saying that --
indicating that since the -- informing us that
since the status change had been made, which
Mr. Erwin was responsible for, that Mr. Nakata
would be proceeding to reengage with the applicants
to restart the contracting process from where it
left off when these applications were put on hold
back in 2016.

Q. I see. So NDC had been sent the CIS, is
that what it's called?

A. The Contracting Information Request, CIR.

Q. That's right. This was the next step for
providing signatory contract information; is that
right?

A. The next step -- since almost two years
had gone by, my team was confirming signatory
information at that time.

Q. And Mr. Erwin states that ICANN has
notified the other applicants?

A. Notified, yes.

Q. Okay. And if we look at Tab 35, Exhibit
C-62, it's from Global Support Center, dated June
7th, 2018. It is to Mr. Kane at Afilias. I
believe he was in Australia at the time, which is
why it is dated June 7. And it says, "Dear John,
thank you for contacting the ICANN team. Case
00892769 has been closed," and then there's case information. And then it says, "Please contact us if you have any additional questions."

Do you see that?

A. I do.

Q. So this was the notification to Afilias that the contention set had been taken off hold, do I understand that correctly?

A. I am not sure exactly what this case is without looking at the whole case. I couldn't speak to this.

Q. Is this the form of notice that ICANN typically gives to members of the contention set when the contention set is closed?

A. It is not what I would expect to see, but I did not typically look at those communications going out from this portal system.

Q. Are you aware of any other notification that was sent to Afilias about the -- taking the contention set off hold?

A. I am not aware.

Q. Are you aware that Afilias' counsel had asked ICANN for advanced notice if the contention set was going to be taken off hold?

A. I recall that.
Q. And you recall that ICANN declined to give any advanced notice, right?

A. It was not our practice to have outside exceptional communications with applicants. We were treating Afilias like we would any other applicant in the contention set and informing them at the same time we informed everyone else.

Q. Well, that's interesting because in August 2016, after VeriSign had issued its press release, VeriSign's outside counsel got a call from ICANN's outside counsel asking them for information about .WEB.

Do you recall that?

A. I have no idea what counsel did, outside counsel.

Q. No one from Jones Day called Afilias' counsel when the contention set was taken off hold, right?

A. I have no idea.

Q. Let's take a look at Tab 36 of your binder, which is Exhibit C-169, and we are going to start at the end. And it is an email dated June 12th from Grant Nakata to you and various others, and it says, quote, "Hello, everyone. We have the following contracting request for your review and
approval. Attached please find the RA sending list."

I think "RA" stands for "Registry Agreement"?

A. It does.

Q. It goes on to say, quote, "If you recall, the .WEB/.WEBS contention set had resolved via indirect contention auction in July 2016. The contention set was later placed on hold due to a pending accountability mechanism. The accountability mechanisms closed and the contention set was reverted back to resolved. NU DOT CO LLC, the prevailing applicant for .WEB, has completed the CIR form, and we are now prepared to issue a Registry Agreement," unquote.

Do you see that?

A. I do.

Q. I take it that various approvals for that to happen were required?

A. That's correct.

Q. So we see an approval from Mr. Bare, from you, from Mr. Weinstein, and then at the top Mr. Nakata writes on June 14th, quote, "We have the following contracting request for your review and approval. Attached please find the RA execution
list. NU DOT CO has signed the Registry Agreement for .WEB, and we are now able to proceed to countersign."

So if I understand correctly, the Registry Agreement has been sent to NU DOT CO., they have returned it and Mr. Nakata says, quote, "We are now able to proceed to countersign," unquote.

Am I understanding that correctly?

A. So essentially it is two separate requests for approvals in this email chain.

Q. And so after the June 14th email there's a request for additional approvals to proceed to countersign?

A. So the first request for approval from Mr. Nakata, initiated on 12 June, was for approval to send the Registry Agreement. Then he evidently received that. And then the email from Mr. Nakata on 14 June indicates that NU DOT CO had signed the Registry Agreement. So he was then seeking a second approval from those individuals to -- prior to ICANN's execution, countersigning of the Registry Agreement.

Q. And so if we take a look at what's behind Tab 37, Exhibit C-170 and looking at the bottom of Page 2, we see the same -- I think this is the same
email that we just looked at from Mr. Nakata asking for approvals -- maybe that's -- yes, asking for approval to countersign, and above it we see various approvals.

And then on June 20th, 2018, Mr. Nakata writes to various recipients, "Hello," quote, "I want to provide an update on the .WEB Registry Agreement. Prior to the execution of the .WEB Registry Agreement, we received notice that a cooperative engagement process was initiated on .WEB. The .WEB/.WEBS contention set has been placed on hold. We will void the current Registry Agreement via DocuSign. If or when we are able to proceed, we will reinitiate this approval process," unquote.

Were you instructed that once there were no accountability mechanisms pending, you should go ahead to proceed to delegate or contract with NDC for .WEB?

A. Well, as I said before, I wasn't instructed. It would have been our common practice. And if I had -- if there were questions, it would have been a conversation with counsel.

Q. Was the ICANN Board informed that staff was moving forward with contracting with NDC for
A. So there were communications with the Board in which ICANN's legal team was copied.

THE WITNESS: Is that something I can disclose in regards to ICANN -- the Board's oversight of this process?

MR. LeVEE: Probably no, but I don't know what the document is that you're referring to.

I am trying not to object, but the question, Ms. Willett, is: Do you know of any communications that don't involve counsel?

MR. De GRAMONT: Let me just start with a yes-or-no question.

