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 V
ARBITRATION
AUGUST 7, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR 465536
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FRIDAY, AUGUST 7, 2020

ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME V
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ARBITRATOR BIENVENU: Good day, everyone.

It is an early morning on the West Coast. We have a big day ahead of us.

I'll ask if there are preliminary matters that the parties or Amici would like to raise.

MR. ALI: Just very briefly, Mr. Chairman.

Mr. LeVee had asked me earlier today to provide an estimate regarding the cross-examination times for Mr. Rasco and Mr. Disspain.

All I can say is that we worked pretty much late into the night and all night to cut back our examinations of both as much as we could to allow the Panel time to ask questions and for Mr. LeVee and Mr. Marenberg to conduct their respective redirects of the witnesses.

I can't say much more than that because I think we have done what we can. We hope that the witnesses will be efficient in their responses and that the redirects will be efficient as well to allow you sufficient time to question the witnesses.

I did make a commitment to Mr. LeVee, and we will do everything that we can to abide by the
commitment that we made to do our part to get both witnesses done today.

ARBITRATOR BIENVENU: Excellent. Thank you, Mr. Ali, for that.

Mr. LeVee, will you be introducing -- no, Mr. Marenberg will be introducing the witness this morning, correct?

MR. MARENBERG: Correct.

MR. LeVEE: Yes.

ARBITRATOR BIENVENU: Good morning, Mr. Marenberg.

MR. MARENBERG: Good morning.

ARBITRATOR BIENVENU: Do you have any preliminary matters that you would like to raise, or can we bring the witness in the hearing room?

MR. MARENBERG: Nope, I think we can bring the witness in. The only thing I would say is -- and probably Mr. LeVee would echo this -- we have gotten a commitment to finish both witnesses today. That is obviously dependent on the length of the cross-examination, and I think we should monitor it as we are going forward carefully because we can easily get off time.

ARBITRATOR BIENVENU: Yes, I think we are all conscious of these constraints.
Mr. English, if you could bring the witness in.

Morning, Mr. De Gramont.

MR. De GRAMONT: Morning.

MR. ENGLISH: The witness is now in the meeting.

ARBITRATOR BIENVENU: Good morning, Mr. Rasco. Can you hear me?

THE WITNESS: I can. Good morning.

ARBITRATOR BIENVENU: My name is Pierre Bienvenu. I serve as Chair of the Panel. My colleagues are Professor Catherine Kessedjian, who is joining us from Paris, and Mr. Richard Chernick, who is in Los Angeles.

Can you see all three of us on your screen?

THE WITNESS: Yes. Good morning. I believe I can, yes.

ARBITRATOR BIENVENU: Excellent. So, Mr. Rasco, welcome and thank you for participating in this hearing.

You have signed a witness statement in relation to this case dated 30 May 2020?

THE WITNESS: That's correct.

ARBITRATOR BIENVENU: And at the end of
your witness statement, you swear that the content
of this statement is correct to the best of your
knowledge and belief, correct?

THE WITNESS: That's correct.

ARBITRATOR BIENVENU: May I ask you, sir,
in relation to the evidence that you will give to
the Panel today, likewise solemnly to affirm that
it will be the truth, the whole truth and nothing
but the truth?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Thank you, sir.

Mr. Marenberg, any introductory questions?

MR. MARENBERG: Mr. Rasco, is there
anything that you would like to change or augment
to your witness declaration before
cross-examination starts?

THE WITNESS: Sure. Thanks, Steve.

Just in reviewing my witness statement, I
just wanted to point out a clarification. I
believe it is Paragraph 107 where I mentioned that
I communicated with ICANN primarily -- I
communicated with ICANN through the portal, and I
didn't mean that to be an exhaustive list. I also
did initiate communications with ICANN, I believe,
by email, and I think I attempted by phone call.
So I just wanted to clarify that. By no means was I trying to exclude the fact that there was other means of communications, but primarily ICANN communications have been through the portal.

  MR. MARENBERG: Mr. Rasco, what period of time do the communications referenced by Paragraph 107 infer?

  THE WITNESS: After the auction.

  MR. MARENBERG: I have nothing further, Mr. Chairman.

  ARBITRATOR BIENVENU: Thank you, Mr. Marenberg.

  Mr. De Gramont, you will be conducting the cross on behalf of the claimant?

  MR. DE GRAMONT: I will, Mr. Chairman.

  ARBITRATOR BIENVENU: Morning to you.

  MR. DE GRAMONT: Morning to you. Thank you, Mr. Chairman.

  CROSS-EXAMINATION

  BY MR. DE GRAMONT

  Q. Good morning, Mr. Rasco. My name is Alex de Gramont. I represent Afilias. Thank you very much for being with us this morning.

  You should have a package that has a binder of documents, and I would ask you to open it
A. Okay.

MR. MARENBERG: May I open mine as well?

MR. De GRAMONT: I don't know about that, Mr. Marenberg. Yes, please go ahead.

Q. Mr. Rasco, you have a binder in front of you. We have included your witness statement behind Tab 1, and then behind that are various documents that we're going to discuss with you.

The good news is we are going to skip a lot of them in an effort to speed up the examination, but we will be asking you about some of them. You will see that we have put brackets at the bottom of the page that has page numbers, and that's because sometimes the PDF and the hardcopies had different page numbers. Just so everyone can follow, we will be looking at the bracketed page numbers, okay?

A. Thank you.

Q. Okay. So, Mr. Rasco, you are still one of the managers and the chief financial officer of NU DOT CO, or NDC; is that correct?

A. That's correct.

Q. Are you currently employed in any other capacity?
A. Yes, I am.

Q. And can you tell me in what other capacity or capacities?

A. Sure, yeah, I have multiple -- multiple jobs. I am the CEO and founder of the .HEALTH top-level domain. I also operate a coworking space here in Miami, so -- and also a real-estate-related business.

Q. Okay. Thank you. You testify in your witness statement that you and Juan Diego Calle and Nicolai Bezsonoff founded NDC in 2012; is that correct?

A. That's correct.

Q. And in Paragraph 6 of your witness statement, you explain that at its founding, NDC had two shareholders, the first was Domain Marketing Holdings, LLC, or DMH, which owned 85 percent of NDC; is that correct?

A. That's right.

Q. And then Nuco LP, which owned the other 15 percent; is that right?

A. That's correct.

Q. And who owned DMH?

A. Redacted - Third-Party Designated Confidential Information
Q. Can you tell us who owns STRAAT Investments?

A. Redacted - Third-Party Designated Confidential Information

Q. And then who owned Nuco?

A. Redacted - Third-Party Designated Confidential Information

Q. And do you know if that information was provided to ICANN?

A. I don't believe so. I believe the application only asked you who owned more than 15 percent.

Q. Now, you and Mr. Calle and Mr. Bezsonoff had previously launched the .CO ccTLD; is that correct?

A. That's correct, along with Lori Anne Wardi and Eduardo Santoyo.

Q. And the term "ccTLD" is an abbreviation for "country code TLD," correct?
A. That's correct.

Q. For ccTLDs each country decides how to choose the registry for its own country TLD; is that right?

A. That's right. They generally set up the guidelines for running it.

Q. So Colombia had a public auction, and your company .CO won the auction; is that correct?

A. It wasn't an auction; it was an RFP.

Q. And that took place under the procurement laws of the Republic of Colombia, I assume?

A. That's correct.

Q. So it is a different process than the one that ICANN used for issuing gTLDs in the new gTLD Program, correct?

A. Yeah, that's right, that's right.

Q. Okay. So NDC was formed in 2012 for the purpose of applying for new gTLD strings in the new gTLD Program; is that right?

A. That's right.

Q. And NDC ultimately applied for 13 gTLD strings, including .WEB, correct?

A. Thirteen, yes.

Q. And the one -- and the one gTLD that NDC acquired was .HEALTH; is that right?
A. No, that's not correct. .HEALTH was applied for by a different entity, so NDC has nothing to do with .HEALTH.

Q. With respect to the 13 gTLD strings, I assume that NDC paid the 185,000 application fee for each application, right?

A. That's right.

Q. When you applied for .WEB and the other strings in 2012, were you hoping to obtain the Registry Agreement and operate the registries for all of those gTLDs?

A. Redacted - Third-Party Designated Confidential Information

Q. And did you envision in 2012 that there would be private auctions and other settlement of contention sets to, quote, "monetize," unquote, the applications?

A. Well, we speculated, but there was no way to be sure at that time.

Q. Okay. And you and Mr. Bezsonoff completed NDC's .WEB application; is that correct?

A. Primarily. We might have had help from other folks in several sections. It was a very
long application times 13 times. It was a pretty long process.

Q. Did you hire consultants or proposal writers to assist you?

A. No. We hired a young man by the name of David McCombie who kind of helped us kind of theorize about different outcomes and try to come up with valuations for the different strings.

Q. And what kind of consultant was Mr. McCombie?

A. David is a -- I guess like a management consultant, McKinsey kind of background, or Bain, one of those.

Q. Okay. Thank you.

You understood that the public portions of the application would be publicly posted for public comment, correct?

A. Yes. I can't recall which exact portions, but yes, I remember that there was -- there were definitely many aspects of the application that were to remain public.

Q. Okay. And that was so the public could see who was applying for each particular gTLD; is that your understanding?

A. I believe so, yes.
Q. Okay. Skipping ahead to 2015, you state in your witness statement that by 2015 market conditions had changed and

Redacted - Third-Party Designated Confidential Information

Do you recall that testimony?

A. I recall that section in my testimony, yes.

Q. And you recall that given changing market -- given what you described as changing market conditions, you thought that

Redacted - Third-Party Designated Confidential Information

A. My experience to that point is that in the auctions that we participated in, just our competitors were willing to bid a lot more than we were.

Q. Okay. And you reached the same conclusion with respect to .WEB; is that right?

A. That's correct.

Q. And you state that the, quote, "market expectations for .WEB were high."

Do you recall that testimony?

A. Yes, I do.

Q. And that means that you believe that .WEB
was going to command a high price whether at an ICANN auction or a private resolution of the contention set; is that correct?

A. Yeah. Mostly in -- going back all the way to 2011, when all of us potential applicants would talk about the gTLD Program, .WEB was frequently mentioned as one of the more attractive strings.

Q. Okay. And you knew who all the members of the .WEB contention set were?

A. Not all of them personally, but yes, in general I knew the organizations.

Q. And based on that knowledge, NDC was able to consider how best to develop a strategy that would allow for a return on your investment in preparing the .WEB application; is that accurate?

A. Well, I don't necessarily think that knowing who all the applicants were really affected us. I think the market conditions are the things that kind of drove our decision-making.

Q. Well, you mentioned in your witness statement that there were some big players in the .WEB contention set, Google, et cetera, so that must have helped you assess the likely price at which the contention set was going to be resolved, whether privately or through an ICANN auction; is
that fair?

A. Well, it definitely influenced. However, you know, Google had -- we had participated in auctions with Google, and Google didn't value everything very highly. They didn't bid up a lot of things. So it really depended on the individual string.

Q. On the individual string and on the individual companies in the particular contention set?

A. That's right.

Q. Okay. And you state in your witness statement that in around May 2015 you, quote, "received a phone call from VeriSign expressing interest in working with NDC to acquire the rights to .WEB," unquote. It is at Paragraph 41 of your witness statement if you want to take a look.

A. I remember that.

Q. You remember that.

So who at VeriSign called you?

A. I believe the first contact that I had was with Pat Kane. I don't know his exact title, but he's generally the face of their registry program and someone who I was friendly with and familiar with.
Q. Okay. Do you recall what Mr. Kane said to you?
A. He was trying -- he wanted me to have -- he didn't explain too much, but he wanted me to have a conversation with a colleague of his at VeriSign.
Q. And who was that colleague?
A. That was Paul Livesay.
Q. And we have been arguing about whether it is pronounced Livesay or Livesay. Is it Livesay?
A. I think it is. I haven't spoken to Paul in many years, but I think that's what it is.
Q. How long after your call with Mr. Kane did you make -- did it take for you to make contact with Mr. Livesay?
A. I can't recall exactly, sir, but I don't believe it was the same day. It might have been the next day or it could have been a few days. I really don't recall.
Q. It was soon thereafter, soon after the call with Mr. Kane?
A. That's probably accurate, yeah.
Q. And do you recall what Mr. Livesay said?
A. I think just speaking generally, you know, I think the message was,
Q. Did he mention that VeriSign had failed to timely make applications for the gTLDs itself?

A. I am not sure that he told me that. I knew that they had applied and participated in the program to a certain extent, but obviously he was asking me about strings that they didn't apply for.

Q. So after that phone call, did you enter into negotiations with VeriSign that led to the Domain Acquisition Agreement, or the DAA?

A. Yeah, I can't recall the exact timeline, but yes, after that phone call we started talking. We started discussing what they would be interested in doing and went through various different thoughts as to how to work out some kind of a deal, which consummated in the DAA, I think in August of that year.

Q. Was he interested in any other gTLDs, or was the focus only on .WEB?

A. Well, when we first started talking, we were talking about our applications in general, our
gTLDs in general, and we were negotiating primarily the three -- so at that moment we had four applications remaining, I believe it was .WEB, obviously, .INC, .LLC and .CORP, all four of those applications -- yeah, all four of those applications were on hold.

So mine and my partners' attitude was, all right, if we are going to end up doing a deal, let's try to do a deal for all our applications and all these strings and then we're done with this program. So we first started talking about all of them.

Q. Did you reach an agreement on any of those TLDs other than .WEB?

A. We didn't end up signing anything, no.

Q. And do you know why that is? How did it come to be that only .WEB was the subject of your agreement with VeriSign?

A. So we were actually negotiating on the three primaries, which I would call .WEB, .INC and .LLC. .CORP, there was some significant questioning as to whether .CORP would ever see the light of day, and that ended up being true.

So we actually were negotiating on those three. The negotiations became difficult and
complicated, and at some point in those negotiations, rather than breaking down completely, I think we said, "Look, let's do this one at a time."

Q. And did you have to enter into a nondisclosure agreement in connection with the negotiations, do you recall?

A. I don't recall. I wouldn't be surprised if I did.

Q. Okay.

A. But I don't recall.

Q. And who conducted the negotiations for NDC?

A. I was the primary point of contact with VeriSign. And when it came down to actually structuring the agreement, my attorney, Brian Leventhal.

Q. And who conducted the negotiations for VeriSign?

A. Mr. Livesay.

Q. Anyone else at VeriSign?

A. I met with several lawyers a few times, again, I think more in the course of structuring the agreement, but in terms of hard-nose negotiations, it was myself and Mr. Livesay.
Q. Do you recall the names of the VeriSign lawyers with whom you met?
   A. I don't. I think one was Kevin, Kevin R., if I recall his initials.

Q. Did VeriSign send you the first draft of the DAA?
   A. I can't recall.

Q. Do you recall how many drafts were exchanged over time?
   A. No, not exactly, no.

Q. And were you, meaning you, Mr. Rasco, focused on the substantive terms of the DAA or were you focused primarily on the payment terms or both?
   A. Well, you know, as in any negotiation, you have stages. So first we tried to figure out what we were all dealing with and then you try to come to terms on the financial portion and then how you execute it.

   So I was involved in all of it, but really, obviously, when it comes down to the legal matters, I defer those, the legalities to Brian Leventhal.

Q. Had Mr. Leventhal helped you on other application issues?
   A. Brian's been our corporate attorney for
many years, so he's well aware of all of our businesses.

Q. Did you and Mr. Livesay meet in person to negotiate or were the negotiations by phone?

A. Both.

Q. Do you recall how many times you met in person?

A. We met one time in my office in Miami, and we met one time definitely in VeriSign's office in Virginia.

Q. And the DAA was executed on August 25th, 2016; is that correct?

A. That sounds correct.

Q. Was it executed in person?

A. I believe so, yes. I think Paul -- I think Mr. Livesay was in my office.

Q. Let's take a look at the DAA, which is at Tab 2 of your agreement. It is Exhibit C-69. And you'll see that throughout NDC is referred to as "the Company" and VeriSign is referred to as "VeriSign"; is that correct?

A. I see that, yes.

Q. Redacted - Third-Party Designated Confidential Information
Do you see that?
A. Yes.
Q. And that's NDC, correct?
A. Yes.
Q. And if you turn to
Redacted - Third-Party Designated Confidential Information

Do you see that?
A. I see that, yes.
Q. So you understood that after signing this agreement, entering into this agreement,
Redacted - Third-Party Designated Confidential Information

A. Well, I don't necessarily agree with that. I think,
Redacted - Third-Party Designated Confidential Information

Q. In spite of what this says.
Okay. Let's look at some of the other provisions. Let's take a look at
Redacted - Third-Party Designated Confidential Information
A. I believe that's correct.

Q. In fact, it is more detailed than that.

Let me just read some of the language.

So if I understand that correctly, you had
A. Yes.

Q. And you had to

Do you recall those requirements?

A. Yes, I do. I recall their

Q. I am not asking whether they are

appropriate. I am just asking if -- if my

understanding of them is consistent with yours,

which is that

A. Correct.

Q. You know, I believe I did. There may be
an occasion or two where I didn't think about some of these. For the most part, I don't think I was trying to conceal anything from VeriSign.

Q. And if you turn to

Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. But it also provides that

Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. So

Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Is that your understanding?

A. I believe that's about accurate, I think, yes.

Q. Okay. Let's take a look at

Redacted - Third-Party Designated Confidential Information
So here's the proviso.

Redacted - Third-Party Designated Confidential Information
I am going to stop there. I know that's a lot, but what this provision is saying is that

A. I think, as you've mentioned, there's some provisos, as you call them, but yes, in general, that's correct.

Q. Okay. And that's true even if

A. I think, as you read, as long as we
Q. Okay

A. Correct.

Q. And you think that if the DAA had been disclosed, it would have affected the outcome of the auction?

A. I can't pretend to know what might have happened.

Q. So if

A. I don't think that the DAA

Q. Now, you have testified in your witness

819
statement that you thought this arrangement with
VeriSign was acceptable under the guidebook,
correct?

A. I did.

Q. Did you wonder why

A. No, not really. As I just mentioned, I

Q. And you thought that it was prudent not to
let anyone know that NDC -- strike that.

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Do I understand that correctly?

A. That's correct. My experience working with public companies, they are pretty quirky about

Q. Was it your understanding that under the guidebook a nonapplicant was permitted to indirectly participate in the resolution of the contention set or otherwise seeking to become the registry operator through an applicant's application?

A. I'm sorry, can you kind of rephrase that question? I don't understand.

Q. Yeah. What this provision states, if I understand it correctly, is that
A. Well, I believe what this says is -- not what this says, but they

Q. Yeah. That's not what this says, though, is it, sir?

A. It is contingent on a lot of things.

Q. Yeah. And so your view is that when they say they were

A. I think in terms of

Q. So what was the interest rate on the loan that VeriSign was providing you with?

A. 
Q.   But NDC effectively

A.   I don't -- I don't see how you come to
that.  Redacted - Third-Party Designated Confidential Information

Q.   You basically

A.   No, I disagree.

Q.   Redacted - Third-Party Designated Confidential Information

A.   Redacted - Third-Party Designated Confidential Information

At that point, when we signed the DAA, there was not even any clarity as to
whether or not the .WEB TLD would ever be delegated. It was on hold and had been on hold for
years. So I don't...

Q.   Redacted - Third-Party Designated Confidential Information

A.   If that's the way you want to phrase it.
Q. The answer is yes, that's what you thought?

A. Well, the DAA, Redacted - Third-Party Designated Confidential Information

Q. Did you ever ask Mr. Livesay why

Redacted - Third-Party Designated Confidential Information

A. I don't believe I did. As I mentioned, I have been fortunate to do a few deals with public companies, so I didn't think anything was strange in terms of confidentiality. I don't even know how many people within VeriSign knew about our arrangement.

