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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

VOLUME VII
ARBITRATION HEARING HELD BEFORE
AUGUST 11, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465538



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INDEPENDENT REVIEW PROCESS
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) 01-18-0004-
 INTERNET CORPORATION FOR) 2702
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 Respondent.)
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TUESDAY, AUGUST 11, 2020
ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME VII (Pages 1113-1308)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

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A-P-P-E-A-R-A-N-C-E-S
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CALIFORNIA, AUGUST 11, 2020

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ARBITRATOR BIENVENU: Mr. Livesay, good morning. Good morning, sir. I don't know where you're joining us from, but I made the presumption that "good morning" would work.

THE WITNESS: Yes, it's morning. I am here in California.

ARBITRATOR BIENVENU: Excellent. Sir, could I ask you to speak closer to your mic or to increase the volume of your mic?

THE WITNESS: Is that better? Can you hear me now better?

ARBITRATOR BIENVENU: It is better, but we could do with a bit more volume.

THE WITNESS: Let me put the mic here in front of my face. How about that?

ARBITRATOR BIENVENU: Mr. Livesay, my name is Pierre Bienvenu. I chair the Panel. My colleagues are Catherine Kessedjian, who is joining us from Paris, and Mr. Richard Chernick, who is joining from Los Angeles.

You have, sir, filed in connection with this Independent Review Process a witness statement dated 1st June 2020, correct?

1 THE WITNESS: Correct.

2 ARBITRATOR BIENVENU: And your statement
3 ends with your swearing that the statements in your
4 witness statement are true and correct?

5 THE WITNESS: Correct.

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

11 THE WITNESS: I do.

12 ARBITRATOR BIENVENU: Thank you.

13 Mr. Johnston.

14 MR. JOHNSTON: Good morning, Mr. Livesay.
15 Have you recently had an opportunity to review your
16 witness statement?

17 THE WITNESS: I have over the last few
18 days.

19 MR. JOHNSTON: And are there any
20 corrections you wish to make to it?

21 THE WITNESS: I think the only
22 clarification is there might be where I said not
23 four --

24 (Discussion off the record.)

25 ARBITRATOR BIENVENU: Maybe, Mr. Livesay,

1 maybe you could put your mic on something else so
2 it would be higher up. If you rest it on a book or
3 binder or whatever, it will be closer to you.

4 (Discussion off the record.)

5 ARBITRATOR BIENVENU: I believe
6 Mr. Johnston was asking if you had any corrections
7 that you wish to make to your witness statement,
8 and you were cut off in the course of your answer.

9 THE WITNESS: Right. I was simply stating
10 there's a point where I said I may have talked to
11 four or five of the potential set members, and I
12 can confirm I have only talked to four, not four or
13 five. It is a clarification. I don't think it is
14 inconsistent with the original statement.

15 MR. JOHNSTON: Mr. Chairman, we offer
16 Mr. Livesay for cross-examination.

17 ARBITRATOR BIENVENU: Thank you very much,
18 Mr. Johnston.

19 Mr. Litwin, you ready to proceed with your
20 cross-examination?

21 MR. LITWIN: I am, Mr. Chairman. Thank
22 you very much.

23 //

24 //

25 //

1 CROSS-EXAMINATION

2 BY MR. LITWIN

3 Q. Good morning, Mr. Livesay. My name is
4 Ethan Litwin. I am from the law firm of
5 Constantine Cannon. I understand that you have
6 likely received a package from us, as has
7 Mr. Johnston, and I would ask that you both open
8 them now.

9 A. All right.

10 Q. Mr. Livesay, as you will see, in fact, if
11 you just turn to your witness statement, which is
12 behind Tab 1, you'll see that we've marked each
13 page of the documents in that binder with a unique
14 page number. When I direct your attention to these
15 documents, I will refer to that unique page number,
16 okay?

17 A. The lower right-hand corner?

18 Q. Correct.

19 A. Okay.

20 Q. Now, there are a few documents that are
21 not in the binder. Those will be on the screen.
22 So I assume that you have been able to see on your
23 screen the documents that Chuck has been pulling up
24 this morning?

25 A. Yes.

1 Q. Okay. You're a little faint again, but I
2 think I can make it out.

3 A. I think it is just because when I look
4 away.

5 (Discussion off the record.)

6 Q. BY MR. LITWIN: All right. We are in
7 business.

8 Mr. Livesay, can you please tell me, in
9 addition to your witness statement, what other
10 documents you reviewed to prepare for your
11 testimony here today?

12 A. I reviewed some of the filings, I believe
13 Afiliast's filing from May, and then I also read
14 through some of the filings afterward, including
15 Afiliast's response and some of the other papers, but
16 largely just the filings over the last couple of
17 months.

18 Q. Did you look at any of the exhibits that
19 were referenced in those filings?

20 A. Exhibits -- I just read the filings mostly
21 directly.

22 Q. Okay. Mr. Livesay, you were employed at
23 VeriSign as a vice president and associate general
24 counsel between 2014 and 2018; is that correct?

25 A. Correct.

1 Q. And you had previously worked at VeriSign
2 in 2009-2010 as the vice president, strategy and
3 management for VeriSign's digital certificate
4 business; is that correct?

5 A. Correct.

6 Q. And in 2010, you left VeriSign to join
7 Symantec when it acquired VeriSign's certificate
8 business; is that right?

9 A. Correct. I was sold off in that
10 transaction, correct.

11 Q. Do you recall the month in 2014 when you
12 returned to VeriSign?

13 A. I think I started early June, like the
14 first week of June 2014.

15 Q. And what about the month in 2018 that you
16 left?

17 A. I believe my last day was early May of
18 2018.

19 Q. And what was the reason for your departure
20 in 2018?

21 A. I live in the Silicon Valley and VeriSign
22 is in Reston, Virginia. I was commuting every
23 other week for almost -- well, a long time. I got
24 separated from my wife in 2017 and ultimately just
25 had to return home.

1 And at that same time my mother was going
2 through a severe decline, had to take over as her
3 medical attorney-in-fact, and she went into
4 hospice. So I had that kind of stuff.

5 Q. Understood, Mr. Livesay.

6 A. I also wanted to take care of some stuff.

7 Q. Did you sign any sort of termination
8 agreement when you left VeriSign?

9 A. I'm sure I was exited as part of a
10 reduction in force. I am sure there was some forms
11 that I signed or whatnot.

12 Q. Did you sign anything related to providing
13 VeriSign with assistance in matters relating to
14 disputes concerning .WEB?

15 A. I don't recall anything like that as a
16 part of my departure, no.

17 Q. Since you left VeriSign, where have you
18 been employed?

19 A. Since leaving VeriSign, I am basically
20 working as an independent attorney contractor, as
21 you say, because I was dealing with a lot of other
22 family stuff at the time.

23 Q. Have you done any work for VeriSign since
24 leaving in 2018?

25 A. No, not until they contacted me in early

1 May regarding this matter.

2 Q. In early May of?

3 A. This year.

4 Q. Of this year?

5 A. Yeah.

6 Q. Are you providing your testimony in this
7 case pursuant to any contractual agreement with
8 VeriSign?

9 A. No.

10 Q. Have you been compensated in any way for
11 the assistance you have provided to VeriSign in
12 connection with these disputes concerning .WEB?

13 A. Nope.

14 Q. Do you have any financial interest in the
15 outcome of the .WEB dispute?

16 A. Nope.

17 Q. Okay. In 2014 you were asked to identify
18 potential business opportunities for VeriSign in
19 ICANN's new gTLD Program; is that right?

20 A. Yeah, towards the end of '14, yeah, I
21 began -- I started middle of '14 I was doing some
22 stuff having to do with strategy and the patent
23 group stuff. Later in the fall I kind of got into
24 this program, yeah.

25 Q. Who gave you this assignment?

1 A. My boss at the time, Tom Indelicarto, and
2 Jim Bidzos, the CEO.

3 Q. Mr. Bidzos personally instructed you to
4 identify opportunities in the new gTLD Program?

5 A. I worked for two people at the company, my
6 immediate boss and his boss. I do what they ask me
7 to do.

8 Q. Well, my question is: Do you recall
9 receiving this assignment from somebody?

10 A. You know, we had small discussions. I
11 don't recall a specific -- I am not really sure
12 what you're asking, because, like I said, I had
13 discussions with these two executives, and I was
14 asked to pursue and find opportunities in this
15 area.

16 Q. Okay. That's fair enough.

17 Just for the court reporter, could you
18 spell Indelicarto and Bidzos for her?

19 A. This is going to be good. Indelicarto,
20 I-n-d-e-l-i-c-a-r-t-o, Indelicarto, I think.

21 Q. I think that's right.

22 A. Bidzos, B-i-d-z-o-s.

23 Q. Thank you. Did you report back to
24 Mr. Indelicarto or Mr. Bidzos as you proceeded to
25 work on this assignment?

1 A. Sure, absolutely.

2 Q. How often?

3 A. Probably weekly or biweekly as we
4 progressed trying to investigate this area.
5 Obviously -- go ahead. Sorry.

6 Q. In what form did you report back, was it
7 in writing, email, memo, small meetings?

8 A. Most commonly small meetings talking about
9 the development and progress of matters.

10 Q. Did you collaborate on this project with
11 anyone else at VeriSign?

12 A. Not sure what you mean by "collaborate,"
13 depending on where in the project we were. Early
14 on it was a very small group. As we got into
15 later, working on the agreement became more
16 involved. There were other attorneys involved in
17 the drafting and that kind of stuff.

18 Q. So let's break this into the -- what I'll
19 call the investigative stage and the contracting
20 stage; is that fair, Mr. Livesay?

21 A. Within reason, yes, that's probably fair.

22 Q. Okay. So during the investigative stage,
23 how big was the group you were working with?

24 A. It was pretty small. A little project
25 group. I don't know entirely who else might have

1 been aware of the project outside of the few
2 executives I mentioned. I am not telling anyone
3 outside my -- those folks at that time.

4 Q. So outside of Mr. Bidzos and
5 Mr. Indelicarto, is there anyone else who was
6 working with you to identify opportunities in the
7 new gTLD Program?

8 A. Well, certainly there was some people on
9 the business side who were evaluating and making
10 the decisions whether it makes sense for us to get
11 into the gTLD market.

12 Q. Who were they -- I'm sorry.

13 A. I am not sure of everyone. I know I
14 worked with a gentleman by the name of John Cochran
15 at the time who was in the corporate strategy
16 group. I think he rolled up through finance.

