INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,
Claimant,

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

ICDR Case No.
01–18–0004–2702

VOLUME VI

ARBITRATION

AUGUST 10, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
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MONDAY, AUGUST 10, 2020

ARBITRATION HEARING HELD BEFORE
PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME VI
(Pages 1011-1100)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
A-P-P-E-A-R-A-N-C-E-S

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FOR THE CLAIMANT AFILIAS DOMAINS NO. 3 LTD.:

DECHERT LLP
1900 K Street, NW
Washington, DC  20006-1110
BY: ARIF HYDER ALI, ESQ.
   ALEXANDRE de GRAMONT, ESQ.
   ROSEY WONG, ESQ.
   DAVID ATTANASIO, ESQ.
   MICHAEL LOSCO, ESQ.
   TAMAR SARJVELADZE, ESQ.
(202) 261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
rosey.wong@dechert.com
david.attanasio@dechert.com
michael.losco@dechert.com

CONSTANTINE CANNON
335 Madison Avenue, 9th Floor
New York, New York  10017
BY: ETHAN E. LITWIN, ESQ.
(212) 350-2700
elitwin@constantinecannon.com

FOR THE RESPONDENT THE INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS:

JONES DAY
555 California Street, 26th Floor
San Francisco, California  94104
BY: STEVEN L. SMITH, ESQ.
   DAVID L. WALLACH, ESQ.
   PAUL C. HINES, ESQ.
(415) 626-3939
ssmith@jonesday.com
dwallach@jonesday.com
phines@jonesday.com
FOR THE RESPONDENT THE INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS:

JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, California 90071
BY: JEFFREY A. LeVEE, ESQ.
    ERIC P. ENSON, ESQ.
    KELLY M. OZUROVICH, ESQ.
    (213) 489-3939
    jlevee@jonesday.com
eenson@jonesday.com
    kozurovich@jonesday.com

FOR AMICI NDC:

PAUL HASTINGS
1999 Avenue of the Stars
Los Angeles, California 90067
BY: STEVEN A. MARENBERG, ESQ.
    JOSH GORDON, ESQ.
    APRIL HUA, ESQ.
    (310) 620-5700
    stevenmarenberg@paulhastings.com
    joshgordon@paulhastings.com
    aprilhua@paulhastings.com

FOR AMICI VERISIGN:

ARNOLD & PORTER
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017
BY: RONALD L. JOHNSTON, ESQ.
    RONALD BLACKBURN, ESQ.
    OSCAR RAMALIO, ESQ.
    MARIA CHEDID, ESQ.
    JOHN MUSE-FISHER, ESQ.
    HANNAH COLEMAN, ESQ.
    (213) 243-4000
    ronald.johnston@arnoldporter.com
    ronald.blackburn@arnoldporter.com
    oscar.ramalio@arnoldporter.com
    maria.chedid@arnoldporter.com
    john.musefisher@arnoldporter.com
    hannah.coleman@arnoldporter.com
THE TRIBUNAL:

Pierre Bienvenu,
pierre.bienvenu@nortonrosefulbright.com
Richard Chernick,
richard@richardchernick.com
Catherine Kessedjian, ckarbitre@outlook.fr
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CALIFORNIA, AUGUST 10, 2020

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ARBITRATOR BIENVENU: Let's open the hearing. I will do so by welcoming everyone, hoping that you had a productive, if not restful weekend.

We have received communications from counsel about a change in the hearing agenda. On behalf of the Panel, I responded, wanting to have an opportunity to discuss the import of those changes with the members of the Panel. Obviously we wanted to hear from the parties first before forming a view as to the consequence of that change in the hearing agenda.

Would you like, Mr. Ali or Mr. LeVee -- if you haven't agreed, I will ask the claimant to address this first, on this question and what lies behind it.

MR. ALI: From claimant's perspective, we have the experts presented by VeriSign.

Mr. Chairman, as I was saying, that from the perspective of Afilias, the expert testimony that's been presented by ICANN's experts and the expert -- and by Amici's expert is something that we have viewed as being irrelevant to the ultimate
issues that are before you.

And in light of the testimony that we received last week, we felt there was no need to examine Mr. Carlton. We had previously dropped Mr. Kneuer and Mr. Murphy as witnesses, and we just felt that there was no need to burden Mr. Carlton. He, of course, is an economist and has a particular perspective.

Professor Zittrain comes at this from a standpoint of being a law professor and someone who is at the Berkman Center, which is a very well-known institution at Harvard that deals with questions of Internet governance. So that was his perspective that he was bringing as an Internet historian and an Internet governance specialist.

And George Sadowsky is an ICANN Board member and somebody who was bringing the perspective of a technologist.

We thought that that testimony is far more relevant than the testimony of the economists, but at the end of the day, we will, I believe, agree that there would be no need for the experts in light of the testimony that was --

ARBITRATOR BIENVENU: I follow what you said, and I am sure there is more to come on
matters of argument, and you have had and will
continue to have an argument to address us on that.

       All right. So thank you for the
claimant's perspective on this.

       Mr. LeVee, would you like to add anything?

MR. LeVEE: Just very briefly. Once
Afilias chose not to cross-examine any of the three
experts that Amici and ICANN have tendered, and of
course those experts were responding --

ARBITERATOR CHERNICK: Speak louder,
Mr. LeVee.

MR. LeVEE: Those experts were responding
to the Afilias experts. So the Afilias experts had
submitted their witness statements first, and then
the Amici and the ICANN experts responded to those
witness statements.

       Once Afilias made the decision that they
were not going to examine the three experts
tendered by the Amici and ICANN, we felt that on
that basis and because of the testimony that came
in last week, there really was no reason to
cross-examine Mr. Sadowsky or Mr. Zittrain, who --
and we will argue their relevance in the
posthearing briefs. So I do agree with Mr. Ali on
that.
I think if the Panel were to begin asking -- request asking questions of any of the experts, we run the risk of an unbalanced record.

ARBITRATOR BIENVENU: We are aware of that.

MR. LeVEE: Okay. Because, as I said, depending on who you chose to ask questions of, we have a situation where two of the experts were excused even before the hearing, the Amici experts. I have no way of knowing if they remain available for you this week.

But I think because of the sequencing of the experts, should the Panel choose to examine or ask questions of any of the experts, we would have significant issues, including that the parties have not discussed and we are assuming that they would not need to discuss, whether there would be follow-up questions from the parties and how that would work.

So I think there's a pretty significant procedural and logistical problem associated with having the Panel ask questions of any of the experts now that all five of them have been excused.

ARBITRATOR BIENVENU: Very well. I said,
in reacting to what you were submitting, Mr. LeVee,
we are aware of that, not just I am aware of that.

    All right. Well, that's very helpful. We
have the parties' perspective on their decision.
Leave it with us, and we'll discuss it during the
next break and come back to the parties, but that's
very helpful.

    MR. LeVEE: Thank you all.

    ARBITRATOR BIENVENU: Thank you, Mr. Ali.

    Thank you, Mr. LeVee.

    We now move, then, to hearing the evidence
of Mr. McAuley. I am led to understand that he
will be introduced by Mr. Blackburn.

    Welcome, again, Mr. Blackburn.

    MR. BLACKBURN: Good morning.

    ARBITRATOR BIENVENU: And he will be
cross-examined by Mr. Litwin, whom I have seen
earlier in this hearing.

    So, JD, we are ready, if you could bring
the witness in.

    MR. ENGLISH: Yes, I am going to go join
the witness and bring him back in. He is connected
on his phone, so he can hear us very well. You're
going to have to excuse his video. It is going to
be very delayed, but you'll be able to hear him in
real time, and he'll be able to speak in real time.

Before I do that, can I ask who needs to share their screen for the witness?

MR. BLACKBURN: For Amici it will be John Fisher.

MR. VAUGHAN: For Afilias it will be me, Chuck Vaughan.

ARBITRATOR BIENVENU: Where is Mr. McAuley joining us from?

MR. LITWIN: He is joining us from Chicago.

ARBITRATOR BIENVENU: Mr. McAuley.

THE WITNESS: Yes. This is David McAuley speaking.

ARBITRATOR BIENVENU: Morning, sir. You are hearing the voice of Pierre Bienvenu. I am the Chair of the Panel, and serving on the Panel with me are Professor Catherine Kessedjian, who is joining us from Paris, and Mr. Richard Chernick, who is joining from Los Angeles.

Can you see us on your screen, sir?

MR. ENGLISH: David, you need to unmute the Zoom meeting. We can see you but can't hear you.

THE WITNESS: Can you hear me?
MR. ENGLISH: There you go.

THE WITNESS: JD, should I start my video?

MR. ENGLISH: Your video's on. We can hear you.

THE WITNESS: Thank you. And I'd like to respond to that question. I can see myself on screen on the right. It just went away. I am reconnecting right now. It looks like I'm reconnecting.

ARBITRATOR BIENVENU: Very well. We'll wait until you have reconnected, then.

THE WITNESS: Thank you. I would like to mention that I had -- I thought that this was a good connection. I was testing it yesterday and again early this morning, and everything had seemed fine.

ARBITRATOR BIENVENU: Well, these things happen.

THE WITNESS: And I still have a screen that says "connecting."

MR. ENGLISH: David, can you unmute yourself? You're still muted, David. Can you unmute on the Zoom meeting?

THE WITNESS: JD, can you hear me?

MR. ENGLISH: Yes, and I can see you.
THE WITNESS: Thank you. I can see myself and another gentleman. I can see four -- myself and three other people. I believe they are the Panel members, and now I can see five video screens.