Q. And did you ever discuss with Mr. Calle or Mr. Bezsonoff why

Redacted - Third-Party Designated Confidential Information

A. Did I speak about that particularly with Mr. Calle or Mr. Bezsonoff, I don't believe that I did.

Q. Let's turn to Exhibit A

Redacted - Third-Party Designated Confidential Information
A. I believe so. It looks like it is part of the original agreement.

Q. Do you see that?

A. I do, yes.

Q. And by the way,

A. I mean, if you're saying it is. I don't recall, but sounds fair.

Q. Okay. I think that will become evident as we go through the provisions.

A. Okay.

Q. So you understood that
that correct?

A. Yes, that was for -- in my mind,

Q. And let's look at some of the terms and conditions.

A. I think this section
Q. Yeah, we'll come to that, sir.

A. I do.

Q. Do you see that?

A. I do.

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A. Redacted - Third-Party Designated Confidential Information
Q.: Redacted - Third-Party Designated Confidential Information

A.: Well, I wouldn't phrase it that way. VeriSign was not the bidder. NDC was the bidder. NDC always retained control. As the one putting up

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A. Yes, that's correct.

Q. Did you arrive two business days prior to the start of the auction?

A. I believe it was one business day. I don't think it ended up being two, but I can't be certain. I think it was just one business day.

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Do you see that?

A. I do, yes.

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A. Redacted - Third-Party Designated Confidential Information
Q. So how did this work, you and Mr. Leventhal were sitting in a conference room at VeriSign's offices; is that right?

A. That's correct.

Q. And who from VeriSign was there with you?

A. Mr. Livesay was there, and people would come in and out. I am not sure who was there. There might have been an IT support person that was around. I am not sure exactly who else, but obviously my relationship and my primary contact was always Mr. Livesay.

Q. And do you recall how many bids you put in during the bidding process?

A. No. The bid last -- the auction lasted two days, so there were several rounds. I don't recall exactly how many rounds. It is public, so that information is available.

Q. And did Mr. Livesay tell you each bid to make?

A. Well, the way the auction works is that I believe you have a continue price. So the auction provider generally provides a threshold for continuing the auction. You have to bid something above that amount in order to continue or that amount to continue, and I believe that's how it
worked.

Q. 

A. Well, as our funding source, we were kind of limited as to what we were going to bid, just as I'm sure my competitors who were financed by outside sources were limited as to how much they were going to bid.

Q. And you think that your competitors had their financing sources sitting with them, telling them whether they could bid on each specific round?

A. I can't pretend to know how they handled it.

Q. Did VeriSign provide any financial-modeling people for the bidding process?
A. I never participated in anything like that.

Q. Okay. So you are not aware whether they had financial-modeling people to figure out how much to bid or not?

A. I don't know.

Q. Okay.

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4. Q. Redacted - Third-Party Designated Confidential Information

5. A. Redacted - Third-Party Designated Confidential Information

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9. A. Redacted - Third-Party Designated Confidential Information

10. Q. Redacted - Third-Party Designated Confidential Information

11. A. Redacted - Third-Party Designated Confidential Information

12. Q. Redacted - Third-Party Designated Confidential Information

13. A. Redacted - Third-Party Designated Confidential Information

14. Q. Redacted - Third-Party Designated Confidential Information

15. A. Redacted - Third-Party Designated Confidential Information

16. Q. Redacted - Third-Party Designated Confidential Information

17. A. Redacted - Third-Party Designated Confidential Information

18. Q. Redacted - Third-Party Designated Confidential Information

19. A. Redacted - Third-Party Designated Confidential Information

20. Q. Redacted - Third-Party Designated Confidential Information

21. A. Redacted - Third-Party Designated Confidential Information

22. Q. Redacted - Third-Party Designated Confidential Information

23. A. Redacted - Third-Party Designated Confidential Information

24. Q. Redacted - Third-Party Designated Confidential Information

25. A. Redacted - Third-Party Designated Confidential Information
Q. How did you know that?
A. We had discussions.

Q. 
A. 

Q. How did you know that?
Q. And they did that during the negotiations?
A. I believe so, yes.
Q. Okay. We are going to come back to that point, but let me just ask you this: If that was VeriSign's position,
A. Yes, I am there.
Q. That's correct.

A. Yes.

Q. Do you recall that?

A. I do, yes.
Q. But if you disclosed -- strike that.

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information
A. You know, I don't know what I would have done in that circumstance.

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A. Redacted - Third-Party Designated Confidential Information

MR. De GRAMONT: Mr. Chairman, I am going to suggest that we take our break earlier today. It might enable me to cut down on some of the questions. Would that be acceptable to the Panel?

ARBITRATOR BIENVENU: It would certainly be acceptable to us, and I don't expect Mr. Marenberg would have any difficulty with that.

MR. MARENBERG: No objection,

Mr. Chairman.

ARBITRATOR BIENVENU: Excellent. So let's break for 15 minutes.

And, Mr. Rasco, sorry, we have to -- you still there, Mr. Rasco?

THE WITNESS: I am still here.

ARBITRATOR BIENVENU: Yes. I am going to instruct you during our break, and that holds true
until the end of your evidence, not to discuss your
evidence with anyone during the break.

THE WITNESS:  Understood.

ARBITRATOR BIENVENU:  Thank you, sir.

THE WITNESS:  Thank you.

 (Whereupon a recess was taken.)

ARBITRATOR BIENVENU:  Mr. Rasco, good
morning again.

THE WITNESS:  Good morning.

ARBITRATOR BIENVENU:  We will continue
with your cross-examination.

Mr. De Gramont, please proceed.

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

Q. Welcome back, Mr. Rasco.

A. Thank you.

Q. Now, there are various scenarios set forth
in the rest of Exhibit A as to what happens
depending on the outcome of the contention set. I
am going to focus primarily on the scenario which
actually happened, which was NDC winning the ICANN
auction.

So I'd like to direct you to

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A. That is correct.

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Do you see that, sir?

A. Yes.

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A. That seems accurate, yes.

Q. Redacted - Third-Party Designated Confidential Information
A. That's what it says.

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yeah. But, I mean, look, as a businessperson, I don't know that anything is that simple when you're talking about something of this magnitude.

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

A. What do you mean by that?

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information
Do you recall that?

A. I do recall.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. That seems likely, yes.

Q. Redacted - Third-Party Designated Confidential Information
A. That's correct.
Q. Redacted - Third-Party Designated Confidential Information

A. Yes, it did.
Q. Redacted - Third-Party Designated Confidential Information

A. That is correct.
Q. Redacted - Third-Party Designated Confidential Information

A. We did receive that, yes.
Q. Redacted - Third-Party Designated Confidential Information
A. That's correct.

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A. We have.

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Q. Redacted - Third-Party Designated Confidential Information
A. Right, correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Not technically, no.

Q. Do you have a rough estimate?

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Q. Pretty good return on investment, right?

A. It was a fantastic deal.

Q. Okay. Congratulations for that.

A. It is not done yet, unfortunately.

Q. Okay. You write in your witness statement that in April 2016 ICANN sent notice to the contention set that ICANN had scheduled the ICANN auction for .WEB on 27 July 2016; is that correct?

A. That's correct.

Q. Do you recall this?

A. Yes, I do.

Q. And certain members of the contention set commenced discussions about a private resolution of
the contention set, right?

A. I believe so, yes. It was a general practice, in my experience, in general, when a string became available at the auction, then you'd start talking.

Q. Do you recall when you advised the other members of the contention set that NDC was not willing to participate in a private auction?

A. I don't know -- I don't know if I actively or affirmatively told them at some point other than probably some of the correspondence that we are going to speak of here today.

Q. Do you know if anyone else at NDC, Mr. Calle or anyone else, advised the other members of the contention set that it was not going to participate in a public auction?

A. Other than some of the exhibits that were kind of in front of us here today, I don't believe so.

Q. Okay. Let's take a look at what's behind Tab 6. It's Exhibit C-33. And if we look at the last page, Page 4, we see that on October 12th, 2015, Mr. Jon Nevett of Donuts sent an email to you and other members of the contention set advising that the Vistaprint decision had been issued and
asking if everyone was available to discuss next steps.

Do you see that?

A. I see that, yep.

Q. Okay. And do you remember receiving that email?

A. I see that I am a recipient here. I don't remember this email specifically, but it looks like I most likely received it.

Q. And then if you look up a couple emails on October 18, 2015, you replied all, quote, "All, I won't be joining you in Dublin, but I'll support however I can. Just let me know. Have a great meeting. Jose."

Do you recall writing that email?

A. Yeah, this recalls my memory, yeah, sure.

Q. And this is a couple months after you've entered the DAA, correct?

A. Correct. That would have been August, so yes.

Q. And under the DAA

A. I guess we read that, yeah, sure.

Q. And do you recall if you forwarded this to

848
VeriSign?

A. I don't recall doing so.

Q. Yeah, okay. Let's turn to Page 2, and this is skipping forward to May of 2016, and if you look at the second email from the bottom, May 5th, 2016, at 11:44 p.m., Mr. Sandeep Ramchandani of Radix wrote, "The GDD is just around the corner. If most of us are going to be there, would be a good opportunity to catch-up face to face,"

What was GDD?

A. GDD is an industry meeting put on by ICANN. GDD stands for the Global Domains Division. Outside of the regular ICANN meetings there's usually -- or there had been for a few years a GDD meeting, which was really for the registry operators primarily and the registrars.

So a lot less policy, you know, high-level ICANN policy and more registry/registrar-related policy and business.

Q. And if you go up a couple of emails to the middle of the page, you'll see that on May 6, 2016, Jon Nevett writes, quote, "I'm free for a call at that time, but it shouldn't be that hard to schedule the auction and decide what to do about
And then right above that, on May 9th, you write, Jose Ignacio Rasco writes, "Sandeep, I am available for a call tomorrow if needed. Regards, Jose," end quote.

Do you recall if that call took place?

A. I don't believe it did. I don't remember being a part of a call like that.

Q. Do you recall if you forwarded this on to VeriSign, Redacted - Third-Party Designated Confidential Information

A. I don't recall, no.

Q. If you turn to Page 1, at the bottom you'll see a May 11, 2016, email from John Kane at Afilias, and he writes, quote, "Good news! I have spoken directly with most members of the contention set and/or saw confirmation in email that everyone is willing to participate in a .WEB only auction. If for any reason anyone's position has changed, please let the group or the auction house know ASAP. If we are going to keep it on track, I suggest to do an auction the week of June 13th," unquote.

Do you recall receiving this email?

A. I don't particularly recall, but, yeah, it is likely that I saw this as part of the contention
Q. Do you recall if you or anyone else at NDC had indicated that NDC would be willing to participate in a private auction?

A. No. I remember speaking to the auction providers and them giving the updates, but other than that, I don't believe I ever committed affirmatively or negatively.

Q. Okay.

A. No, no. My assumption all along was that my default position was we are going to an ICANN auction. If anything changed, I assumed we'd discuss it.

Q. And then why were you talking to the private auction providers if you knew that you were going to an ICANN auction?

A. Just to stay informed.

Q. Just to stay informed?

A. Just to stay informed, yeah.

Q. And I assume you were passing that information on to VeriSign?

A. I was probably updating VeriSign on what
was happening with the contention set, most likely, yes.

Q. If you knew that you were not going to a private auction, why didn't you just tell the other members of the contention set of that fact?

A. Honestly, I didn't feel obligated to do so. ICANN had set the public auction, and outside of that, that's what was going to be next.

Q. Well, if all the members were talking about privately resolving the contention set, you felt no obligation to tell them that they shouldn't be wasting their time because you were going to insist on an ICANN auction?

A. No. I mean, at some point I do communicate clearly that I am not changing my mind.

Q. Well, when you say changing your mind, have you ever advised the members of the contention set that NDC was likely going to seek an ICANN auction as opposed to a private auction?

A. I don't recall, but honestly, the history of NDC, we had participated in both. So one could assume, you know, that we would participate in a private auction.

Q. If you look up to the next email in Exhibit C-33, you'll see there's a Jon Nevett email
dated July 7. He says, quote, "Hi guys. Just so you are not surprised, we are seeking a postponement of the .WEB ICANN auction. I don't want to get into the details yet, but I don't want you guys to be surprised if a postponement was announced."

You are not copied on this email. I assume by this point you had informed the other members of the contention set that you were not going to participate in the private auction?

A. No, I hadn't. I definitely had an exchange with Jon Nevett in June where I told him that we were not going to participate in the private auction.

Q. Okay. Let's take a look at that. It is behind Tab 8 of your email -- I'm sorry. It's behind Tab 8 of your binder. It is Exhibit C-35.

A. Got it.

Q. And Mr. Nevett writes on June 6, "Hi guys. Jose and I corresponded last week, but I wanted to take another run at the three of you. Not sure if you three are still the Board members of your applicant, but I wanted to reach out to discuss a couple of ideas," unquote.

And he asks for a two-month delay of the
ICANN auction and whether you would be agreeable to that.

Do you recall receiving that email, that's what you just referred to?

A. I do, yes.

Q. Okay. And do you recall whether you forwarded it to anybody at VeriSign?

A. I don't believe I did, no.

Q. Okay. And then on June 7th you respond, quote, "Thanks for the message. Sorry for the delay. The three of us" -- and there you're referring to yourself, Mr. Calle and Mr. Bezsonoff?

A. That's correct, yes.

Q. "The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the Board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and will not be seeking an extension."

So I have a few questions about this.

A. Sure.

Q. When you stated that "the decision goes
beyond just us," that was accurate, right? The
decision was really in the hands of VeriSign?

A. No, not at all. Really what I was
referring to there is that, you know, as an LLC, as
a company, you know, yes, while Juan, Nicolai and I
are the managers in general for major decisions, we
speak about it with the shareholders. So that's
what I was referring to.

Q. You were referring to the shareholders,
even though you had signed an agreement with
VeriSign

A. Well, no, as I previously stated,

Subject to anything changing, that was
going to be our position.

Q. So your reasoning is -- sorry, I didn't
mean to cut you off, sir.

A. No, that's okay.

Q. So your thinking is that since you made
the decision to enter into an agreement which
A. Well, I kind of disagree with your premise. I don't believe there's any rights to participate in a private auction. ICANN says you can try to resolve these contention sets however you want, and if you can't, you come to an ICANN auction of last resort. So that's really what we were doing.

Q. Well, the question, sir, isn't whether there's an obligation to participate in a private auction, but all applicants have the choice as to whether to participate in a private or ICANN auction.

A. Well, I believe you said that there's no right to participate in a private auction, so I don't think I was obliged to explain to any of my competitors how I was going to resolve our contention set.
Q. Well, there's no obligation to participate in a private auction, but every applicant had a right to do so, correct?

A. Well, no, ICANN says if there's a contention set, figure it out. If you can't figure it out, then you come to an auction. I didn't want to figure it out. I already knew what I was doing.

Q. Right. Redacted

A. No, I disagree.

Q. All right. Then you say, "Nicolai is at NSR full time and no longer involved with our TLD applications."

What is "NSR"?

A. "NSR" is Neustar.

Q. And you say, "I'm still running our program and Juan sits on the Board with me and several others."

Who were the other Board members to whom you were referring?

A. Well, I was referring there to our other shareholders, the Board members. As you probably are aware, LLCs don't have a Board of Directors. They have managers and members. So there I was just referring to our members.
Q. Sir, there were three members in the LLC, correct?

A. No, there's three managers.

Q. Three managers. Oh, and when you say the members, you're talking about the owners of the other shares?

A. Shareholders.

Q. I see. Why didn't you simply say other shareholders?

A. I mean, I was just writing an email. I wasn't intending this to be some kind of official document describing the inner workings of NU DOT CO. I was really just trying to redirect and put off Mr. Nevett, who I had a friendly relationship, and, I mean, how many different ways could I tell him we are not going to a private auction?

So I guess it was my fault for trying to be a little polite in trying to just redirect him.

Q. But you certainly couldn't tell him the truth, Redacted - Third-Party Designated Confidential Information

A. Well, I wasn't going to tip my funding sources for an ultimate auction. That would affect the outcome of the auction.
Q. So you knew who all the other applicants were, but they didn't know that VeriSign was behind your application?

A. Well, VeriSign was not behind my application. NU DOT CO is and always was in control of our application. There was never -- VeriSign never controlled our application and never controlled NU DOT CO.

Q. Well, I think the Panel will have to determine that based on the terms of the DAA, sir. Let me point you to the last sentence of your June 7th email. It says, quote, "It pains me personally to stroke a check to ICANN like this, but that's what we're going to have to do just like others did on .APP and .SHOP."

Now, it couldn't have been that painful to stroke a check to ICANN since VeriSign was paying for it, right?

A. Well, no matter what, yes, it was painful.

Q. How so?

A. Figuratively speaking it was just sending ICANN $135 million wasn't -- actually, at this time I didn't know how much it was going to be, but I was just speaking figuratively.

Q. But it was VeriSign's money, but it pained
you to take VeriSign's money and pay it to ICANN as opposed to --

A. It was my application. Again, I was trying to be polite and just get this guy off my back, quite frankly.

Q. In any event, you're aware now that Mr. Nevett contacted ICANN about a potential change in control in NDC, right?

A. I later learned of that, yes.

Q. And you can see why based on your email he thought there might have been a change in the ownership or control; isn't that fair?

A. I mean, I can't pretend to understand what he was thinking, but I see how he took my email out of context and tried to create a barrier, a delay to moving forward with the ICANN auction.

Q. When you say "out of context," you mean that he thought you were being truthful?

A. I mean, yes, I probably told him a little white lie in order to get him off my back, and yes. Again, I was not trying to tell him how exactly things operated internally at NU DOT CO. But most clear to me is that NU DOT CO hadn't had any changes to our organization, to our application or anything else.
Q. Now, on June 27th you received an email from Jared Erwin.

Do you recall that?

A. Yes.

Q. It is behind Tab 10 of your binder. It is Exhibit M to your witness statement. And the bottom email is from Mr. Erwin. He writes, quote, "We would like to confirm that there have not been changes to your application or the NU DOT CO LLC organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts)," unquote.

You appear to have responded very quickly to that email, although I can't tell whether there's a time change in this because you were in a different time zone.

Do you recall responding very quickly?

A. I honestly don't. Just for your context, this is not an email. This is a message system within the customer service portal. So yeah, just based on the time stamps, yeah, it looks like I got to him pretty quickly, but I can't tell if I opened
that message at 12:45 or at 12:05.

Q. And you say, quote, "I can confirm that there have been no changes to the NU DOT CO LLC organization that would need to be reported to ICANN."

Do you recall that?

A. Yes, I do.

Q. But you didn't answer the part of his question asking you to confirm that there had not been changes to the application.

Do you see that?

A. Yeah. As I testified, I honestly thought this was a routine inquiry one month out from the auction, considering the fact that it had been four years since we submitted our application. I just read it and fired off an answer.

I mean, I don't think anything was inaccurate or misleading here. Nothing did change in our application and nothing did change in NU DOT CO.

Yeah, I see that I direct the answer, the part of the organization, but I never intended to withhold anything. There was no changes that I felt I needed to report.

So I really just, again, as a routine
inquiry, I was like, okay, I guess they are getting ready for the auction.

Q. And you state that other members of the contention set were putting pressure on you to do a private auction and you had your conversation with Mr. Nevett re: the additional Board members, et cetera, but it never entered into your mind that this communication from ICANN had anything to do with that?