Q. Did anyone on your staff inform the Board that the contention set had been taken off hold and that you were proceeding to contract with NDC?

A. It wasn't a common practice for us to inform the Board of contention set status changes, no.

Q. But in this instance -- let me ask it this way: Are you aware of any nonlawyer at ICANN informing the ICANN Board in June 2018 that the contention set was being taken off hold and you were proceeding to contract with NDC for .WEB?

A. Communications between my team and the

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Board typically copied one or more attorneys.

Q. Mr. LeVee will object if he thinks that's appropriate.

Right now I just want to know if any nonlawyer wrote to the Board to inform the Board that ICANN was proceeding to contract with NDC for .WEB?

A. Yes.

MR. LeVEE: Yes-or-no question. Okay.

Thank you.

Q. BY MR. De GRAMONT: Do you know who sent that communication to the ICANN Board?

A. Without looking at an email, I can't be certain in this specific instance.

Q. Is there someone who it typically would have been?

A. It would have been someone on my team, either Mr. Nakata or there was also a David Saxa, who would have sent an email to the Board, and our legal team would have been copied on those communications.

Q. And do you recall if anyone on the Board responded to the nonlawyer who had made the communication advising the Board that you were proceeding to contract with NDC for .WEB?
A. To my knowledge, no Board member responded.

Q. So what had happened to the, quote, "informed resolution," unquote, that ICANN said it was seeking back in September 2016?

A. So I believe that was in relationship to those previous accountability mechanisms, the CEP, the ombudsman matter, and those had been resolved.

Q. So once Ruby Glen's CEP was resolved and once the ombudsman said he wasn't going to consider ICANN's -- sorry, Afilias' complaint, the questionnaires were -- or the informed resolution was rendered moot?

A. I don't know what the legal department was undertaking.

Q. If Afilias had not filed for CEP, ICANN would have proceeded to contract with NDC; is that your understanding?

A. I don't really know what would have happened.

Q. Is it ICANN's position that it only has to consider whether the gTLD rules have been violated if someone forces them to do so by filing an accountability mechanism?

MR. LeVEE: Can I get that question back?
MR. De GRAMONT: Yes, yes.

(Reporter read back as requested.)

MR. LeVEE: I object on the grounds of privilege. If you know on other grounds, then you should answer.

THE WITNESS: So I -- well, first I'd like to say I don't think -- because I am no longer an employee for ICANN, I don't think I can represent ICANN's position in this hearing.

I can only share with you my understanding as to how we operated, how we functioned and what we told applicants about this matter. So I would have to say at ICANN -- I fully expected from 2016 August, I expected Afilias to file a -- a reconsideration request at any day, and I fully expected that as soon as we changed the status of the contention set, taking the contention set off hold, that was staff action, and Afilias would have voiced their objection to that and made a formal -- the way to formally complain is not by writing a letter. It is by initiating a reconsideration request. That's what I had been telling applicants publicly. That was commonly understood since 2013.

Q. BY MR. De GRAMONT: Ms. Willett, Afilias had asked for an investigation. ICANN had
responded that it was going to seek informed resolution of the concerns that Afilias had raised. You don't think that ICANN was required to actually do what it had said it was going to do?

MR. LeVEE: I object the question's very argumentative. Put it in a brief.

Q. BY MR. De GRAMONT: Having sent a letter to Afilias stating that ICANN was going to seek informed resolution of ICANN's -- of Afilias' concerns, didn't you think it was incumbent on ICANN to actually provide an informed resolution of those concerns?

A. As we discussed before, I thought I told you the informed resolution pertained to the accountability mechanisms. It was not our practice to respond and initiate investigations and take action in the program based on letters.

We had hundreds, if not thousands of letters written to us asking ICANN to eliminate one applicant or give the TLD to another applicant in correspondence, and ICANN did not take questions in letters.

Q. Can I ask you to take a look at Tab 30 in your binder, which is Exhibit C-61? It is a letter dated 30 September 2016 from Mr. Atallah to
Mr. Hemphill, and at this point ICANN's ombudsman had dismissed Afilias' complaint.

Do you recall that?

A. I am not sure when I became aware of Afilias' ombudsman complaint.

Q. Okay. Just to save time, I will represent that the ombudsman had rejected the complaint by this time and the letter is on record.

Mr. Atallah acknowledges Mr. Hemphill's letters of 8/2016 and 9 September 2016. He says, quote, "We note your comments regarding the NU DOT CO LLC application for .WEB and the ICANN auction of 27 July 2016."

At the bottom, second-to-last paragraph, he writes, quote, "As an applicant in the contention set, the primary contact for Afilias' application will be notified of future changes to the contention set status or updates regarding the status of relevant accountability mechanisms. We will continue to take Afilias' comments and other inputs that we have sought into consideration as we consider this matter," unquote.

Do you see that?

A. I do.

Q. Had you seen this letter at the time?
A. I believe so.

Q. And at this point Afilias doesn't have any accountability mechanism pending, right?

A. That's my understanding.

Q. And Mr. Atallah is committing to continue to take Afilias' comments and other inputs that we have sought into consideration as we consider this matter, right?

A. I see that.

Q. In fact, if Afilias had not filed for CEP, ICANN would simply have proceeded to contract with NDC without ever considering the issues that Afilias had raised, right?

A. I can't speak to what Mr. Atallah would have done. He would have been the executive to sign the agreement on ICANN's behalf.

Q. In fact, the Registry Agreement was sent to NDC, NDC signed it, returned it to ICANN and ICANN personnel approved ICANN's signature and only stopped the process when Afilias filed its CEP; is that right?