ARBITRATOR BIENVENU: Excellent.

So I am the Chair of the Panel, Pierre Bienvenu. Mr. Richard Chernick serves on the Panel, as does Professor Catherine Kessedjian, who as I mentioned, is joining us from Paris. So you have all three of them on your screen, Mr. McAuley?

THE WITNESS: Thank you. Good morning. I did, but the -- but myself and you are staying on the screen, but the others are coming and going.

ARBITRATOR BIENVENU: Okay. Well, I think if you see me for the moment, and then I suppose JD will show you Mr. Blackburn and then Mr. Litwin, we should be in business.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: Excellent. So you're joining us by telephone, Mr. McAuley. Can you hear me well?

THE WITNESS: I can. I have -- I have my phone up to my ear. I have a hearing aid on.

ARBITRATOR BIENVENU: Excellent. Very
well.

So if you are ready to go, we will proceed.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: Excellent. So, Mr. McAuley, welcome, again. You have prepared and signed in relation to this IRP a declaration dated February 5, 2019, correct?

THE WITNESS: Yes, sir.

ARBITRATOR BIENVENU: And that declaration ends with an affirmation that the statements contained in the declaration are true and correct to the best of your knowledge and belief, correct?

THE WITNESS: Yes, sir.

ARBITRATOR BIENVENU: May I ask you, Mr. McAuley, 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: Yes, sir, I do.

ARBITRATOR BIENVENU: Thank you very much.

Mr. Blackburn.

MR. BLACKBURN: Thank you, Mr. Chairman.

Mr. McAuley, good morning. Before we --

THE WITNESS: Good morning.
MR. BLACKBURN: -- we begin, are there any corrections or amendments to your witness statement that you would like to make at this time?

THE WITNESS: No, sir.

MR. BLACKBURN: Then, Mr. Chairman, we tender Mr. McAuley for cross-examination and reserve time for redirect as necessary.

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

MR. LITWIN: would you like to begin your cross-examination?

ARBITRATOR KESSEDJIAN: You are muted. We cannot hear you.

ARBITRATOR BIENVENU: We cannot hear you, Mr. Litwin. Still no sound coming from you, Mr. Litwin.

Is JD available to troubleshoot us out of this?

MR. ENGLISH: Ethan, can you disconnect your headphones and then reconnect them? Because it is a very tiny sound coming from your headphones. It's a bad connection.

MR. LITWIN: I'll try again.

MR. ENGLISH: There you go.

MR. LITWIN: That was not my headphones,
but let me see. Does this work or is it still bad?

MR. ENGLISH: No, you sound normal.

MR. LITWIN: Okay. Reconnecting and connecting, that did the trick.

CROSS-EXAMINATION

BY MR. LITWIN

Q. Mr. McAuley, I just wanted to confirm that when Mr. Blackburn's assistant put up your witness statement and your affirmation, were you able to see that on your computer screen?

A. I was, yes.

Q. Great. Now, I believe you should have received a package from us containing a binder, and I believe Mr. Blackburn has the same. And if you could just open that, please. I know you're on the phone, so it is okay to put the phone down and open it up.

A. I'll put the phone down. Thank you. Just one second.

Q. Sure.

ARBITRATOR BIENVENU: Mr. Litwin, since the witness may want to leaf through -- or look at the binder when you're cross-examining him, you may wish to invite him to --

THE WITNESS: Okay. I have opened it.
Thank you.

ARBITRATOR BIENVENU: -- to use the speakerphone on his phone.

THE WITNESS: Hello.

MR. LITWIN: That's a good idea.

THE WITNESS: My wife has just walked in with some cables, and I don't think we want to do that. We want to press on with this phone. Thank you. I had some connection issues. Thank you.

Q. BY MR. LITWIN: Mr. McAuley, will you be able to hear if you go on speakerphone when you're working with the binder?

A. I think I can certainly try. I will turn up the volume and go on speakerphone. I do have some hearing issues, but I have my hearing aid on, and I think it will work. Let me try it. Just one second.

Q. Okay.

A. Can you hear me?

Q. I can.

MR. LITWIN: Balinda, will that work?

THE REPORTER: Yes. Thank you, Ethan.

THE WITNESS: I think that will work.

ARBITRATOR BIENVENU: We can hear you, Mr. McAuley. Can you hear us?
THE WITNESS: Yes.

ARBITRATOR BIENVENU: Please proceed.

Q. BY MR. LITWIN: Mr. McAuley, I will from
time to time refer you to specific pages and tabs
in your binder. And if you'll see at the bottom
right-hand corner, we have marked each exhibit with
a unique page number in a bracket. So when I refer
to a page number, I'll be referring to that
bracketed page, okay?

A. Okay.

Q. Mr. McAuley, in preparation for your
testimony here today, what documents did you
review?

A. My statement and the exhibits to my
statement. And I believe I read Sam Eisner's
statement, and I looked -- I believe I read the
public comments to the interim rules again. I read
them a number of times, so some of them I may not
have read again, and those are the ones I have
read.

Q. Okay. Anything else that you recall?

A. I don't think so.

Q. Now, Mr. McAuley, you're presently
employed by VeriSign; is that correct?

A. Yes, I am.
Q. And how long have you been employed by VeriSign?

A. Almost six years, from late September of 2014.

Q. And your current title is senior international policy and business development manager; is that right?

A. Yes.

Q. So is it fair to assume that your duties largely involve policy development?

A. Yes, they do.

Q. What about the business -- I'm sorry?

A. I'm hoping you can hear me, but I am reconnecting on the video side.

Q. We can hear you.

Is it fair -- and on the business development side -- we just lost Mr. McAuley.

A. No, I'm here on the phone, but I am reconnecting on the video.

Q. Okay.

MR. LITWIN: Mr. Chairman, I know that most of, if not all of the firms, except for mine on the phone, have offices in Chicago. Given we are not cross-examining -- ICANN is not cross-examining Dr. Sadowsky this afternoon, does
it makes sense to adjourn so we can get a better connection? This is awkward enough sort of as it is.

ARBITRATOR BIENVENU: Let's see if once Mr. McAuley has reconnected we can -- well, you are able to conduct your cross-examination. I am, of course, concerned that you'll want to show documents to the witness, and so we'll need to ensure that he sees them.

So let's see once he's reconnected.

MR. LITWIN: Okay.

THE WITNESS: I think if JD is on the line, I think I'd like to connect via Zoom again. Honestly, I think -- I just have the wheel that's -- can you all hear me?

MR. LITWIN: We can, Mr. McAuley.

THE WITNESS: So I'm thinking that might be the best thing to do, if JD is there.

MR. ENGLISH: Yeah, I am here.

THE WITNESS: Or if you can connect me.

If you could try again, JD, but I am on the phone, I am just not on the video. The turning wheel is now gone. I am on Trial Graphix Zoom Room.

MR. ENGLISH: Yeah, so the problem is your bandwidth is not able to sustain the video
connection. That's why you keep getting kicked out.

So if we're taking a pause anyway, does the Tribunal want me to try to get him to -- there's one other option, to try to hardwire him, now that he has cables, to see if it improves. I am not sure it is really going to work, but we can try it.

MR. LITWIN: Mr. Chairman, why don't we take a five-minute break and see if the hardwire solution works.

ARBITRATOR BIENVENU: Very well. Let's do that.

In the meantime, Mr. Blackburn and others, consider alternatives, maybe getting the witness into one of the law firms in the Chicago offices, as suggested by Mr. Litwin. Let's see where we are once JD has worked his magic.

MR. LITWIN: Yes.

MR. ENGLISH: Okay.

MR. LITWIN: Thank you, Mr. Chairman. (Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Thank you very much, JD.

Mr. McAuley, welcome again.
THE WITNESS: Thank you for your patience.

ARBITRATOR BIENVENU: And you can see what there is to be seen on the screen and you can hear us, correct?

THE WITNESS: I can certainly do both right now. I have -- on the right-hand side I have about five people on screen, including myself.

ARBITRATOR BIENVENU: Excellent. So we are seeing the same thing.

So then I'll call upon Mr. Litwin to proceed with his cross-examination.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Mr. McAuley, I think where we left off I was asking you about your duties on the business development side of your title.

What role do you have in business development?

A. I really have none. It is a bad part of the title. When I was given that promotion, it just was part of the title and no one made an issue of it.

Q. Mr. McAuley, are you a lawyer?

A. Yes. I used to serve as a lawyer, and I retired from practice a while back.

Q. When was that?
A. I started pursuing a second career, I believe, in 2004.

Q. Okay. In January 2016, you joined the IRP-IOT; is that correct?

A. I believe that's when it was, yes.

Q. And in November 2016 you became the Chair of the IOT; is that right?

A. I believe that's the time.

Q. Now, VeriSign naturally requires its employees to submit reports regarding the activities of ICANN committees on which they serve, correct?

A. It's not very formal. I tend to report to my boss periodically.

Q. And who is your boss?

A. My boss at present is a man named Keith Drazek.

Q. I'm sorry, can you spell that?

A. Keith Drazek, D-r-a-z-e-k.

Q. And how do you submit those reports?

A. I submit reports on the IRP-IOT, I submitted them orally.

Q. Okay. And during the period from, let's say, November 2016 through October 2018, was Mr. Drazek your boss at that point?
A. No, not directly. I reported to a woman by the name of Iren Borissova, and her boss was Keith Drazek. While I now report to Keith directly, at the time I reported to Iren Borissova.