A. No, at this point, no. I hadn't heard back from Jon. I don't believe I heard back from Jon after our exchange, and I don't recall having heard from anyone, so no, it didn't spark anything at that point.

Q. Notwithstanding the terms of the DAA that we just reviewed, your view was that nothing about your application had changed whatsoever; is that your testimony, sir?

A. Nothing in the application changed that would require any kind of disclosure to ICANN.

Q. [Redacted - Third-Party Designated Confidential Information]

A. [Redacted - Third-Party Designated Confidential Information]
Q. Do you recall that?

A. Correct.

Q. Okay. You had several exchanges of emails with the ombudsman on July 6, 7 and 8. Do you recall that?

A. I do. I recall one email that I responded to him, but yes.

Q. Okay. And then on July 8th, Ms. Willett emailed you and asked you to call her. Do you recall that?

A. I do, yes.

Q. And, in fact, you did call her, correct?

A. I did.

Q. Okay. And if you take a look behind Tab 13, we see the message that she sent to you on July 8th. It is Tab 13, "Rasco Witness Statement Exhibit O." At the bottom of the page she asks you
to call her, and then there's an email on the top
that says -- well, in which you responded to her
after that conversation.

Do you recall when she sent you this email
or text or message?

A. Well, it says July 8th that she sent it to
me, and then the one you have in the box right now
is my follow-up response to her.

Q. I can't see a date here. You don't recall
when you sent that to her?

A. Just in reviewing for this, I don't know
if it was the next day or two days after. I am not
sure exactly.

Q. Okay. At the second-to-last paragraph you
write, quote, "I share your understanding that the
complaint was raised in order to get more time to
convince us to resolve the contention set via a
private auction, even though we have made it very
clear to them (and all other applicants) that we
will not participate in a private auction and that
we are committed to participating in ICANN's
auction as scheduled," unquote.

So did Ms. Willett tell you that she
thought the complaint was raised simply to get more
time to convince NDC in the private auction?
A. I don't recall if she raised that possibility. I know we discussed it, and she seemed to sympathize with that position.

Q. You mentioned that NDC had participated in other ICANN auctions?

A. At least two that I can recall, yes.

Q. And do you recall in those auctions when you received inquiries like that, you received from Mr. Erwin about your management and control?

A. I don't recall, but they would have been much earlier in the program.

Q. Okay.

A. There was a lot of preauction correspondence getting ready for auctions, so I honestly don't recall if a similar message to Mr. Erwin ever came in.

Q. Would you take a look at what's behind Tab 14, which is Exhibit D to Ms. Willett's witness statement. I don't know if you have seen this before. Looking at Page 3, it is an email dated Saturday, July 9, 2016, from Ms. Willett to Chris LaHatte, who I understand was the ICANN ombudsman at the time.

Have you ever seen this before?

A. I think I have.
Q. Let me rephrase it. Have you ever seen this email outside the context of preparing for your testimony?

A. No, I have not.

Q. I am going to refer you to Paragraph 5 and it says, quote, "He" -- and she's referring to Mr. Rasco. "He was contacted by a competitor who took some of his words out of context and is using them as evidence regarding the alleged change in ownership. In communicating with that competitor, he used language to give the impression that the decision to not resolve contention privately was not entirely his. However, this decision was, in fact, his," end of quote.

Did you tell Ms. Willett that the decision to skip the private auction and participate in the ICANN auction was, in fact, your decision?

A. I told her that we as NDC had decided already that we were going to the ICANN auction. I don't know if I told her this was Jose Rasco's decision, but collectively I told her, "Listen, we had already decided that we weren't going to consider a private auction."

Q. And, again, the decision was actually your decision to enter the DAA; is that your testimony?
A. That's correct.

Q. Okay. Would you turn to Tab 15 of your binder?

A. Yes.

Q. Actually, let me take a -- let's go back to Willett Exhibit D for a moment. I want to ask you a few follow-up questions about your saying that the decision to enter the DAA was, in fact, NDC's.

Again, you had entered the DAA a year earlier in

MR. MARENBERG: Objection; misstates the document and misstates his prior testimony.

Q. BY MR. De GRAMONT: Sir, do you disagree that

A. Sorry, is that for me or for my attorney?

Q. It is for you, sir.

A. Sorry. Can you repeat it?

Q. Yes. We looked at the DAA,
Do you recall that provision in the DAA?

A. I recall that there's a provision that says

Q. Let me just read to you again

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Q. In your witness statement you testified

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that your communications with ICANN were as, quote, "thorough and responsive as possible," unquote.

        Do you recall that?
A. I mean, you'd have to point it out to me, but if you're saying it is in my witness statement, then I'll take that.

Q. It is at Paragraph 80.
In Paragraph 90 you testified that your statements to ICANN were, quote, "unequivocally true," unquote.

        Do you recall that?
A. I don't, but if that's in my witness statement, then I believe so.

Q. So when you --
MR. MARENBERG: Excuse me. Can you ask Mr. De Gramont to put up these statements? Because he's actually taking snippets of these statements out of context, I believe.

ARBITRATOR BIENVENU: So the sentence is now projected on the screen.

Q. MR. De GRAMONT: If you like, Mr. Rasco, you can look at the hardcopy of the witness statement, which is behind Tab 1 of your binder, whichever you prefer.

        Let me first read Paragraph 80.
MR. MARENBERG: If you could put up Paragraph 80, that would be helpful, please.

Q. BY MR. De GRAMONT: Paragraph 80 says, In particular, Mr. LaHatte referenced an email, quote, "which suggests that one of [NDC's] directors is no longer taking an active part in the application, and that there are other directors now involved," unquote. And he informed me that the, quote, "complainant also suggested that NDC's shareholders have changed since the original application," close quote. "In the communications with ICANN that followed, I endeavored to be as thorough and responsive as possible, and I provided what I thought were clear answers to the questions I was asked," unquote.

So did your testimony that you were providing thorough and responsive answers extend to your communication to Ms. Willett that the decision as to whether to enter a private or ICANN auction was NDC's decision?

A. I don't know. Can you rephrase that? Because I am confused by what -- you're talking about Ms. Willett and Mr. LaHatte in here, and I am a little bit confused.

Q. It was a long question, and I apologize.
When you told Ms. Willett that the decision to skip the private auction was NDC's decision, were you being as thorough and responsive as possible?

A. I told her what I believed to be true, which was Redacted - Third-Party Designated Confidential Information

And really -- and primarily when answering my competitors, I didn't check with anyone, and I think --

Q. No, I'm sorry. I am not talking about communications with your competitors. I am talking about your communications with ICANN.

A. They are asking me about my communications with the competitors.

Q. Did Ms. Willett ask you if the decision to forego the private auction was NDC's decision?

A. I don't believe she asked me that.

Q. But you told her it was NDC's decision?

A. Can you -- I told her -- I told her what I told my competitors. I am not trying to be vague or anything. At the end of the day, I do believe the decision was ours, and I told my competitors something to get them off my back.

Q. Just to be clear, you never mentioned the DAA in your response to Ms. Willett or anyone else
A. I absolutely did not.

Q. Did you ever tell Ms. Willett or anyone else at ICANN that VeriSign was funding your application?

A. I did not.

Q. Prior to the auction?

A. Prior to the auction, I didn't mention that anyone else was involved in the auction.

Q. Your testimony to the Panel is that when you told Ms. Willett the decision to skip the private auction was, in fact, NDC's, that that testimony was, quote, "unequivocally true," unquote?

A. Yes, that's correct.

Q. Okay. So the auction went forward on 27 July 2016, correct?

A. That's right.

Q. Let's turn to what's behind Tab 15 of your binder. It is Exhibit C-97. It is a letter dated July 26, 2016, from Mr. Livesay to you.

Do you recall at this time, were you already at VeriSign's headquarters in Virginia?

This was the day before the auction.

A. Was I -- was I there when?
Q. On July 26, when you received this letter?

A. Well, I'm not sure that -- I am not sure when I exactly received the letter, but I know it was signed on July 26.

Q. And do you recall if you signed it in VeriSign's offices?

A. I believe I did, yes, in person.

Q. And the first paragraph says, quote, "Redacted - Third-Party Designated Confidential Information"

Did you understand Mr. Livesay was referring to?

A. I assume they were talking about the noise that Donuts was making.

Q. And how did -- how did Mr. Livesay become aware of the noise that Donuts was making?

A. Well, I can't recall precisely at this point, but I believe Donuts tried to enjoin the auction and get a postponement of the auction by filing something, I don't know, in District Court or something along those lines.

Q. Had you informed Mr. Livesay or anyone else at VeriSign about the communications that you
had had with ICANN following Mr. Nevett's email
with you?

    A. I can't recall precisely, but in most
likely circumstances, yes, I did.

    Q. Okay. If you look at Page 2,

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    Do you see that?

    A. I do.

    Q. And do you recall that there had been
discussions over the last several months prior to
this letter in which

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    A. I honestly don't recall discussions. As I
mentioned before, I think the -- my assumption and
baseline position was that

Q. Before we move on, just a few more questions about your phone conversation with Ms. Willett.

Did she ask about VeriSign during -- did she mention VeriSign during that call?

A. I don't think so, no.

Q. Did anyone from ICANN ever mention VeriSign in its preauction conversations with you?

A. Not that I can recall, no.

Q. Did she ask you any questions about the email that you had sent to Mr. Nevett?

A. Did she ask me -- I think the basis for the communication was that email and the ombudsman inquiry. So I don't know -- I think that's what the basis of the conversation was.

Q. Did she or anyone else from ICANN ask you what you meant when you were referring to other Board members, do you recall?

A. I think that was part of the communication with Mr. LaHatte. I believe my phone conversation with Christine, with Ms. Willett, was confirming everything that I had told Mr. LaHatte.
Q. And so were you specifically asked about what you meant when you were referring to all the powers that be?

A. I don't know if Christine asked me about that, honestly.

I took it as a we want to make absolutely sure that there hasn't been any change in control that you need to report or anything else that would cause a change in your application. So that's the context for which I was answering her completely. As I mentioned before, the DAA was not something that affected the application.

Q. Did either the ombudsman or Ms. Willett walk you through your email to Mr. Nevett, do you recall?

A. I don't think they did, no.

Q. Okay. So the auction proceeds on 27 July, and were declared the winning bidder; is that correct?

A. NU DOT CO won the auction, that's correct, yes.

Q. And do you recall that on July 31st, 2016, you wrote Ms. Willett
A. I do recall that, yes, I do.

Q. And how did you know that

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A. I can't be certain, but I believe VeriSign told me.

Q. Let's take a look at Exhibit C-100. It is behind Tab 18. And at the bottom you wrote to Ms. Willett on July 31st, 2016,

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You don't remember

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A. Like I said, my primary contact for most issues was Mr. Livesay.

Q. Do you specifically remember Mr. Livesay telling you that?

A. No, I don't.

Q. Do you recall someone from VeriSign telling that you someone from VeriSign would or -- would soon be or already had contacted Akram Atallah?
A. I can't remember, but if I had to assume it was someone, it might have been Mr. Livesay.

Q. Did the person from VeriSign tell you who from VeriSign would be calling Mr. Atallah?

A. Not that I know of, no.

Q. Okay. Do you know who called Mr. Atallah from VeriSign?

A. I don't know that anyone actually did call Mr. Atallah.

Q. So if we go up higher in this document, there's an exchange of emails with Ms. Willett on August 4th. You wrote

Tell me how this worked.

How did that work?

A. Logistically you want me to go through it?

Q. Very briefly.

A. So I believe

...
Q. And then on Friday, August 5th, Ms. Willett confirmed receipt of the proceeds and said you should expect to receive an invitation to contracting later that day.

Do you recall receiving the CIR later that day?

A. I can't recall if we received it that day. I know I did receive it at some point. I just don't know when it was.

Q. Do you recall if it was in August 2016?

A. I can't, no.

Q. Okay. Do you recall if it was in 2016 at all?

A. I don't recall honestly, no.

Q. Okay. Let's take a look at your witness statement again. This is Paragraph 104. Tell me when you're there. It is on Page 38, almost at the end of your witness statement.

So you're there?

A. Yes, yes.

Q. Paragraph 104 says, quote, "On September 16, 2016, I received an email from Ms. Willett at ICANN stating that Ruby Glen and Afilias had continued to complain that NDC should not have participated in the .WEB public auction and that
NDC's application should be rejected. This letter was a surprise to me, as prior to receiving it I had not heard from or communicated with Ms. Willett or anyone else at ICANN about .WEB since confirming our payment for .WEB in August 2016," unquote.

Do you see that?

A. Yes, I do.

Q. Now, were you aware that on August 23rd, 2016, VeriSign's outside counsel had written a letter to ICANN's outside counsel forwarding the DAA and various other information?

A. I had to have been aware.

Q. Let's take a look at the letter. It is Tab 20 of your binder, Exhibit C-102.

When you say you had to be aware, do you specifically remember being aware or are you assuming -- I'm sorry.

A. I recall the existence of the letter, but as it was kind of a fairly legal matter, I wasn't overly involved. Probably Brian Leventhal would have been running point on something like this.

Q. You don't recall if you read it at the time?

A. No, it is probable that I read it, but I can't recall being overly involved in this.
Q. Do you have any understanding of what prompted this letter to be sent from Arnold & Porter to Jones Day?

MR. MARENBERG: Objection; calls for privileged communication. If we can just limit it to outside privileged communications, I would have no problem with this question, Mr. Chairman.

MR. De GRAMONT: I'll rephrase.

ARBITRATOR BIENVENU: Would you like to rephrase your question?

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

Q. Outside of communications with your lawyer, do you have any understanding of what prompted Arnold & Porter to send this letter to Jones Day?

A. Outside of communications with Brian, I can't recall.

Q. Do you recall wondering at the time why Jones Day, the outside counsel, was reaching out to VeriSign's outside counsel about this matter?

MR. MARENBERG: Objection.

THE WITNESS: I don't.

Q. BY MR. De GRAMONT: Let me restate it.

Did it seem strange to you that Jones Day had reached out to VeriSign's outside counsel
rather than simply having ICANN contact NDC?

A. Did I think it was strange that ICANN's outside counsel -- I didn't -- I didn't think about this, honestly.

Q. If you take a look at -- do you recall that NDC prepared responses to the questionnaire from Ms. Willett?

A. What we referred to as the 20 questions?

Q. Yes. Those are the -- I actually didn't count them, but that's how many questions Ms. Willett sent to you?

A. I believe so. I was aware of that document, yes.

Q. And you recall that NDC provided responses, right?

A. We did, yes.

Q. And did you read them?

A. I definitely read them, at least some sort of draft of them, yes.

Q. And did you read VeriSign's responses?

A. I can't recall. Again, this was a similar situation where obviously it was increasingly legal and legalese in nature, so I had Brian running this process.

Q. And are you aware that many of the answers
are verbatim identical in the two responses?
   A. Identical to what?
   Q. To each other.
   A. Sorry, can you rephrase?
   Q. So for example --
   A. I just don't know what you're comparing.
   Q. So if you take a look at NDC's answers and
   VeriSign's answers to the questionnaire --
   A. Oh, I understand.
   Q. -- many of those answers are verbatim
   identical.
   Do you remember that?
   A. I don't recall, but obviously we were a
   part of the same deal. So it doesn't sound strange
   to me that, you know, our interpretation of our
   deal is similar.
   Q. And in some instances,
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   Do you recall that?
   A. I don't particularly recall that.
   Q. Okay. You're aware that the Antitrust
   Division of the Department of Justice commenced an
   investigation in late 2016 or early 2017 about the
   transaction, right?
   A. I'll never forget that.
Q. And the investigation lasted until January 2018?
A. That sounds about right.
Q. And was it your understanding that everything regarding .WEB was on hold pending that investigation?
A. I don't know that there was a firm policy announcement by ICANN, but that was my general understanding, that while the DOJ was looking at this, nothing was going to happen on the ICANN side.
Q. If you look at Paragraph 107 of your witness statement, I think this is the paragraph that Mr. Marenberg referred to you earlier on?
A. Yes. That's the one that I opened up the proceedings with in adding to.
Q. I just wanted to make sure I understand the clarification.
   It says, quote, "Since submitting those responses in October 2016, NDC has periodically made inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB. ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the pendency of the accountability mechanisms or similar
processes."

Could you just tell me the clarification
again so I make sure I understand that?

A. Yeah, here in the second line I said
 "inquiries through the ICANN customer service
portal" -- it probably could have said "customer
services portal, email or phone call" -- regarding
the status of .WEB.

Q. So you do recall having communications
with ICANN after receiving the 2016 twenty
questions?

A. Yes, definitely.

Q. Do you recall that you reached out to
ICANN in December 2017?

A. I do.

Q. Let's take a look at that email. I think
we are both referring to the same thing. It is
behind Tab 31, Exhibit C-182, and down at the
bottom there's an email dated December 12th, 2017,
from Peg Rettino referring to a meeting that was
being scheduled in December of 2017.

Can you tell me what the meeting schedule
was?

A. If I recall correctly, I believe the
context of this message was around this time, just
prior to the holidays, I think we had received
maybe unofficial word from the DOJ that that
process was coming to an end sooner rather than
later.

So I believe I reached out to ICANN to
inquire as to what was next. What was going on
with -- at the time, besides the DOJ, there was an
ongoing accountability mechanism, which was the CEP
between Donuts and ICANN, CEP being Cooperative
Engagement Process.

So, you know, from my viewpoint, I was
trying to get ahead of the fact that, hey, if the
DOJ was going to end, I wanted to know what's going
on with the Donuts CEP, is that -- can that end?
Can we get to a signing?

I wanted my Registry Agreement to sign,
quite frankly. It had been already quite some time
since we had won the auction.

Q. And did you have a conversation with
people at ICANN in December 2017?

A. I believe we did, yes.

Q. Do you remember who you spoke to?

A. If I recall correctly, it probably would
have been John Jeffrey, general counsel, and Akram
Atallah, I believe at the time president of the
Q. And was anyone else on the line from NDC?

A. I believe Mr. Marenberg was on the line with me.

Q. And had Mr. Marenberg replaced your earlier lawyer, whose name I am drawing a blank on?

A. Brian Leventhal. So we added Mr. Marenberg to the team once we -- once we saw that there was any potential litigation surrounding this and for his experience handling the DOJ inquiry.

Q. And was Mr. Marenberg recommended by VeriSign?

A. Mr. Marenberg, I believe Brian and I had a conversation about hiring an attorney and --

MR. MARENBERG: Objection.

Let me caution the witness. You should not disclose your communications with Mr. Leventhal.

I'll object to the question to the extent that it calls for disclosure of those communications on the grounds that it invades privilege.

ARBITRATOR BIENVENU: Your response to the objection, Mr. De Gramont?
MR. De GRAMONT: Let me rephrase the question because I don't want to elicit any client-counsel communications.

Q. This is just a yes-or-no question. Do you know -- strike that.

Did VeriSign, to your knowledge, recommend Mr. Marenberg for this assignment to NDC?

A. No. I recall VeriSign -- I recall VeriSign proffering a few suggestions on law firms to potentially hire, or speak to, at least.