17 To be fair, though, there's a distinction,
18 I think, between the business folks looking at
19 whether it makes sense for us to go into this
20 business and whether or not they were necessarily
21 involved in the project of pursuing opportunities.

22 What I mean by that is there was a
23 decision to potentially look at this opportunity,
24 but the folks developing that intel maybe weren't
25 necessarily aware of what I was doing in trying to

1 pursue an actual agreement with a contention
2 member.

3 Q. Okay. And what was Mr. Indelicarto's
4 title?

5 A. He's general counsel.

6 Q. And Mr. Bidzos?

7 A. He's the chairman, CEO and whatever stuff
8 you could put on there.

9 Q. Now, when you moved to the contracting
10 time of this project, you mentioned that other
11 lawyers were involved. Who were they?

12 A. Specifically a guy by the name of Kevin
13 Ristau, R-a-s-t-a-u, I think it is, and Rob Wilson.

14 Q. And the Panel is familiar with a document
15 called the Domain Acquisition Agreement, which is
16 the agreement you signed with NDC. Did Mr. Ristau
17 and Mr. Wilson draft that document?

18 A. They were definitely involved in the
19 drafting of that document for sure.

20 Q. Were you involved in the drafting of that
21 document?

22 A. Sure.

23 Q. I'm sorry, didn't hear that?

24 A. Yes.

25 Q. Did you work with Mr. David McAuley on

1 this project at all?

2 A. I don't recall that name, no, not on that
3 project.

4 Q. Do you know Mr. McAuley?

5 A. The name sounds familiar. Maybe he's a
6 VeriSign person, but it's been a while. I don't
7 recall.

8 Q. That's the same exact answer he gave about
9 you. He knew your name, but wasn't familiar.

10 Now, you got this project in 2014, and
11 that was after the new gTLD application window had
12 closed, correct?

13 A. I believe the application window closed in
14 '12, so yeah.

15 Q. Following the closure of the application
16 window, VeriSign had raised concerns with ICANN
17 about the risk of name collision; is that right?

18 A. I am not sure. I don't know. I think
19 that's handled within another group within
20 VeriSign.

21 Q. So are you aware that name collision
22 concerns the risk that delegation of new gTLDs
23 could interfere with the attempts to reach a
24 private domain and instead would result in
25 resolving to a public domain as well?

1 A. I thought you asked whether I was aware
2 somebody had communicated about it. I thought
3 that's what you asked. I am aware of the concept
4 of name collision.

5 Q. Okay. And just to be clear that we
6 understand what name "collision" is, so if there
7 were a registry for, let's say, .HOME or .CORP, for
8 example, a lot of people use those for their
9 private Internets, right?

10 A. I don't know. That's not my expertise.

11 Q. Would it be fair to say through its
12 lobbying efforts on name collision, VeriSign
13 managed to at least preliminarily take close to 10
14 million domain names off the market in 2013?

15 A. I have no idea what you mean by VeriSign's
16 lobbying, and I was not with the company in 2013.

17 Q. In January of 2014, ICANN announced that
18 it had received over 1,900 applications for new
19 gTLDs.

20 Do you recall that?

21 A. I wasn't with the company at that time.
22 You said January '14; is that right?

23 Q. Yes.

24 A. No. I joined in June of '14.

25 Q. Did you follow the progress of the new

1 gTLD Program during your time at Symantec?

2 A. No. Prior to joining VeriSign in 2014, I
3 had never been a part of the DNS world. Prior to
4 that, my history in security infrastructure had
5 been on the encryption side and then on the
6 certificate side. So me coming to VeriSign related
7 to the naming business was a new industry to me.

8 Q. Okay. When you joined VeriSign in June of
9 2014, were you aware that ICANN had announced that
10 it had received over 1,900 applications for new
11 gTLDs?

12 A. I am aware that they received a lot of
13 applications. That number sounds correct.

14 Q. And did you become aware in June of 2014,
15 when you began work on this assignment -- scratch
16 that.

17 When you returned to VeriSign, did you
18 become aware that ICANN had announced that it was
19 possible that the DNS would end up expanding by
20 over 1,300 gTLDs; is that right?

21 A. Certainly as I looked into the gTLD
22 program, I became aware of the large increase in
23 number of TLDs that would become available
24 potentially.

25 Q. And over the course of 2013 and 2014, are

1 you aware that quite a few articles had been
2 published from the financial press raising concerns
3 about the slowdown in the growth of the .COM
4 registry?

5 A. I wasn't with the company in 2013.

6 Q. Well, in your discussions with Mr. Bidzos,
7 the CEO, and Mr. Indelicarto, the general counsel,
8 did they disclose to you that there had been
9 concerns raised about the slowdown in the growth of
10 the .COM registry?

11 MR. JOHNSTON: Excuse me, Mr. Chairman,
12 I'd like to ask the witness to be conscious of the
13 fact that that question specifically refers to
14 conversations with Mr. Indelicarto, who is the
15 general counsel of the company, and ask the
16 witness, in the event of answering the question, it
17 might divulge any attorney-client communications
18 with Mr. Indelicarto, that he alert us so that
19 doesn't happen. Thank you.

20 MR. LITWIN: If I might respond briefly,
21 Mr. Chairman, I think we've established that the
22 meetings between Mr. Livesay, Mr. Indelicarto and
23 Mr. Bidzos concerned the business side of VeriSign.
24 I am asking a business question. I am not asking
25 for the witness to divulge any legal advice.

1 ARBITRATOR BIENVENU: I understand your
2 point, and Mr. Johnston did not object to the
3 question. He simply cautioned the witness not to
4 disclose what could be privileged communications in
5 the course of his answer.

6 Unless Mr. Johnston advises otherwise, I
7 did not hear him object to the question.

8 MR. JOHNSTON: That's correct.

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

11 Q. Mr. Livesay, I will echo Mr. Johnston's
12 comment that at no time during my examination I
13 would ask you to reveal the substance of a
14 privileged communication. And please tell me if my
15 question, in your mind, elicits one.

16 My question is: Over the course of your
17 discussions with Mr. Indelicarto and Mr. Bidzos
18 concerning the -- finding opportunities for
19 VeriSign in the new gTLD Program, did they reveal
20 to you that during 2013 and 2014 there had been
21 articles published in the financial press raising
22 concerns about the slowdown in the growth of the
23 .COM registry?

24 A. I don't recall having any specific
25 discussions with Bidzos about that. I do know that

1 there has been obvious legal history and work
2 around that topic, but I am not a competition
3 attorney. I am not involved in the running of
4 .COM. That was a separate business unit, and I was
5 really invoked to try to find ways that the company
6 could simply have more opportunities at other
7 domains to sell more domain.

8 The history of .COM was a separate running
9 enterprise, not my forte.

10 Q. Now, in 2015, VeriSign sought to acquire
11 the rights to the .WEB registry by concluding the
12 DAA; is that correct?

13 A. I'm sorry, say that again?

14 Q. In 2015, VeriSign sought to acquire the
15 rights to the .WEB registry by concluding the DAA
16 with NDC; is that correct?

17 A. I don't know about the DAA, period. There
18 are several steps in that agreement. The goal was
19 hopefully finance or help NDC finance, win the
20 auction, and if they became the registry, that they
21 would seek to have it assigned to us.

22 So there were definitely some steps
23 involved. I don't know if I would say -- use your
24 description about finally signing.

25 Q. Well, let me rephrase it, Mr. Livesay.

1 Is it fair to say that the ultimate
2 objective that VeriSign sought to achieve by
3 entering into the DAA with NDC was the acquisition
4 of the rights to the .WEB registry?

5 A. The goal was for us to become the operator
6 of .WEB.

7 Q. And VeriSign has not signed any other
8 deals to acquire other gTLDs; is that right?

9 A. Not that I am aware of. Not in the time
10 that I was there.

11 Q. Were you aware, as you worked on this
12 project during the end of 2014 and 2015, that the
13 .COM Registry Agreement was due in the fall of
14 2016?

15 A. I don't recall being aware of that at the
16 time, no.

17 Q. Is it fair to say that the .COM Registry
18 Agreement is the single most important contract
19 that VeriSign has?

20 A. I don't think I'd be a good judge of that.

21 Q. Well, .COM is responsible for over a
22 billion dollars in revenue for VeriSign; isn't that
23 right?

24 A. That's true. But you asked if that's the
25 most important agreement. I don't know. I don't

1 run that business. I am not part of that business.
2 I don't know.

3 Q. Would it be fair to say -- strike that.

4 In connection with your assignment in 2014
5 to identify potential business opportunities in the
6 new gTLD Program, you state in your witness
7 statement that you studied very closely the new
8 gTLD application guidebook; is that correct?

9 A. I did, yep.

10 Q. And the auction rules?

11 A. When we got around to the auction, yep.

12 Q. And the other rules -- let me step back.

13 So when you say when you got around to the
14 auction, does that mean that you studied those
15 rules in the run-up to the auction in 2016?

16 A. At some point I would have been reading
17 the auction rules and become aware of them. I
18 don't recall exactly when, but yep.

19 Q. Well, was that before or after you
20 executed the DAA -- or VeriSign executed the DAA in
21 August of 2015?

22 A. I don't recall reviewing auction or
23 bidding agreements prior to signing the DAA, but I
24 don't know. I don't recall it.

25 Q. And did you study the other body of rules

1 that comprise the relevant rules that govern the
2 new gTLD Program?

3 A. Like what?

4 Q. Well, you mentioned -- let's look at your
5 witness statement. If you can turn to Tab 1 in
6 your binder, and I would direct your attention to
7 Paragraph 5, you write, "I studied very closely the
8 new gTLD Application Guidebook published by ICANN,
9 the Auction Rules, and other information regarding
10 the new gTLD Program on ICANN's website to
11 familiarize myself with the rules applicable to the
12 Program."

13 So I guess my question is, Mr. Livesay:
14 Other than the guidebook and the auction rules,
15 what other rules did you review?

16 A. You know, I think generally I am referring
17 to -- the ICANN website has a lot of information on
18 it. Anything I could read, I did. That's where I
19 found information about, say, applicants, what they
20 had done, where they are located. I think that end
21 there is saying I used the ICANN website as the
22 primary source of information for how the program
23 is run and the applicants and the contention sets.