Q. How do you spell the last name?
A. B-o-r-i-s-s-o-v-a.

Q. Okay. And it was the same process with Ms. Borissova, you provided oral reports?
A. I did periodically.
Q. And when you say "periodically," how often was that?
A. I would say with respect to the IOT, they were not often.

Q. Okay. So the IOT, I will say just in the general of its existence, tended to meet about once a month during most of the months of the year. Did you report after every IOT meeting?
A. I did not.

Q. Would you say you reported four or five times a year?
A. I would probably have reported four times a year.

Q. When you provided your reports, did you share the IOT's work product as part of your reporting?
A. No.

Q. Did you share the May 2018 version of the interim rules with anyone at VeriSign?

A. I don't believe that I did. Hard for me to recall exactly, but I don't believe that I did.

Q. If you had, who would you have shared it with?

A. Well, probably Iren Borissova, but I don't remember if I did, but I don't think I did.

Q. Yeah. Did you share any of the materials -- and by "materials" I mean drafts, emails or transcripts of the IOT regarding the drafting of what became Rule 7 of the interim rules with anyone at VeriSign?

A. I don't believe that I did.

Q. When you discussed the activities of the IOT with Ms. Borissova, what did you talk about?

A. I can't say that I recall, but I believe that it was about Rule 4, which was called "Time for Filing."

Q. Did anyone at VeriSign ever seek to discuss any of the topics covered by Rule 7 of the interim rules with you, such as joinder?

MR. BLACKBURN: I would caution the witness at this point if any of those
communications were with counsel, that they would
be privileged. Otherwise he can answer.

MR. LITWIN: Let me rephrase in light of
Mr. Blackburn's objection.

Q. I would like to just get a yes or no from
you, sir. Did anyone at VeriSign ever seek to
discuss any of the topics covered by Rule 7 of the
interim rules with you, such as joinder?

A. No.

Q. Consolidation?

A. No.

Q. Intervention?

A. No.

Q. Participation as an amicus?

A. Not -- not that I -- I don't recall. I
believe the answer is no.

Q. Did any VeriSign personnel -- and by
"personnel" I would include any officer, director
or employee of VeriSign, ever suggest that you
should discuss a particular topic or issue with the
IOT?

A. No, not that I recall.

Q. Did anyone at VeriSign ever suggest
anything that you should consider in light of your
role in the IOT?
A. No.

Q. Other than what we have already discussed, did you ever have any discussions or communications, oral or written, with anyone at VeriSign prior to October 19, 2018, about the IOT or the activities of the IOT?

A. Yes. I would have reported to Iren Borissova about IOT, and I also probably would have reported to Keith Drazek about IOT pretty much as I described, from time to time.

Q. Right. So my question was other than what we had discussed. So other than your conversations --

A. Sorry.

Q. -- with Mr. Drazek or Ms. Borissova, were there any other discussions or communications that you had, oral or written, with anyone at VeriSign prior to October 19, 2018, about what the IOT was doing or about the IOT in general?

A. I can't say I remember what October the 19th was, but I do know that as the interim rules were coming up for review, there was a last-minute issue regarding Rule 4, "Time for Filing," and I believe we were in Barcelona, and I may have mentioned that to Keith Drazek.
Q. In the IOT's work on the rules of procedure, the IOT was assisted by the Sidley law firm; is that right?
A. That's correct.
Q. And I assume that the lawyers at Sidley who worked with the IOT practiced in international arbitration; is that right?
A. I don't know.
Q. You -- well, who were the lawyers at Sidley who you worked with?
A. I didn't work with them. I believe that Sam Eisner did. I did once in a while, very infrequently, correspond with a lawyer at Sidley by the name of Holly Gregory. I believe that was very early on in the work of the IOT, and that's the best of my recollection.
Q. You also note in your witness statement that the IOT was comprised of between 25 and 26 members; is that correct?
A. Yes.
Q. I would like to direct your attention to Paragraph 5 of your witness statement.
A. Oh, it is -- never mind.
Q. This is actually the full paragraph that Chuck has blown up. You state that the IOT's roles
and responsibilities were set forth at Section 4.3(n) of ICANN's bylaws; is that correct?

A. I'm sorry. Could you restate that? I wasn't finished reading.

Q. Sure.

A. Okay.

Q. You state in your witness statement that the IOT's role and responsibilities were set forth at Section 4.3(n) of ICANN's bylaws; is that correct?

A. That's correct.

Q. Let's take a look at that section of the bylaws. We have relevant excerpts behind Tab 2 in your binder, and 4.3(n) can be found at the bottom of Page 15 and the top of Page 16 in that exhibit.

A. I am on Page 15 right now.

Q. Great.

A. Sorry. I am on Page 15 right now.

Q. You see at the bottom of the page, it says, "(n) Rules of Procedure," right?

A. Yes.

Q. I am going to direct your attention to the top of the next page, and there the bylaws provide that the IOT shall, quote, "Develop clear published rules for the IRP ('Rules of Procedure') that
conform with international arbitration norms and
are streamlined, easy to understand and apply
fairly to all parties."

Do you see that?

A. I do.

Q. Now, moving on to Subparagraph (ii) of
Section 4.3(n), the bylaws there provide that, "The
Rules of Procedure shall be informed by
international arbitration norms and consistent with
the purposes of the IRP."

Do you see that, sir?

A. I do.

Q. And are these two provisions consistent
with your understanding that the rules that the IOT
were developing should be informed by international
arbitration norms and be consistent with the
purposes of the IRP?

A. I think I understand your question.
You're asking if I remember that this -- this was
part of the directions to the IOT?

Q. Correct, correct.

A. Yes, yes.

Q. Now, let's take a look at the purposes of
the IRP. I would direct your attention to Section
4.3(a) of the bylaws that can be found on Page 9 of
the exhibit at Tab 2 in your binder.

   Do you see that, Mr. McAuley?

   A. I do, yes. I am on Page 4.3, and I see it
   is also on the screen. I'm sorry, Page 9.

   Q. Great. Correct. And there in the top
   paragraph, at the end it says, "The IRP is intended
   to hear and resolve Disputes for the following
   purposes ('Purpose of the IRP')."

   Do you see that, sir?

   A. I do.

   Q. And Number (i) is, "Ensure that ICANN does
   not exceed the scope of its Mission and otherwise
   complies with its Articles of Incorporation and
   Bylaws."

   Do you see that, sir?

   A. I do.

   Q. So it was your understanding that in
   drafting the rules for the IRP, that IRP panels
   must hear and resolve disputes to ensure that ICANN
   complies with its articles and bylaws; is that
   correct?

   A. I am not sure I would say it that way. I
   would think of it that it would hear disputes to
   determine whether ICANN had exceeded its mission
   and did not comply with its articles or bylaws.
In other words, I think I understood the question to be was the Panel to ensure that they did, and I would have stated it differently, that I thought the Panel would resolve disputes where someone claimed that they had not.

Q. So maybe we should break it apart, my question, because that wasn't exactly what I had asked.

We had just seen that the instruction to the IOT was that the rules of procedure should be consistent with the purposes of the IOT, correct?

A. I believe that's right.

Q. And here at Subparagraph (i), the bylaws provide that, "The IRP is intended to hear and resolve Disputes" to "ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws"; is that right?

A. I believe that that's what the language says.

Q. So the plain language, therefore, would require the IOT to draft the rules consistently with this purpose to ensure that ICANN does not exceed the scope of its mission and otherwise comply with its articles and bylaws; is that right?
A. I am not sure. I might be confused by your question, and I think the way that I read this -- frankly, I had read Bylaw 4.3 quite a lot over the last four years or whatever it is, but I think what I took this to mean is that a Panel would be addressing or hearing disputes and trying to resolve disputes where a party, a claimant, claimed that ICANN had not complied with its articles or bylaws.

So my understanding of the section, I believe, looking back, was that the purpose is the Panel will hear disputes, they'll be discrete. There will be a dispute where the public claims they didn't comply with their bylaws, and the Panel's job, as I understood it -- I never understood it to be that it would be sort of overseeing ICANN to ensure independently, perhaps, that ICANN stayed within its bylaws.

Maybe I misunderstood the question. That seems -- I am trying to tell you how I read that.

Q. Okay. That's also not my question, so perhaps I am not being clear, Mr. McAuley.

A. I'm sorry, sorry.

Q. Nope. Let me try and go back over this. So Section 4.3(n) instructs the IOT to
draft the rules of procedure to be consistent with
the purposes of the IRP; is that right?

A. I believe that's correct.

Q. And this section identifies the purposes
of the IRP; is that correct?

A. This section, (a), I believe, yes, does
identify the purposes of the IRP.

Q. In fact, it says in bold, it creates a
defined term, "Purpose of the IRP," right?

A. I believe that that's right.

Q. And the first purpose says, "Ensure that
ICANN does not exceed the scope of its Mission and
otherwise complies with its Articles of
Incorporation and Bylaws," right?

A. I believe -- yes, I believe that you
correctly read that.

Q. Well, that's what it says. And if you
are --

A. It does.

Q. -- instructed to draft rules of procedure
that are consistent with the purposes of the IRP,
and one of those purposes is to ensure that ICANN
does not exceed the scope of its mission and
otherwise complies with its articles of
incorporation and bylaws, then the bylaws
themselves are instructing the IRP to develop procedures to ensure that ICANN does not exceed the scope of its mission and otherwise complies with its articles of incorporation and bylaws; isn't that right?