A. Once they initiated, yes, that accountability mechanism.

Q. So the only way that ICANN will consider -- strike that.
Did you consider the concerns that Afilias had raised to be serious concerns?

A. I considered them to be sour grapes.

Q. And did you express that view to anyone else at ICANN?

A. I may have.

Q. You don't recall specifically?

A. I don't recall specifically.

Q. Did anyone at ICANN express that view to you, that Afilias' concerns were simply, quote, "sour grapes," unquote?

A. Not that I recall.

Q. And you reached that view that Afilias was simply acting out of, quote, "sour grapes," unquote, without ever having seen the DAA; is that right?

A. Correct.

MR. De GRAMONT: May I take a two-minute break, Mr. Chairman, to consult with my counsel, with my colleagues?

ARBITRATOR BIENVENU: Yes, you may, Mr. De Gramont.

(Whereupon a recess was taken.)

MR. De GRAMONT: Mr. Chairman, I have no further questions.
Ms. Willett, thank you very much for your time. It is nice to meet you.

ARBITRATOR BIENVENU: Thank you, Mr. De Gramont.

The Panel has a few questions for Ms. Willett, and we agreed that I would begin. If there are supplemental questions, my colleagues would follow me.

Ms. Willett, just to clarify an answer that you have just given to counsel for Afilias, he asked you, you said -- stated in an answer to one of his questions that you consider Afilias' concerns to be sour grapes.

Do you remember saying that?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Now, does that mean in your opinion, Ms. Willett -- and I am asking only for your opinion, not other people's opinion, not your counsel's opinion.

But in your opinion, does that answer mean in your opinion NDC's contract with VeriSign did not violate the guidebook and the auction rules?

THE WITNESS: I haven't evaluated that agreement, and I am not a lawyer or in a position to do a legal assessment of it, but the mere fact
of an agreement to me and the fact that VeriSign essentially acted as a bidder in the auction on behalf of NDC would not disqualify them. That's my --

ARBITRATOR BIENVENU: Sorry to cut you off, but if you haven't seen the agreement, you don't know if the agreement --

THE WITNESS: Correct. I haven't reviewed the agreement. I don't know what it says. I am simply saying the fact that an agreement exists to me is not disqualifying.

ARBITRATOR BIENVENU: Are you aware, Ms. Willett, as you sit here today, that the position taken by the Respondent in this IRP, and I am reading here from Paragraph 81 of ICANN's rejoinder, is, and I quote, "ICANN has taken no position on whether NDC violated the guidebook." Are you aware that that is the position taken by the respondent in this IRP?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And was that the position throughout the period from the moment concerns were first raised about NDC's bid -- NDC's application and the moment of your departure? At no point during that period did ICANN take a
position on whether NDC had violated the guidebook?

    THE WITNESS: As far as I am aware, that's correct, yes.

    ARBITRATOR BIENVENU: And to pick up on another question that was asked of you by counsel for Afilias, the fact that ICANN sent a draft Registry Agreement to VeriSign -- forgive me, to NDC for execution, that does not imply compliance of NDC's application with the guidebook?

    THE WITNESS: Well, I suppose, in terms of the fact that -- sorry. I am trying to replay the question.

    ARBITRATOR BIENVENU: Let me rephrase it if it is helpful to you.

    If you and your team had taken the view that applicant -- let's move away from the facts in this case, but that an applicant had failed to respect the guidebook, but there had been no accountability mechanism to complain about that noncompliance, would you, by reason of the absence of an accountability mechanism, have sent a draft Registry Agreement for execution?

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

ARBITRATOR BIENVENU: So why is it, then, that no one in your team raised a red flag before the Registry Agreement was sent to VeriSign to say, "Hey, we have not yet taken a position on whether NDC violated the guidebook, and we have to take a position on this before we send that Registry Agreement out for signature"?

THE WITNESS: So my team was operating within the rules of the applicant guidebook, and we were administering the processes and functions described in that applicant guidebook.

For us to have been reviewing something else, there was no mechanism beyond those evaluation criteria for the program team to determine that an applicant had violated the guidebook unless we were informed by an outcome of an accountability mechanism, an ombudsman determination, a reconsideration request that was taken up by the Board, and we were informed somehow by the Board to take something new into consideration. We were evaluating their application and the information that the applicant provided us according to those processes.
ARBITRATOR BIENVENU: Can I ask you to turn to your letter of 16 September 2016?

THE WITNESS: Yes, right there.

ARBITRATOR BIENVENU: And if we go to the next page, we see at the top of --

ARBITRATOR CHERNICK: What tab is that?

ARBITRATOR BIENVENU: It is Tab 30.

Sorry, I had a separate copy apart from the witness binder, but it is Tab 30.

ARBITRATOR CHERNICK: Thank you.

ARBITRATOR BIENVENU: Sorry. I am mistaken. It is not Tab 30.

MR. De GRAMONT: I believe it is Tab 29, Mr. Chairman.

ARBITRATOR BIENVENU: 29. That's right, 29.

By the way, your letter is dated 16 September 2010.

Do you see that?


ARBITRATOR BIENVENU: Sorry, 16 September 2016, yeah, forgive me.

16 September 2016, that is the deadline that had been -- I will say "set," but maybe it
would be more appropriate to say "proposed" -- in Afilias' letter of 9 September. Was that coincidental?

THE WITNESS: Yes, I believe it was.

ARBITRATOR BIENVENU: Now, turning to Page 2, we see the title of the questionnaire, "Topics on Which Ruby Glen, NU DOT CO, Afilias and VeriSign are Invited to Comment."