Q. And do you recall if Mr. Marenberg was on that list?

A. I can't recall. Honestly, these go to my communications with Mr. Leventhal.

Q. I am sure Mr. Marenberg is on everyone's list, but you don't recall if he was on the list provided by VeriSign?

A. If he isn't, he should be.

Q. But you don't recall?

A. I can't recall, no.

Q. But you do recall that VeriSign provided you with a list of possible lawyers for this representation?

A. I believe they made some suggestions.

Q. Okay. So Mr. Marenberg was on the phone
with you. Anybody else from NDC?

A. No, I don't think on this call, no.

Q. Was anyone from VeriSign on the call?

A. No.

Q. Had VeriSign asked you to reach out to ICANN?

A. No.

Q. And do you recall if anyone other than John Jeffrey and Akram Atallah were on the line?

A. I don't believe that anyone else was on -- at least no one was disclosed to me if they were.

Q. And do you recall what you said to Mr. Jeffrey and Mr. Atallah?

A. I think in summary, what I just previously mentioned, which was, "Listen, I am sure you are hearing just like we are that the DOJ investigation is going to end without further action. You know, I know that the Donuts CEP has been going on for a very long time and can we expect that to come to an end any time soon?"

Q. And what did they tell you?

A. There wasn't much of a concrete answer. You know, all along I think for some time the general message that we were getting was that that Donuts CEP was going to end, but it never did.
1. Obviously it did eventually, but there was no real concrete answer given other than when it ends and if there are no accountability mechanisms, we'll follow our process.

Q. Did they say that when it ends and when there are no accountability mechanisms pending, they would proceed to contract for .WEB with NDC?

A. I can't say that they said that verbatim, but I think it was along the lines that they would follow their process. As far as I knew it, the process was that if there were no accountability mechanisms, there was nothing standing in the way from a Registry Agreement.

Q. A Registry Agreement with NDC?

A. With NDC, correct.

Q. Okay. Let me ask you this: Did you follow up with anyone at VeriSign about the conversation you had with Mr. Jeffrey and Mr. Akram and Mr. Marenberg?

A. I probably gave them a summary of the conversation, yes, although I can't be certain. In most likely circumstances, I updated them on the conversation.

Q. Are you aware that someone from VeriSign reached out to ICANN staff in January 2018 to ask
about the process of having NDC assign the Registry Agreement to VeriSign?

A. I recall in preparation for this, I recall perhaps seeing that there was a contact about that.

Q. Let's just take a quick look at it. It is Tab 32, Exhibit C-115.

I have two questions. First of all is whether outside of preparing for the testimony, do you recall seeing this exchange of emails at the time?

A. I can't recall, no.

Q. Were you aware that these communications were taking place at the time?

A. I honestly can't recall. I recognize Jessica Hooper's name as someone who was assigned by VeriSign at some point to help with the assignment process. I think she was becoming familiar with the assignment process.

Q. Do you recall speaking to her or anyone else about that?

A. You know, I believe I did have a phone call with someone. I think Jessica -- Ms. Hooper was probably one of those people. It is just kind of a preparatory call where we kind of talked about what their understanding of the assignment process
was as the way they read it through ICANN's website and the guidebook.

Q. Do you recall when that conversation took place?
A. I really can't, no.

Q. Do you recall if they --
A. It was obviously premature.

Q. Do you recall if they told you that they had already been in contact with ICANN?
A. No. I don't recall that.

Q. Okay. Let's take a look at what's behind Tab 31 of your binder, which is Exhibit C-182, and this is an email -- oh, we were looking at that.

So this is the email on top of that email chain. It is an email from you to John Jeffrey and Akram Atallah, dated February 15, 2018.

Do you recall whether between the phone call in December 2017 and this February 15th, 2018, email, there had been any other communications between you and ICANN?
A. I can't be certain, but I don't believe there were.

Q. Okay. And so you write to Mr. Jeffrey and Mr. Atallah, quote, "I hope this message finds you well. In line with our previous conversation, I am
contacting you regarding NuDotco signing the
Registry Agreement for .WEB. Now that the DOJ CID
has concluded and that there are no pending
accountability mechanisms associated with our
successful bid at the auction for this string in
2016, the next step in the process is for us to
execute the Registry Agreement. Please let me know
if you’ll have sufficient time to get that to me
this week. Thanks so much for all your help
throughout this process, and I look forward to
wrapping this up."

Did you write this email yourself?

A. It definitely looks like my language, yes.

Q. Did anyone from ICANN respond to this
email?

A. I don't believe they did.

Q. So what was the next communication you had
with ICANN after this?

A. Again, I can't be certain, but I guess at
some point there was a notification that -- well, I
can't be certain if there was a notification that
there was no longer any accountability mechanisms
or whether or not that was for the entire
contention set, or in -- I believe it is in June we
received the Registry Agreement to sign.
Q. And when you received the Registry Agreement, you signed it and returned it to ICANN?
A. As fast as I possibly could.

MR. De GRAMONT: Mr. Chairman, I think I am getting close to the end of my examination.

Could I just have a two-minute break? I may have about 15 minutes more or so, but I just want to confer with my colleagues.

ARBITRATOR BIENVENU: Absolutely. I think we will keep the witness in the hearing room, but you are free to consult your colleagues.

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

(Whereupon a recess was taken.)

MR. De GRAMONT: Mr. Chairman, I'm sorry that it took a little longer break than we thought, but the time was well spent.

I have no further questions, Mr. Rasco.

Thank you very much for your time today.

THE WITNESS: Thank you very much.

ARBITRATOR BIENVENU: Mr. Marenberg has a few questions for Mr. Rasco, and as we did for the previous witness, I will begin. If my colleagues have additional questions, they will go after me.

Mr. Rasco, could I ask you to take a look at Paragraph 58 of your witness statement?
THE WITNESS: Yes, Mr. Chairman.

ARBITRATOR BIENVENU: There you say in the first sentence that

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Do you see that?

THE WITNESS: I do, that's correct.

ARBITRATOR BIENVENU: The question of whether

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THE WITNESS: I don't recall it being a part of the negotiations, Mr. Chairman.

ARBITRATOR BIENVENU: You don't recall the determination being made on the part of NDC or as part of its negotiations with VeriSign as to whether or not -- let me finish, if I may.

THE WITNESS: Yeah, sorry.

ARBITRATOR BIENVENU: Do you recall a determination being made -- and, of course, please do not disclose any discussion you may have had with counsel. But do you recall the determination being made in the course of your negotiations with VeriSign

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THE WITNESS: I am having a little trouble to try to figure out how to answer the question.

The way that I understood

ARBITRATOR BIENVENU: Was the question of whether the guidebook -- or I'll say the program rules in order to include both the guidebook and the auction rules. Was the question of whether the program rules required disclosure of the DAA to ICANN discussed with ICANN?

ARBTRATOR BIENVENU: I am asking if you had a discussion with ICANN about whether that kind of an agreement needed to be disclosed to them?

THE WITNESS: No, sir. No, we did not.

MR. MARENBERG: Mr. Chairman, you meant to be inquiring about discussions he had with ICANN and not VeriSign?

ARBTRATOR BIENVENU: Yes, I meant to ask ICANN. Prior I asked the clarifying, but now I was talking about ICANN.

Mr. Rasco, as you sit here today, I believe you are aware that in November 2016 the ICANN Board turned its mind to the question of whether NDC's bid was compliant with the program rules and decided not to pronounce itself on that question. Are you aware of that?

THE WITNESS: In the context of this hearing, I became aware of that.

ARBTRATOR BIENVENU: Exactly.

Now, when did you -- withdrawn.

Were you informed of that decision in the days, weeks or months following that decision?

THE WITNESS: I don't believe I ever was, no.

ARBTRATOR BIENVENU: So it is in the
context of this IRP that you became aware of that?

THE WITNESS: I believe that's correct.

ARBITRATOR BIENVENU: So if we look at the letter under Tab 33, which is a letter sent by Mr. Marenberg to ICANN, you recognize this letter? It is the very last tab of the witness binder.

THE WITNESS: Yes, I see that, yes.

ARBITRATOR BIENVENU: You recognize that letter?

THE WITNESS: I do. I haven't seen it in some time, but I vaguely recognize it, yes.

ARBITRATOR BIENVENU: If we look at the last paragraph of that letter, so basically this is a letter complaining to ICANN that a lot of time has passed since the auction, and we have reached a point when a Registry Agreement should be delivered for execution to NDC. In substance, I believe that's what the letter says.

In the last paragraph we read this, "ICANN has gone to great lengths over a very long period of time to protect what it thought might be any interests of other parties, including," et cetera, and then we have the sentence, "That process is complete."

When that letter was sent out, and I
assume it was with your approval, you were not
aware that the ICANN Board had deferred
consideration of whether NDC's bid was compliant
with the program rules, were you?

THE WITNESS: I was not aware. In my
experience, most new TLD applications didn't go
before the ICANN Board to go to signing. But I was
not aware that the Board had made a decision not to
decide.

ARBITRATOR BIENVENU: Thank you,
Mr. Rasco.

Do my co-panelists have questions for
Mr. Rasco?

ARBITRATOR CHERNICK: I do not.

ARBITRATOR KESSEDDJIAN: Sorry, took me
some time to unmute. No. I decided not to ask the
questions that I initially had because the topics
had been covered, even though I am still fairly
confused about some of the answers, but I think in
terms of time, I think I will refrain.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Marenberg, any redirect for Mr. Rasco?

MR. MARENBERG: Yes. May I just have two
minutes to cut some questions and make it very
brief?
ARBITRATOR BIENVENU: Of course. Wave your hand when you're ready.

MR. MARENBERG: I am just going to go off and then come back.

(Whereupon a recess was taken.)

MR. MARENBERG: I am ready whenever you are, Mr. Chairman.

ARBITRATOR BIENVENU: We are ready for your questions, Mr. Marenberg. Please proceed with your redirect.

REDIRECT EXAMINATION

BY MR. MARENBERG

Q. Can we put up Rasco Exhibit 0, please? Would you go to the text of the email?

ARBITRATOR BIENVENU: Do you know which tab of the exhibit book?

MR. De GRAMONT: It is Tab 13.

ARBITRATOR BIENVENU: 13, thank you, Mr. De Gramont.

Q. BY MR. MARENBERG: I believe, Mr. Rasco, you were shown this exhibit by Mr. De Gramont, and he asked you a couple questions about it.

I just want to confirm, Ms. Willett from ICANN reached out to you and asked you to call her; is that correct?
A. That's correct.
Q. And you did that same day?
A. I believe it was the same day, yes.
Q. Now, if we could put up paragraph -- excuse me, Exhibit C-75 and turn to Page 4, which is Ms. Willett's summary of the conversation that she had with Mr. Rasco. Go to Page 4, please.
Mr. De Gramont, what was -- that's it.
Right there.
And you were shown this exhibit earlier in your testimony here today.
Do you recall that?
ARBITRATOR BIENVENU: This is Tab 14 of the witness exhibit?
THE WITNESS: Yes, I recall.
Q. BY MR. MARENBERG: Now, Mr. De Gramont highlighted various sections of this document with you, and he has with other people.
I want to highlight another section.
Would you highlight Paragraph 1. It reads, "When ICANN previously contacted him about potential changes, he assumed that the confirmation was part of the standard auction process, and his response was relatively brief."
Mr. Rasco, is it your understanding that
what Ms. Willett is referring to there is your initial email exchange or exchange on the portal with --

A. Mr. Erwin.

Q. -- Mr. Erwin; is that correct?

A. That's correct.

Q. All right. And Ms. Willett is recounting what you said to her about that exchange in 2016, correct?

A. That sounds correct, yes.

Q. Now, a fair amount of ink has been spilled insinuating that you have changed your view of what you said to Mr. Erwin over time now that we are in an IRP proceeding.

But at the time you had this conversation with Ms. Willett in 2016, was there an IRP proceeding involving Afilias?

A. No, there was not.

Q. And so when you told Ms. Willett and gave the explanation of your response to Mr. Erwin as that it was simply part of the standard auction process and that you quickly responded to Mr. Erwin, that was not in the context of any declaration or witness statement prepared in connection with any IRP or litigation?
A. No, not at all.

Q. All right. Before there was ever any of this contention, you had told Mr. Erwin essentially what you said in your witness statement -- you had told Ms. Willett essentially what you said in the witness statement, which was, "I fired off a quick response to Mr. Erwin as part of the standard auction process"?

MR. De GRAMONT: Mr. Chairman, I am not objecting to leading questions because I want this to go fast, but at some point Mr. Marenberg cannot testify for the witness. So I will object to that last question as leading.

MR. MARENBERG: I'll withdraw it.

ARBITRATOR BIENVENU: I think, Mr. De Gramont, we all understand what's happening here, but your point is well-taken by your colleague, I'm sure.

MR. De GRAMONT: Thank you.

Q. BY MR. MARENBERG: Now, if we could put up Exhibit C-100, which is Tab 18 in the binder?

ARBITRATOR BIENVENU: Just so that it is clear, when I said we all understand what's happening now, I meant to say that counsel is simply trying to go through points to be covered in
the most efficient way. That's what I meant.

MR. MARENBERG: Right. Thank you, Mr. Chairman.

Q. So this is your exchange with Ms. Willett on the 31st of July of 2016, and you write to her,

Redacted - Third-Party Designated Confidential Information

To your knowledge, was this the first time you said anything to ICANN about VeriSign's involvement in the .WEB TLD?

A. I believe this was the first time I mentioned VeriSign, that's correct.

Q. Now, did you discuss

Redacted - Third-Party Designated Confidential Information

A. I don't recall exactly, Mr. Marenberg, but I know that the plan all along was, subsequent to the auction, to notify ICANN immediately of

Redacted - Third-Party Designated Confidential Information

Q. Did you have an understanding yourself as to whether

Redacted - Third-Party Designated Confidential Information
A. I knew that no matter what, they were going to be aware of the agreement. I can't be sure as to whether or not they were going to ask for a copy of it, but I knew that we were going to have to let them know about our agreement and about

Q. Is it fair to say that

A. Well, yeah, correct.

Q. Is it accurate to say, in essence, from the beginning of the negotiations with VeriSign over this deal,

MR. De GRAMONT: Mr. Chairman, I want this to go quickly, but Mr. Marenberg is really testifying for the witness. So object to that question as leading.

ARBITRATOR BIENVENU: Mr. Marenberg, do
you want to reformulate your question?

MR. MARENBERG: I'll withdraw it, your Honor.

Q. Now, let me just go back to the Exhibit C-100.

At the time that you mentioned to Ms. Willett on July 31st that what was the nature of the blogosphere as it concerned the .WEB TLD?

A. So if I recall correctly, even prior to the auction I believe the filings from Donuts or Ruby Glen were made public in their attempts to try to stop the auction. So at that point I guess the scuttlebutt or the gossip going around was, wow, there must be someone behind this. And there were kind of -- I don't know if you would say suppositions or there were assumptions that, wow, it must -- what if one of the big players is here? What if, could it possibly be VeriSign?

And then subsequent to the auction or around the time of the auction when the actual dollar amount came out, I have a feeling, if I recall correctly, there was, you know, definitely bloggers, whether it was Kevin Murphy of Domain Incite or Kieren McCarthy, I forget where he was
writing at the time, but probably writing about the potential participation of VeriSign.

Q. Can we put up Exhibit C-43, please?

MR. De GRAMONT: Mr. Chairman, I have a feeling counsel is about to go beyond the scope of cross-examination, and if so, I will object to that.

MR. MARENBERG: I don't believe so.

ARBITRATOR BIENVENU: Would you like to respond to that objection, Mr. Marenberg?

MR. MARENBERG: I think I am just putting up the clarifications that Mr. De Gramont asked him and putting it in that context.

MR. De GRAMONT: I didn't go through that with this witness, but why don't we hear the question and then I'll deal with the objection.

Q. BY MR. MARENBERG: Is this an example of the types of communications that were circulating in the blogosphere in the aftermath of the .WEB auction?

A. That's correct, this is an example of those assumptions that VeriSign was potentially involved.

Q. Okay. Now, let's go back to Exhibit C-100, please.
ARBITRATOR BIENVENU: Tab 18?

MR. MARENBERG: Tab 18.

Q. Now I want to focus your attention on the next email after the one you sent on July 31st and after Ms. Willett's response.

That's your email of August 4th. For what purpose were you writing Ms. Willett on August 4th?

A. I was confirming that they received the payment and inquiring about the CIR, which is the invitation to contracting.

Q. Okay. At this point in time, did you have an understanding when you were communicating with Ms. Willett as to whether she understood that VeriSign was involved in some way in the .WEB TLD?

A. I don't know what she thought, but I had already -- Redacted - Third-Party Designated Confidential Information, so I am assuming she already knew about it.

Q. Okay. And let's go to the top email on the page, which is Ms. Willett's response. Same document, top email, please, C-100. Thank you.

And Ms. Willett responds to you, Redacted - Third-Party Designated Confidential Information
What did you understand she was telling you there?

A.  From my point of view,

Q.  This was after VeriSign's involvement had been disclosed, correct?

A.  That's correct. It didn't -- in other words, it didn't look like there was much of a surprise here.

MR. MARENBERG: I have no further questions.

ARBITRATOR BIENVENU: Thank you very much, Mr. Marenberg.

Mr. Rasco, I would like, on behalf of the other members of the Panel and indeed on behalf of all the participants in this process, to thank you for your evidence and for your time.
THE WITNESS: Thank you very much, Mr. Chairman. It was fun.

ARBITRATOR BIENVENU: Mr. Rasco, I must instruct you not to discuss your evidence and your testimony with any other persons who are scheduled to appear before the Panel.

THE WITNESS: Yes, sir.

ARBITRATOR BIENVENU: Thank you very much, indeed.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: We are on to our next witness. Mr. LeVee, will you be leading or introducing the witness?

ARBITRATOR KESSEDJIAN: Can we can have a short break, probably five or eight minutes, no more?

ARBITRATOR BIENVENU: An unscheduled break?

ARBITRATOR KESSEDJIAN: An unscheduled break, yes.

ARBITRATOR BIENVENU: I see agreement by our friend Mr. Chernick, so let's have an unscheduled break of five minutes.

In the meantime, Mr. LeVee, you can perhaps ensure that the witness -- can you tell us
if the witness is ready?

MR. LeVEE: The witness should be in his own holding room. I believe that's been confirmed. I apologize. I had expected the Panel to take a short break.

ARBITRATOR KESSEDJIAN: I am reading your mind, Mr. LeVee.

MR. LeVEE: My apologies, but I am sitting here getting my computer activated.

ARBITRATOR KESSEDJIAN: Let's meet in five minutes.

MR. LeVEE: Five minutes is good with me.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Welcome, again, Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

ARBITRATOR BIENVENU: Mr. Disspain, welcome. My name is Pierre Bienvenu. I chair the Panel in this IRP. My colleagues are Professor Catherine Kessedjian, whom I assume you see on your screen, and Mr. Richard Chernick.

THE WITNESS: Yes, I can see them. Thank you.

ARBITRATOR BIENVENU: Very well. So first of all, on behalf of the Panel, welcome to you.
Sir, you have signed a witness statement in relation to this case dated 1st June 2020.

THE WITNESS: Yes, I have.

ARBITRATOR BIENVENU: And at the end of your statement, you swear that the content of your statement is true and correct?

THE WITNESS: Yes, I do.

ARBITRATOR BIENVENU: May I ask you, sir, likewise solemnly to affirm that the evidence that you will give to the Panel today will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, I do so affirm, sir.

ARBITRATOR BIENVENU: Thank you very much.

Mr. LeVee.

MR. LeVEE: Thank you, Mr. Chairman.

Good evening, Mr. Disspain. How are you?

THE WITNESS: I'm fine, Mr. LeVee. Thank you. How are you?

MR. LeVEE: I am fine. Thank you.

I have just two questions. One, are you in the United Kingdom? Is that where you are testifying from?

THE WITNESS: Yes, I am.

MR. LeVEE: Okay. And second, the Chair showed you your witness statement. Do you have any
corrections to your witness statement that you'd like to correct?

THE WITNESS: No, I don't.