24 Q. Redacted - Third-Party Designated Confidential Information
25

1 Redacted - Third-Party Designated Confidential Information

2
3
4 A. Redacted - Third-Party Designated Confidential Information

5 Q. I would now like to refer to you Tab 4 in
6 your binder.

7 A. You know, I am just looking at this side
8 of the paper. That's why I'm looking down.

9 Q. Okay. That's fair. I am going to be
10 largely doing the same thing over here.

11 Chuck will put things up on the screen in
12 case it is unclear.

13 So these are some significant excerpts
14 from the new gTLD guidebook, and I will just
15 represent to you that we've included the entire
16 module where we have accepted the module, but we do
17 have the entire version available electronically.

18 I would like to direct your attention to
19 Page 95. And on Page 95 you will see Rule 4.1.3,
20 which you discuss in your witness statement.

21 This section is entitled "Self-Resolution
22 of String Contention."

23 Do you see that, sir?

24 A. Yep.

25 Q. Now, it provides that, "Applicants that

1 are identified as being in contention are
2 encouraged to reach settlement or agreement among
3 themselves that resolves the contention."

4 It goes on to say, "Applicants may resolve
5 string contention in a manner whereby one or more
6 applicants withdraw their applications."

7 It goes on to say, "It is understood that
8 applicants may seek to establish joint ventures in
9 their efforts to resolve string contention," and
10 then concludes, it says, "Accordingly," and I would
11 interpret that as "however," given how we have gone
12 through this, that, "new joint ventures must take
13 place in a manner that does not materially change
14 the application, to avoid being subject to
15 reevaluation."

16 Do you see that, sir?

17 A. Yep.

18 Q. So it's fair to say that ICANN encourages
19 applicants to resolve contention sets among
20 themselves before an ICANN auction; is that fair?

21 A. That's fair.

22 Q. And one of the ways in which ICANN
23 envisioned that this may happen was by establishing
24 joint ventures among themselves; is that right?

25 A. It says it right there, correct.

1 Q. But ICANN cautions applicants that in
2 creating joint ventures, they shouldn't do so in a
3 manner that would require reevaluation under the
4 rules, right?

5 A. That's what it says.

6 Q. Okay. If you could please turn back to
7 Page 32 of Tab 4, you will see Rule 1.2.7 there.

8 Do you see that, sir?

9 A. What page number are we on?

10 Q. Page 32 of Tab 4.

11 A. All right. Yep.

12 Q. And what Section 1.2.7 provides, it says,
13 "Notice of Changes to Information. If at any time
14 during the evaluation process information
15 previously submitted by an applicant becomes untrue
16 or inaccurate, the applicant must promptly notify
17 ICANN via submission of the appropriate forms."

18 And then at the bottom, it says that,
19 "ICANN reserves the right" -- I guess it is in the
20 middle, rather -- "reserves the right to require a
21 re-evaluation of the application in the event of a
22 material change"; is that right?

23 A. That's what it says.

24 Q. Now, you can turn back to Page 95 if you
25 want, where Rule 4.1.3 is, but is it fair to say

1 that the lesson you drew from reviewing Rule 4.1.3
2 is that when applicants were seeking to resolve
3 contention among themselves, ICANN's primary
4 concern was that they did so in a way that would
5 not require reevaluation and thus not cause delay
6 in the resolution of the contention set; is that
7 fair?

8 A. It seems to be that they knew or were
9 expecting that people would resolve contention sets
10 through various agreements and simply wanted to
11 ensure that -- to try and do it in a way that did
12 not trigger reevaluation. I agree with that
13 statement.

14 That seemed to be what they were
15 encouraging and were also aware and wanted to be
16 clear, don't do anything that actually changes the
17 organizational function. I think they say -- I
18 don't recall where, but having an entity acquire an
19 applicant might require reevaluation. So they gave
20 some examples, I believe, about things you could or
21 shouldn't do. It seemed to be that's what they
22 were looking for in the guidebook.

23 Q. Now, of course, you were aware at the time
24 that VeriSign was not an applicant for .WEB; is
25 that right?

1 A. That's correct.

2 Q. Now, Section 1.2.7 requires applicants to
3 notify changes in their application via submission
4 of the appropriate forms, correct?

5 A. No. It says a material change to the
6 applicant or that becomes untrue or inaccurate. I
7 don't believe anything in the application of NU DOT
8 CO changed.

9 Q. Let's just keep it general for now,
10 Mr. Livesay. I will agree with you that where --
11 and I believe this is what you're saying, but if
12 you would confirm that Section 1.2.7 provides that
13 where a -- where information in the application
14 that had been previously submitted by the applicant
15 becomes untrue or inaccurate, that applicant must
16 promptly notify ICANN via submission of the
17 appropriate forms?

18 A. Correct. If something's untrue or
19 inaccurate, the applicant needs to do that.

20 Q. Now, those forms were analyzed pursuant to
21 ICANN's change request criteria, correct?

22 A. I don't know what form you're talking
23 about.

24 Q. You did not familiarize yourself with the
25 ICANN application portal?

1 A. We weren't making any changes to an
2 application requiring submission of a form. It
3 sounds like you jumped over something in this last
4 question, that's all.

5 Q. So Section 1.2.7 says if an application
6 previously submitted has information in it that
7 becomes untrue or inaccurate, the applicant must
8 promptly notify ICANN, correct?

9 A. Yeah. And you had asked me whether or not
10 I looked at the form, and I said no, because we
11 didn't do anything that changed the applicant that
12 made it untrue or inaccurate.

13 Q. Okay. Right now I am just trying to
14 inquire, Mr. Livesay, into your review of the ICANN
15 rules and procedures governing the new gTLD
16 Program. We'll come back to the particular
17 transaction in a minute.

18 Chuck, can you put up Exhibit C-56,
19 please.

20 ARBITRATOR BIENVENU: Is that in the
21 binder, Mr. Litwin?

22 MR. LITWIN: It is not. I apologize,
23 Mr. Chairman. There's a handful of documents that
24 are not in the binder.

25 Chuck, if you could just blow up -- yeah,

1 that part. That would be great.

2 Q. This is a document from ICANN's website
3 called the "New gTLD Application Change Request
4 Process and Criteria."

5 Have you seen this document before?

6 A. Doesn't look familiar to me, nope.

7 Q. So when you say that you carefully studied
8 the rules and procedures governing the new gTLD
9 Program, you did not review the change request
10 process?

11 A. I didn't say that. I am saying it doesn't
12 look familiar. Right now I can't see the document
13 on the screen because you have this thing blown up
14 in front of it.

15 MR. LITWIN: Chuck, can you please take
16 that off. Is there any way to blow up the whole
17 document, or at least the first page of it?

18 THE WITNESS: Your question was did I
19 review this when I reviewed the guidelines?

20 Q. BY MR. LITWIN: Correct.

21 A. When I went through the guidelines, I
22 looked for things that seemed relevant, and when I
23 got to something like this, which said "Change
24 Request Process," I look at what the requirement
25 is, doesn't apply, so I move on.

1 Q. Okay. So is it fair to say you did not
2 discuss the change request criteria with NDC?

3 A. Nope.

4 Q. Is it also fair to say in your work on the
5 DAA you did not consult with ICANN regarding the
6 applicability of the change request criteria?

7 A. Say that again?

8 Q. And is it fair to say that in connection
9 with your work on the DAA, you did not consult with
10 ICANN regarding the applicability of the change
11 request criteria?

12 A. Correct. I didn't contact ICANN in this
13 regard, no.

14 Q. And it is true, Mr. Livesay, that NDC, in
15 fact, never filed a change request with ICANN; is
16 that right?

17 A. As far as I am aware.

18 Q. Okay. Now, directing your attention to
19 the first page and to the section called change
20 request overview, you can see that the document
21 quotes that part of 1.2.7 that we just reviewed,
22 that when, "any time during the evaluation process
23 information previously submitted by the applicant
24 becomes untrue or inaccurate, the applicant must
25 promptly notify ICANN via submission of the

1 appropriate forms."

2 Do you see that, sir?

3 A. I see that, yep.

4 Q. And ICANN notes that the Application
5 Change Request process was, in fact, created "in
6 order to allow applicants to notify ICANN of
7 changes to application materials."

8 Do you see that at the bottom of that?

9 A. Yep.

10 Q. Now, if we can look at the next section,
11 it identifies seven criteria, and it is on the
12 bottom of this first page and the top of the next
13 page. I will just wait a second for Chuck to blow
14 that up for you.

15 And the seven criterion are, one,
16 explanation; two, evidence that the original
17 submission was in error; three, other parties
18 affected; four, precedents; five, fairness to
19 applicants; six, materiality; and seven, timing,
20 correct?

21 A. That's what it says.

22 Q. Now, ICANN states right below this -- and
23 Chuck, if you could blow that up -- that, "These
24 criteria were carefully developed to enable
25 applicants to make necessary changes to their

1 applications while ensuring a fair and equitable
2 process for all applications."

3 Do you see that, sir?

4 A. I see where that's written, yeah.

5 ARBITRATOR BIENVENU: "For all
6 applicants," not "for all applications."

7 MR. LITWIN: "For all applicants." Sorry.
8 I misspoke, Mr. Chairman.

9 Q. Let's move down to the next section, which
10 goes through these criterion in more detail.

11 So the first -- maybe just -- yeah, pull
12 up that whole box so we don't have to keep doing
13 it. That's great.

14 So the first criterion is explanation.
15 This is, as ICANN says here, simply an opportunity
16 to allow the applicant to provide an explanation
17 for the change.

18 A. If you weren't making a change, this
19 wouldn't apply, correct?

20 Q. Excuse me?

21 A. Since we didn't make a change, this
22 wouldn't apply, we didn't need to provide an
23 explanation if the change hadn't been made,
24 correct?

25 Q. What I am doing, sir, is just going

1 through the document so that we understand what
2 ICANN provided as their criterion. We'll come back
3 and look at the NDC application.

4 A. Right. When you read this, if you step
5 into these seven criteria on the presumption that a
6 change has been made and an application for a
7 change has been made, I agree these are all
8 written, but we didn't request a change because an
9 applicant -- and NDC's application wasn't altered.

10 Q. I understand that. I understand that that
11 is what you have testified to here today,
12 Mr. Livesay.

13 What I am trying just to establish is that
14 in the event that a change request had been
15 submitted, these are the criterion that ICANN would
16 have looked at, correct?