A. I don't -- that's what I'm trying to say, is I don't believe I agree with that. I think there's language in 4.8 that says this will be in the context of deciding a dispute, that it will ensure that ICANN does not exceed its mission and bylaws.

Q. Sorry, you said 4.8?

A. No, sorry, 4.3(a). In other words, I think we are just having a semantics issue, perhaps, but I agree with a minute ago when you read out those terms that that's what the terms say, but I --

Q. Okay. Well, let me move on, and perhaps it will become clear as we go on, Mr. McAuley. So I am looking now at Subparagraph (ii) of 4.3(a), and here the bylaws say that one of the purposes of the IRP is to "Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and
accessible expert review of Covered Actions"; is that right?

A. I believe that that's correct. I believe that's right.

Q. So in drafting the rules of procedure, the IOT was instructed by the bylaws to create rules of procedure so that disputes could be heard and resolved in a meaningful, affordable and accessible review that would empower claimants to enforce compliance with ICANN's articles of incorporation and bylaws; isn't that right?

A. And if I am understanding your question, you said in the context of dispute, did I hear that right?

Q. Yes.

A. In the context of dispute, I think that's a correct reading.

Q. And turning to Subparagraph (iii) in this section, it says that "The IRP is intended to hear and resolve Disputes" to "ensure that ICANN is accountable to the global Internet community and Claimants," correct?

A. Yes. Can I make a comment, though, with respect to -- I don't want to -- I think I am not sure I am understanding. Because when you
underscore the words "to ensure that ICANN," I want to go back, as I did a minute ago, to say this is all in the context of a dispute where someone has claimed that ICANN has not done this. In other words, this is a standard by which something will be judged, not an independent oversight. That's my understanding of what an IRP is.

Q. Yes. We are in agreement. I am trying -- when I read these, I am going back to the prefatory clause at the end of 4.3(a), where it says, "The IRP is intended to hear and resolve Disputes for the following purposes," and then it has a colon. So when it says, "Ensure that ICANN is accountable to the global Internet community and Claimants," that would be in the context of a dispute?

A. Exactly. And I appreciate you pointing out the language at the end of 4.3(a). I am actually looking also at the language more in the middle or at the beginning of 4.3(a) where it says that activity was alleged by a claimant not to have been consistent with these purposes.

I am paraphrasing. I don't remember what I said a moment ago, but I think all of 4.3(a) is the language that is important. I think we are on the same page. Thank you.
(Discussion off the record.)

MR. LITWIN: I will just continue. Is that okay, Mr. Chairman?

ARBITRATOR BIENVENU: Yes, please proceed.

MR. LITWIN: Thank you.

Q. Mr. McAuley, I would direct your attention to Subparagraph (ix) at the bottom of Page 9, and here the bylaws provide that "The IRP is intended to hear and resolve Disputes" by "providing a mechanism for the resolution of Disputes, as an alternative to legal action in the courts of the United States or other jurisdictions"; is that correct, sir?

A. Yes, that is correct, that is what (ix) says.

Q. So this IRP is intended to operate as an alternative to a legal action that could otherwise be commenced by a party that has been materially affected by ICANN's action or inaction in any civil court of competent jurisdiction around the world; is that correct?

A. I think so.

Q. You say -- well, that was a very long question. Maybe I should break it down for you and then be clearer.
So the IRP is intended to operate as an alternative to civil court jurisdiction, right?

A. When it says it is a mechanism for the resolution of disputes, I think it is getting at as an alternative to the legal action, yes. I think we are agreeing.

Q. Yes, I think that's right.

So if you have a dispute with ICANN, as "dispute" is defined in the bylaws, you can choose whether to bring that case in a here in the United States we would say filing a complaint, maybe in federal court or in any similar proceeding in civil courts around the world, or you could file a request for IRP; is that what this is designed to say?

A. Having -- I think the design is to be an alternative that someone would not need to file a civil action, but they, of course, could, I think.

Q. Okay. Now, as the IOT developed this alternative to a civil action, did the IOT discuss the implications created by the litigation waiver that applicants for new gTLDs were required by ICANN to agree to?

A. I do not recall that.

Q. So in developing the rules of procedure
for the IRP, the IOT didn't consider how they would apply in the context of ICANN's New gTLD Program?

A. I don't recall us discussing that. I believe I attended most of the IOT meetings, but not all. I think I may have missed a couple of early meetings, but I don't recall that discussion.

Q. Now, isn't it true that ICANN legal and their representatives at the IOT meetings represented to the IOT on numerous occasions that the IRP had most frequently been invoked by applicants in the new gTLD Program?

A. Let me ask you to ask that one more time.

Q. Sure.

I'll just break it down for you.

ICANN legal had representatives at the IOT meetings, right?

A. Yes, they did.

Q. And isn't it true that those ICANN legal representatives told the IOT that IRPs had been most frequently invoked by applicants in the new gTLD Program?

A. I don't remember that.

Q. Did the IOT -- and what you're saying is that you don't recall whether the IOT considered that its work should be informed by that litigation
waiver that was in the new gTLD guidebook; is that what you're saying?

A. No. I am saying I don't remember a discussion about the litigation waiver.

Q. So are you aware that there is a litigation waiver in the new gTLD guidebook?

A. That's a hard one to answer. I may have heard that before, but I have so little to do with the applicant guidebook. I don't know. I don't know. It is not something that comes to mind immediately. It is not something I work in.

Q. Okay. Well, we'll -- I understand, Mr. McAuley.

Let's do this: I will represent to you that in the terms and conditions that all applicants agree to as part of the new gTLD guidebook, the guidebook provides that applicants may not bring disputes arising under the new gTLD guidebook in a civil action in court, okay?

A. Okay.

Q. And I want you to accept that that's true for the purposes of my next question.

A. Okay.

Q. Assuming that that litigation waiver says what it does, should the IOT have interpreted the
rules of the IRP in reference to ICANN's bylaws -- let me strike that.

Is it fair to say that the IRP-IOT, in its work developing the rules of procedure and in providing an alternative to federal litigation, needed to consider where applicants or where counterparties or potential claimants in an IRP did not have access to court because of a litigation waiver?

A. I don't know the answer to the question. I would think it's possible. I believe my approach to the work of the IOT was that we were a threat -- we were coming up with rules for people who appeared at the IRP.

And I don't recall any discussions that went to the point of how the people appeared at an IRP. I don't know -- what was preliminary for the IRP. So I don't know how to answer your question. It is not something that I recall.

Q. Okay. I'd like to direct your attention to Paragraph 24 in your witness statement, which is behind Page 1 of your binder.

MR. LITWIN: Now, Mr. Chairman, I have sort of lost track on where we are on time here, but I am going to continue going even though we are
technically an hour and a half into this hearing; is that okay, sir?

ARBITRATOR BIENVENU: That's fine with me if it is all right with the witness and my colleagues, I don't have any objection to your -- maybe you could go for another 15 minutes?

MR. LITWIN: Okay.

Q. Mr. McAuley, at Paragraph 24, you describe comments that you made during an IOT meeting on October 9, 2018.

What you say there is, "During the meeting, I expressed my concern that the provisions for the intervention or participation as of right were not sufficiently clear. As I stated during that meeting, I had reviewed the United Stated Federal Rules of Civil Procedure," and I believe that is just a typo there, it should be "States," not "Stated," "and was concerned that the proposed rules were not sufficiently clear that parties with a significant interest relating to the subject of the IRP, that would be impaired by the adjudication of that interest in their absence, be guaranteed a right to participate in the proceedings."

Is that a correct reflection of what you have in Paragraph 24?
A. I believe it is, yes.

Q. So it is fair to say you consulted the Federal Rules of Civil Procedure because, I believe as you stated earlier, the IRP is intended to serve as a mechanism for the resolution of disputes as an alternative to legal action in, among others, the federal courts of the United States, correct?

A. I believe that's correct.

Q. Now, by "significant interest," you mean an interest that was important to the party, right?

A. I would believe so, yes.

Q. So something that was material to that entity and therefore justified intervention into the IRP?

A. That's what -- that's what I was getting at, I believe. Sam Eisner and I had a disagreement at the time. That's what I was getting at, someone being able to bring a significant interest.

Q. Now, as I understand from the IRP-IOT's website, members of the IOT were provided with several sources of procedure to use as references; is that correct?

A. I don't know about several. I think that we -- I think that we looked at the rules of the International Centre for Dispute Resolution, and I
don't recall others. We may have looked -- I don't recall others.

Q. What about the ICC rules of arbitration, did you look at those?

A. Actually, that -- that reference -- I hadn't remembered that, but I believe that if I am not mistaken, Greg Shatan mentioned those, but I thought it was in reference to the rule for time for filing. But it is a long time ago. It is hard to remember, but I think there was one time one reference to an ICC rule.

Q. Well, regarding your concerns about the then-current draft of Rule 7 and where you state you consulted with the Federal Rules of Civil Procedure, did you also look at, to inform your understanding on how to address your concerns, any set of rules for international arbitration?

A. I did not.

Q. Did you ask any of the lawyers at Sidley who were assisting the IOT which set of rules you should consult?

A. I was not in touch with Sidley, so I did not ask them.

Let me just also mention, when I answered the last question, I did from time to time look at
the rules of ICDR, International Centre for Dispute Resolution, but I was not in touch with Sidley myself insofar as I can recall.

Q. Did anyone suggest to you that you should look at the Federal Rules of Civil Procedure in figuring out how to deal with your concern about Rule 7?