MR. LeVEE: Then, Mr. Chair, I have no additional questions and submit Mr. Disspain to cross-examination.

ARBITRATOR BIENVENU: Thank you, Mr. LeVee.

The cross-examination will be conducted by Mr. Litwin.

Mr. Litwin, your witness.

MR. LITWIN: Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. LITWIN

Q. Mr. Disspain, can you hear me okay?

A. Yes, I can. Thank you very much.

Q. Excellent. Good evening, sir. I understand you have received a bundle containing our exhibits?

A. I do have it, yeah.

Q. If you could open that on camera, and Mr. LeVee may do the same.

A. I will do my best to open it on camera without cutting myself.

Q. Don't cut yourself. We see it is
unopened.

   A. I will put it down so I can open it properly. Okay. There we go. Okay. There we are.

   Q. I regret to say we killed quite a number of trees with it, and I am not sure we are actually going to review much of it.

   A. It would appear so, but I can use it for scrap paper later.

   Q. Very good. I am happy to hear to that.

But if I do refer to a document in that binder, you will see that we have marked each page at the bottom right-hand corner with a unique page number that is new, and I will be referring to that page number, not to the original document number.

   A. You said the bottom right-hand corner?

   Q. Yeah, should be the bottom right-hand corner.

   A. So that's ICANN-WEB_ something?

   Q. Yes.

   A. The binder wants to spring itself open, so just give me a second so I don't lose any documents. I will do my best. It is kind of damaged.

   Q. No worries. As I said, I don't expect to
look at much of anything in there.

A. Just so you know, it is actually broken. Don't worry. My apologies.

Q. I apologize.

A. No, it is not your fault. I just didn't want to be an inconvenience to you.

Q. Mr. Disspain, you are a member of ICANN's Board of Directors, correct?

A. Yes, that's correct.

Q. When did you first join the Board?

A. October 2011.

Q. And you have been a member of the Board since that time, correct?

A. That is correct.

Q. I would like to take you back to the events of November 2016. You stated in your witness statement that ICANN lawyers periodically provided updates to the Board regarding the status of .WEB; is that correct?

A. That's correct.

Q. And these updates address various legal matters, such as the Ruby Glen litigation against ICANN regarding .WEB, correct?

A. Yes, that's correct.

Q. And the associated CEP that Donuts, Ruby
Glen's parent entity, had initiated concerning .WEB; is that correct?

A. Yes, that's correct as well.

Q. And the complaints that Afilias had made to ICANN's ombudsman regarding .WEB?

A. Well, I think we knew that a complaint had been made, but we didn't have any of the details. That would not have been appropriate. Complaints to the ombudsman, obviously they'd complained to the ombudsman, so we didn't have any of the details of that.

Q. What about the letters that Afilias had written to Mr. Akram Atallah that had raised concerns regarding how the .WEB contention set had been resolved, were those discussed during those updates?

A. I think we certainly knew about them because they were -- as Akram said, they were public. They would have been part of the briefing, if you will, to discuss the issue.

Q. And at the time in 2016, Mr. Atallah was the president of ICANN's Global Domains Division, correct?

A. I believe so, yeah.

Q. Generally speaking, he was responsible for
overseeing the administration of the new gTLD Program, right?

    A. Reporting to the CEO, but yes.

    Q. Now, you attended the public ICANN meetings that were held in Hyderabad, India in November 2016, correct?

    A. I did, indeed.

    Q. And during those meetings, did you attend a Board workshop session on November 3rd, 2016, where ICANN legal briefed the Board about .WEB?

    A. The answer to that is yes, although I couldn't be certain about the actual dates, but yes, at Hyderabad in November we had a briefing session on the issue.

    Q. I will represent to you that in ICANN's privilege log, there is an entry for a transcript of a Board workshop session that took place on November 3rd. If I am representing that correctly, would that help you recall that that is the subject of the discussion?

    A. If that's what it says, then I accept that's what it was, yes.

    Q. I will also represent, as far as I can tell from ICANN's website, the first meeting of the ICANN Board was on November 5th. Is it your
recollect that this workshop was held before
that regular meeting?

A. So you say "meeting," you mean formal
meeting of the Board?

Q. Yes.

A. If you do, the answer is yes.

Q. Okay. Was there a discussion during that
November 3rd workshop that the conversation you
were having was privileged?

A. Yes.

Q. And that meeting took place in India,
correct?

A. It took place in Hyderabad, yes.

Q. And ICANN carries out its activities in
conformity with the principles of international
law, correct?

A. I can't -- I don't understand -- I can't
answer that question. I don't know what you mean.

ICANN carries out its activities pursuant to
California law, I think.

Q. So already I have misrepresented to you,
sir, we are going to take a look at your witness
binder.

A. Not a problem.

Q. But it is at the beginning?
A. Given the state of it --

Q. If you can turn to Tab 4, sir.

A. Yes, I have got Tab 4.

Q. And if you can, if you just give me a minute here, if you turn to Page 5, these are ICANN's bylaws.

A. Hang on, is this your page number?

Q. Yes. Exhibit C-1, Page 5.

A. I am on Page 5, yep, yep, yep.

Q. If you look at Section 1.2(a).

A. Yes, I have got that.

Q. It says, "In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law."

Do you see that?

A. I am fine with that, and yes, that's absolutely what the bylaws say.

Q. So when there was a -- when you write in your witness statement, sir, that the Board's communications with counsel during the November 3rd workshop session were privileged, which set of laws
regarding the legal privilege are you referring to?

A. I'm referring to advice received by our lawyers. I am not an international lawyer, and you are asking me to provide you with a legal opinion, which I can't do.

Q. So you don't -- sitting here today, you do not have an understanding of which laws concerning legal privilege were governing that meeting in India?

A. I have an understanding.

MR. LeVEE: Mr. Chairman, could I interrupt briefly? There has already been litigation or activity regarding Afilias's claims relating to this meeting, and the Panel concluded what it did. I am not going to say what the Panel concluded in front of the witness.

But this clearly is an improper line of questioning with respect to a legal issue. The witness has already said he doesn't know the legal issue, but he also did say he understood California law applied.

ARBITRATOR BIENVENU: Let us see where we're headed with Mr. Litwin's questions, and I invite you to reformulate your objection as the case may be.
MR. LeVEE: I will do that.

Q. BY MR. LITWIN: Mr. Disspain, do you need me to restate?

A. Yes, I do. I have no idea what you were asking me. So you have to start again, I'm afraid.

Q. So my only question was whether, sitting here today, you have any understanding as to which privilege rules applied to the meeting you were having in Hyderabad, India?

A. My understanding is we were instructed that that meeting was privileged, not specifically by what law, but that it was privileged.

Q. Now, Mr. Disspain, I am going to ask you a series of questions regarding the November 3rd workshop session.

I will not ask you to reveal the substance of any privileged communication made during that workshop, and certainly by my questions I am not intending to elicit any answers that would reveal any such privileged communications.

I would therefore request that, just to be safe, you keep your responses brief, but naturally you should be guided by the instructions of your counsel in this regard. But I just wanted to make that clear up front.
A.  I appreciated it, and I understand.  Thank you very much.

Q.  To the best of your recollection, how many directors attended the November 3rd workshop session where issues related to .WEB were discussed?

A.  I wouldn't start to put a number on it. My recollection is there were a significant number of Board members present, but I couldn't tell you how many.

Q.  Could you give me an approximation of what percentage of the Board was present?

A.  It would be very much a guess, but in my mind I would suggest it was certainly more than 50 percent. It could have been up to -- it could have been everyone, but certainly more than 50 percent, in my mind.

Q.  Did anyone from ICANN staff attend the November 3rd workshop?

A.  Yes, lots of people from -- are you talking about this specific session or just general?

Q.  Yes, yes.

A.  This specific session?

Q.  This specific session, where -- the
November 3rd workshop I am going to refer to when the issue -- the legal issues regarding .WEB were discussed.

A. Yes, certainly the lawyers did. John Jeffrey was there. I think Amy Stathos was there, the CEO was there. Again, I don't have a clear recollection. I would be surprised to discover that Akram Atallah wasn't there. I am not telling you stuff from actual memory. I am telling you it would surprise me if he hadn't been, but yes, there was certainly staff present.

Q. So just to be clear, Mr. Disspain, I am not asking you to speculate. I am asking you, to the best of your recollection, was Mr. Atallah in attendance?

A. I believe he was.

Q. What about Ms. Willett?

A. I don't remember.

Q. Other than Mr. Atallah, were there any other members of ICANN staff present at the November 3rd workshop session, also other than legal staff, that you recall?

A. Not that I can recall.

Q. So just to clarify again, what we are talking about in the November 3rd workshop session,
is it fair to say, and this is really a yes-or-no question, that multiple topics were discussed during the entirety of that November 3rd workshop unrelated to .WEB?

A. Now you have confused me because you said before, you said when you refer to the November 3rd workshop, you are specifically referring to a discussion about this.

Q. Correct. What I am trying to just get at, sir, I just want to understand, this was one of the topics that were discussed at the workshop? And then we'll go on.

A. During the day, during our sessions, a number of topics were discussed, yes, that is correct.

Q. Okay. So from now on when I refer to the November 3rd workshop session, I am just going to refer to the discussion regarding .WEB.

To the best of your recollection, how long was the discussion concerning .WEB?

A. I couldn't -- I genuinely couldn't say. I don't know. I would be speculating.

Q. Okay.

A. I would be saying -- I'd be thinking it through and saying, well, I know what was
discussed, how long would that take, et cetera, and that's what you don't want me to do, so I don't know.

Q. Would you say it was more than 15 minutes?
A. I'm going to resort to a reply I gave you earlier in another context. I would be surprised if it wasn't more than 15 minutes, but I remember there being a full and open discussion about the topic. How long it actually took, I couldn't say.

Q. Okay. Had there been another sort of full and open discussion of legal issues regarding .WEB in any of the other updates that had been provided to the Board?
A. You mean at Hyderabad?

Q. No, at any other time that you recall.
A. I don't recall there being any face-to-face discussion. I do recall that we were kept up to speed with what was happening to some extent, but I don't recall that -- so we received updates in respect to what was going on with .WEB, but I don't recall a Board discussion.

Q. Now, the discussion regarding .WEB that took place on November 3rd, did that -- ICANN was involved in active federal court litigation with Ruby Glen at the time. So the briefing, I assume,
would have included a discussion of Ruby Glen's case; is that right?

A. Well, it included an update on Ruby Glen's case, yes.

Q. And Donuts' CEP that we mentioned earlier?

A. Again, it would have been -- we would have been briefed that that had happened, that was happening, yes.

Q. What about what ICANN was doing in response to the letters that Mr. Atallah had received from Afilias?

MR. LeVEE: That question I will object to because it is so vague.

Ethan, can you make it a little bit more clear? We are trying to make sure -- you are trying to make sure he doesn't waive the privilege. I am trying to make sure he doesn't waive the privilege. That question --

THE WITNESS: I'll be guided by both of you as to whether I am waiving the privilege or not, so I am comfortable.

Q. BY MR. LITWIN: I think you should listen to ICANN's lawyer.

A. I think you are probably right.

Q. That's not my role here today, but I do
want to make sure that I am sensitive to this.

So I will rephrase the question. So did
the Board also receive an update about ICANN's
response to Afilias' letters to Mr. Atallah?

A. My recollection is that we knew that ICANN
had sent out a questionnaire, if that's what you're
asking me.

Q. Yes. That is what I'm asking you. Thank
you.

Did the Board discuss on November 3rd
Ms. Willett's preauction investigation of NDC? I
am asking just for a yes-or-no question, not about
the substance.

A. I don't know what you're referring to, so
I am afraid I can't -- I don't know what
Ms. Willett's preauction investigation is, so I
can't answer that.

Q. What about the ombudsman's
pre-investigation auction -- excuse me. Let me
rephrase.

What about the ombudsman preauction
investigation of NDC, was that discussed?

A. We wouldn't discuss what the ombudsman had
done, because that's a matter for the ombudsman and
that remains with him and no one else.
Q. I can represent that other contention set members had complained about the .WEB auction at one point or another. Did the Board discuss any complaints that were brought by any contention set member other than Afilias or Ruby Glen during the November 3rd workshop?

A. Not that I can recall.

Q. You note in your witness statement that Board members asked questions of ICANN's legal counsel during the November 3rd discussion of .WEB.

To the best of your recollection, sir, could you please identify everyone who asked a question of ICANN's legal counsel during the November 3rd discussion of .WEB?

A. Well, no, for a couple of reasons, but mainly because I can remember the events and the discussion, but you're asking me to identify particular individuals who had asked particular questions, and I can't do that.

I know there was a discussion. I know that Board members were present. I know that -- I believe, as I have already said, that 50 percent of the Board was present, but I would not be able to tell you who spoke, and I wouldn't be able to tell you what questions they asked.
Q. Well, I am certainly not asking you to reveal what questions were asked, sir.

Let me ask you this: Did you ask any questions during that November 3rd discussion of .WEB?

A. I believe that I probably did.

Q. Sitting here today, do you have a recollection one way or another?

A. Well, you see, here's the challenge. I know me, so I know that it's highly likely I would have asked questions.

But if you're asking me can I actually remember, I know you are not going to ask me what they were, but logically for me to remember, I would need to remember the questions, the answer is no. To revert to a previous answer, I would be surprised if I did not.

Q. Understood. We sound very much alike, Mr. Disspain.

You note in your witness statement that you received briefing materials in advance of the November 3rd meeting, correct?

A. Correct.

Q. And did those briefing materials include a copy of the August 25th, 2015, VeriSign-NDC Domain
Acquisition Agreement?

A. Not to my recollection.

Q. Did the briefing materials contain a copy of the August 23rd, 2016, letter from Mr. Ronald Johnston of Arnold & Porter on behalf of VeriSign to Mr. Eric Enson of Jones Day on behalf of ICANN?

A. Again, not to my recollection.

Q. You mentioned a few minutes earlier that ICANN had sent questionnaires out in response to Afilias's complaints. Were the responses to those questionnaires that were received from Afilias included in your briefing materials?

A. Not to my recollection.

Q. What about the answers that were received to the questionnaire from VeriSign or NDC, do you recall?

A. I don't recall any responses or the questionnaire.

Q. Did you ever discuss any issues regarding .WEB with Mr. Atallah?

A. Are you asking me personally or are you asking me --

Q. Yes, personally.

A. Not that I can recall, no.

Q. Since the Board was also discussing the
Ruby Glen WEB litigation, did the briefing materials also contain -- or did the briefing materials contain a copy of Ruby Glen's pleadings from that case?

A. Again, not that I can recall. I don't remember seeing those.

Q. Did the briefing materials contain a copy of any of the legal briefs at that had been filed as of November 3rd, 2016, in that case?

A. Again --

MR. LeVEE: Let me just interrupt. I am letting this go on, but I am confident that whatever materials were provided to the Board would themselves be -- the fact of a lawyer giving a document to the Board would itself be privileged.

I don't think it is appropriate -- and I don't want to waive the privilege, but I don't think it is appropriate for questions to be asked about what specific materials were provided to the Board. They were selected by counsel. That's already been established.

MR. LITWIN: Mr. Chairman, may I respond to that, please?

ARBITRATOR BIENVENU: I was going to invite you to do so.
MR. LITWIN: Thank you, Mr. Chairman.

Without belaboring the point, it is well-established that the identity of a document that is provided by a lawyer to a client is not privileged, but the contents of that document and any discussion about that document to the extent the document is privileged.

So I believe I am entitled to know what documents were provided to the Board. To the extent that they are nonprivileged documents, I would ask questions about them. To the extent it is a privileged document, I obviously would not ask questions about them.

MR. LeVEE: May I respond?

ARBITRATOR BIENVENU: Just a minute, Mr. LeVee. I have a question.

What you say is well-established, Mr. Litwin, is this a matter of New York law, California law, U.S. federal law or all?

MR. LITWIN: I believe it is all of the above, and I will represent that I checked with my ethics counsel before embarking on these questions here today. I would be happy to provide a written opinion to the Panel if it so desires.

ARBITRATOR BIENVENU: Mr. LeVee, you want
to respond?

MR. LeVEE: Thank you, Mr. Chairman.

The Panel has already ruled that California law applies, so I am going to stick with California law.

Under California law, the fact that a document exists, that's not privileged. The fact that a lawyer gives the document to the client, that is privileged because the lawyer is making a determination of what materials to provide to the client, and that is privileged.

So I agree with Mr. Litwin to the extent that a document itself, the very existence of the fact that a letter was sent, that's not a privileged fact. I haven't argued that it was, but the transmission by the lawyer to the client is privileged. There are many cases in California that agree with that concept.

MR. LITWIN: Mr. Chairman, if I might, I am really at the end of these questions, so I think we are having a debate over an academic point. But if the Panel would like to hear further on this, I would be happy to submit something in writing so we do not take up any more of Mr. Disspain's time.

ARBITRATOR BIENVENU: So would you like,
then, to withdraw your question and move on to the
next topic?

MR. LITWIN: Yes, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you.

Q. BY MR. LITWIN: Mr. Disspain, you stated
in your witness statement that on November 3rd the
Board, quote, "chose not to take any action at that
time," close quote, concerning .WEB.

Did the Board take a vote on November 3rd?

A. No.

Q. Was a straw poll taken?

A. Not that I can recall.

Q. Was there a show of hands?

A. Not that I can recall.

Q. Was there a call of ayes and nays?

A. No, again, not that I can recall. It was
a decision to -- a choice, if you will, to do what
we would usually do, normally do with a
longstanding practice of not interfering when there
was an outstanding accountability mechanism.

Q. I will represent to you, Mr. Disspain,
that ICANN has stated at oral argument in this IRP
that the Board, quote, "decided to defer" --

A. But it wasn't a vote or a straw poll.

ARBITRATOR BIENVENU: Mr. Litwin, I think
you hadn't completed your question.

MR. LITWIN: To clear up the record, why don't I ask my question again.

Q. So as I was saying, Mr. Disspain, at oral argument ICANN's counsel represented that during the November 3rd meeting, the Board, and I quote, "decided to defer," end quote, "consideration of Afilias's complaints regarding the resolution of the .WEB contention set."

Would you agree with that statement that the Board took a, quote, "decision to defer"?

A. We decided that it was -- there were outstanding accountability mechanisms.

ARBITRATOR BIENVENU: I'm sorry to interrupt you. There was a break in the communication, so we did not hear the beginning of your question. Could I ask you to start again at the very beginning of your answer?

THE WITNESS: The beginning of my answer. I will do my best.

The Board discussed the briefing and it decided that -- we had agreed that we would continue the longstanding practice of not doing anything where there is an outstanding accountability mechanism.
I don't recall if there was a specific agreement to not to deal with Afilias' issues. It was more -- my recollection, it was more it is not appropriate for us to be doing anything in respect to this because there are accountability --

(Discussion off the record.)

THE WITNESS: -- and our variable practices.

MR. LeVEE: Mr. Disspain -- go ahead, Mr. Chairman.

THE WITNESS: Would it be helpful if I disconnect and reconnect? Would that be helpful?

ARBITRATOR KESSEDJIAN: Yes.

THE WITNESS: Shall I just do that?

ARBITRATOR KESSEDJIAN: Mr. Disspain, Catherine Kessedjian, make sure you are close to your Wi-Fi connection.

THE WITNESS: Close to my Wi-Fi connection. Thank you. I will disconnect and reconnect now.

ARBITRATOR BIENVENU: Yeah, okay.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: You are back with us. So let's -- do you have a live feed of the transcript? Mr. Litwin, do you know where we left
off?

THE WITNESS: I do. I think --

ARBITRATOR BIENVENU: I think you should repeat your question.