17 A. That seems to be the case. It is right
18 there in black and white.

19 ARBITRATOR BIENVENU: Mr. Litwin, this is
20 Pierre Bienvenu. Could I ask your colleague Chuck
21 to blow the introductory paragraph to the text that
22 we are looking at now. Thank you. This puts the
23 subparagraphs in context. Please continue with
24 your questions.

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

1 Q. So in the event -- and I'll phrase it like
2 that so it is clear, Mr. Livesay. In the event
3 that a change request was submitted to ICANN or --
4 I'll use the subjunctive -- were to be submitted to
5 ICANN, ICANN would first look at the explanation.

6 But is it fair to say that because this is
7 simply an opportunity to allow the applicant to
8 provide an explanation for the change, the
9 criterion is always satisfied and does not bear as
10 much weight as the others; is that fair,
11 Mr. Livesay?

12 A. I have no way of understanding of how
13 ICANN would weigh these in your hypothetical. You
14 are presenting a hypothetical to which you want a
15 hypothetical answer. I don't know.

16 Q. So what this says, and I will quote, it
17 says, "As such, this criterion is always met and
18 does not bear as much weight as the other
19 criteria."

20 Is that what it says, sir?

21 A. That's what it says.

22 Q. So turning next to evidence that the
23 original submission was an error. You know, I
24 think we can agree that even if NDC had submitted a
25 change request, which you testified they did not,

1 to your knowledge, this would not apply, in any
2 event, correct?

3 A. I don't know. I don't know. You are
4 creating a hypothetical which you want me to create
5 an answer to. I don't know. They did not submit a
6 change request because no change was made, and now
7 you're asking me to apply these rules that ICANN
8 would in your hypothetical.

9 Q. Well, fair enough, Mr. Livesay. In the
10 event that a change request is submitted --

11 A. This is a hypothetical question?

12 Q. Yes. In the event that a change request
13 were submitted to ICANN and it does not concern an
14 error in the original submission, but rather a
15 changed circumstance, this criterion would not
16 apply; is that correct?

17 A. I am not really familiar with how ICANN
18 applies these rules. You're reading the words the
19 same as I am right now.

20 Q. Let's skip down to "Precedents" and look
21 at that one. Here ICANN notes that if a change
22 request would create a new precedent, that change
23 request would be unlikely to be approved; is that
24 fair?

25 A. I am reading the same words you are.

1 Q. Well, is it fair, Mr. Livesay, based on
2 your reading of the same words that I am, that if a
3 change request were to create a new precedent, that
4 change would be unlikely to be approved?

5 A. That's what the words say. How ICANN
6 interprets it, I don't know.

7 Q. Now, going back to the "Other third
8 parties affected" criterion, this criterion
9 evaluates whether a change request materially
10 impacts other third parties, particularly other
11 applicants; is that correct?

12 A. That's what it says.

13 Q. And, in fact, it says that in cases where
14 a change to application material has the potential
15 to materially impact the status of another
16 applicant's application, this criterion is heavily
17 weighted; is that correct, sir?

18 A. You read the line.

19 Q. Now, closely related to the "Other third
20 parties affected" criterion is the "Fairness to
21 applicants" criterion. Here ICANN notes that it
22 will evaluate change requests to determine whether
23 granting the request, quote, "would put the
24 applicant in a position of advantage or
25 disadvantage compared to the other applicants,"

1 correct?

2 A. That is what it says.

3 Q. And ICANN further states that, quote, "if
4 a change request is found to materially impact
5 other third parties, it will likely be found to
6 cause issues of unfairness," right?

7 A. That's what it says.

8 Q. In other words, if granting the change
9 would be unfair to other applicants, this criterion
10 would weigh against granting the change, correct?

11 A. I don't know if your rewording is accurate
12 or the way ICANN would read it. I go with the
13 words that are on the page.

14 Q. The next criterion is "Materiality," which
15 notes that ICANN will consider whether a change
16 request will impact competing applications,
17 correct?

18 A. That's what it says.

19 Q. So if a change request would impact other
20 members of a contention set, that would satisfy the
21 materiality criterion, correct?

22 A. I mean, I am just reading the words here.
23 I am not really sure what you're trying to read
24 differently.

25 Q. I am not trying to read anything

1 differently, Mr. Livesay. I am just asking that
2 this "Materiality" criterion provides that if a
3 change request would impact other members of a
4 contention set -- and you can see the word
5 "contention set" in Line 2?

6 A. Yep.

7 Q. Do you see that?

8 A. Yeah.

9 Q. I'm sorry, are you saying "yes" or "yep"?

10 A. Yes, I see where you have highlighted.

11 Q. Then the "Materiality" criterion would be
12 satisfied; isn't that correct?

13 A. I don't see the word "satisfied" in there.

14 Q. Well, you understand that these criterion
15 are used by ICANN to determine whether or not to
16 approve a change request; is that right?

17 A. That's why I defer to how ICANN interprets
18 something. You are providing interpretations of
19 your reading, and I would have to defer to ICANN's
20 interpretation. You are providing hypotheticals
21 for a situation I don't believe we are in.

22 Q. I am just reading the rules.

23 A. You are reading them and then asking me to
24 affirm your ultimate reading where you change a few
25 words. You can read them, and I will affirm the

1 words on the page are what they are, but I have no
2 reason to take an interpretation because this isn't
3 a world -- a situation we were in. I will defer to
4 ICANN. How can I put my mind in what ICANN would
5 use in the seven criterion?

6 Q. Is it fair to say, Mr. Livesay, as you
7 conducted your review of the rules in the
8 guidebook, for example, you just looked at the
9 plain language of the rule and just applied that in
10 terms of your thinking about how to structure a
11 transaction?

12 A. Certainly not. I am not really sure where
13 you get that interpretation.

14 Q. Well, what I am asking --

15 MR. JOHNSTON: I would ask Mr. Litwin to
16 allow the witness to finish his answer before
17 interrupting with another question.

18 MR. LITWIN: I apologize. I thought he
19 was done.

20 Q. Please continue, Mr. Livesay.

21 A. I don't remember what the question was.
22 Where were we?

23 Q. Let me go back, because I think it was a
24 poorly-phrased question, and allow me to rephrase
25 it for you.

1 In reviewing these change request
2 criterion, you say -- well, you agree that that's
3 what it says, but, you know, if you're trying to
4 interpret it, it is really ICANN's job to interpret
5 it; is that right?

6 A. You presented on the screen right now the
7 seven criteria after a change request was submitted
8 and what ICANN would use to evaluate. This isn't
9 the standard for how you get into a change request.
10 This is once it is already there.

11 You asked previously did I look at the
12 rule and just decide there not to go through a
13 change request. No, there's a lot of factors.
14 There's a lot of rules.

15 I looked at other transactions going on in
16 the market. I saw disclosures of different
17 companies having funded other activities of other
18 applicants. I see elsewhere in the guidebook where
19 it encourages parties to resolve without changing
20 their application so as to not delay or have the
21 string -- I guess "delay" is the right word, or put
22 on hold. So there's a lot of factors that went
23 into this.

24 But at the end of the day, the path we
25 took is we are not looking to become the applicant.

1 We are looking to become the registry of this
2 domain and to try to help fund NDC to win the
3 auction. And if they ended up winning and we
4 successfully signed a Registry Agreement, they
5 would then apply to have it assigned to us, and we
6 would be evaluated at that time.

7 So I don't think there's anything -- we
8 were following -- we had a lot of different things,
9 both through what we see in the marketplace and
10 what the guidebook suggests, and we think we did it
11 correctly.

12 Q. So, Mr. Livesay, I am not trying to imply
13 here that NDC submitted a change request. I think
14 we have established that NDC did not submit a
15 change request.

16 What I am trying to do is to progress
17 through a set of ICANN rules that inform how ICANN
18 would consider a change request and asking you what
19 your view of the rule is outside of what may or may
20 not have happened regarding NDC.

21 A. And I have told you before, it is hard to
22 give you hypothetical answers to hypothetical
23 questions. So you just read one rule, and did it
24 go this way, no, it is not that.

25 Like I said, the way we approached this is

1 we are reading the rules. We are looking at
2 activities in the marketplace. We are looking at
3 what other strings and how other contention sets
4 get resolved. We look at other information in the
5 guidebook itself that suggests, recommends parties
6 reorganize themselves in a way that doesn't require
7 reevaluation, and we think we did that correctly.

8 Q. Mr. Livesay, is it fair to say that this
9 document that we are looking at now, Exhibit C-56,
10 concerns how ICANN evaluates change requests?

11 A. That is exactly what it says.

12 Q. And is it also fair that this document
13 informs whether or not a change request should be
14 filed?

15 A. That doesn't tell me that, no.

16 Q. So the description that ICANN provides
17 here about how it goes about evaluating and the
18 things it considers in evaluating a change request
19 has no bearing whatsoever to the decision on
20 whether or not to file a change request?

21 A. As I look at the document, there's a
22 criteria for filing the change request, which we
23 did not think applied, and these standards here, as
24 I read them, are once you're in that realm, this is
25 how those change requests would be addressed. It

1 would seem unusual to think that the change request
2 criteria are how you get into the change request
3 criteria, seems circular the way you have described
4 it.

5 Q. So the rule -- if we can turn back to the
6 first page of this document, C-56, ICANN quotes the
7 rule from the applicant guidebook?

8 A. That's right.

9 Q. That says if any information previously
10 submitted by an applicant becomes untrue or
11 inaccurate, that applicant is obligated to promptly
12 notify ICANN, correct?

13 A. That's what it says.

14 Q. And turning through this document, it does
15 suggest that, well, in determining whether or not
16 Rule 1.2.7 applies, whether those changes would be
17 unfair to applicants, whether those changes would
18 create new precedents, whether those --

19 A. You are jumping again. Those changes, if
20 there are no changes, you can't bootstrap yourself
21 into the criteria. There were no material changes
22 that made the application untrue and inaccurate.

23 Q. Okay. We'll come back to that. We'll
24 come --

25 MR. JOHNSTON: Stop interrupting.

1 THE WITNESS: I am confused at what you're
2 asking at this point, I guess.

3 MR. JOHNSTON: Your Honor, Mr. Chair, I
4 object to this line of questioning. We have been
5 spending a lot of time on this document, and
6 virtually every question posed lacked foundation
7 and most just asked the witness to read the
8 document.