A. I don't recall.

Q. Well -- why did you pick the federal rules?

A. I used to do litigation very, very early in my career when I was in the Navy JAG Corps. The Navy had rules of procedure, and when they were insufficient, I always went to the federal rules, just a habit I had formed early in my career.

Q. Now, I'm going to assume that your proposal was inspired by Rule 19 of the federal rules, which provides that an entity must be joined to a lawsuit, where that entity, and I am going to quote from that rule, quote, "claims an interest relating to the subject of the action," close quote, and that litigating that case in the entity's absence would, quote, "as a practical matter impair or impede the entity's ability to protect that interest," end quote.
Is that what you recall?

A. I don't recall it.

Q. Now, what you were proposing here is that a party with a significant interest relating to the subject of the IRP, and that seems to be very similar to claims in interests relating to the subject of the action, and then you go on to say, "that would be impaired by adjudication of the interest in their absence," and Rule 19 says, "as a practical matter impair or impede the entity's ability to protect that interest."

So there seems to be a pretty close parallel there, would you agree?

A. It sounds like there might be, yes.

Q. So in other words, your view was that third parties who needed to protect a significant interest that is to be adjudicated in the context of an IRP must have an opportunity to participate in that IRP; is that right?

A. I believe that they should. That's what I believe.

Q. And that's because if the case was brought in a civil court like the United States federal courts, that party would have a right to intervene in that litigation; is that right?
A. Well, I actually think my thinking was derived from the purposes -- from reading from Bylaw 4.3.

Q. What about 4.3?

A. Well, I have read that thing so many times, especially with respect to Rule 4 filing, which I think affected my thinking on it all, but there's references to fairness, efficiency, resolving disputes finally, or whatever the language is.

So I may have been influenced by what you just said, but I think it was also my thinking on this topic was also influenced by the language in 4.3.

Q. Okay. Let's talk about 4.3 and that's, again, on Page 9 of Tab 2. We'll just leave it up in whole for you in the screen, and you'll have it in your binder, so please refer to it.

I think, as we talked earlier, that the IRP in your view was being designed as an alternative to civil litigation. And is it fair to say that you were concerned that because a party -- a third party would have had a right to intervene if the case had been brought in federal court, that they should also have the right to intervene if the
case is brought in an IRP?

A. I think we are very close. I don't think the IRP was designed to be an alternative to litigation. I think the IRP was designed to be a forum for resolving disputes that were within ICANN's mission with the allegations of a violation of ICANN's bylaws, et cetera.

I think in designing it, it was considered that it should act as an alternative to litigation. I think it would be fair to say that my thinking on this developed to the point where I thought, yes, people that have a substantial interest -- whatever that phrase is, material interest, in the dispute would be heard.

Q. And that's because a Panel may make findings of fact that would affect those parties' rights without that party's participation, and that would be unfair, correct?

A. I didn't think in those terms. I thought in terms of being heard. When you get to the Panel's powers, authorities, findings, we weren't concerned with that. We were concerned with how do you get -- you know, what are the rules of procedure.

Q. Okay.
A. But there is a section in 4.3 that does
mention what the Panel's powers are.

Q. Now, if you look at Section 4.3,
Subparagraph (viii), it says, "Lead to binding,
final resolutions." You can read the rest of it.

And you said a minute ago that you were
also concerned that third parties should have the
right to participate if they had a significant
interest that related to the subject of the IRP
because the IRP was being designed to be a binding,
final process; is that right?

A. It is hard -- it is hard -- that's not the
way I would put it. If I would say the "because"
phrase is because there was a hearing going on in
which they had a material interest, is why they
should be heard.

With respect to the findings, I don't
recall what I thought at the time. I do recall
believing that among this -- somewhere in here, I
don't see it right now, there is a purpose of the
IRP that it be efficient, that it be -- something
like that, but basically saying, you know, if
there's a dispute, try and resolve the dispute
quickly.

Q. Perhaps I can -- perhaps I can help you
with this, Mr. McAuley.

If you turn to Tab 3 in your binder, this is a copy of the transcript from the October 9, 2018, IOT meeting. If you turn to Page 16, that's our Page 16, of that exhibit, you'll see that you're speaking in the middle of that page. Let me know when you get there.

A. I'm there on the page. Wait a minute.

Yes, I am on Page 16.

Q. Okay. And here in the middle of the page it says, "And especially given the finality of these kinds of proceedings," namely the IRP, "it is my view that intervention, whatever term we are using needs to capture that."

Does that help refresh your recollection that at the time you were concerned that because this new enhanced IRP was designed to be a final, binding process that it made the need for third parties to be able to participate if they had a significant interest to protect?

A. I think that's a fair statement.

MR. LITWIN: Okay. Mr. Chairman, I am actually at a pretty good point for us to take our first break, if that's okay with you.

ARBITRATOR BIENVENU: That's fine with me.
Perfect.

So, Mr. McAuley, you are not to discuss your testimony or your cross-examination during our breaks today. So with that instruction, we will take a 15-minute break and bring you back into the hearing room at the end of that break.

THE WITNESS: Thank you.

MR. LITWIN: Thank you, Mr. Chairman.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Under the same solemn affirmations, we will continue with your cross-examination.

Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

Q. Mr. McAuley, why don't we start with looking at Paragraph 25 of your witness statement, which is behind Page 10 of Tab 1. And I would just use this to confirm that you circulated your proposed revisions to Rule 7 on October 11th, correct?

A. Let me see. Let me take a look at the statement just real quick.

Q. Sure.

A. Yes.

Q. Now, if you turn to Tab 4 in your binder,
I'll just ask if the document there is the email you referred to in Paragraph 25?

A. Could I -- let me get to Paragraph 25 while do you that.

MR. LITWIN: Chuck, can you just bring up the top part of the email there so it is easier to see on the screen?

I think you need to get Mr. McAuley's message below that, just so he can see that. Just go through, "Regards, David."

Q. Can you see that, Mr. McAuley?

A. I can see what's on the screen. I am just reading in my hand beginning of Paragraph 25. I believe that's correct.

Q. Okay. If we turn to Page 5 of Tab 4, and I'll represent to you that even though it appears as a unitary document, this -- Pages 4, 5, 6 and 7 are an attachment to that email.

This is -- and I believe this is correct -- your edits to Rule 7 to the interim rules; is that correct?

A. I am looking at -- I am just going to take a second here to read that. I am not sure. So this is an attachment to the email of October 11th; is that correct?
Q. Correct. You'll see at the bottom of Page 2 of the exhibit it says that there is an attachment, and then what's reproduced behind it is that attachment.

A. Okay. Thank you. I believe that sounds -- yes, I believe so. I don't recall this, but I believe that sounds right.

Q. And if you look at what in this document is -- I guess I'll call it a purple line, at least that's how it appears on my screen, it says, "In addition, any person, group or entity shall have a right to intervene as a CLAIMANT where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS."

Do you see that, sir?

A. I do.

Q. Did you personally make these edits?

A. I believe that that's correct.

Q. Did anyone at VeriSign draft any of the edits reflected in this attachment to your October 11 email?

A. I don't recall, but I don't think so.

Q. Did anyone at VeriSign assist you in drafting any of the edits reflected in the
attachment to your October 11 email?

A. I am just going to finish -- I am just looking -- I don't believe -- I don't believe so, no.

Q. Did anyone at VeriSign review or otherwise comment on any of the edits reflected in the attachment to your October 11 email?

A. Not that I recall.

Q. And this is the language that was discussed at the IOT's meeting later that day, October 11th, correct?

A. I believe that's right.

Q. Now, in your witness statement you state at Paragraph 25 that Ms. Eisner, quote, "proposed that protection for persons with a significant interest should be -- should be moved to the amicus curiae section of Rule 7," correct?

A. I believe so. I do recall that Sam and I were not in agreement on how this would be treated.

Q. And I believe Chuck just put up that quote that you wrote in your witness statement that if persons did not qualify as claimants, Ms. Eisner proposed that protection for those persons with a significant interest be moved to the amicus curiae section of Rule 7.
Do you see that, sir?

A. I do see that, yes.

Q. And you agree with that statement here today, right?

A. That she proposed that protection was to be moved to amicus curiae, yes.

Q. Okay. I'd like to direct your attention to Tab 5 in your binder. This is the transcript from that October 11 IOT meeting, and I would direct your attention to Page 15 of that transcript.

As I do that, sir, I'll represent that we heard from Ms. Eisner that these transcripts were made from an automated service and from time to time they are fairly rough, and this section on Page 15 is certainly a good example of that.

I will represent to you that I reviewed the audio recording, and based on my review of the audio recording, as well as this transcript, we have come up with what I believe you said at October 11th -- on October 11th. I am going to read that to you, and I'll ask whether or not this is a fair representation of what you said during that meeting.

I am starting at the second full paragraph
on Page 15. "But if it was moved to an amicus thing, I would like to look at the language you came up with. You can tell between this and Rule 8, where I'm coming from is a competitive situation, where members of contracted party houses or others have contracts with ICANN or others that have contracts that are affected by ICANN have to be able to protect their interest in competitive situations, so I used language that largely followed U.S. federal rules of procedure. But these rules are fairly -- I think at least in common-law countries, fairly routinely accepted, that someone has an interest can defend themselves because they can't look for defendants to make their argument for them."

Is that a fair representation of what you said on October 11th?