Do you see that?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Can you tell us why the questionnaire was addressed only to those four parties and not to all members of the contentions set?

THE WITNESS: Any information I have on that would have been based on conversation with counsel.

ARBITRATOR BIENVENU: You were aware when you sent that questionnaire that, among its addressees, two of them were obviously aware of the DAA because they were signatories to it, and you knew that at least one of the four was not aware of the DAA, namely Afilias; is that correct?

THE WITNESS: So I'm sorry, I don't recall when I became aware of the DAA, if it was in -- if
it was prior to 16 September or not, and I don't know what other parties were aware of the DAA or had seen copies.

ARBITRATOR BIENVENU: Bear with me, Ms. Willett.

THE WITNESS: Of course.

ARBITRATOR BIENVENU: Just looking through my notes here.

You mentioned yesterday that you had not reviewed Mr. Rasco's statement; is that correct?

THE WITNESS: Which statement is that?

ARBITRATOR BIENVENU: Excuse me?

THE WITNESS: Oh, his witness statement?

ARBITRATOR BIENVENU: Yes.

THE WITNESS: No, I have not.

ARBITRATOR BIENVENU: You have not seen it?

THE WITNESS: Unless it's in this binder, I have not.

ARBITRATOR BIENVENU: Okay. There are statements in Mr. Rasco's statement about what ICANN knew or might have known, and I'd like to explore that with you, if I may.

THE WITNESS: Of course.

ARBITRATOR BIENVENU: If you go to
Paragraph 27, and can someone -- we are going to have someone display it for you.

THE WITNESS: Okay.

MR. De GRAMONT: Chuck, are you able to get Mr. Rasco's -- okay.

MR. BIENVENU: If we go to the bottom of Page 9 and top of Page 10. So I'll read it for you.

"It was not until April 2016, however, that ICANN" -- sorry, I can't read on my screen because we have the -- I'll follow here.

"It was not until April 2016, however, that ICANN sent notice to the contention set that ICANN would issue the .WEB gTLD and, therefore, that ICANN had scheduled a public auction for .WEB to take place on July 27, 2016. Until ICANN sent that formal notice, there was no guarantee that ICANN would hold an auction for .WEB. Rather, as had occurred with other domain strings (such as .CORP), ICANN had the right to decline to issue the .WEB gTLD and thus not hold an auction."

Could you help us situate those cases? In what circumstances might ICANN decide not to hold an auction?

THE WITNESS: So it is true that ICANN and
the Board had ultimate discretion as to whether to
issue any TLD or not.

With .CORP, as I recall -- I am going to
forget the term for this. There was a technical
risk to the root, a root collision. There was a
risk of essentially resolution of domain names to
IP addresses and queries to the DNS being routed to
the incorrect location, essentially, pertaining to
the .CORP, C-O-R-P, top-level domain.

So I do believe that that was a Board
decision which directed that we would not be
delегating the top-level domain .CORP at all.

ARBITRATOR BIENVENU: Thank you.

Can you go to Paragraph 33, and I'll just
let you read it, Ms. Willett. Let me know when
you're done.

THE WITNESS: I am. Thank you.

ARBITRATOR BIENVENU: So there's reference
in the second sentence to means of resolving
contention sets, and I would like to focus on the
third one mentioned by Mr. Rasco, which is, "buying
various applicants out of their applications before
any auction was held."

Do you know whether that has happened in
practice?
THE WITNESS: I would have to think about a specific example, but I do recall more than a few applicants who the applying entity was acquired by a different organization.

ARBITRATOR BIENVENU: I don't believe that that's what he's referring to. He's not referring to an acquisition of the applicant. He is referring to an applicant being bought out of its application, at least that's how I read it.

THE WITNESS: I don't know what that would mean. Because it would be contrary and against the rules and the AGB to buy or sell an application, but the entity -- the applying entities changed hands on multiple occasions.

ARBITRATOR BIENVENU: Right. So you have anticipated my question.

If what he's referring to, and no doubt he can clarify when he appears before us, but if what he were referring to was the buyout of the application from the applicant, your view is that this would not be permissible under the guidebook; is that right?

THE WITNESS: To me it is -- what ICANN was looking at was that the applying entity continued to retain responsibility for the
application. So as long as that was still the
case, I -- I am not a lawyer. I know there's all
sorts of creative arrangements that could be made,
but as long as the applying entity still was
managing the application, that would have been
consistent with the rules.

But if that -- if that changed and then
that applicant wasn't managing the application,
that might be an issue. But we would have
evaluated that on a case-by-case basis.

ARBITRATOR BIENVENU: Can you think of
examples where that happened?

THE WITNESS: I'd have to do a little
harder thinking about the specific strings, but I
recall that we had at least one applying entity
that ceased to exist, so some other, I don't know,
parent corporation or sister corporation acquired
the assets of that entity. I think there were --
over many years, you know, not just these four
years in the program and beyond, it was a lot of
time for all sorts of changes to corporate
structures to occur.

As the program progressed, we had to
continue to adapt our procedures to handle
situations we hadn't contemplated and beyond what
was expressly stated in the AGB.

ARBITRATOR BIENVENU: Thank you. Could we
go to Paragraph 37, and I'll let you read it, but
my question will concern the penultimate sentence
of the paragraph.

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Based on your
experience, Ms. Willett, were you aware of these
practices?

THE WITNESS: I don't recall ever being
informed explicitly by applicants of these
practices, but I became aware through general
discussions in the community that various practices
of choosing which contention sets or which strings
to pursue versus others did occur.