And, Mr. Disspain, you are going to have to repeat your answer, I'm afraid.

THE WITNESS: Not a problem.

Q. BY MR. LITWIN: Just to summarize, Mr. Disspain, because I think you generally do recall what my question was, was -- would you agree with ICANN's counsel's statement that the Board took a, quote, "decision to defer," end quote, during the November 3rd workshop session?

A. So what I said to you in response to that question is I think the Board made a choice to follow its longstanding practice of not doing anything when there is an outstanding accountability mechanism.

I cannot say that the Board proactively decided, proactively agreed, proactively chose to as to put to do -- as to do it as you put it, which is to not pursue Afilias' complaints.

We just decided that it was our standard practice not to do anything because there were outstanding accountability mechanisms.
Q. So when you say that the Board did not proactively decide, is it fair to say you received a brief from legal counsel, questions were asked of legal counsel, responses to those questions were given, and then you moved on to the next item on the agenda?

A. Yeah, it wasn't before us for a decision -- for a formal decision unless we had chosen to move to a formal decision.

What we chose to do was to follow our longstanding practice.

MR. LITWIN: Excuse me for one second, please.

(Whereupon a recess was taken.)

Q. BY MR. LITWIN: So, Mr. Disspain, I think you testified earlier that certain members of staff were present during the November 3rd workshop where the .WEB issues were discussed, correct?

A. Correct, yes, that's correct.

Q. And that included Mr. Atallah?

A. That's my recollection.

Q. So Mr. Atallah, at the least, would have heard the conversation and heard the questions that were asked of legal counsel and the responses that were given, correct?
A. Yes. If my recollection is correct and he was in the room, then yes, he would have heard.

Q. The ICANN bylaws require that ICANN must make, quote, "any action taken by the Board publicly available within seven business days of the conclusion of each meeting."

Are you aware of that, sir?

A. Yes, I am aware of what you just said, yes.

Q. And that if the Board determines not to disclose any action, that the Board must disclose the reasons for that disclosure; is that also correct?

A. That sounds right.

Q. Are you aware that Afilias sent a DIDP -- again, that's D-I-D-P for the court reporter -- a DIDP request to ICANN in early 2018 demanding that ICANN disclose the status of its .WEB investigation and the .WEB contention set; are you aware of that?

A. I am aware there was a DIDP question from Afilias, and I think that's the one you're referring to, yes.

Q. Are you aware, in response to ICANN's response to that DIDP request, Afilias filed a reconsideration request?
A. Yep.

Q. Are you aware that ICANN, in its response to the DIDP request, did not disclose anything about the November 3rd workshop?

A. Yes, I think I would have been aware of that at the time. At the time the reconsideration request came in, I would have been aware of that, yes.

Q. Are you aware that the Board denied Afilias' --

A. Yes.

Q. -- reconsideration request?

A. Yes.

Q. You state in your -- yes?

ARBITERATOR BIENVENU: Excuse me. The Chair here. I am sorry to break your flow.

Could you, for my benefit, recall what precisely was being sought by the DIDP and what was the decision and then what precisely was being sought by the reconsideration request?

MR. LITWIN: Mr. Chairman, I do not have those documents in front of me, but I believe we will have time that my team can compile those so we can put those on the screen when I complete my questions. Would that be acceptable, Mr. Chairman?
ARBITRATOR BIENVENU: Yeah, I don't need to see the documents. I just need to have an understanding exactly of what was being sought at each step and what decision was at each step.

But if it takes too long to summarize it, let's defer it.

MR. LITWIN: I just don't want to misrepresent anything, Mr. Chairman. I would prefer to take that later on in the examination, if I might.

ARBITRATOR BIENVENU: That's fine. Please proceed.

Q. BY MR. LITWIN: Mr. Disspain, you state in your witness statement that it did not seem prudent for the Board to interfere or preempt issues that were the subject of accountability mechanisms concerning .WEB; is that right?

A. Yes, that's correct.

Q. Now, as of November 3rd, 2016, Donuts had filed a CEP concerning .WEB; is that correct?

A. Yes.

Q. And the claims at issue in the CEP had also been brought in court as part of Ruby Glen's litigation against ICANN; is that correct?

A. If you say so. I can't confirm that
personally.

Q. Is it your understanding that the claims that were at issue, at least in the CEP, concerned the conduct of ICANN's preauction investigation of NDC?

A. I haven't looked at that for some time. That sounds right, but I can't remember exactly. I just know that there was an outstanding CEP and that, therefore, waiting for that or any others would be a prudent way to deal with the matter.

Q. Now, other than the Donuts CEP, as of November 3rd, 2016, there were no other accountability mechanisms pending concerning .WEB, correct?

A. Not that I can recall, no, I don't believe so.

Q. You state in your witness statement that the Board also considered that there might be future accountability mechanisms brought concerning .WEB, correct?

A. That's correct.

Q. So there could be more CEPs, right?

A. There could be more CEPs. There could be reconsideration requests. There could be DIDP requests. There could be other considerations,
yes.

Q. Is a DIDP request an accountability mechanism?
A. Probably not. Fair enough. It would be a reconsideration request or a CEP.
Q. Or an IRP?
A. Or an IRP as an accountability mechanism, that's correct.
Q. Now, if an IRP was brought, the bylaws strongly encouraged and were designed to strongly encourage complainants to bring a CEP before an IRP, right?
A. Correct.
Q. Now, the purpose of a CEP is to narrow claims in advance of filing an IRP; is that right?
A. Yeah, but I think it is also -- yes, but in the main, it is also about getting the parties together to discuss things and see if we can avoid an IRP, if possible. But yes, you're right. The purpose is to do exactly what you just said.
Q. I guess if everybody agrees you have narrowed the claims completely and everybody can go home happy, right?
A. Correct.
Q. So if ICANN determines if it agreed with
the claimant on any issue, that would help narrow
the claims in dispute in advance of filing an IRP, right?

A. If they agreed. If the claimant and ICANN
agreed on something, absolutely it would.

Q. And if the ICANN --

A. By the way, if the claimant agreed with
ICANN or ICANN agreed with the claimant,
absolutely.

Q. Point taken. And if the ICANN Board
determined that it agreed with the claimant on any
issue, that would also help to narrow the claims in
dispute in advance of filing an IRP, right?

A. It would except for the fact that the
Board hasn't involved itself and didn't involve
itself in CEPs. The Board -- CEP is an
accountability mechanism. The accountability
mechanism takes place -- that particular
accountability mechanism takes place between ICANN
and the claimant, and so the Board wouldn't get
involved at all in that respect.

Q. Wouldn't it be consistent with the CEP for
the ICANN Board, if it had the opportunity to do
so, to consider the merits of a claim presented to
ICANN during CEP?
A. It never has. As far as I am aware, it never has.

Q. You state in your witness statement that you recall that once there were no pending accountability mechanisms in June of 2018, that ICANN staff changed the status of the .WEB contention set from "on hold" to "resolved" and NDC's status from "on hold" to "in contracting"; is that right?

A. Yes.

Q. And Afilias' status had changed at the same time from "on hold" to "will not proceed"; is that also correct?

A. If you say so. I think that's a natural corollary from the move that you previously laid out, so yes.

Q. So just -- it would be ICANN's general practice that if one member of a contention set's status had changed to "in contracting," the other members of the contention set would move to "will not proceed," correct?

A. That sounds right.

Q. Are you aware that those changes were made the very day after Afilias' reconsideration request was denied?
A. No. I mean, I am aware they were made. I wasn't -- I was aware -- not -- in contrast of the fact it was the very day after.

Q. The ICANN Board did not meet to consider the merits of Afilias' complaints during the resolution -- regarding the resolution of the .WEB contention set in June of 2018 after those accountability mechanisms had expired, did it?

A. I don't think so. Again, you need to run that past me one more time. Are you asking me that we didn't meet to discuss what, Afilias' complaints?

Q. Yes. So on November 3rd you stated that the Board had --

A. Yes.

Q. -- chosen not to discuss any of the issues regarding .WEB until all accountability mechanisms had expired?

You write in your witness statement that they had expired in June of 2018 --

A. Correct.

Q. -- and now my question is: Did the Board meet in June of 2018, after those accountability mechanisms had expired, to discuss those issues regarding the .WEB?
A. That's a slightly different question. Yes is the answer, the Boards did meet. Certainly the Board Accountability Mechanisms Committee met. It may have been that there were -- my recollection would be that there were other Board members present.

But originally you asked me specifically to discuss Afilias' complaints, I think, and that's -- I wouldn't say that. What I would say is that we met -- we were briefed that after the contract came off hold that that is what had occurred, and, in fact, the Board Accountability Mechanisms Committee was briefed prior to it coming off hold, that the next step -- the next step in the process would be that it would come off hold.

And it was also briefed that Afilias had written letters, maybe a letter, I can't remember, one or more than one, to say that if that happened, if it came off hold, Afilias was going to launch an accountability mechanism. I can't remember if it says an IRP or not, but launch an accountability mechanism. The BAMC was aware of that.

Q. Did the BAMC discuss the substance of Afilias' complaints about how the resolution of the .WEB set had occurred?
A. No.

Q. Did the Board during June of 2018 discuss the merits of Afilias' complaints regarding the resolution of the .WEB contention set?

A. No.

Q. So, Mr. Disspain, as it turns out, this was not the only period where there was no accountability mechanism pending concerning .WEB. I will represent to you that the Donuts CEP that we discussed earlier terminated on January 30th of 2018 and that Donuts was given until February 14 of 2018 to file an IRP.

Are you aware of that?

A. That sounds right.

Q. And are you also aware that Donuts did not, in fact, file an IRP by February 14?

A. Yes, I am aware of that.

Q. And Afilias filed its first reconsideration request on April 23rd, 2018.

Are you aware of that?

A. I am, indeed.

Q. So during the period when there was no accountability mechanisms pending, the ICANN Board held workshop sessions on March 9th and 11th.

Did the Board take up the merits of
Afilias' .WEB complaints during those workshops?

A. No.

Q. And on March 15th the Board held a regular meeting, and by "regular meeting," I mean the formal meeting that's called the regular meeting that's set forth in ICANN's bylaws.

Did the Board consider the merits of Afilias' .WEB complaints during the March 15 meeting?

A. No. The Board has, to my recollection, not considered the merits of Afilias' complaint.

MR. LITWIN: Mr. Chairman, at this time I would request that we would take our recess. I realize it is a bit early, but I am coming towards the end, and I would like to confer with my team and also respond to your question about the reconsideration requests.

ARBITRATOR BIENVENU: Surely. We will take our 15-minute recess.

Mr. Disspain, you are not to discuss your evidence with anyone during the break.

THE WITNESS: I shall not do so, Mr. Chairman. Thank you very much. I will, however, be leaving the camera. I believe the expression is to take a comfort break.
ARBITRATOR BIENVENU: That's fine. Thank you, Mr. Disspain.

MR. LITWIN: Thank you, Mr. Disspain.

THE WITNESS: Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. Litwin, do you wish to continue your cross-examination?

MR. LITWIN: I do, Mr. Chairman. Thank you.

Chuck, if you could bring up Exhibit C-78, please.

MR. VAUGHAN: Is this in the binder?

MR. LITWIN: This is not in the binder. This is in response to the question the Chairman asked of me earlier. I just wanted to have this up to walk Mr. Disspain through it.

Q. Mr. Disspain, I will represent to you that this is a letter that my colleague, Arif Ali, sent to the Board of ICANN regarding a request for update on ICANN's investigation of the .WEB contention set and containing also a request for documents pursuant to the DIDP.

So, Chuck, could we look at the top of Page 2, please.

MR. LeVEE: Can I ask, Ethan, that you
just thumb through the whole thing so we can see how long it is?

MR. LITWIN: Of course. It is a five-page letter.

Chuck, if you could just scroll briefly through all five pages, please.

Now, if you could go back to Page 2. If you could just blow up the first -- the bullet and the heading, rather, in the first two paragraphs -- three paragraphs. I'm sorry. That will be easiest, yes.

Q. You will see, Mr. Disspain, this is entitled "Request for Update on ICANN's Investigation of .WEB Contention Set."

Do you see that, sir?

A. I do.

Q. Mr. Ali writes, "Therefore, pursuant to ICANN's transparency obligations, we respectfully request that ICANN provide an update on the status of ICANN's investigation of the .WEB contention set, including: (1) the steps (if any) taken by ICANN to disqualify NDC's bid on the basis that NDC violated the rules applicable to its application; and (2) the steps (if any) taken by ICANN to assess competition issues arising out of delegation of
.WEB to VeriSign."

Do you see that, sir?

A. I do.

Q. And turn to the next page. And if you could just highlight the Point Heading II, Chuck.

This says, "Request for Documents Pursuant to the DIDP," and you understand, Mr. Disspain, that refers to the document information -- now I can't remember. What is DIDP? Document Information Disclosure Policy?

A. Yes.

Q. Yes. If we could turn to the next page, Page 4 of the February 23rd, 2018, letter, Mr. Ali requests the disclosure of, No. 6, "All documents concerning any investigation or discussion related to the .WEB contention set."

Do you see that, sir?

A. I do.

Q. So this DIDP request was sent on February 23rd of 2018.

Are you aware that ICANN responded to it on March 24th?

A. I am aware that ICANN responded to it. I have no idea what the date was.

Q. Are you aware that ICANN did not disclose
documents pursuant to this request?

A. Yes, I am.

Q. Are you aware that ICANN did not provide a status update as requested pursuant to Point Heading I?

A. Not specifically. I am aware that there was a reconsideration request in respect to the DIDP request, so matters that were part of that reconsideration request, I would have been aware of it at the time we were considering the reconsideration request.

Q. I am just going to take you through the timeline, Mr. Disspain.

On April 23rd, are you aware that Afilias filed a reconsideration request regarding the denial of the DIDP request that had been sent in February of 2018?

A. Again, I am aware they filed a reconsideration request. I take your word for it that it was on that date.

Q. And are you aware that also on April 23rd Afilias filed a second DIDP request requesting, in sum and substance, the same information as in February 23rd?

A. I do recall there was a -- I do recall
that there was a second DIDP request, yes.

Q. Now, on May 23rd, are you aware that ICANN responded to this second DIDP request?

A. If you're asking me about the date, no. If you're asking am I aware they responded, yes.

Q. And are you aware that they received the same answer, which is essentially nothing?

A. Yes, I believe that that's correct.

Q. And then on June 5th, are you aware that Afilias' reconsideration request that had been filed on April 23rd was considered within the BAMC?

A. So I am. Again, if you say it was on June the 5th, I will accept that. I am aware of that. I have a memory of that discussion, yes.

Q. And I believe it was your testimony from earlier today that the BAMC recommended that Afilias' reconsideration request be denied; is that a fair statement?

A. It is a little difficult to remember with it, because there were two, but yes, I believe that that's correct, we did, indeed.

Q. And are you aware that the -- that Afilias' reconsideration request was never presented to the full Board?

A. I believe that under the bylaws at that
time, that's correct, yes.

MR. LITWIN: Mr. Chairman, does that clarify your questions about the timeline and what was requested under Afilias' DIDP request and reconsideration requests?

ARBITRATOR BIENVENU: Yes, it does. Thank you very much. All of these correspondence are in the file, are in the record?

MR. LITWIN: They are, Mr. Chairman.

ARBITRATOR BIENVENU: Thank you very much.

Q. BY MR. LITWIN: Mr. Disspain, you testified earlier today that ICANN and the ICANN Board has a policy of not considering the merits of complaints that are subject to outstanding accountability mechanisms; is that correct?

A. No. I said that we had a longstanding practice. And I'm sorry to be picky, but the term "policy" in the context of ICANN has a different meaning.

Q. And what is the difference between practice and policy, in your mind, as a Board member?

A. Well, policy is -- a policy in the ICANN context is the policy that is set by the supporting organizations for dealing with -- in the case of a
gTLD, the GNSO in the case of country codes and ccNSO.

I didn't say "policy." I said "practice." I don't use the word "policy" because that has a different meaning to me.

Q. So the Board has certain practices that it observes in its functioning; is that fair to say?

A. Yes. If you're implying that there's a list of them somewhere, no. But there are things that we have generally done over time, and our practice has -- was in respect to new gTLDs, very specifically, to avoid stepping in where there are outstanding accountability mechanisms running.

Q. Is that practice documented anywhere?

A. Not -- I couldn't say, don't know.

Q. Is it in the bylaws, for example?

A. Not as far as I'm aware.

Q. Is there a document on ICANN's website that reveals that practice?

A. Not as far as I'm aware, but it may be that there are documents on the website that reveal discussions that will reveal rationale. There may be mentions in rationales and resolutions that say, "In accordance with ICANN's longstanding practice."

They may appear in "whereas" clauses to
resolutions, you know, "whereas there was an accountability mechanism outstanding." I don't know. I can't say.

Q. So is it fair to say if I were to -- let me just ask you, sir, just to bottom this out --

A. Sure.

Q. -- can you direct me to any resolution or rationale that discloses this practice?

A. No. But I can direct you to numerous occasions where -- there have been a number of occasions where the Board has not done anything because there have been accountability mechanisms running. It's just our practice.

Q. Were those examples -- well, strike that. Can you give me another example of when the Board has not intervened because of an outstanding accountability mechanism.

A. Not off the top of my head, and I wouldn't do that without going away and doing some research, but I can assure you they exist.

Q. So it's fair to say, sitting here today, you could not direct me to any minutes or transcripts of a Board meeting where that practice was disclosed?

A. It would be fair to say that I cannot
Q. Now, the practice, as you say, was exercised during the November 3rd workshop session. There was no transcript posted from that workshop, correct?
A. No, there wasn't, and the discussion was privileged, in any event.
Q. So is it fair to say that where this practice had arisen previously was likely to be in the context of a privileged discussion with counsel?
A. It's possible. It's equally possible that it could have been disclosed, as I said, as part of a formal resolution as a parse action in a "whereas" clause. I don't know.
So I don't think you can draw that conclusion. I think you can say that it's -- either way is possible. I can only comment on this particular occasion and tell you that it was privileged.
Q. Okay. ICANN has collected hundreds of millions of dollars in fees and auction proceeds as a consequence of its administration of the new gTLD Program; is that correct?
A. Yes, that's correct.

Q. In fact, just looking at auction proceeds, ICANN has collected net revenues of approximately $240 million; is that correct?

A. That's about right.

Q. So if my math is correct, the .WEB auction brought in somewhere north of 50 percent of that $240 million; is that fair to say?

A. If your math is correct, then yes, that is correct.

Q. Now, ICANN represented to the community that it would hold the auction proceeds in a fully segregated bank and investment account earmarked for use in a community-developed plan, correct?

A. You are going to have to tell me where we represented that, because I don't recall that term. I am not saying that -- I am not saying that -- I'm saying that I don't remember us saying we would put it in an entirely separate bank account, et cetera, et cetera, et cetera. I don't remember any of that.

Q. Okay. Are you aware that there is a CCWG, a Cross Community Working Group, that was formed to discuss the final plan for use of the funds; is that correct?
A. I am aware of that, yes.

Q. Are you aware that they have yet to develop a final plan for the use of those funds?

A. They have developed a number of proposals, but the plan is as of yet still forming. We anticipate we will be sending a report through to the Board relatively soon.

Q. Since VeriSign paid the $135 million winning bid to ICANN, that money has earned interest; is that fair to say?

A. Yes, I believe so. I wouldn't have any of the details.

Q. Is it fair to say that ICANN has, in fact, earned over $10 million in interest on the auction funds that it is holding in its bank in investment accounts?