A. I believe that it probably -- I believe that it probably is.

Q. Now, Afilias and VeriSign are competitors, correct?

A. I believe that that's correct.

Q. And at the time, October 11th, 2018, NDC had a contract with ICANN in the form of its .WEB application, correct?
A. That I don't know. I was not involved in any of that.

Q. Well, I'll represent to you that NDC had an application pending with ICANN on October 11, 2018, for the .WEB gTLD. Are you aware that ICANN considers those applications to form a contract?

A. Yes.

Q. And VeriSign also at the time had a contract with NDC, the Domain Acquisition Agreement it executed with NDC, correct?

A. I will -- if you're representing that that's correct, then I have no reason to dispute it. I don't know that on my own.

Q. Well, I'll represent to you that NDC and VeriSign executed an agreement called the Domain Acquisition Agreement in August of 2015, and that the contract was not fully performed as of October 11, 2018.

So if that's correct, would it also be fair to say that VeriSign had a contract with NDC pending at the time of this meeting?

A. If -- I think -- I think that the answer is yes. I think if what you said is correct, then they would have a contract pending.

Q. And are you aware, sir, that VeriSign has
argued in this IRP that its contract with NDC would
be affected by this IRP, correct?

A. No, I don't -- I don't know what
VeriSign's arguing. I am not involved in this
other than how I am making a witness statement.

Q. Okay. Fair enough.

Turning to the next page of this
transcript, Page 16, again, that's our Page 16,
Ms. Eisner stated that she would, quote, "come back
on list with some proposals of how to integrate
some of these ideas into the interim rules."

Do you see that, sir?

A. Yes.

Q. And by "list," she meant the email to the
IOT LISTSERV; is that right?

A. That's my understanding.

Q. Okay. If we turn to the next tab in your
binder, Tab 6 -- actually, let's turn to Tab 9 --
Tab 8 first, I'm sorry. This is an email that
Mr. Turcotte sent on your behalf to the IOT
LISTSERV on October 19th; is that correct?

A. Yes, that's the way it looks.

Q. And I am now reading the fifth paragraph
here. In this paragraph you write that, "As
Sam" -- that is Ms. Eisner -- "attempted to draft
the compromise in this respect she encountered
difficulty in capturing the language that she felt
would be consistent with the bylaws."

I'll represent to you, sir, that this is
about Rule 7.

"Sam reached out to me in my participant
capacity and we discussed over the ensuing days."

Do you see that, sir?

A. Yes.

Q. And now turning back to Tab 6 in your
binder, this is an email that Ms. Eisner sent to
you on October 12th, the day after that IOT meeting
we were discussing. And is it fair to say that
this is the email in which Ms. Eisner reached out
to you in your participant capacity to describe the
difficulty she was having in drafting the
compromise on Rule 7?

A. That's the way it appears.

Q. And, again, the compromise was that while
you had suggested granting entities with a
significant interest in the subject of an IRP the
right to intervene as a claimant, as we saw from
your edit, Ms. Eisner, as we saw from your witness
statement, had proposed a compromise to move the,
quote, "protection for persons with a significant
interest to the amicus curiae section"; is that right?

A. I believe that's correct.

Q. Now, turning to Ms. Eisner's email, in the first paragraph she writes, and I am just going to summarize here, but do read the full paragraph, that she writes that she tried to develop some language to expand the amicus section of Rule 7, but she was concerned that this would take away from the discretion of the Panel on a much broader basis than is currently allowed; is that correct?

A. Yes, that's the way it sounds.

Q. And in the second paragraph, Ms. Eisner writes that giving this amicus protection as of right based on a significant interest is also broader than what the IOT discussed in outcomes of the public comment, correct?

A. I think that's what she said, yes.

Q. And she also says in this paragraph that there was no basis in the public comments to develop a rule that would provide for broader amicus participation as of right; is that correct?

A. I am reading. Let me see. Can you restate your question? I don't see that here.

Q. Sure. Perhaps I can refer you to some
language and then ask my question.

Ms. Eisner writes, "As I understand" --
and maybe, Chuck, you can highlight this as I go through -- "we agreed as an IOT and we have
reflected in the rules that those who participate
in underlying Panels should have the ability to
participate as of right (either as a claimant or as
an amicus). We did not have comments on nor agree
as an IOT, from what I" -- meaning Ms. Eisner --
"can tell, that having an interest that might be
impaired by or is similar to that which is under
discussion should give a right to participation."

So my question is: What Ms. Eisner is
saying here is that the IOT did not have comments
on nor agree to develop a rule that would give a
right to participation based on a party's
representation that they have a right that might be
impaired by or is similar to that which is under
discussion in an IRP; is that correct?

A. I think that's what she was saying.

Q. And in the third paragraph, Ms. Eisner
proposes at the end of that third paragraph to
defer this discussion of Rule 7 for when the IOT
took up the final set of rules; is that correct?

A. Just one second. I think that's correct.
Q. And because if you look at particularly the last line, she says, "Depending upon the scope of the final rule we propose, we then have to see how significant a change it is from what was posted for comment previously."

What she's saying there is that the IOT had a rule of procedure that if there was a significant change, then it would require the IOT to go out for a second public consultation; is that correct?

A. I think that's what she's saying.

Q. Now, Ms. Eisner closed this by saying that, "My thought is that the rules are broad enough, and in particular, the amicus rules are quite broad as well."

What she's saying there is we should just wait for the final rules because your concerns are difficult to draft to reflect correctly, the current rules are quite broad and sufficient to protect most of those parties, and we should really do this when we have more time; is that fair?

A. I think that's what she was saying.

Q. Now, I will represent to you, Mr. McAuley, that October 12th, 2018, was a Friday. Do you recall emailing Ms. Eisner that you would review
her email over the weekend?

A. I do not recall that.

Q. Then on Monday, October 15, 2018, do you recall responding to Ms. Eisner's email that you had concerns about the substance of her email and that you would discuss those with her on your 1:00 p.m. call?

A. I do recall something like that. The time and the date, I don't remember.

Q. I understand it was a few years ago at this point.

Did you, in fact, have a call with Ms. Eisner to discuss her concerns as she set them out here in her email of October 12th?

A. I don't recall it, but -- I don't recall it, but I would not be surprised.

Q. Do you recall discussing Ms. Eisner's view that amicus participation rules were quite broad, in her phrase, and sufficient to protect the interests of potential Amici during the period between the -- the period that the interim rules would come into effect and when the final rules were adopted by the Board?

A. I recall having discussions with Sam about this because we were -- we did not agree on this.
As to when we said what we said, I don't recall.

But I do recall I was not as convinced as she was on two things. One is that I was concerned that Amici -- one of the reasons I used the term "claimants" is I thought that people should have a fair chance to defend their interest, and I wasn't convinced or I didn't know that Amici would do that.

The other thing was, with respect to final rules, is that we worked in the IOT -- I guess in ICANN generally it takes a long time to get things done, and we were very, very hung up on time for filing. In fact, 90 percent, 85 percent of our time was spent on time for filing, and I didn't see a compromise coming.

So I am not sure I agreed with Sam that final rules could be coming any time soon, but I don't recall specifics.

Q. So was it Ms. Eisner's position that the gap between when the interim rules were adopted and when the final rules would have been drafted and adopted by the Board, that that would have been a relatively short period of time?

A. No, I don't think she was saying that. In fact, things just take a long time. I think Sam
recognized -- it is very complex, but in Rule 4, "Time for Filing," Rule 4 has two sort of timing things. One is when you file, when you learn of some acts that harmed you, but the second part of Rule 4 is there would be an end date, that no matter what a party knew, there would be a time within which a claim would just get old and couldn't be made anymore.

I think Sam agreed. We all talked about a placeholder, a way to move forward the interim rules where someone would not be impacted by the time for filing, the second part of that rule.

So we were talking, I think at one point, of the end date could be two or three years, but I don't think Sam expected that we would have a rule on time for filing, final rules in short order. I can't speak for her, so I shouldn't have said that.

I can't speak for Sam, but I think it was many of us in the IOT -- I thought that it would be years before we got the final order.

Q. Okay. You know, in fact, you said that things take quite a long time. In fact, the IOT began work in and around May, June, July of 2016; is that correct?

A. Let me think. We began -- that sounds
about right, yes, just before the bylaws were adopted, I think.

Q. Right. And you put a first draft of the proposed supplementary procedures out for public comment in November of 2016, correct?

A. I don't recall when it was.

Q. I will represent to you that it was, in fact, the end of November 2016. Do you recall that the comments came in in -- by February 2017?

A. I do recall that it was around that time.

Q. And then it took from February 2017, when you had the draft rules and the public comments, to get -- it took all the way to October 2018, so a little bit over a year and a half until you could get the interim rules in front of the Board for a vote; is that right?

A. I believe that's correct.

Q. And, you know, during this time between February 2017 and October '18 -- let me just say from February 2017 through, let's say, June of 2018, ICANN didn't say during any IOT meeting that it was under tremendous pressure to get this done immediately; is that right?

A. Not that I recall. I don't recall
anything like that.

Q. Now, do you remember in October of 2018, actually in connection with your discussion on this Rule 7 issue, Ms. Eisner represented that she was under a lot of pressure to get these rules to the Board, and the reason for that is that ICANN was on the precipice of having an IRP filed.

Do you recall that?

A. I don't recall the latter part of that. I do recall that -- I don't think I recall it the way that you asked it.

I recall that there was a great deal of frustration in the group that we spent so much time on the statute of limitations question, and we had developed some rules. It got to a point where -- I think it was Sam that recommended that we put out what we have.