ARBITRATOR BIENVENU: Can you go to
Paragraph 83 of the witness statement?

THE WITNESS: I'm sorry, before we go
there, Mr. Chairman, I want to make sure I'm clear.
If you're referring to the penultimate statement
that ICANN did not object to them -- is that what
you were asking me about specifically?

ARBITRATOR BIENVENU: I was mostly,
whether it did or not is something -- is easily
traceable, or more easily traceable. But what I
just wanted to know is whether a person in your position, an important position in relation to that program, whether you were aware of these practices?

THE WITNESS: So I was aware that a variety of resolutions was taking place, and the way we became aware of that is because applicants would withdraw their applications from ICANN, essentially leaving one remaining applicant, and it would resolve contention.

That is how we in the program team came to understand that a private resolution had occurred, but I don't recall anyone specifically telling me of their strategy about an arbitrage strategy.

But over many years observing it, I think it is easy to form conclusions how certain applicants were treating certain applications and what was being resolved.

ARBITRATOR BIENVENU: Thank you.

I was going to ask you about the account in Paragraphs 83 to 86 of your conversation with Mr. Rasco, but I believe we have your evidence on this. So I don't need to go there.

My last question concerns the litigation waiver that is contained in Module 6. It is under Tab 8 of your binder.
THE WITNESS: Yes.

ARBITRATOR BIENVENU: And it is at Page 4. Do you have it in front of you?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: So I'll let you read the beginning of the paragraph. I don't want to burden the transcript, but when the text becomes capitalized, we read, quote, "Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application," and you can read what follows.

And then at the bottom of the paragraph, the last -- in the penultimate sentence we see, "Provided, that applicant may utilize any accountability mechanism set forth in ICANN's bylaws for purposes of challenging any final decision made by ICANN with respect to the application."

Do you have a view, Ms. Willett, as to what is meant by "final decision made by ICANN with respect to the application"?

THE WITNESS: I have a personal opinion.

ARBITRATOR BIENVENU: Excuse me?

THE WITNESS: I have a personal opinion as to that.
ARBITRATOR BIENVENU: Yes. Could you give us your understanding of what is meant by this language?

THE WITNESS: So the guidebook describes multiple evaluations that an evaluation goes -- that an application goes through, and if an applicant failed any of those evaluations, that would be a final decision made by ICANN.

So evaluation -- I guess in general, there are a number of actions that ICANN could take in the processing of an -- sorry -- in the processing of an application, which could be a final decision by ICANN, which would be an evaluation outcome, an objection determination to either perbado [phonetic] or fail an objection process, resolving contention, string similarity, all of those -- it wasn't just contracting. It wasn't just delegation which we deemed as a final decision.

This was the part of the guidebook that we were relying on when we looked and guided applicants to utilize those accountability mechanisms to channel action by ICANN.

We were talking about .CORP and not choosing to delegate .CORP. That would have been a final decision. This would have been a variety of
actions by ICANN in the processing of the program.

ARBITRATOR BIENVENU: Thank you very much.

So I don't know if my colleagues have questions, additional questions for Ms. Willett.

ARBITRATOR CHERNICK: I do not.

ARBITRATOR KESSEDJIAN: Well, I think I do, and I want to apologize to both Ms. Willett and Jeff LeVee because he's waiting for the redirect. I was looking at the schedule, and you have evaluated 40 minutes. So it is going to take us pretty long, but I will try to cut short -- I have four questions. We will see whether I go through four questions or whether I cut them.

Ms. Willett, I am speaking to you in your capacity as general manager of this new gTLD Program. So I want you to answer my questions to the best of your professional capacities at -- and not really trying to imagine what a lawyer would do, what another person would do. So I am really talking to you in the capacity you occupied for so many years, which I consider to be an essential capacity in the managing of the program.

On Monday -- of course you don't know about that, but I am going to tell you what happened on Monday. On Monday we had the opening
statements by the parties and the Amici.

   NDC, who is an Amici -- Amicus in this IRP said, and I quote, "ICANN" -- and it's -- by the way, anyone who is concerned about where I quote, this is one of the slides of NDC's opening statement, and it is in the second version that we received. It is Slide 8. I don't know whether anybody would want to -- it is very short, so I don't think you need to see the document.

   I quote, "ICANN" -- and it is a title of the slide. "ICANN Never Inquired about the Agreement," and I am adding for you, Ms. Willett, that the agreement that he is concerned about is the DAA. It is the agreement between NDC and VeriSign. "ICANN Never Inquired About the Agreement With VeriSign Prior to the .WEB Auction," unquote.

   Now, when I read in my capacity as a Panel member this very sentence, what I read is the reverse position, which is basically what NDC's telling us, is that ICANN should have asked -- if they were interested, if ICANN was interested in the DAA, they should have asked, ICANN should have asked.

   Now I am asking your opinion. Do you
think it was ICANN's duty to inquire about
something that would have happened, could have
happened? You said to us many times that you had
no idea, but if that were true, if something like
this was going on, do you think that was your duty
as ICANN to ask for it?

MR. LeVEE: Professor Kessedjian, can I
just clarify that you're asking about prior to the
.WEB auction?

ARBITRATOR KESSEDJIAN: Yes, prior to the
.WEB auction. Thank you, Mr. Levee.

THE WITNESS: So I don't believe we could
have had a duty to inquire about an agreement we
didn't know about. So I think we inquired the
questions in June and July that my team and I posed
to Mr. Rasco about who the directors or managers
were of NDC, who the ownership interests were. We
asked those same types of questions of many, many
applicants. We sincerely did not -- I had no
clue -- sorry, American --

ARBITRATOR KESSEDJIAN: That's okay. I
understand.