9 If Mr. Litwin wants to make these
10 arguments in closing argument, that's appropriate.
11 But to spend all this time with the witness asking
12 questions that lack foundation is not appropriate.

13 ARBITRATOR BIENVENU: Your objection is
14 noted, Mr. Johnston.

15 As to the question of foundation,
16 Mr. Livesay, may I ask you just to clarify your
17 evidence as regards the knowledge that you had when
18 you familiarized yourself with the guidebook of the
19 requirement to notify ICANN of changes in an
20 application.

21 I am looking at Page 32 of the rough
22 transcript, and Mr. Litwin, having displayed the
23 document we have been talking about, said, "This is
24 a document from ICANN's website called the 'New
25 gTLD Application Change Request Process and

1 Criteria.' Have you seen this document before?"

2 Your answer was, "It doesn't look familiar
3 to me, nope.

4 "Question: So when you say that you
5 carefully studied the rules and procedures
6 governing the new gTLD Program, you did not review
7 the change request process?

8 "Answer: I didn't say that. I am saying
9 it doesn't look familiar. Right now I can't see
10 the document on the screen because you have got --
11 you have this thing blown up in front of it."

12 And then we went on.

13 Let me ask you this, Mr. Livesay: Was it
14 a concern to you, as you were considering on behalf
15 of VeriSign the potential of striking a deal with
16 NDC, that the agreement not trigger a notice of
17 change to information under Section 1.2.7 of the
18 guidebook?

19 I'm sorry, please --

20 (Discussion off the record.)

21 THE WITNESS: I said that's correct, we
22 were looking for --

23 (Discussion off the record.)

24 ARBITRATOR BIENVENU: Shall I repeat my
25 question?

1 (Discussion off the record.)

2 THE WITNESS: Please repeat the question.

3 (Discussion off the record.)

4 ARBITRATOR BIENVENU: Okay. So I am going
5 to read it, Mr. Livesay, so I don't interpret it.

6 "Was it a concern to you, as you were
7 considering on behalf of VeriSign the potential of
8 striking a deal with NDC, that the agreement not
9 trigger a notice of change to information under
10 Section 1.2.7 of the guidebook?"

11 THE WITNESS: That is correct. It was a
12 concern --

13 (Discussion off the record.)

14 THE WITNESS: So yes, it was a concern
15 that we not trigger or do anything to change the
16 application that would trigger a reevaluation
17 because we knew that that -- couple of things.
18 One, the guidebook suggests, one, to try and
19 resolve things without triggering reevaluation.

20 Two, if it did trigger reevaluation, that
21 might actually delay the string in getting
22 resolution. So yeah, it was a concern of ours to
23 not trigger that.

24 ARBITRATOR BIENVENU: Excellent.

25 Now, given that this was a concern, as you

1 sit here today, do you recall looking at the form
2 on which you were questioned in the past 15 minutes
3 entitled "New gTLD Application Change Request
4 Process and Criteria," do you recall looking at
5 that?

6 THE WITNESS: I recall only the portion --
7 the reference to 1.2.7. I don't recall
8 specifically the other, but this was a long time
9 ago, five or more years, and the guidebook is a
10 long document.

11 ARBITRATOR BIENVENU: Very well. Very
12 well. I am sorry for the interruption, Mr. Litwin.
13 Please proceed.

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

15 Q. I just have two more questions on this
16 document, Mr. Livesay. If you look at the next
17 page, Page 3 of this document, is it your
18 understanding that where change requests were
19 submitted to ICANN, they were posted on ICANN's
20 website?

21 A. Are you asking if I'm aware whether they
22 were?

23 Q. Yes.

24 A. I don't recall one way or the other. I
25 decline whether I knew that or not.

1 MR. LITWIN: Mr. Chairman, perhaps this is
2 a good time to take our first break today. I am at
3 a good breaking point in my outline.

4 ARBITRATOR BIENVENU: Very well.
5 Mr. Livesay, we are going to break for 15 minutes.
6 I am required by our sequestration order to ask
7 that you not discuss your evidence during the
8 break.

9 THE WITNESS: That's good.

10 ARBITRATOR BIENVENU: Thank you very much,
11 sir. So we will resume in 15 minutes, and you'll
12 be brought virtually to a separate room.

13 THE WITNESS: Okay. Thank you.

14 ARBITRATOR BIENVENU: Thank you.

15 (Whereupon a recess was taken.)

16 ARBITRATOR BIENVENU: Thank you very much.

17 Mr. Johnston, you are there?

18 MR. JOHNSTON: Yes, I am.

19 ARBITRATOR BIENVENU: Mr. Litwin, and is
20 Mr. Livesay back with us?

21 MR. ENGLISH: No, he's in the waiting
22 room.

23 ARBITRATOR BIENVENU: Okay. So you may
24 bring him back.

25 You ready to proceed, Mr. Litwin?

1 MR. LITWIN: I am, Mr. Chairman.

2 MR. ENGLISH: Okay. Mr. Livesay has
3 joined the meeting, and if he could unmute himself.

4 THE WITNESS: You can hear me all right
5 with the new microphone?

6 ARBITRATOR BIENVENU: We can hear you.

7 MR. LITWIN: Much better.

8 ARBITRATOR BIENVENU: Thank you very much.
9 So, Mr. Livesay, under the same solemn affirmation,
10 Mr. Litwin, please proceed.

11 Q. BY MR. LITWIN: Mr. Livesay, I just wanted
12 to ask you one last question about -- and just to
13 clarify your earlier testimony, about the change
14 request criterion document that we have been
15 reviewing, Exhibit C-56, I think what you said,
16 that it did not matter what you or VeriSign think
17 about the rules set forth in here, I think your
18 testimony was it's what ICANN thinks that matters;
19 is that a fair statement?

20 A. You read the provisions and then you
21 rephrased them and asked me if your rephrasing was
22 fair. I simply said I defer to ICANN how they
23 would interpret the plain language of these
24 provisions.

25 Q. Okay. Thank you.

1 So moving on, I would refer you back to
2 your witness statement and Paragraph 5. As you
3 recall from before the break, we left off with the
4 provision in the change request criterion document
5 that says that change requests would be posted to
6 ICANN's website.

7 And in response to the Chairman's
8 question, you said that you had studied the rules
9 to ensure that there were no changes that needed to
10 be reported to ICANN.

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18 A. Redacted - Third-Party Designated Confidential Information

19 Q. Okay. Now, let's turn back to Section
20 4.1.3 of the AGB. So that's Tab 4 at Page 95.

21 Are you there, sir?

22 A. Is that in what you sent me or is this
23 another document that's not in the binder you sent?

24 Q. No, it is there. It is Tab 4, Page 95.

25 A. Oh, 95, okay. Got it here.

1 Q. This rule is titled "Self-Resolution of
2 String Contention" and only concerns transactions
3 among contention set members themselves; is that
4 correct?

5 A. It appears to be the case, yeah.

6 Q. Okay. Please turn to Page 124 of this
7 document behind Tab 4, and I direct your attention
8 to what is the last line of Paragraph 10 of Module
9 6, the terms and conditions.

10 A. Yep.

11 Q. What it says here is that, "Applicant may
12 not resell, assign, or transfer any of applicant's
13 rights or obligations in connection with the
14 application."

15 Now, this provision is not limited to
16 transactions among contention set members, correct?

17 A. I am not sure -- say that again.

18 Q. So where this provision says, "Applicant
19 may not resell, assign, or transfer any of
20 applicant's rights or obligations in connection
21 with the application," my question to you, sir, is
22 that this provision is not limited to transactions
23 among contention set members?

24 A. As I read the sentence, it applies to
25 applicant. So I am not really sure what you're

1 saying about other contention sets. As I read
2 this, it is a restriction on an applicant.

3 Q. It is a restriction on an applicant that
4 provides that the, "Applicant may not resell,
5 assign, or transfer any of applicant's rights or
6 obligations in connection with the application" to
7 any third party, correct?

8 A. I guess. It doesn't say that limitation.
9 The limitation is on the applicant.

10 Q. I --

11 A. You're asking me to read something in
12 there that's not there. I mean, maybe you are -- I
13 am not really sure what you're asking me to read
14 into that. It says, "Applicant may not resell,
15 assign, or transfer any of the applicant's rights
16 or obligations." That seems very straightforward.

17 Q. Any -- sorry, Mr. Chairman.

18 ARBITRATOR BIENVENU: First of all, can
19 we, just in fairness to the witness, go to Page 120
20 of that document, just to situate that provision.
21 So this is part of the terms and conditions of
22 Module 6.

23 You are familiar with that document?

24 THE WITNESS: I recall reviewing it at
25 great length back in the day. I did not review it

1 again in advance of this testimony.

2 ARBITRATOR BIENVENU: Right. Now,
3 focusing back on the text on which Mr. Litwin drew
4 your attention --

5 THE WITNESS: Yep.

6 ARBITRATOR BIENVENU: -- do you understand
7 that provision as targeting transactions within a
8 contention set or as targeting transactions
9 generally, whether they involve contention set
10 members or not? I think that's the question that
11 is being asked of you.

12 THE WITNESS: I see. I don't read that
13 sentence that's highlighted as limited to just
14 within a contention set. It seems to apply to an
15 applicant both inside and outside a contention set.
16 The applicant cannot resell, assign or transfer in
17 and outside of a contention set. That's the way I
18 read it. Is that the clarification you were asking
19 for?

20 ARBITRATOR BIENVENU: I was just trying to
21 rephrase the question that was asked of you.

22 THE WITNESS: Got it.

23 ARBITRATOR BIENVENU: Back to you,
24 Mr. Litwin.

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

1 Q. In addition to your review of the
2 guidebook and other rules governing the new gTLD
3 Program, Redacted - Third-Party Designated Confidential Information
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7 A. Redacted - Third-Party Designated Confidential Information

8 Q. Redacted - Third-Party Designated Confidential Information
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12 A. In the sense -- how do you mean,
13 special-purpose vehicles -- go ahead. I am
14 listening.

15 Q. Perhaps I should just orient you to your
16 witness statement, sir. It is behind Tab 1. If
17 you look at Page 5, Paragraph 9.

18 A. Oh, correct, right, in terms of special.
19 Like in this example I found that sometimes an
20 entity would have a shell company for each
21 individual company, sometimes held by a parent, or
22 sometimes all the applications were held by one
23 entity, such as the way Google did it with
24 Charleston Road Registry. Redacted - Third-Party Designated
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1 Q. And we can look down at Paragraph 10,
2 where you continue your discussion about the
3 special purpose entities. You write, "For example,
4 Google is identified as the owner of Charleston
5 Road Registry, Inc.," correct?