A. I have no idea. I could find out, but I don't know.

Q. In the event that ICANN is required to refund part or all of the $135 million to VeriSign, would it need to pay interest on that?

A. I don't know.

Q. If it is required to pay interest, would it be a fair estimate to say that it is a proportion relative to the overall value of the
$135 million, as opposed to the full corpus that's in that account?

A. I don't understand the question.

MR. LeVEE: Okay.

MR. LITWIN: I will rephrase. That was a terrible question.

Q. Mr. Dissanayake, assuming my math is correct and the $135 million winning bid that was paid on .WEB represents more than 50 percent of the corpus of that investment account where the auction proceeds are held --

A. Yes.

Q. -- is it fair to say that if ICANN is required to refund that winning bid payment to VeriSign and it had to pay interest on that, that a reasonable estimate would be somewhere over 50 percent of the interest earned to date on that account?

A. Well, there are so many ifs in that question it is not helping me to answer it. I don't know.

If you're saying -- I mean, if you're asking me if you took the full amount of the money and you got paid 1 percent interest on it and if ICANN was refunding that money to VeriSign and it
was required to refund the portion of the interest, then obviously it seems to me logical to say that the 1 percent on that money would be paid. But I don't know for sure, and I have no idea what the actual arrangements are off the top of my head.

Q. Is it true that ICANN has already moved $36 million out of this account that holds the auction proceeds and moved it into ICANN's reserve fund?

A. It is correct that ICANN has repaid the reserve fund with the amount of money calculated to have been the cost of the gTLD Program, but that is -- if you say that's 36 million, again, I'll take your word for it. Off the top of my head, I can't remember the exact amount. But yes, that is correct, the amount, the costs of the new gTLD Program have been refunded.

Q. And a reserve fund is used to pay operating expenses when a company runs a deficit; is that right?

A. Well, we could get into an extraordinarily long discussion about what reserve funds are for and whether it is a reserve fund and/or a contingency fund, whether it should be the amount of money to pay to wind down an organization in the
event that it's being wound up, et cetera, et cetera. So I would prefer not to provide a cast-iron definition of what a reserve fund is for. It is entirely dependent on the organization itself.

And ICANN has dipped into the reserve fund on occasions and has a policy -- the Board has an agreement, rather, to try to increase the amount of the reserve fund to a reasonable amount. I can't remember the exact number off the top of my head.

Q. When you say that ICANN has dipped into the reserve fund, that is from time to time to pay operating expenses, correct?

A. It pays some of the New gTLD expenses out of its reserve funds, so yes. If you want to characterize that as operating expenses, yes, that's correct.

MR. LITWIN: Chuck, can you pull up Module 4 of the AGB, please, the applicant guidebook, and I would refer your direction to Page 4-19.

ARBITRATOR BIENVENU: Is that in the witness binder, Mr. Litwin?

MR. LITWIN: I am going to check, but I don't believe it is.

ARBITRATOR BIENVENU: Okay. That's fine.
We will look at it on the screen.

MR. LITWIN: Oh, it is. It is Tab 6.

THE WITNESS: My strong advice is to tell me to look at it on the screen instead of the binder.

MR. LITWIN: Yeah, I think we have -- Chuck, I need Module 4, not Module 6. I think it is Exhibit 314, if that helps. Okay. This is not what I asked for.

Mr. Chairman, I am just going to go off the record, but I think I am done with the witness. May I have two minutes?

MR. ALI: Wait a second. You are not done with the witness, Ethan. Why don't you and I just have a chat first.

MR. LITWIN: Yeah, that's fine. That's what I was going to say.

ARBITRATOR BIENVENU: Okay. So let's pause for a few minutes to give counsel for the claimant an opportunity to consult.

THE WITNESS: Mr. Chairman, are you okay if I disappear briefly?

ARBITRATOR BIENVENU: I think you will be made to disappear, but you may disappear.

THE WITNESS: Thank you so much. I
I appreciate it.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: All right. We are ready to resume.

Mr. Disspain, I believe Mr. Litwin has more questions for you.

Q. BY MR. LITWIN: Mr. Disspain, thank you very much. I have just a couple of questions for you.

Earlier, a few minutes ago, I represented to you that ICANN had represented to the community that it would hold the auction proceeds in a fully segregated bank account, investment account earmarked for community use.

I'd like to direct your attention to Module 4 of the guidebook. This is Exhibit C-3.

Do you see that, sir, on your screen?

Mr. Disspain, I'll ask you again, do you see Module 4 of the guidebook up on your screen there?

A. Yes, I do.

Q. If we could turn to Page 4-19 of the guidebook, which I understand is on Page 203 of the PDF, and on that page, if you can bring up that footnote on the bottom, please, you will see in
that second paragraph that the guidebook says that, "Any proceeds from auctions will be reserved and earmarked until the uses of funds are determined."

And then it says -- I am trying to find where it says this -- that, "Possible uses of auction funds include formation of a foundation with a clear mission and transparent way to allocate funds to projects that are of interest to the greater Internet community."

Do you see that?

A. I do. That's what the working group is currently working on, yes.

Q. And if you can -- if I could now call up Exhibit 314, which are the Board resolutions.

MR. LeVEE: Is that in the binder?

MR. LITWIN: It is not.

Q. So these are -- if we could turn to Page 45, please.

MR. LeVEE: Ethan, if you would give me a second with the exhibits. You are faster than I am at putting them up, and I have to get copies.

MR. LITWIN: I understand that. Please let me know when you're ready, Jeff.

MR. LeVEE: Thank you. Is it C-314?

MR. LITWIN: It is -- I believe it is. My
team has told me it is 314.

MR. LeVEE: Okay. I have got it. Thank you. For the record, it is C-314, I believe.

Q. BY MR. LITWIN: Can we blow up Page 45, please?

A. What is it I am actually looking at?

Q. These are the Board resolutions from October 25th, 2018.

Chuck, can you just blow up that page?

I'm sorry, I apologize.

Arif, if you have anything on this, let me know, but I'm sorry, I don't see the quote.

MR. ALI: Just one second, please.

ARBITRATOR KESSEDJIAN: I don't see the Chair of the Tribunal anymore.

ARBITRATOR BIENVENU: I have lost my connection, but I can still see the proceedings using our administrative secretary's screen. I am in the process of reconnecting.

ARBITRATOR KESSEDJIAN: Okay. You'll have the time to find out what you want to show us.

(Discussion off the record.)

MR. LITWIN: Mr. Chairman, I would just ask that, given that I cannot find what my team is trying to refer to me, that perhaps Mr. Ali could
ask whatever question he is asking me to ask the
witness, just to be more efficient, given the time
limits.

ARBITRATOR BIENVENU: Mr. LeVee, any
objection to that?

MR. LeVEE: If it is one or two questions,
I have no objection to that.

ARBITRATOR BIENVENU: Mr. Ali, good
afternoon to you, and please proceed.

MR. De GRAMONT: Mr. Chairman, this is
Mr. De Gramont. Mr. Ali is just trying to find the
relevant page. This is one of the challenges of
having everybody spread out in different places,
and the associate who knows the documents best is
at home in Pennsylvania.

So if you'll just bear with us for another
minute, we'll be right back. Thank you.

ARBITRATOR BIENVENU: Thank you.

(Whereupon a recess was taken.)

MR. LeVEE: I wonder if the Panel has
questions. They could begin, conscious of the
time.

ARBITRATOR BIENVENU: Does that foreshadow
the length of your redirect, Mr. LeVee?

MR. LeVEE: It is only because I do not
I know how long the members of the Panel will ask questions.

ARBITRATOR BIENVENU: I was joking. I think I prefer to wait until the cross-examination is completed.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Please proceed, Mr. Ali.

MR. ALI: Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. ALI

Q. Mr. Disspain, good afternoon. This is Arif Ali here. It’s been a long time since we have seen each other.

A. It has, indeed.

Q. At the bottom of Page 66, you see that language that says "Resolved"?

A. Yeah.

Q. "The Board directs the president and CEO, or his designee(s)"?

A. Yep.

Q. Then we go to the top of the next page, "to take all actions necessary to increase the Reserve Fund through annual excesses from the operating fund of ICANN organization by a total
amount of 32 million over a period of seven to eight years starting with fiscal year 2019."

So my question is: If that money -- those are moneys that are coming from the auction fund; is that correct?

A. No. That's a resolution to direct the president and CEO to take all actions necessary to increase the reserve fund through annual excesses from the operating fund by 32 million over a period of seven to eight years. If they were to take funds from the auction proceeds fund, then it would be able to come out in one go and it would say "auction proceeds funds" rather than "operating fund."

Q. All right. Then let's continue down below.

A. Yep. That's the resolution that deals with the repayment of the costs of the -- of the new gTLD Program, I believe.

Q. So what you're telling us is that no money has been taken from the proceeds of the auctions to fund the reserve fund?

A. That is correct. I am telling you that one payment has been made -- well, a payment, I don't know if it was one, but the new gTLD Program
was costed to be a cost of 36 million, and the
Board resolved that the auction proceeds should --
the 36 million should be taken from the auction
proceeds.

And I believe from memory that that means
that the Cross Community Working Group is working
on the principle that the funds for .WEB being cast
aside to a different category, that there is
roughly speaking, ignoring those, roughly speaking,
some 80-something to $3 million left of the
proceeds, apart from the .WEB proceeds, and that is
the number they are working on, because no one has
any idea what will happen to the .WEB proceeds at
this stage.

And there is a separate resolution above
that which has to do with ongoing replenishment of
the reserve fund over a period of seven to eight
years, which is the Board's decision based on the
fact that the Board believes that that should be
set at a particular level, and I cannot remember
off the top of my head what that level is.

Q. None of those moneys from the reserve fund
would come from the auction proceeds; that's your
testimony?

A. Didn't say that. I said that the $36
million from the auction proceeds that you referred
to here is repayment to the -- for the new GTLD
process -- sorry, new gTLD Program costs.

The previous resolution refers very
specifically to $32 million being funded into the
reserve fund from annual excesses from the
operating fund of ICANN over seven to eight years,
which is not the same as the auction proceeds.

MR. ALI: Thank you, Mr. Disspain. I have
no further questions.

ARBITRATOR BIENVENU: Thank you, Mr. Ali.

Mr. Litwin, does that complete the
cross-examination of Mr. Disspain by the claimant?

MR. LITWIN: It does, Mr. Chairman.

Mr. Disspain, thank you very much, and I
do apologize about the kerfuffle at the end here.

THE WITNESS: There is nothing to
apologize for except possibly your binder.

ARBITRATOR BIENVENU: So do my colleagues
have questions for Mr. Disspain, or shall I begin
and you have supplementary questions and you go
after? What's your preference?

ARBITRATOR CHERNICK: Go ahead, Pierre.

ARBITRATOR KESSEDJIAN: Yeah, I think
that's good if you go ahead.
ARBITRATOR BIENVENU: Mr. Disspain, just a couple of questions.

Turning your mind back to the November 2016 workshop session concerning .WEB, and repeating the caution not to disclose any privileged communication or any privileged advice, do you know whether, as part of the briefing that was provided to the Board at that session, the staff of ICANN or, you know, what I think you referred to as ICANN org had taken a position and that position was conveyed to the Board as to whether the NDC bid complied with the program? Was there an ICANN staff position on this question?

THE WITNESS: I think I understand your question, Mr. Chairman.

MR. LeVEE: Mr. Chairman, I am really uncomfortable making this objection, but I do think you are asking about the contents of a privileged communication.

ARBITRATOR BIENVENU: Because you -- well, I do not want to do so.

Basically it is a question I asked Ms. Willett, I believe, what I tried to explore with Ms. Willett, but if you're saying that whatever position ICANN staff would have taken
would reflect the advice of counsel, I am prepared to move forward.

MR. LeVEE: I am saying that.

ARBITRATOR BIENVENU: Okay. Very well.

Mr. Disspain -- and forgive me, Mr. LeVee, I really didn't want to elicit privileged communications or advice.

MR. LeVEE: Fair enough.

ARBITRATOR BIENVENU: Mr. Disspain, did the Board discuss at the November 2016 working session that its decision not to take any action regarding the claims arising from the .WEB auction should not be made public, including should not be communicated to those who were within the contention set? Was that part of the discussion?

THE WITNESS: No, I don't believe it was.

ARBITRATOR BIENVENU: And you as a Board member, do you know that the decision taken by the Board at that workshop session was only communicated to the claimant as is alleged by the claimant in the course of these proceedings?

THE WITNESS: Forgive me, Mr. Chairman. I am not sure I actually understand your question.

ARBITRATOR BIENVENU: Let me reformulate it.
Are you aware, as you sit here today, that the decision taken by the Board during that workshop was only communicated to Afilias in the course of the proceedings in this IRP, so just very recently?

THE WITNESS: No. I am now aware of that. I wasn't aware of that at the time. I am aware of it because it's been mentioned.

ARBITRATOR BIENVENU: At the November 2016 session, Mr. Disspain, you were made aware that Afilias -- and you might have been aware of that from prior correspondence -- was taking the position that NDC's bid, supported as it was by VeriSign through an agreement with NDC, that Afilias was taking the position that that bid did not comply with the guidebook and the auction rules, correct?

THE WITNESS: Yes, I am aware that Afilias had said that in correspondence.

ARBITRATOR BIENVENU: So after the November 2016 working session, you knew as a Board member that the question of whether the bid was compliant or not was a pending question, one on which the Board had not pronounced and had decided not to address in November 2016; is that correct?
THE WITNESS: Yes. I was -- I knew that we had not -- that it had not been addressed.

Well, no -- yes, you're right. I knew that.

ARBITRATOR BIENVENU: Right. And by early 2018, the situation as I have just described it, remained unchanged; is that correct?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: Can you look now at Paragraphs 12 and 13 of your witness statement?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: And there you refer to the events of the first half of the year 2018?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: So first you referred to the DOJ announcement in January 2018 that it had closed its investigation?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: Then to the withdrawal by Donuts of its CEP?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: And then the denial by the Board of Afilias' reconsideration request regarding its document requests, correct?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: And then you come to
ICANN's decision in June 2018 to change the status of the .WEB contention set and send a draft Registry Agreement for .WEB to NDC?

THE WITNESS: Correct.

ARBITRATOR BIENVENU: And in Paragraph 13, you mention that this was a decision of ICANN staff.

Do you see that?

THE WITNESS: I do.

ARBITRATOR BIENVENU: Does that mean that the Board was not consulted about this decision?

THE WITNESS: Well, it depends on what you mean by the word "consulted." But let me tell you what actually happened. Perhaps that would be helpful.

Again, I can't give you dates, but I can tell you that prior to the -- I think I have already said this to Mr. Litwin. Prior to the lifting of the hold on the contention set, the matter was discussed in the Board Accountability Mechanisms Committee, I believe as part of its general litigation update, but I am not certain.

In that discussion we were told that the next step in the process was for -- should all of the accountability mechanisms be dealt with, was
for it to come off hold, but that Afilias had made it abundantly clear that in the event that it did come off hold, that they would file an IRP.

And we were also clear as a Board committee that Afilias would be aware that it had come off hold because all of the contention set members would be informed that it had come off hold. So that occurred.

And then secondly, a couple days -- again, I don't know exactly, I can't remember exactly when -- after it had actually come off hold, there was another discussion at which we were told that it had come off hold and that an IRP claim from Afilias was expected -- I am going to paraphrase here -- at any minute, so to speak, because that is what they said they would do.

I hope that's helpful and clear.

ARBITRATOR BIENVENU: Yes, it is. In fact, it kind of anticipates what was my next question. When you say in the penultimate sentence of Paragraph 13, "Given the letters we had received from Afilias threatening to take legal action in such circumstances, I fully expected, as did others, that Afilias would immediately initiate another Accountability Mechanism" --
THE WITNESS: Yes.

ARBITRATOR BIENVENU: -- so that suggests that you as a Board member actually turned your mind to this issue. And in light of that expectation -- well, I shouldn't say that, but you turned your mind to this, and you anticipated that an IRP would be coming?

THE WITNESS: We as a group meeting -- again, I'm sorry. I cannot remember. I am fairly sure it was the Board Accountability Mechanisms Committee meeting, but I imagine there would have been other Board members present as well. We were very clear that our understanding was that Afilias had said categorically that they would launch an IRP in the event that the contention set was taken off hold.

ARBITRATOR BIENVENU: By ICANN sending a draft Registry Agreement to NDC for execution, would you consider, Mr. Disspain, that ICANN was, in effect, expressing disagreement with those who claimed that NDC's bid was noncompliant and that the auction rules had been breached by NDC because of its agreement with VeriSign?

THE WITNESS: No, I don't think so. I think that ICANN was taking the next step in its
process. You know, there are two -- without
wishing to place any weight on either side in this
matter, there are two sides. There are the Afilias
side, who are bringing this IRP; and then there are
others on the other side who believe that they are
entitled to the TLD. So both sides need to be
treated fairly by ICANN. The best way for ICANN to
do that is to follow its process.

To be clear, having been told in no
uncertain terms by Afilias that they were intending
to lodge an IRP, that is what we expected to
happen, and that is exactly what did happen. I
don't think you can read into the step, the process
step, a motive, if you will, that says we,
therefore, believe that this is the right thing to
do.

ARBITRATOR BIENVENU: Let us assume,
Mr. Disspain, that contrary to your and your
colleagues's expectations, Afilias had not
commenced an IRP, what would have happened then?
Would ICANN have executed the Registry Agreement
that NDC had promptly signed and returned to ICANN?

THE WITNESS: Well, Mr. Chairman, I can't
say what would have happened. I can say that the
Board would have known that Afilias had not filed
an IRP. I can say that the Board -- when I say "the Board," I am mainly talking about the Accountability Mechanisms Committee, but for the purposes of this discussion, it amounts to the same thing, and that the Board would have known that the contract -- or the BAMC had known that the contract had been returned, and I can't say what the Board would have done in those circumstances. But I can say that the Board would have been aware.

ARBITRATOR BIENVENU: Are you aware, Mr. Disspain, that in November 2018, after Afilias filed its IRP, ICANN took the position in the context of the IRP that it would only keep the dot contention set on hold until 27 November 2018, so as to give an opportunity to Afilias to file a request for emergency relief, barring which -- barring which ICANN would take the contention set off of its on-hold status?

THE WITNESS: Yes, I am.

ARBITRATOR BIENVENU: You were aware of that?

THE WITNESS: And I am aware that this is the practice in respect to IRPs, that the process itself -- it differs slightly from the way that reconsideration requests are dealt with, in that
there is a mechanism by which the claimant can bring a -- I think you used the expression "emergency relief claim" to stay the moving forwards. So yes, I am aware of that and that that is the practice.

But I am not ICANN's lawyer, and what lawyers instructed, advised us to do, I can't comment.

ARBITRATOR BIENVENU: And what I'm interested in asking you, Mr. Disspain, is whether in so doing, ICANN was again taking a position that might have resulted in .WEB being awarded to NDC, delegated to NDC without the Board having the opportunity to determine the question that it chose not to pronounce upon in November 2016, namely whether the bid was compliant?

THE WITNESS: So the answer to that question is, again, I need to say I don't know what the Board would have done, but to take the leap to say does ICANN's position in the legal proceedings imply that the delegation would have taken place is a leap -- is not a leap I would take because I don't know what the Board would have done.

And it is not -- it is impossible to suggest that the Board would have stepped in, but I
don't know. I can't say whether they would or wouldn't. That is purely a hypothetical.

ARBITRATOR BIENVENU: Now, I assume that you are aware that in this IRP, as we speak today, ICANN takes no position as to whether NDC's bid violated the guidebook or not, you're aware of that?

THE WITNESS: Yes.