THE WITNESS: I had no suspicion, no hint
that there was this separate agreement. So I don't
think we had a duty beyond all of the inquiries
that we did make.

ARBITRATOR KESSEDJIAN: Okay. Thank you.

Now, you said yesterday, and I quote from the transcript of your witness deposition yesterday, and that's for everybody in the room, it is Page 140, Lines 12 and 13 of the transcript. You said that the applicants are prohibited, and you were very strong on that statement, from signing, reassigning, transferring their application, and you made a difference between that prohibition, which seemed to be very strong in the way you expressed it, and the rights.

Now, when I read that -- and in your witness statement you said many, many times, and you were asked today about that, but I noted at least three paragraphs, if not more, 20, 23, 34, where you said, "At no time did NDC tell us that they were doing anything with VeriSign."

Now, for the sake of argument and for the sake of discussion, if you had known -- and it is just supposition, if you had known that there was something going on with VeriSign, that was my word, behind the scenes. Now, in your capacity as general manager, what would you have done?

You didn't know, so it is a completely
THE WITNESS: So hypothetically, if we had been made aware that NDC had an agreement with any other party, and as we now know about the auction and perhaps a hopeful assignment, we might have asked some questions about it, but not knowing about that, we didn't.

So hypothetically, it might have -- it might have driven us to ask some additional questions about the nature of that.

ARBITRATOR KESEDJIAN: Thank you.

Pierre, I had two other questions, but I think it is very late in the day, so thank you very much.

ARBITRATOR BIENVENU: Thank you.

Mr. LeVee, any redirect for Ms. Willett?

MR. LEVEE: I do have some.

Are you good to keep going?

(Discussion off the record.)

REDIRECT EXAMINATION

BY MR. LEVEE

Q. Ms. Willett.

A. Mr. LeVee.

Q. Would you turn to Exhibit C-61, but in your binder it is Tab 30.

I am going to ask Ms. Ozurovich to
highlight the second paragraph.

You see where it says -- this is the letter that you said you recognize sent by Mr. Atallah and Mr. Hemphill in September 2016, correct?

A. Correct.

Q. Okay. And do you see where it says in the second paragraph, "You were notified via the Customer Portal we placed the .WEB/.WEBS contention set on hold. This was to reflect a pending accountability mechanism initiated by another member of the contention set." And then there's a citation to the cooperative engagement.

Do you know what that was referring to, the other member of the contention set?

A. Yes. I believe that was Donuts/Ruby Glen's CEP from 2016.

Q. And does this letter anywhere say that ICANN was putting the contention set on hold because of the letters that Afilias had sent?

A. No, it does not.

Q. Okay. Now, would you --

Ms. Ozurovich, would you pull up Exhibit C-51.

I am going to -- you don't have this,
Ms. Willett. It is not in your binder.

Do you see that this is a letter from Afilias to you dated October 7, 2016?

A. I do.

Q. And I am going to ask Ms. Ozurovich -- so this is a letter from Afilias to you, and it says, "We appreciate the opportunity to provide comments on behalf of Afilias to the question posed by ICANN in its September 16 letter." I am going to skip because we're short on time.

Last sentence. "We are concerned" -- go up one sentence. It says, "Mr. Atallah states that while the .WEB contention set was placed on hold by ICANN on August 19," that's the letter we looked at, "such action was taken because of the initiation of an ICANN accountability mechanism by another applicant."

Do you see that?

A. These are long sentences. Yes.

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

Do you see that?

A. I do.
Q. Did ICANN place the contention set on hold because of the letter sent by Afilias?

A. We did not.

Q. So the concern expressed by Afilias was accurate, that ICANN was not placing the contention set on hold because of the letters that it had sent?

A. Correct.

Q. Now, you said before that you expected Afilias to file a reconsideration request. Tell the Panel, what does it mean to file a reconsideration request and what could they have reconsidered back in 2016?

A. So a reconsideration request is one of those accountability mechanisms defined in ICANN bylaws, both prior to 2016 and the most current ones, and a reconsideration request asks the Board to examine any action or inaction taken by staff, Board, et cetera.

Q. And who decides a reconsideration request?

A. The Board does, or one of the -- either the Board governance committee or the Board itself depending on practice.

Q. So could Afilias have initiated a reconsideration request after the .WEB auction when
it started complaining that it thought NDC and VeriSign had done something wrong?

A. Absolutely, yes. That's what we expected.

Q. And by doing that, would the Board have acted on the reconsideration request? That's a bad question.

Would it have been the Board that had acted on the -- would have acted on the reconsideration request that Afilias would have filed?

A. Yes, it would have been the Board.

Q. Okay. And so had that happened, the Board would have taken up at that time whatever Afilias' reconsideration requests addressed?

A. Correct.

Q. Okay.

ARBITRATOR BIENVENU: Mr. LeVee, I am sorry, this is the Chair here. If you'll permit, can I ask the witness what decision would the reconsideration request have targeted?

MR. LeVEE: That's a good question. That was my next one.

THE WITNESS: So hypothetically --

ARBITRATOR BIENVENU: Then maybe you should wait for the question from Mr. LeVee.
MR. LeVEE: No, no, no, Mr. Chairman, you asked a question. I couldn't help myself. I'm getting tired. I'm sorry.

ARBITRATOR BIENVENU: Please proceed.

THE WITNESS: So Afilias made a number of assertions in those two letters of August and September 2016. I would have expected they would have raised those same issues as part of the reconsideration request and hypothetically would have asked the Board to disqualify NDC or invalidate the auction or any of the actions Afilias was asking in letters. It would have been a formal request through that proper channel to the Board to drive them to look at it.