6 A. Correct.

7 Q. And when you say "is identified," you mean
8 identified in the application, correct?

9 A. Correct. I have not looked at it, but if
10 I recall correctly, you can look at the
11 applications and it will show for each string who
12 the applicant is.

13 In this case it would show up as
14 Charleston Road Registry. If you then click on it,
15 it will show you the public portion of the
16 application, which would then show who the actual
17 party is, or the contact, I should say.

18 For instance, if I recall, if I looked up
19 this, it would have said -- on the applicant it
20 would have said Charleston Road Registry, but it
21 would have a contact name, and that contact name I
22 think was a Google address, for example, email,
23 that is.

24 Q. Yes. In fact, in Section 11 Google is
25 identified in each of Charleston Road Registry's

1 applications as the owner of Charleston Road
2 Registry.

3 Do you recall that?

4 A. I believe so, yeah. Let me see where
5 you're highlighting. Yep.

6 Q. Now, you also go on to write that, "In
7 other instances, the requirement for a disclosure
8 of the real party in interest was avoided by
9 forming another entity to be the parent of the
10 application, so the real parties in interest were
11 not disclosed as part of the parent entity in the
12 application." And you give an example. You say
13 "Donuts formed 'Covered TLD, LLC,' for example, and
14 made that entity the disclosed parent on many of
15 its applications."

16 A. Correct.

17 Q. You see that, sir?

18 A. Yep.

19 Q. And in Paragraph 9 you refer to Ruby Glen
20 LLC as a Donuts applicant entity, correct?

21 A. Correct.

22 Q. So what you're saying is that the
23 application would have been made on behalf of Ruby
24 Glen, and when you look at the ownership
25 information, it would say, "Covered TLD LLC,"

1 another shell, in your words, correct?

2 A. I believe that's correct.

3 Q. Now, are you aware that the primary
4 contact listed at Section 6 of Ruby Glen's
5 applications was identified as an executive vice
6 president of Donuts?

7 A. I believe I may recall it might have been
8 a Donuts address, perhaps, the email, perhaps, I
9 think you're talking about.

10 Q. Well, they give his title as the executive
11 vice president of Donuts, and as you say, there was
12 a Donuts email address associated with that contact
13 person. Does that sound familiar?

14 A. I don't recall seeing his title on the
15 application, but likely seeing the email.

16 Q. Do you also recall that at Section 11(b),
17 Ruby Glen identified Donuts' CEO and the chairman
18 of Donuts' Board of Directors as the two people who
19 had legal and executive responsibility for Ruby
20 Glen?

21 A. I'm sure at some point I looked at who the
22 individuals listed in the application were. I
23 don't recall specifically their names now.

24 Q. So it wasn't exactly a secret that Ruby
25 Glen was a Donuts special purpose entity, correct?

1 A. I don't think it was a secret, no.

2 Q. In the course of your research you learned
3 about an arrangement between Donuts and Demand
4 Media, correct?

5 A. Correct.

6 Q. If you could take a look at Page 18 of Tab
7 1. This is Exhibit A to your witness statement, a
8 press release by Demand Media. I am just going to
9 read what it says in the fourth paragraph.

10 It says, "As part of this initiative,
11 Demand Media has applied for 26 names on a
12 stand-alone basis. In addition, Demand Media has
13 entered into a strategic arrangement with Donuts,
14 an Internet domain registry founded by industry
15 veterans, through which it" -- meaning Demand
16 Media -- "may acquire rights in certain gTLDs after
17 they have been awarded to Donuts by ICANN. These
18 rights are shared equally with Donuts and are
19 associated with 107 gTLDs for which Donuts is the
20 applicant."

21 Do you see that?

22 A. I am reading along with you, yes.

23 Q. And this is one of the examples that
24 informed your research in advance of negotiating
25 the DAA, correct?

1 A. It was an example, yes.

2 Q. Now, if you look at the date of the press
3 release, you'll see it's from June 11th, 2012.

4 Do you see that?

5 A. Yep.

6 Q. So that was -- the press release was
7 issued shortly after the application window had
8 closed in April of 2012, as you testified earlier,
9 correct?

10 A. The dates look correct.

11 Q. And, therefore, this press release was
12 issued during the period for public comment and
13 evaluation by ICANN, correct?

14 A. That would be the case, yeah.

15 Q. Are you aware that Demand Media was
16 disclosed as Donuts's, quote, "partner in these 107
17 applications"?

18 A. I am not aware that they were listed as a
19 co-owner or partner, no.

20 Q. Are you aware that the public portions of
21 these applications are available on ICANN's
22 website?

23 A. The public portion of the applications
24 would naturally be available on ICANN's website.

25 Q. Did you review these 107 applications by

1 Donuts that you refer to at Paragraph 8 of your
2 witness statement?

3 A. I do not recall looking at all those
4 applications, no.

5 Q. So, for example, if I represented to you
6 that Demand Media is listed as Donuts's partner in
7 its applications for .CITY, .ASSOCIATES, .CAMERA,
8 .CHURCH, .CLOTHING, .COACH, .ECO, .ENERGY, .HELP,
9 .INVESTMENTS, .SALON, .SINGLES, .VENTURE and
10 .VOYAGE, among others, would you have any knowledge
11 as to whether or not Demand Media is, in fact,
12 listed as Donuts' partner in those applications?

13 MR. JOHNSTON: I'll object on grounds of
14 lack of foundation. Perhaps counsel could put just
15 one of those in front of the witness.

16 MR. LITWIN: Well, I am asking him for his
17 knowledge about this. I don't believe these are in
18 the record. I'd be happy to show him one if you
19 would consent to that.

20 MR. JOHNSTON: I would consent to showing
21 him the limited part you're representing to him is
22 in the application.

23 MR. LITWIN: Very good.

24 For my team that's on the phone, can you
25 send to Chuck the .CITY application, please.

1 Chuck, let me know when you get it.

2 I have just been told .CITY is on the
3 record, and they are pulling it up right now.

4 Chuck, when you get that, if you can just
5 put it up on the screen for everyone to see,
6 please.

7 MR. JOHNSTON: I'm sorry to have provoked
8 this delay. I had a specific reason, which I won't
9 explain with the witness on camera, but I had a
10 specific reason for wanting the witness to see the
11 application as opposed to rely on the
12 representation as made.

13 Again, I am sorry for the delay.

14 ARBITRATOR BIENVENU: That's fine. Let's
15 see if we can get the document up quickly,
16 otherwise we can put this in abeyance and come back
17 to it.

18 MR. LITWIN: There we go. Actually, while
19 we go through this, if you can just stop right
20 there, Chuck, don't move any further. If you can
21 blow up the full legal name at one, please?

22 MR. VAUGHAN: I don't have the ability to
23 blow anything up on this.

24 MR. LITWIN: Got it.

25 Q. Can you see that, Mr. Livesay?

1 A. I see it says, "Snow Sky, LLC."

2 MR. LITWIN: If we can go down to 6,
3 please, Chuck.

4 Q. You'll see the gentleman there is
5 identified as the executive vice president of
6 Donuts?

7 A. Yep, yep.

8 Q. And under 6(f), that's the Donuts email
9 address that you recall.

10 Do you see that, sir?

11 A. Yep, yep.

12 Q. Now, if you can go down to Paragraph 23.
13 Boy, this is incredibly small on my computer. What
14 it says in the second paragraph there is, "The
15 following response describes our registry services
16 as implemented by Donuts and our partners. Such
17 partners include Demand Media Europe Limited for
18 back-end registry services."

19 Do you see that, sir?

20 A. I see that.

21 Q. So Demand Media was disclosed in the .CITY
22 application submitted by Donuts to ICANN. So there
23 was no secret that Donuts and Demand Media had a
24 partnership, correct?

25 A. Well, I think the word "partnership" goes

1 to what you mean by partnership. In the press
2 release it doesn't describe the nature of that
3 partnership. In this it seems to limit Demand
4 Media, at least in the application, to being a BERS
5 provider, not necessarily a co-owner of the
6 application. Maybe you need to describe what
7 "partner" means in the relationship of the press
8 release.

9 When I read this, it looks like Demand
10 Media is simply, at the stage that this is made,
11 not represented as a co-owner, but a back-end
12 registry provider, which is a different matter, at
13 least as I read it.

14 Q. So let me see if I can break this down a
15 little bit.

16 In Paragraph 23 of the .CITY application,
17 Demand Media is identified as a partner for Donuts
18 to provide back-end registry services, correct?

19 A. Correct.

20 Q. So there was no secret that Demand Media
21 had at least some role here as a back-end registry
22 service provider associated with the .CITY
23 application, correct?

24 A. It appears in the .CITY application they
25 are the BERS, back-end provider. That doesn't

1 represent them as a co-owner or having an interest
2 in possibly obtaining the domain after its
3 delegation. It doesn't suggest they have any of
4 that kind of right in it.

5 Q. In the application --

6 A. In the public portion that you are having
7 me read, I am only saying that it lists them only
8 as a BERS provider, not a co-owner.

9 Q. Sir --

10 A. Which is what you mean to imply.

11 Q. Sir, I am not implying anything, and I
12 would appreciate it if you would let me finish my
13 question --

14 A. Go ahead.

15 Q. -- as well as I will let you finish your
16 answer.

17 My question is simply that Demand Media is
18 identified as a partner for Donuts at Paragraph 23
19 of the .CITY application for the purpose of
20 providing back-end registry services, correct?

21 A. They are identified as the back-end
22 registry service provider for this application.

23 Q. So there was no secret that Demand Media
24 was involved with Donuts in at least some capacity
25 in its application itself, correct?

1 A. As a back-end registry provider. I don't
2 see that as an owner.

3 Q. Now, we also looked at the press release
4 that was issued on June 11th, 2012, where Demand
5 Media publicly disclosed that its relationship with
6 Donuts was broader; is that correct?

7 A. I don't know what you mean by "broader."
8 If you mean -- as I read the article, it seems to
9 state that they had an arrangement whereby Donuts
10 would obtain certain TLDs and in some situations
11 postdelegation request assignment and transfer for
12 Demand Media, up to 107 of them. It looks like you
13 pointed me to one in which Demand Media is listed
14 as the BERS provider, okay.