So I think there was pressure both within the group. It is just hard to remember.

Q. Let me help you refresh your recollection. If you could turn back to Tab 5, which is the October 11th transcript, and look at the top of Page 16.

What Ms. Eisner states there -- on the prior page you'll see that it was Ms. Eisner
speaking here. She says, "But there will be a point that we can agree that we could get a set of interim rules in place so that we will have something, because from our standpoint, from the ICANN Org side, we are getting very nervous that we are on the precipice of having IRPs filed for which we don't have an adequate set of procedures to meet the bylaws. So we have that pressure."

Do you see that, sir? Does that help refresh your recollection?

A. Yes, I believe that's what she probably said.

Q. I'd like to direct your attention to Tab 7 in your binder, and this is an email that Ms. Eisner sent to you on October 16th, which contains her proposed revisions to Rule 7.

Do you see that?

A. Yes.

Q. So if I could just summarize the timeline, because we have looked at a few different things, you send an email with suggested revisions on October 11th. They are discussed later that day at the IOT meeting on October 11th. During that meeting Ms. Eisner says she will come back on list and propose something to the group.
Ms. Eisner on October 12th sends you an email saying that she's got these concerns that we went through. And now on October 16th she has sent this email with her proposed language.

Is that the timeline as you understand it, sir?

A. I think so.

Q. And you said that you remembered speaking with Ms. Eisner but you couldn't remember when. My question is: By looking at her changes here and the fact that it is, you know, very different than what she wrote on October 12th, just four days earlier, does that help refresh your recollection that you and she may have hashed out her concerns in the interim, perhaps on that phone call on Monday the 15th?

A. It helps me think that that could happen, that we tried to negotiate the differences between us.

Q. Okay. Now, turning to Tab 13 in your binder, this is an email that you sent to Ms. Eisner with some suggested -- you say you are attaching a few changes that Sam suggested language on in Track Format.

Do you see that?
A. I do.

Q. And if you turn to the third page in that exhibit, it appears that you have excerpted Ms. Eisner's language from the 16th and made a few changes here; is that fair to say?

A. That's the way it looks to me, yes, looking at it now.

Q. Okay. So the first change that you make is that -- it's where Ms. Eisner wrote that, "If the IRP relates to an application arising out of ICANN's new gTLD Program, an entity that was part of the contention set for that string at issue in the IRP shall be deemed to have a material interest in DISPUTE," and she had gone on to write, "and may participate as an amicus before the IRP Panel," and you changed that to "and shall be permitted."

Do you see that, sir?

A. I do.

Q. And that's an edit that you made; is that right?

A. It looks to me like that's so.

Q. And if you look down at the next set of edits -- or just as it continues after that sentence, you'll see you made the same edit regarding any entity that is external to the
dispute, you again replaced "may participate" with "shall be permitted to participate."

Do you see that?

A. I see that.

Q. Now, before this set of edits, Ms. Eisner had kept the original language about "entities that had participated in underlying proceedings (a process-specific expert panel pursuant to the bylaws)," and she had also written there, "shall be deemed to have a material interest and may participate as an amicus before the IRP PANEL."

But you did not change "may participate" as an amicus there to "shall participate"; is that fair?

A. I have lost where that is. Can I see it? Is it on the screen now?

Q. It is. It is right before -- you can see the underlines and the highlighting. It is the sentence before that. It says, "A person, group or entity that has participated in an underlying proceeding (a process-specific expert panel) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an amicus before the IRP PANEL."

My observation there and question to you,
sir, is that you did not change "may participate"
there to "shall participate"; is that correct?

A. That looks to be the case.

MR. LITWIN: Okay. Mr. Chairman, I would
like to take a brief break at this point to confer
with the other members of my team about where we
are in the process, but I think I am coming very
close to the end here.

ARBITRATOR BIENVENU: Very well. So we'll
break for a few minutes to give you an opportunity
to consult.

MR. LITWIN: Thank you, Mr. Chairman.

(Whereupon a recess was taken.)

MR. LITWIN: Mr. McAuley, all that's left
for me to do is thank you very much for your time
this morning. I am sorry about the technical
difficulties, but I am happy we were able to get it
sorted. Thank you very much.

THE WITNESS: Thank you.

Can you all hear me?

MR. LITWIN: We can.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: Yes, we can hear you
very well, Mr. McAuley.

Any questions from my fellow panelists,
Professor Kessedjian, Mr. Chernick?

ARBITRATOR KESSEDJIAN: No questions for me. Thank you.

ARBITRATOR CHERNICK: None for me. Thank you.

ARBITRATOR BIENVENU: Mr. McAuley, at the beginning of your cross-examination, you were asked to enumerate the documents that you had reviewed to prepare for your appearance before the Panel today. Do you remember that?

THE WITNESS: I do, yes.

ARBITRATOR BIENVENU: And you mentioned your statements, the exhibits to your statement, Ms. Eisner's statement and some of the public comments on the interim rules.

You did not mention the Panel's decision in Phase I of this IRP. Did you read the decision of the Panel in Phase I?

THE WITNESS: No, sir, I did not.

ARBITRATOR BIENVENU: Was the substance of that decision as it relates to your evidence and the matters that were canvassed today in your cross-examination summarized to you?

THE WITNESS: No, they weren't.

MR. BLACKBURN: I'm sorry, I was on mute.
I would caution the witness not to reveal any communications with counsel regarding the Phase I decision.

ARBITRATOR BIENVENU: Yes, please, with that -- with paying heed to that caution, can you tell me if you know what the decision of the Panel on Phase I was in relation to the matters that were canvassed in your cross-examination today?

THE WITNESS: Mr. Chairman, I don't know what Phase I was. I have decided -- I personally decided not to read any of the pleadings for -- anything to do with that -- with the IRP.

ARBITRATOR BIENVENU: Incidentally, Mr. McAuley, you were -- you had a discussion with Mr. Litwin concerning your current responsibilities at VeriSign. I think he questioned you about the business development aspect of your title.

So how would you summarize your present responsibilities at VeriSign?

THE WITNESS: I would say that my responsibilities at VeriSign have essentially 100 percent to do with policy work, and the business development aspect of my title is unfortunate.

Perhaps I should have made a point of it when Ms. Borissova suggested that as a title, but I
didn't. I didn't make an issue of it. I am talking about the business development part.

ARBITRATOR BIENVENU: Thank you.

Do you know Mr. Paul Livesay?

THE WITNESS: The name rings a bell.

ARBITRATOR BIENVENU: He held the position of vice president and associate general counsel at VeriSign between 2014 and 2018.

THE WITNESS: I was just going to say, I do recognize that name. I don't know him. I don't know that he and I had any interactions. None that I recall.

ARBITRATOR BIENVENU: So you are basically -- I think you have answered -- you have answered my next question. You haven't had any interaction with Mr. Livesay between and including the year 2016 and 2018?

THE WITNESS: Not that I recall.

ARBITRATOR BIENVENU: Thank you. I have no more questions for the witness.

Mr. Blackburn, do you have any redirect?

MR. BLACKBURN: Yes, Mr. Chairman. Would it be possible to have a short recess to confer with my colleagues before commencing?

ARBITRATOR BIENVENU: Yes. Absolutely.
Just let us know when you're ready.

MR. BLACKBURN: Thank you.

(Whereupon a recess was taken.)

ARBITRATOR BIENVENU: Please proceed, Mr. Blackburn.

REDIRECT EXAMINATION

BY MR. BLACKBURN

Q. Mr. McAuley, do you recall that Mr. Litwin asked you a question regarding the application -- sorry, the use of the IRP process by participants in the new gTLD Program?

A. Yes, roughly.

Q. Is the IRP process in ICANN's bylaws limited to use by applicants in the new gTLD Program?

MR. LITWIN: Objection; leading.

THE WITNESS: In my opinion the IRP process --

ARBITRATOR BIENVENU: Mr. McAuley, just a minute, Mr. McAuley.

THE WITNESS: Sure.

ARBITRATOR BIENVENU: You're asking -- could you reformulate your question, Mr. Blackburn? Surely you're asking the witness for his understanding, correct?
MR. BLACKBURN: Yes, yes.

Q. Mr. McAuley, is it your understanding that the IRP process is limited to use by participants in ICANN's new gTLD Program?

MR. LITWIN: This is also leading.

ARBITRATOR BIENVENU: You want to try reformulating your question, Mr. Blackburn?

Q. BY MR. BLACKBURN: Mr. McAuley, who may file an IRP under ICANN's bylaws?

A. It is my understanding that anybody can file an IRP under ICANN's bylaws who believes they have been harmed by an action or inaction by ICANN that they claim violated the articles of incorporation or the bylaws.

Q. Does that mean that the people who fall within that group is not limited to participants in the new gTLD Program?

MR. LITWIN: Objection. Mr. Chairman, Mr. Blackburn is clearly leading the witness here. If he wants to ask what Mr. McAuley's understanding is, he should ask him, "What's your understanding?"

MR. BLACKBURN: I'll rephrase.