Q. BY MR. LeVEE: Was a reconsideration request available to be filed with respect to the action of ICANN staff as opposed to the ICANN Board at that time?

A. Yes, it was.

Q. So in 2016, Afilias could have filed a reconsideration request with respect to an action of both the Board and the staff, whether it was action or inaction; is that correct?

A. That's correct.

Q. I am going to jump ahead to 2018 just to
connect the points.

   In June of 2018, when ICANN took the
contention set off hold, did you know that Afilias
had promised to file an accountability mechanism,
namely invoking the CEP?

   A. I believe they sent a letter to that
effect.

   Q. Yes. So when they did initiate a CEP,
that put the contention set back on hold before
ICANN could sign, if it was going to sign, a
Registry Agreement?

   A. That's correct.

   Q. Okay. You were asked a question this
morning about -- well, I have the copy of the daily
transcript. This is something that we receive.

   And for the members of the Panel, I am
going to read from the transcript today at 8:00
a.m. -- 8:43, that would be Pacific time. There's
an answer I don't understand.

   The question is: "But if VeriSign had
been involved with NDC's application, that would
suggest a resell, transfer or assignment of NDC's
rights and obligations in the application." And
then you were asked, "Do you disagree?"

   And you said, "Not necessarily."
I did not understand what you meant by "Not necessarily," because I was concerned that you actually might not have heard the whole question.

A. Yeah. I think it was a long question, and I might have misunderstood. So could you reread?

Q. Let me read the question.

A. Perfect.

Q. "But if VeriSign had been involved with NDC's application, that would suggest a resell, transfer or assignment of NDC's rights and obligations in the application."

Let me ask you to comment on that without asking you to either agree or disagree.

A. So, again, if VeriSign had been involved with NDC's application, I don't know what that meant. VeriSign -- VeriSign was acting as the back end. They had been designated as the back-end registry operator for several dozen applicants to operate TLDs.

So that could have been an involvement, and that wouldn't have indicated a resell of the application. They could have been acting as a consultant to the applicant.

Again, if I may, I have the experience of having managed 1,930 applications and many
different scenarios between applicants and third parties and consultants. So my answers are informed not just based on these applicants for .WEB, but I am informed by -- in regards to how many applicants behaved and how ICANN interacted with them and conducted the program as a result.

Q. Thank you.

ARBITRATOR KESSEDJIAN: Mr. Levee, can I interject a follow-up question on this one?

MR. LeVEE: Please do.

ARBITRATOR KESSEDJIAN: Thank you.

Ms. Willett, would you say that because you were asked "involved," if VeriSign had been involved and then you explained to us that there are many kinds of different involvements, are you saying to us that basically each case is to be looked at, evaluated?

I am not sure I know exactly the word because I have not worked in this kind of position, but would that be a case-by-case depending on what are the facts, who is doing what and so on?

THE WITNESS: Thank you, Professor.

ICANN, through information provided by applicants, both in their applications, subsequent conversation and dialogue, we became aware of a variety of
plans, future plans for their operation, what they wanted to do with the TLD. If it wasn't pertaining to selling the application and taking it from, you know, application -- Applying Entity A to Applying Entity B, ICANN was simply -- we were trying to administer the evaluations described in the guidebook.

We couldn't and didn't undertake to evaluate all of those other third-party relationships, whether it was for marketing or back-end registry operation or in some cases we became aware of intention to assign a TLD to a third party.

Applicants asked us to do that before contracting with some frequency, and we reminded them of the rule that that wasn't possible, that they could request such an assignment after contracting.

So to your question, Professor, I suppose it would have required an evaluation of that, but there were so many hundreds or thousands of those potential relationships, we didn't deem it to fall within the scope. It wasn't part of the evaluation criteria that we applied within the guidebook.

ARBITRATOR KESSEDJIAN: You have been
repeating many times that you had so many
applications and, therefore, couldn't spend a lot
of time on each of them or whatever, you had a lot
of each of them, and it was a fairly difficult job.

Now, isn't there some kind of
contradiction with the fact that you have been in
contact very regularly -- and I could quote you the
number of emails and telephone conversations and
whatever with the representatives of NDC.

So, you know, if, indeed, you had so much
work with all those applications, how come this
particular application was concerning you
particularly?

In your witness statement at some stage
you say that there was an email to Mr. Rasco, and
then a few hours later he's calling you. So he had
apparently direct communication with you.

THE WITNESS: So I --

ARBITRATOR KESSEDJIAN: These are
questions in my mind. So if you could clarify
that, that would be helpful.

THE WITNESS: I would be happy to. You're
right, there were many applications, and I didn't
regularly email -- have email contact or phone
contact with the primary contacts, with the
applicants on a regular basis.

However, there were more than a handful of several dozen applications that became highly contentious, not just string contention, but I'm thinking of the string for .AMAZON, the string for .AFRICA, the string for .GAY. I could go on, several dozen. Those issues, because we were getting the string for dot -- it doesn't matter.

There were several of those situations where there were many communications, there were many accountability mechanisms triggered, and those parties, it wasn't always satisfactory to them or suitable simply to engage on somewhat sensitive and very charged topics simply through emails from low-level staff via that applicant portal.

It wasn't very friendly, if you will. So on these handful of occasions, I would become involved, my staff would bring it to my attention or parties would contact me directly. So it was those few dozen applications, contention sets that I had direct conversation with applicants about.