ARBITRATOR BIENVENU: So the matter, then, comes before -- the matter comes before the IRP Panel, and the Panel doesn't have the benefit of ICANN's view on the -- on whether the bid is compliant or not even though the guidebook emanates from ICANN.

You don't think it would have been useful to the Panel to have the view of ICANN as to the reach or the interpretation of the guidebook in relation to an agreement like the DAA?

THE WITNESS: Well, I think two things, Mr. Chairman. I think that the Board -- the Board has rigorously stuck to its practice and its processes.

And secondly, that the scope of the Panel, as I understand it, doesn't stretch to a discussion -- or, rather, a decision in respect to
the actual DAA itself.

Now, I am not holding myself out as an
expert in this respect. I am merely reading the
bylaws. That's my understanding. So I can only
say what I understand.

ARBITRATOR BIENVENU: I think you have
very accurately described the position of ICANN
before the Panel, but the claimant is taking a
different position.

THE WITNESS: I understand that.

ARBITRATOR KESSEDJIAN: Mr. Chairman, can
I ask a follow-up question on this one without
interrupting you, or do you want to finish your
questions?

ARBITRATOR BIENVENU: No, if it is a
follow-up question.

ARBITRATOR KESSEDJIAN: Mr. Disspain, this
is Catherine Kessedjian. I am speaking from Paris,
so we are actually closer.

THE WITNESS: Is it as hot there as it is
here?

ARBITRATOR KESSEDJIAN: It's very warm.

I have a follow-up question on this very
question of how you understand the scope of the
jurisdiction of the IRP. It is one of the issues
we have.

You just said that you don't think -- you were careful, and if I rephrase in a way that is not correct, please interrupt me.

But you said that you don't think that the IRP jurisdiction will stretch to whether or not the DAA was validly entered into considering the guidebook rules; is that correct?

THE WITNESS: Yes. That is, in essence, what I said, yes.

ARBITRATOR KESSEĐIJAN: Okay. So if you consider this is not our jurisdiction, whose jurisdiction is that? Where does an applicant go to have this question resolved?

THE WITNESS: Well, Professor, that is an extraordinarily good question, and I believe that at the end of the day, the answer may well be that it is a matter for the Board. But that's just my opinion, and I am not here to debate the legal issues.

The IRP itself is -- the bylaws are very clear about what an IRP does and what an IRP does not do.

Let me suggest something to you as a sort of answer to your question.
The Board -- I was asked earlier on what would have happened if the Board had not -- if the IRP had not happened, and I said I don't know because I don't know what the Board would have done.

What I do know is what the Board will do with respect to this IRP. If the IRP finds in favor of ICANN, the Board is going to consider the decision of that IRP, and what the Board will do is to take very seriously -- it will operate within its fiduciary responsibility and its responsibility to the community, within its responsibility to ICANN's mission and bylaws and public interest, and it will take very seriously anything that the Panel says by way of recommendation outside of its decision on the finer points of what the Panel's scope extends to in respect to the bylaws.

Now, I can't say what the Board will do, and I can't say that the Board will necessarily do anything. But what I can say is that this Panel operates under the terms of the bylaws, and I think my understanding of an interpretation of bylaws is the correct one.

I don't know if that's helpful.

ARBITRATOR KESSEDJIAN: I am just
surprised by the beginning of your answer, or
beginning of your explanation, for which I am very
grateful.

    Sorry, I don't have the feed of the court
reporter.

    THE WITNESS: Not a problem.

    ARBITRATOR KESSEDJIAN: Did you say that
the Board would take seriously only if the IRP was
in favor of ICANN?

    THE WITNESS: No, no, no. I was not
saying that at all, no. What the Panel decides
is what the Panel decides. I was simply suggesting
that if the Panel -- I was simply saying that the
Panel -- it is open to the Panel to make its
decision.

    And if the Panel, on making its decisions,
makes a series of recommendations, those
recommendations are something that we treat very
seriously by the Board.

    ARBITRATOR KESSEDJIAN: Thank you very
much.

    THE WITNESS: That's all I was trying to
say. I hope that's clearer.

    ARBITRATOR KESSEDJIAN: Yes, indeed.

    THE WITNESS: I apologize if we missed
each other.

ARBITRATOR KESSEDJIAN: No, no, that's great. Thank you.

ARBITRATOR BIENVENU: My last question, Mr. Disspain, is the following: I am speaking under the control of Mr. LeVee, but I understand -- not because we are treading near privilege, but because I am about to summarize the position of ICANN.

THE WITNESS: Okay. Thank you.

ARBITRATOR BIENVENU: I think I am correct in describing ICANN's position in this IRP as being that the proper scope of the IRP requires the Panel to limit itself in deciding whether in making the decision that it did in November 2016, the Board acted reasonably.

My question to you is: Let us imagine that we accept that position and that we refuse the claimant's invitation to pronounce on the question of whether the NDC's bid was compliant with the program rules, then what will happen then and when will the Board have an opportunity to resolve that question and to pronounce upon it?

THE WITNESS: Thank you. I am going to, in some respects, repeat what I just said to
Professor Kessedjian, but in the context of your question. So when will the Board have an opportunity?

My recollection is that the Board, there is a set time frame in which the Board must address any decision made by the Panel. I can't remember what it is off the top of my head, but there is a set time frame. So that is the answer, whatever the set time frame is, that's the answer to that question.

In respect to what the Board will do, I don't know what the Board will do. Let me say it again. I believe that the Board would take very seriously any recommendations made by this Panel outside of its decision within scope. This Panel would have heard everything, and this Panel will be -- what it says in respect to its decision is its decision.

If it wants to make a series of recommendations outside of its decision, I am saying, when the Board looks at the decision of this Panel, I would expect the Board to take those recommendations very seriously.

ARBITRATOR BIENVENU: My question was slightly different --
THE WITNESS: I apologize.

ARBITRATOR BIENVENU: -- than Professor Kessedjian's question.

My question was: If we accept ICANN's submission that in making the decision that it did, the Board acted reasonably, and accept the further submission by the respondent that we should go no further, then the question that was not addressed in November 2016 and that remains as yet unaddressed, when will that question be resolved?

THE WITNESS: I don't know. All I can tell you is that pursuant to the decision of this Panel, the Board will meet and the Board will consider what this Panel has to say. But I can't give you -- I apologize. I can't give you a clearer answer than that.

ARBITRATOR BIENVENU: No, that's fair enough. Thank you. Thank you, Mr. Disspain. Any questions from my colleagues?

ARBITRATOR CHERNICK: No, thank you.

ARBITRATOR KESSEDJIAN: No other questions.

ARBITRATOR BIENVENU: Mr. LeVee, any redirect?

MR. LeVEE: I do have some redirect. I am
mindful that it is seven minutes before we are
supposed to conclude, and if it's possible to go
over just a couple, I'll do my best to be
efficient.

ARBITRATOR BIENVENU: Thank you,

Mr. LeVee.

REDIRECT EXAMINATION

BY MR. LeVEE

Q. Mr. Disspain, thank you for staying with
   us.

   Let me return you briefly to the November
   2016 meeting.

   Do you recall anyone at the meeting
   voicing opposition to the decision that was taken?

   A. Do you mean voicing opposition to deciding
      that we would not do anything pending the
      accountability mechanisms running their course?

   Q. Yes.

   A. No, I do not.

   Q. You were asked about whether the bylaws
      required the publication of a decision from a
      workshop like this.

   A. Yes.

   Q. I am not going -- I don't have the time to
      take you through all the bylaws.
Do you have an understanding of whether the bylaws require publication of actions taken at Board workshops?

A. I don't believe that the bylaws do.

Q. Okay. Now, you were shown an application under the DIDP policy, but you were not shown the response. So I am going to ask Ms. Ozurovich to bring up the response, and I think the exhibit number is VeriSign-24.

Do you see that on your screen?

A. Yes, I do.

Q. And this is dated 24 March 2018.

Do you see that?

A. I do. Very large font now.

Q. The very first paragraph, can you read it without Ms. Ozurovich blowing it up?

A. Yeah, I can read that perfectly well.

Thank you.

Q. Okay. In the first paragraph it references a letter dated 23 February 2018, which was Exhibit C-78 that you were shown earlier?

A. Yep, I remember that.

Q. And it included a request for an update and then also a request under the DIDP policy.

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

Q. And there was a statement by counsel that ICANN provided no documents in response.
   I wanted just briefly to show you that -- have you seen this before?
   A. No, not that I can recall.
   Q. Okay. Do you know --
   A. Who is it from?
   Q. Well, it is from ICANN.
   A. Okay. Fine.
   Q. Do you know whether as part of the DIDP response ICANN refers people who submit DIDP applications to documents that are in -- that are publicly available?
   A. I do know that ICANN does that, if the document is published, then they will say go here.
   Q. Okay. So ICANN doesn't actually send copies of the documents; ICANN identifies where in the public domain those documents exist?
   A. Absolutely.
   Q. So just by way of example, if you look -- I am going to go to Page 6. We are going to look at the -- that's 4. If you look at the bottom, do you see where it says, "Item 4, all applications and all documents," et cetera, et cetera?
A. Yep.

Q. You see that ICANN provided links to a number of materials?

A. Yep.

Q. I am going to ask you to turn to Page 16, Ms. Ozurovich, just so you can see that initially the response is 16 pages. I am not going to take the time to go through all the responses. Do you see that?

A. Yep.

Q. And then if you turn, Ms. Ozurovich, just sort of scan through the next page, next several pages, through Page 28, are additional links that ICANN provided to Afilias and its counsel where materials can be found?

A. Correct.

Q. And is that what you understand to be ICANN's policy in terms of responding to the DIDP request?

A. When you say is that what I understand, you mean where the documents are public to provide links? Yes.

Q. Yes.

A. Yes.

Q. Do you understand whether ICANN discloses
information that is privileged in response to a
DIDP request?

A. No, it doesn't.

Q. Okay. You were asked about the extent to
which ICANN's practice of keeping contention sets
on hold as a result of accountability mechanisms --
and I am not going to -- I am trying to avoid
saying what you said, but you reference the
possibility that ICANN has published material on
this topic.

Do you remember your testimony on that?

A. Yes, I did. I said it is possible. I
have no idea whether it's happened or not, but it
is possible.

Q. Let me ask everyone to take a look at
Exhibit R-33. Do you recall that ICANN published
updates on application status and contention sets
from time to time?

A. I certainly do, yeah.

Q. This particular one is dated August 1,
2016. Do you know if ICANN published them
regularly?

A. Yes. But how regularly, I don't know.

Q. Okay. And you can see -- I am not going
to read it all. I am going to go to the second
page in a second, but you can see that in the middle there's a bold that says "Application Status and Contention Set Status."

Do you see that?

A. Yes, yes.

Q. Toward the bottom it says "Explanation of Application Status."

Do you see that?

A. Yes, I do.

Q. Now, I am going to just read at the bottom. It says, "Alternatively" -- the very last line, "Alternatively, the page may reflect one of the following statuses for an application."

Do you see that?

A. Yep, yes.

Q. Okay. Now we'll turn the page. I am going to have Ms. Ozurovich blow up just that top section, just like that.

A. Brilliant.

Q. So one of the statuses is that the application has been withdrawn, correct?

A. Yes, yep.

Q. Another is that it is not approved?

A. Yep.

Q. Another is that it will not proceed?
A. Yep.

Q. And then it says, "On-Hold"?

A. Yes.

Q. "May be applied if there are pending activities (e.g., ICANN accountability mechanisms, ICANN public comment periods)," so forth and so on?

A. Yep.

Q. Is that some recognition of the practice that ICANN posted on its website that accountability mechanisms result in an on-hold status?

A. Yes.

Q. Okay.

ARBITRATOR BIENVENU: What's the exhibit number of this document that you just introduced?

Because the transcript says 433.


ARBITRATOR BIENVENU: R-33, thank you.

MR. LeVEE: Of course.

Q. Do you know whether in June 2018 -- I think I misspoke.

You may be on mute, Mr. Disspain.

A. Sorry. I had to close the window due to bats flying around.

Q. Sounds like a good excuse.
A. Trust me, you don't want one in the house.

Q. I am positive.

Do you know whether prior to June of 2018, when Afilias initiated what was actually a CEP at that time, do you know whether Afilias had initiated an accountability mechanism relating to the .WEB auction?

A. Not as far as I can recall.

Q. Okay. So the status at that time was that Afilias had sent letters?

A. Yeah, they sent heaps of letters saying this was wrong, this should happen, that should happen, et cetera. The questionnaire had gone out and so on.

But they had not of themselves actually filed any form of -- ignoring the DIDP, which is separate, they had not filed any accountability mechanism in this .WEB matter, no.

Q. Okay. In your witness statement, which is the first tab of the binder, if you'd like to look at it.

A. Yeah.

Q. You say -- I am not going to read it, but you comment -- you address how ICANN deals with letters, right?
A. Yeah, yep.

Q. And the practice of ICANN was that absent the accountability mechanisms, such as a reconsideration request, CEP and so forth, that was the way to know that a contention set would be placed on hold; is that correct?

A. Well, kind of. In essence, the way I would put it is you can write whatever letters you like. The way that you move forward with an issue of this nature is through using ICANN's accountability mechanisms. That's what they are there for.

MR. LeVEE: Mr. Chairman, may I take one minute to consult with my colleagues, including Mr. Smith, who, of course, is in San Francisco?

ARBITRATOR BIENVENU: Of course.

MR. LITWIN: Before we break, I would beg the Panel's indulgence to allow me one brief recross on a document that was inspired by your question, Mr. Chairman, that I think would clarify one of Mr. Disspain's responses. It would be no more than two minutes.

ARBITRATOR BIENVENU: That's fine. We will hear the question, but first I will allow Mr. LeVee to consult his colleagues.
MR. LeVEE: Just for the record,
Mr. Chairman, I do object to redirect -- sorry, recross. It is not part of the rules. It is not something we have done, and I just want the objection noted for the record.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Mr. LeVee.

MR. LeVEE: I have no additional questions. I do repeat that I am concerned about recross, and if there is recross, I would ask that I be given at least the opportunity to respond to it.

ARBITRATOR BIENVENU: Yes, yes, well, I agree with you that there is no recross, but I didn't understand Mr. Litwin to ask for recross, and if he did, I would disallow it.

However, we are an international arbitration, and it is customary to allow counsel to ask, you know, supplementary questions if they arise out of redirect.

So I am sure that Mr. Litwin will be disciplined, as he should be at this stage in the process, and ask a question that only is supplemental to your redirect, and he will do so under our watchful eye.
MR. LeVEE: Thank you, Mr. Chairman.

MR. LITWIN: Mr. Chairman, just as a point of clarification, my question arises not out of Mr. LeVee's redirect, but in response to an answer Mr. Disspain gave to one of your questions.

ARBITRATOR BIENVENU: That's fine. Please proceed, but understand this is a supplementary question, not a continuation of your cross.

MR. LITWIN: I understand, Mr. Chairman.

SUPPLEMENTARY EXAMINATION

BY MR. LITWIN

Q. Mr. Disspain, do you recall the Chairman asking you about whether or not the Registry Agreement would have been signed by ICANN in June of 2018?

A. Can I interrupt you for one second? I lost you at the beginning of your question. I just heard you for the last ten seconds. Can you go back and start again for me, please?

Q. Mr. Disspain, do you recall that the Chairman asked you whether or not ICANN would have executed the Registry Agreement in June of 2018, and you said that one way or another, you could not speculate as to what would have happened?
Do you recall that?

A. Yes.

MR. LITWIN: I would ask Chuck to bring up Exhibit 170, please.

MR. LeVEE: Mr. Chairman, I can tell already, this is recross.

ARBITRATOR BIENVENU: I'll allow the question, Mr. LeVee.

Q. BY MR. LITWIN: Mr. Disspain, I am showing you an email that was sent from Mr. Grant Nakata from ICANN internally, and he writes, "I want to provide an update on the WEB Registry Agreement."

This email was sent on June 20th, 2018, two days after Afilias filed its CEP.

He says, "Prior to the execution of the WEB Registry Agreement, we received notice that a Cooperative Engagement Process (CEP) was initiated on .WEB. The .WEB/WEBS contention set has been placed On Hold. We will void the current Registry Agreement (via DocuSign). If or when we are able to proceed, we will reinitiate this approval process."

If you look down in this document at the bottom of Page 1 and onto Page 2, you will see that the Registry Agreement had been approved by
Ms. Christine Willett and the other members of her team.

Do you see that, sir?

A. It would appear so, yes.

Q. So does that refresh your recollection that had Afilias not filed its CEP, that ICANN was ready to sign the Registry Agreement?

A. No, it doesn't, because this doesn't refresh my recollection. I don't have a recollection. I simply said what I said. I am not aware of these emails. They are internal emails, so I can't comment on them.

Q. That's because the Board does not have to approve a Registry Agreement. It simply required the signature of Mr. Atallah; is that correct?

A. The Board does not have to approve an agreement, that is correct. However, as I already said, the BAMC in its discussion with ICANN org prior to -- sorry, post the lifting of hold would have been aware if Afilias had not filed a -- what's the word I'm looking for? Accountability mechanism, that's the word. Thank you.

Accountability mechanism.

But I am talking about what the Board was doing. I can't tell you what ICANN org was doing.
That's a matter for ICANN org.

MR. LITWIN: Okay. Thank you,

Mr. Chairman.

ARBITRATOR BIENVENU: Thank you,

Mr. Litwin.

Mr. LeVee?

MR. LeVEE: I do not have follow-up.

Thank you.

ARBITRATOR BIENVENU: Mr. Disspain, it remains for me and the members of the Panel and, indeed, all the participants in this process, to thank you very much for your time and for your evidence. We appreciate it very much.

THE WITNESS: Thank you very much, indeed.

MR. LITWIN: Thank you, Mr. Disspain.

THE WITNESS: Thank you, Mr. Chairman.

Thank you all.

ARBITRATOR BIENVENU: Mr. Disspain, one last point. Per the sequestration order, it requires that I instruct you not to discuss the case with other persons who may appear as witnesses before us.


ARBITRATOR BIENVENU: Thank you. Thank you for your time.
THE WITNESS: Thank you very much.

Good-bye.

ARBITRATOR BIENVENU: Well, it's been a long day. Is there anything that absolutely needs to be raised now, as opposed to when we resume next Monday? Looking at the claimant.

MR. ALI: I apologize. Nothing from claimant's side, Mr. Chairman, other than thank you for a good week.

ARBITRATOR BIENVENU: On the respondent's side, Mr. LeVee?

MR. LeVEE: Nothing beyond wishing everyone a very nice weekend. We will see you on Monday.

ARBITRATOR BIENVENU: Those are wishes I send back from everyone on the Panel.

I wish to thank everyone for what I know was an extremely demanding week. We are certainly impressed, but mostly very grateful for the extraordinary work of counsel throughout the week, and in particular for going through our demanding agenda today.

So thank you all. Have a good weekend. We resume on Monday at the normal hour. And the next witness is?
MR. ALI: Mr. McAuley.

ARBITRATOR CHERNICK: Is the normal hour 8:00 a.m. Pacific?

ARBITRATOR BIENVENU: That's correct.

ARBITRATOR CHERNICK: Okay. That's fine.

ARBITRATOR BIENVENU: Thank you all. And I wish you all a restful weekend.

ARBITRATOR KESSEDJIAN: Have a good weekend.

MR. LITWIN: Thank you.

MR. LeVEE: Have a good weekend.

(Whereupon the proceedings were concluded at 1:18 p.m.)

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REPORTER'S CERTIFICATE

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) ss.
COUNTY OF SAN FRANCISCO )

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 18th day of August, 2020.

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