15 Q. Okay. All I am saying, Mr. Livesay, is
16 that Demand Media was identified as having some
17 role in all of the 107 applications of which I am
18 showing you one?

19 A. And I am only able to confirm the one.
20 The one you're showing me shows them as a BERS
21 provider, nothing more.

22 Q. I will represent to you, sir, that the
23 same language is in each of those 107 different
24 applications.

25 A. Based on the --

1 MR. JOHNSTON: Excuse me, Mr. Livesay.

2 Objection; lack of foundation.

3 ARBITRATOR BIENVENU: Before I address the
4 objection, it is very important for us, in order to
5 have a clean record, that only one person speak at
6 a time. I understand it is difficult, especially
7 when we are proceeding by remote video, but let the
8 question be asked and then proceed with your
9 answer. And Mr. Litwin will not cut you off. He
10 will let you finish your answer.

11 Now, what is the nature of your objection,
12 Mr. Johnston? Lack of foundation as to what?

13 MR. JOHNSTON: Well, counsel was
14 representing what was present in 107 applications
15 the witness said he wasn't familiar with. The
16 question was only, "Take my representation; is that
17 true," as I heard the question. I think that's
18 pretty obviously a question that has no foundation
19 in the witness' knowledge.

20 ARBITRATOR BIENVENU: Mr. Litwin?

21 MR. LITWIN: I can rephrase.

22 Q. Is it fair to say, Mr. Livesay, that
23 Demand Media was disclosed as a partner of Donuts
24 for the purposes of back-end registry services in
25 its application submitted to ICANN?

1 A. The one you have shown me, it looks like
2 their limited nature as a partner is that of being
3 a BERS provider.

4 Q. Is it also fair that Demand Media issued a
5 public press release during the comment period and
6 the time at which ICANN was evaluating the
7 application to disclose its broader role regarding
8 those applications?

9 A. From the time and the dates of things,
10 that appears to be the case, yeah.

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1 agreement would have provided --

2 A. It is not an agreement, and so it is
3 hypothetical. Would have provided. This is a
4 first draft of something --

5 ARBITRATOR BIENVENU: Mr. Livesay.

6 THE WITNESS: Yes, sir.

7 ARBITRATOR BIENVENU: I'm sorry, I have
8 to -- I instruct you again to not cut off
9 Mr. Litwin in the middle of a question because we
10 are not going to get a clean record.

11 THE WITNESS: I am trying to -- sometimes
12 I think he's finished with a statement or a
13 question, and I am making a presumption -- I will
14 try to stop and hold back.

15 ARBITRATOR BIENVENU: Don't take this as a
16 reproach, Mr. Livesay, but just as a direction so
17 that in everybody's interest, we have a clean
18 record.

19 THE WITNESS: Understood.

20 ARBITRATOR BIENVENU: Very well.

21 So -- well, do you want to finish what you
22 were saying, Mr. Livesay, and then Mr. Litwin.

23 THE WITNESS: We can go back -- I am fine
24 with him asking or reasking questions. That's
25 fine.

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ARBITRATOR BIENVENU: Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

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Q. Mr. Livesay, when we were talking about the change request criteria, you noted that you had received draft agreements and these were, in your view, precedents for the DAA.

Do you recall that testimony, sir?

A. Right. These were some examples of that, yeah.

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1 MR. LITWIN: Excuse me for one minute. I
2 just need to look at the transcript for a second.

3 Q. You testified a moment ago, and I am
4 referring to Page 81, line -- Lines 17, 18, 19, 20
5 and 21, you say, "To be honest, I don't recall
6 reviewing this document at depth really at the
7 time, because it presented a situation, in my view,
8 and the way they presented it, is we would buy the
9 entity."

10 So I'm a little confused because I think
11 you just said that you did review the document at
12 the time. So which is it?

13 A. First of all, like I said, I did review it
14 at the time. But at a basic level I saw that it
15 was trying to set up an acquisition of the entity.
16 I am sure my recollection back then is better now,
17 but I did not rereview or reexamine the documents
18 in preparation for this, is my point. I can assure
19 you I had a much better understanding of all this
20 five years ago than I do right now.

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2 ARBITRATOR BIENVENU: Mr. Livesay, I'm
3 sorry to interrupt.

4 THE WITNESS: He asked me a question, and
5 I am trying to answer it and then he jumps in and
6 tries to tell me to correct it. If he doesn't like
7 my answer, he can not like my answer. That's fine.

8 ARBITRATOR BIENVENU: Mr. Litwin, you are
9 not there to argue with the witness.

10 MR. LITWIN: Understood, your Honor.

11 ARBITRATOR BIENVENU: I would ask both of
12 you to sit back for a moment.

13 And, Mr. Livesay, let the questions come
14 and answer them in the best of your ability.

15 And please, I am addressing this to both
16 of you, don't cut each other off. It just creates
17 an unworkable record.

18 Mr. Litwin, please pose your question.

19 Q. BY MR. LITWIN: Mr. Livesay, I am going to
20 try and lay some foundation for what I'm asking you
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5 You see, this is my difficulty, Mr. Head of the
6 Tribunal, is he's quoting it and adding different
7 language as he's reading it, and I am left trying
8 to figure out is he asking for me to affirm his
9 interpretation of it or my reading of it when I
10 have not read these details.

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15 And if Mr. Litwin wants to read it and ask
16 if I can confirm what it says, I can do that. If
17 he's going to read it and add different words in,
18 how am I supposed to respond?

19 ARBITRATOR BIENVENU: So I may suggest,
20 Mr. Livesay, that you take a minute to look at the
21 language on which you are questioned and perhaps
22 refer back to terms that are defined in that
23 language. And once you have familiarized yourself
24 with that language, then Mr. Litwin can ask his
25 question. All he can ask for is your understanding

1 of that document as you sit here today and read the
2 language. Fair enough?

3 THE WITNESS: Well, I don't know. Is the
4 Tribunal willing to give me an hour to look at a
5 document that I haven't looked at in five years?

6 ARBITRATOR BIENVENU: You think you need
7 an hour?

8 THE WITNESS: I assure you that when we
9 went through this in 2015, it was a lot more than a
10 few hours to look at these documents and settle
11 this out. I am perfectly fine reviewing these
12 documents that never iterated, we didn't sign, but
13 if he's going to ask me to interpret documents that
14 have defined terms, I tend to read documents
15 thoroughly.

16 ARBITRATOR BIENVENU: Mr. Livesay, you
17 chose to append this document to your witness
18 statement.

19 THE WITNESS: I did. And I appended it as
20 an example of something I received. If he's going
21 to ask me to read it and interpret it as an
22 attorney, I should do that.

23 ARBITRATOR BIENVENU: You appended it in
24 order to make a point, and you are being questioned
25 about your evidence.

1 THE WITNESS: Fair enough.

2 ARBITRATOR BIENVENU: I think it is a fair
3 line of inquiry for Mr. Litwin in order to
4 understand your evidence.

5 THE WITNESS: Fair enough.

6 ARBITRATOR BIENVENU: Now, I fully
7 understand your concern that you don't want to be
8 trapped into giving a legal interpretation to a
9 document you have not recently reviewed. We
10 appreciate that, and we are sensitive to that.

11 Now you're being questioned on one
12 subparagraph of the agreement. I take your point
13 that they are defined terms, but please take the
14 time to read that one paragraph. If you want to
15 refer to the defined terms, do that, and then we'll
16 see the question and we'll step in if we find the
17 answer -- the question puts you in an unfair
18 position, but I don't think that it does. If you
19 take the time to review that paragraph, review the
20 defined terms, you should be able to answer his
21 question.

22 THE WITNESS: Fair enough.

23 I think it is back to you, Mr. Litwin, to
24 pick up wherever I interrupted.

25 MR. LITWIN: Thank you.

1 Q. Mr. Livesay, I just wanted to ask a couple
2 of questions. You executed your witness statement
3 on June 1st of this year, correct?

4 A. Correct.

5 Q. And did you review the attachments to your
6 witness statement when you signed it or before
7 you -- in the preparation of your witness
8 statement?

9 A. I reviewed that it was the document that I
10 received. I did not go through and reread the
11 document.

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1 Q. Are you aware that Dot Tech the entity
2 did, in fact, prevail at the ICANN auction for
3 .TECH the gTLD?

4 A. I believe I may have heard that, yeah.

5 Q. Are you also aware that Dot Tech the
6 entity submitted a revised application after the
7 auction identifying Radix as the new owner of the
8 applicant Dot Tech the entity?

9 A. I don't have any specific memory of that,
10 but sounds accurate, I guess.

11 Q. And are you aware that as a result of
12 submitting that revised application, ICANN
13 commenced a reevaluation of that application?

14 A. I was not aware of that, that I can
15 recall.

16 Q. Are you aware that Dot Tech the entity, in
17 fact, submitted a further revised application in
18 response to a change request that it had submitted
19 to ICANN?

20 A. Nope, not aware of that.

21 Q. You also refer in your witness statement
22 to a transaction between Automattic and Primer
23 Nivel regarding .BLOG; is that correct?

24 A. I think I refer to maybe a press release
25 or something about that, yeah.

1 Q. Now, you state that in May 2016 it was
2 reported that Primer Nivel's bid for .BLOG had
3 been, quote, "financed by Automattic," correct?

4 A. I think I'm citing a news source about
5 that, yeah.

6 Q. So the answer to my question is yes?

7 A. Correct.

8 Q. And those reports postdate your August
9 2015 Domain Acquisition Agreement with NDC,
10 correct?

11 A. I'd have to relook at the dates. Do we
12 have that as an attachment?

13 Q. Yes. It is an attachment to your witness
14 statement, sir.

15 A. Let me make sure I am remembering the
16 correct press releases here.

17 Q. They begin, sir, at Exhibit E, which is on
18 Page 95 of Tab 1, and continue on to Page 111.

19 A. Yeah. So your question is what?

20 Q. Let me ask my question again.

21 A. Yeah.

22 Q. These reports regarding .BLOG postdate the
23 August 2015 DAA, correct?

24 A. Yes. That appears to be the case,
25 correct.

1 Q. So it's fair to say that you did not
2 discover information concerning the
3 Automattic-Primer Nivel transaction as part of your
4 research prior to the execution of the DAA,
5 correct?

6 A. That would seem to be the case, yeah.

7 Q. Therefore, it's also fair to say that you
8 were not relying on the Automattic-Primer Nivel
9 transaction as a precedent for the DAA, correct?