Q. Mr. McAuley, you just testified that to your understanding, anyone who qualifies as a claimant could participate -- could file an IRP
under ICANN's bylaws; is that correct?
   A. Yes. Anybody who feels that any action or
   inaction by ICANN, whatever that might be, could
   be -- could bring a claim at an IRP if they allege
   that ICANN's actions violated the bylaws or its
   articles of incorporation and cause them harm.
   Q. To your understanding, was there any
   limitation on the subject matter that a claimant
   could allege was a violation of the bylaws or
   articles of ICANN?
   MR. LITWIN: Mr. Chairman, I apologize,
   but he keeps asking yes-or-no questions to this
   witness, and it is totally inappropriate on
   redirect.
   ARBITRATOR BIENVENU: Mr. Blackburn, do
   you want to reformulate it? It is true.
   MR. BLACKBURN: I will move on.
   Q. Mr. McAuley, do you recall Mr. Litwin
   asking you about a litigation waiver in the new
   gTLD Program guidebook?
   A. I do.
   Q. And were you aware of that litigation
   waiver in the new gTLD Program while you were
   performing your work on the IRP-IOT?
   A. I was not.
Q. Are you aware of any other litigation waivers that ICANN has imposed with respect to any other person who may file a claim under the -- an IRP claim against ICANN?

A. No, I am not aware of any waivers. The IRP is open. There's no waivers that I am aware of.

Q. Okay. Could we put up Tab 5 on the screen, turn to Page 6. Actually, strike that. Let's turn to Tab 4.

Mr. McAuley, do you see Tab 4, which is your October 11, 2018, email about which you were asked some questions earlier?

A. Yes, I do.

Q. And if you could turn to the attachment to that email that you also were asked some questions about. The purple line which is identified in this document, those are your edits to the existing -- the language at that time for Rule 7 in the interim procedures?

A. That's my understanding, yes.

Q. And in looking on the page which is marked Page 5, there's a paragraph. Is that an edit by you with respect to a party's right to intervene in an IRP process?
MR. LITWIN: Mr. Chairman, again, these have all been yes-or-no questions. Mr. Blackburn obviously knows how not to ask a leading question, he's just not doing it.

ARBITRATOR BIENVENU: Overruled. I think this is an exception.

MR. BLACKBURN: It is foundational, yes.

THE WITNESS: That's my --

ARBITRATOR BIENVENU: I agree with Mr. Blackburn, that it is foundation. I will allow the question. We will see where we go.

MR. LITWIN: Okay. Thank you, Mr. Chairman.

Q. BY MR. BLACKBURN: So, Mr. McAuley, these are your edits to the section of Rule 7 regarding intervention, correct?

A. Yes, sir.

Q. Did you propose any -- at this time any edits to Rule 7 with respect to the amicus participation rights?

A. Not that I recall.

Q. And if you could turn the page, and you see at the top it says, "Participation as an Amicus Curiae." Did you -- strike that.

Mr. McAuley, you testified earlier about a
potential call with Ms. Eisner in the October 2018
time frame.

  Do you recall that?
A. I recall being asked about it.
Q. Did you -- during your time on the
IRP-IOT, did you frequently have telephone calls
with Ms. Eisner?
A. No. I had calls with a number of people
on the IOT, but I wouldn't say they were very
frequent at all.
Q. Did you have any calls with Ms. Eisner
during your time at the IOT?
A. I believe the answer would be yes.
Q. Do you recall approximately how many calls
you had with Ms. Eisner in the 2016 through 2018
time frame of your participation on the IRP-IOT?
A. I believe it would be less than five,
maybe less than four. It is hard to recall
honestly, but our practice was to meet -- not
just -- every one of us was to meet at the meetings
on the list. As I said, I spoke on the phone with
a number of people, but very, very infrequently.
Q. Do you have any recollection of whether or
not your calls with Ms. Eisner tended to be long or
brief?
A. They were short. It was hard to get time, hard to -- I am not a long-phone-call person.

Q. Would you just pick up the phone and call Ms. Eisner or would you schedule calls with her?

A. I would generally schedule a call with her.

Q. And was there any particular reason for that?

A. She was hard to get in touch with. I knew that the first time I ever tried to do it, but I would schedule a call with anybody on the IOT that I wanted to speak to.

Q. Mr. McAuley, do you know what a CEP is under ICANN's bylaws?

A. I believe it is a Cooperative Engagement Process.

Q. Were you aware in October 2018 that Afilias had filed a CEP with ICANN?

A. I believe that I was not. I don't -- I don't pay attention to CEP. I don't pay attention to IRP, really.

Q. And in October of 2018, were you aware that Afilias had threatened to file an IRP against ICANN with respect to .WEB?

A. I was not.
Q. Did Ms. Eisner ever tell you that Afilias had instituted a CEP with ICANN regarding .WEB?
A. Not that I recall.

Q. Did Ms. Eisner ever tell you that Afilias had threatened to file an IRP with respect to .WEB at any time prior to -- in October 2018?
A. Not that I recall.

Q. Had she told you that at any time?
A. I don't think so.

Q. Mr. McAuley, are you aware that VeriSign has participated in ICANN's new gTLD Program?
A. I don't know about the new gTLD Program.

I think -- I think that VeriSign got an IDN, but I don't know.

Q. Were you involved in VeriSign's participation in ICANN's new gTLD Program?
A. I was not.

MR. BLACKBURN: I have no further questions.

THE WITNESS: I can't hear.

MR. BLACKBURN: I have no further questions.

ARBITRATOR BIENVENU: Forgive me. It is the second time that I forget to unmute my phone.

I was told that only the administrative secretary
heard one of my rulings on Mr. Litwin's objections, so I apologize for that.

So I was in the process of asking if my colleagues had any supplemental questions for Mr. McAuley.

ARBITRATOR CHERNICK: No.

ARBITRATOR KESSEDJIAN: I don't.

ARBITRATOR BIENVENU: Thank you very much. I believe it is for me, Mr. McAuley, to thank you very much, indeed, on behalf of all three members of the Panel and, indeed, all participants in this IRP for your evidence today. We are grateful for your time.

THE WITNESS: Thank you.

ARBITRATOR BIENVENU: I must also instruct you, Mr. McAuley, that our sequestration order extends to requesting witnesses not to discuss the case or their evidence with other individuals scheduled to appear before us.

So thank you very much.

THE WITNESS: Thank you. I should leave the meeting?

ARBITRATOR BIENVENU: You can leave the meeting. Thank you.

MR. ENGLISH: The witness is gone.
ARBITRATOR BIENVENU: Thank you, JD.

So, Counsel, do we move right away to Mr. Livesay, or what is next on our agenda?

MR. LITWIN: Mr. Chairman, it's my understanding that Mr. Livesay is not available today, and we'll commence his testimony tomorrow. The Jones Day lawyers should confirm that.

MR. JOHNSTON: The VeriSign lawyer will confirm that.

MR. LITWIN: My apologies.

MR. JOHNSTON: No problem.

ARBITRATOR BIENVENU: So is that the position, Mr. Livesay is available tomorrow but not today, correct?

MR. JOHNSTON: Correct.

ARBITRATOR BIENVENU: Excellent. Okay.

Very good.

So we had occasion to discuss the parties' respective decisions not to call -- or, rather, to go back on their decision to call the three expert witnesses discussed in the exchange of emails over the weekend, and we take note of the parties' decision and we'll live with it, as will the parties.

So from the perspective of the Panel, I
think that exhausts the agenda for today. Should we then resume tomorrow at the normal 8:00 a.m.
Pacific time -- time to begin the hearing, yes?

MR. LITWIN: Yes, Mr. Chairman.

MR. JOHNSTON: Yes, Mr. Chairman.

ARBITRATOR BIENVENU: I see heads nodding.

MR. LeVEE: I apologize. I was not 100 percent certain of your statement. Just to confirm that, the Panel will not be asking questions of the experts?

ARBITRATOR BIENVENU: Yes. Sorry, Mr. LeVee, if I was unclear. Yes, I said that we have discussed the parties' decision, and we will live with that decision. So we will not be asking for an opportunity to put the questions which we may have had to these witnesses.

MR. LeVEE: And the only other matter I would suggest, because we have one witness left, I would suggest that the -- first I wanted to ask the court reporter a question, if she's on, which is to give us an estimate of how long it will take for the final transcripts to be produced. And that will help inform the parties' discussions about a briefing schedule and so forth, which I am, perhaps, presumptively -- presumptuously we discuss
at some point tomorrow afternoon.

ARBITRATOR BIENVENU: No, it was on our agenda, Mr. LeVee. We provided in the parties' chart that we would have that discussion at the end of the hearing. So your question, if I may say so, is very relevant.

MR. LeVEE: Thank you. So if we knew when we would have the final transcripts, that would help the parties give some estimate on when we might provide the briefs to the Panel.

(Discussion off the record.)

MR. LeVEE: Perhaps, Mr. Chairman, the parties should have some discussion over the next -- the course of the rest of the day as to when we might propose to submit our posttrial brief -- posthearing brief, and that way we can know a little bit more about our respective views before we have that discussion with the Panel tomorrow.

ARBITRATOR BIENVENU: Right. When you say "the parties," you mean to include all the Amici?

MR. LeVEE: Oh, I did mean to include the Amici, yes.

ARBITRATOR BIENVENU: Thank you. So that's perfect with us, and we'll look forward to
having the parties and Amici's thoughts on the briefing schedule for posthearing briefs.

MR. LeVEE: Thank you, Mr. Chairman.

ARBITRATOR BIENVENU: Okay. So thank you all, and we will resume tomorrow at 8:00 a.m. Pacific time.

MR. JOHNSTON: Thank you.

MR. LeVEE: Thank you.

(Whereupon the proceedings were concluded at 11:15 a.m.)

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REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA )
) ss.
COUNTY OF SAN FRANCISCO )

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 18th day of August, 2020.

____________________
BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR
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