ARBITRATOR KESSEDJIAN: And yet in the case for which we are sitting here, that did not trigger your curiosity about trying to find out what was going on, really?
THE WITNESS: Well, it wasn't really a matter of my curiosity. It was a matter of what ICANN had a right to and trying to treat this applicant and this contention set the same way we had treated the other 1,900 applications before it. So that's why we ask the same questions.

ARBITRATOR KESSEDBJIAN: But you just said it was not true for those two handful -- so there was a differentiation?

THE WITNESS: So I was speaking of the distinction in terms of the level of concern and disagreement. The .AMAZON TLD had numerous accountability mechanisms and perhaps even hundreds of letters written about it.

So depending on sort of the nature, certain issues get escalated to me. But that didn't mean that we were treating the applications and we were applying different standards to different applicants, you know, based on whether I knew them or -- no one got -- there was no favoritism, whether I knew someone or didn't know someone.

I believe when I first emailed Mr. Rasco in June 2016, July 2016, I said, "Do you even remember me?" Because I don't know that he and I
have ever met face to face, and I don't think I recall talking to him prior -- except maybe on one occasion prior to June 2016.

So it was more about --

ARBITRATOR KESSEDJIAN: I got the message. I think we probably need to defer to Mr. LeVee. I am sorry, Mr. LeVee, took more time than I thought. Thank you.

MR. LeVEE: You are entitled to ask whatever you want, you know that. Let me follow up on those questions.

Q. When there was a top-level domain application or there was kinds of disputes such as .AMAZON, was .WEB one where there was a lot of activity over the course of a few years?

A. Yes. A couple of accountability mechanisms. Not as much as some, but it wasn't a straightforward contention set.

Q. Was there a point on these -- I don't know the right word, I don't want to put words in your mouth, but a point where strings that had a lot of attention where the law department would inevitably become involved?

A. Absolutely.

Q. And would that affect the amount of
attention that you personally would give once the law department became involved?

A. Yes.

Q. Let me ask you -- I just have two other things.

You were asked about the ombudsman and what kind of investigation an ombudsman can do.

I am going to ask to have the bylaws put up. I think it is Exhibit C-1, and in particular, let's start with Page 41. Actually go to the previous page, Kelly.

Just to orient you, as you see, Article 5 is the ombudsman article, yes?

A. Yes.

Q. Okay. So, Kelly, if you would turn to Page 42, I am going to ask you to look at Section 5.3, which is entitled "Operations." It says, "The Ombudsman shall" -- and look at (d). We'll blow that up.

It says, "The ombudsman shall have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible
(subject only to such confidentiality obligations
as are imposed by the complainant or any generally
applicable confidentiality policies adopted by
ICANN)."

You see that?

A. I do.

Q. You understand that was part of the
bylaws?

A. Yes.

Q. Did you understand that the ombudsman
would ask ICANN's staff to assist him from time to
time in gathering information relating to his
investigations?

A. Yes. Based on his having done so with me
in regards to matters pertaining to the new gTLD
Program.

Q. Okay. Change of subject.

You were asked about some emails that you
could not recall, in particular, some media
reports.

Do you remember that?

A. Yes.

Q. Can you give some estimate of how many
e-mails you received in a given day and the priority
that you put on media reports?
A. So in 2016, I was probably down to receiving 200 to 300 emails per day, and media reports were definitely not my priority. I might look at them when my calendar permitted, but I will say I typically had in 2016 many hours of meetings scheduled on my calendar.

    I looked at those news feeds maybe once or twice a week.

    MR. LeVEE: Mr. Chairman, if I could have one minute, and I'll just check with my colleagues.

    ARBITRATOR BIENVENU: Yes, Mr. LeVee, please do.

    MR. LeVEE: I am just going to put this on mute.

    (Whereupon a recess was taken.)

    MR. LeVEE: Ms. Willett, I would like to thank you. You sat much longer than I told you you would, and for that I apologize.

    I very much appreciate that the Panel stayed extra late this evening, in particular the Panel in France, and I have no additional questions. Thank you.

    THE WITNESS: Thank you.

    ARBITRATOR BIENVENU: Thank you very much, Mr. LeVee.
Ms. Willett, I am sure that counsel for
the claimant join Mr. LeVee in thanking you for
your availability and for your evidence, and
certainly the members of the Panel appreciated the
time that you devoted to assisting us in our task,
and we are very grateful.

I must instruct you that the sequestration
of fact witness order requires me to instruct you
not to communicate with other witnesses whose
testimony has not yet been heard in the case. So
if you could avoid doing that, please.

So thanks again. It's been a long day for
all of us, but I am sure particularly for you, and
we are grateful for your availability.

THE WITNESS: I hope it's been helpful.

Thank you.

MR. De GRAMONT: Thank you again.

ARBITRATOR BIENVENU: So I don't think I
am going to ask if there are any other matters.
It's very late for at least one of us, but I do
thank everybody for remaining available until such
a late hour, particularly our court reporter.

Thank you very much.

So we resume tomorrow morning at 7:00 a.m.
Pacific, and until then, keep well. See you
tomorrow.

MR. De GRAMONT: Thank you, Mr. Chairman.

MR. LeVEE: Thank you very much.

MR. De GRAMONT: Thank you, everyone.

ARBITRATOR KESSEDJIAN: Good-bye.

(Whereupon the proceedings were concluded at 2:22 p.m.)

---o0o---
REPORTER'S CERTIFICATE

STATE OF CALIFORNIA  )
 ) ss.
COUNTY OF SAN FRANCISCO  )

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 17th day of August, 2020.

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