10 A. Certainly not in advance of the DAA, but
11 it certainly seemed to give some credibility
12 heading up to the auction.

13 Q. Now, .BLOG was auctioned in February of
14 2015, correct?

15 A. I believe that sounds right.

16 Q. And in March of 2014, Primer Nivel had
17 submitted a change request to ICANN regarding
18 Paragraph 11 of its application, correct?

19 A. I am not aware that that's the case.

20 Q. I direct your attention to Page 96 of
21 Exhibit E, and at the bottom, last paragraph, it
22 says, "ICANN processed the change request to the
23 Question 11 answer in March of 2014."

24 Do you see that?

25 A. I do.

1 Q. And, in fact, Question 11 asks about
2 ownership information, correct?

3 A. I believe that's correct.

4 Q. And, in fact, in Section 11 is where Ruby
5 Glen disclosed that Donuts' CEO and chairman had
6 legal or executive authority over it, right?

7 A. I'm sorry, what's the reference to Donuts?
8 What?

9 Q. Sorry. I'll move on. I was trying to
10 refer to something earlier in the testimony, but it
11 is not important.

12 At the .BLOG auction, the winning bidder
13 was a company called Knock Knock Whois There LLC,
14 correct?

15 A. Sounds correct.

16 Q. And that entity was controlled by
17 Automattic, correct?

18 A. I believe that's the case.

19 Q. And you don't know any of the details
20 about how Automattic and the Primer Nivel deal was
21 structured, do you?

22 A. No, I don't have any window into that.

23 Q. Now, finally, sir, I'll represent to you
24 in his opening statement Mr. Johnston, counsel for
25 VeriSign, referred to several transactions that

1 were entered into by Afilias, these concerned
2 .MEET, .PROMO, .ARCHI, .SKI and .BIO. And for each
3 of these gTLDs, isn't it true that Afilias entered
4 into an agreement to acquire these Registry
5 Agreements after those Registry Agreements had been
6 fully executed?

7 A. I don't -- you had a list there. I don't
8 recall any of those specifically. Was that a list
9 of TLDs that had changed hands when?

10 Q. Correct. So this is .MEET, .PROMO,
11 .ARCHI, .SKI and .BIO.

12 Sitting here today, do you have any
13 information to suggest that any of those deals were
14 struck prior to the Registry Agreement being fully
15 executed between the registry operator and ICANN.

16 A. I don't have any special information on
17 that, no.

18 MR. LITWIN: Okay. Mr. Chairman, I think
19 it is a good opportunity to take a second break.

20 ARBITRATOR BIENVENU: Very well.

21 Can you give us -- without holding you to
22 it, but can you give us a sense of how much longer
23 you plan to go?

24 MR. LITWIN: It's a little difficult to
25 say, Mr. Chairman. I would have thought I would

1 have gone through the first part a bit faster than
2 I did. I estimate I have about an hour and a half
3 left, maybe a little bit more. Depends how quickly
4 we can move through these subjects.

5 ARBITRATOR BIENVENU: Very well. So let's
6 take a second break now.

7 So, Mr. Livesay, with the same
8 instructions, you'll be brought to another room.
9 Thank you for your cooperation, and we resume in 15
10 minutes.

11 THE WITNESS: All right. Thank you.

12 (Whereupon a recess was taken.)

13 ARBITRATOR BIENVENU: Thank you,
14 Mr. Livesay. So under the same solemn affirmation,
15 we continue with your cross-examination.

16 THE WITNESS: True, correct.

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

18 Q. Mr. Livesay, I would like to direct your
19 attention to Paragraph 18 of your witness statement
20 that appears on Pages 7 and 8, and there you write,
21 "The DAA is a conditional agreement pursuant to
22 which VeriSign agreed to provide the funds to NDC
23 to participate in the auction for the .WEB gTLD.

24 "In the event NDC prevailed at the auction
25 and entered into a Registry Agreement with .WEB

1 with ICANN -- upon application to ICANN and with
2 ICANN's consent -- NDC would assign the .WEB
3 Registry Agreement to VeriSign."

4 Sitting here today, do you still agree
5 with that statement?

6 A. Yes.

7 Q. And looking at Paragraph 20, further down
8 the page, you write, "The DAA is compliant with all
9 terms of the Guidebook and consistent with
10 transactions by others with respect to the new gTLD
11 Program."

12 You close that paragraph by saying, "The
13 structure of the agreement was also consistent with
14 industry practices in the secondary market for new
15 gTLD applications of which I became aware in my
16 research of the new gTLD Program, as explained
17 above and further documented below."

18 Sitting here today, do you agree with
19 those statements?

20 A. I do, yes.

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1 financing an opportunity.

2 Q. Did VeriSign provide financing to NDC?

3 A. We provided the funds so they could
4 participate in an auction. How you define
5 "finance," I am not sure. We did not finance their
6 entity. We financed their bid in the auction,
7 which I think are two different things.

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Q. You say that, "The DAA is a conditional agreement pursuant to which VeriSign agreed to provide the funds to NDC to participate in the auction for the .WEB gTLD," correct?

A. Correct.

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11 Q. Well, let's talk about -- let's step back
12 and talk generally, Mr. Livesay.

13 In a financing arrangement, generally the
14 entity that provides the financing defines the
15 principal amount of that financing.

16 A. So let me correct again. I did not say
17 this is a financing. I said elements analogous to
18 financing in the following sentence, we are
19 providing a lot of funds for a third party we are
20 arm's length with who I don't know very well. I
21 like Jose, seems like a trustworthy guy, but when I
22 say it is analogous to a financing, I mean from the
23 standpoint, whether it is a home financing or a
24 business financing or a small loan, an unsecured
25 financing, you might look for ways to secure your

1 interest in that money so it is not misused, used
2 for things it was not intended to, making sure it
3 is returned if something goes awry.

4 So when I say "analogous to a financing,"
5 I mean from the standpoint of putting protections
6 into the one providing the funds. I did not mean
7 to suggest it was a financing with a fixed
8 principal or interest rate or this or that.

9 That's why I am trying to make sure you
10 don't step over the word "analogous" and start
11 going into financing, because it is not that. It
12 is analogous to that from the sense of providing
13 protections for the funds we were providing.

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Q. So, Mr. Livesay, you testified earlier that VeriSign funded the \$135 million that was eventually paid as the winning bid at the .WEB auction, correct?

A. Correct.

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A. Correct.

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Q. And are you aware, sir, that in a financing agreement, when a financier secures a security interest, that is limited to the amount of investment that they have made, the amount of funding they have provided; isn't that true?

A. I wouldn't know because this isn't a financing agreement in the common sense. Even in the highlighted part, it says it serves like a security interest. I am not saying it is a security interest in the terms that you would have, like, mortgage interest, for instance. We don't have any -- we are trying to, like I said, analogize, when you put a lot of money on the table, how do you ensure that those moneys are used the way you and this other third party agreed.

Like I said, as much as I like Jose, they were a new party to us. They were working in the

1 secondary market of TLDs. They had been in private
2 auction along with all of these folks in this
3 cohort.

4 To me, as I am looking at this, it looks a
5 bit swampy, and I am thinking, how would we go
6 about preserving our interests so we don't get
7 hosed one way or another. And so we started
8 looking at ways to do that.

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In fact, you talked about a mortgage. So
maybe we could use that as a paradigm to compare

1 how this worked here.

2 In a mortgage, the borrower wants to buy
3 some real estate, and the bank loans, let's say,
4 \$500,000 to the borrower to enable them to do that.
5 And in exchange, they take a security interest in
6 the property; is that your understanding of how a
7 mortgage works?

8 A. Yeah, that's why I think comparing this to
9 a mortgage is totally inappropriate. Because the
10 thing about mortgages is, you're right, the lender
11 actually has an interest that's filed in states
12 with the Secretary of State or whoever, regarding
13 the particular property.

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22 Q. Right.

23 A. I don't think a mortgage is a fair
24 comparison because of that.

25 Q. I agree with you, Mr. Livesay. In fact,

1 when a bank has to foreclose, it recoups its
2 security interest up to the amount, in my example,
3 of the \$500,000 principal. Anything that the
4 auction of the property achieves above that goes to
5 the borrower, because the borrower is the owner.

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Q. I'm sorry, you're using the term
"nth-order possibility"?

A. Yeah.

Q. What does that mean?

A. Another word for saying seems like a very

1 remote possibility, right? You look at a tree of
2 potential outcomes. We simply ran through a lot of
3 them, some seemed a lot more remote than others, so
4 we tried to develop an outcome for it. Some of
5 them, we just said, "This seems like the way," and
6 we shook hands and signed the deal.

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Q. Now, the .WEB auction was comprised of several rounds over two days; is that right?

A. Yes.

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7 Q. Now, each round of this auction had a
8 start-of-round price and an end-of-round price; is
9 that correct?

10 A. That sounds correct, yeah.

11 Q. So as Mr. Rasco explained it on Friday, if
12 bidders did not want to continue bidding, they put
13 in a bid at the start-of-round price, correct, and
14 that would be treated as an exit-round bid?

15 A. I believe so.

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25 Q. So if a bidder wanted to continue to the

1 next round, they submitted the end-of-round price,
2 which was the top price in that range, to ensure
3 that they continued to the next round; is that
4 right?

5 A. That's my recollection, correct.

6 Q. And, of course, they could bid anything
7 between the start- and the end-of-round price,
8 right?

9 A. That's my understanding, or recollection,
10 yeah.

11 Q. So let's see how that worked in practice.

12 I will represent to you that during the
13 sixteenth round of the .WEB auction the
14 start-of-round price was \$57.5 million and the
15 end-of-round price was 71.9 million, okay?

16 A. Okay.

17 Q. Now, if that is correct --

18 Actually, Chuck, why don't you put up
19 Exhibit R-10, please. If you could just highlight
20 the sixteenth round.

21 A. This is not in the binder?

22 Q. It is not.

23 A. I will just look at the screen, then.

24 Q. If you just highlight the row information
25 and then the sixteenth row, please. So there you

1 see, sir, Round 16, the start-of-round price was
2 57.5 million and the end-of-round price was 71.9
3 million, right?

4 A. That's correct.

5 Q. Now, NDC entered a bid of -- I'm sorry,
6 did someone say something? I'm sorry.

7 NDC entered a bid of 71.9 million,
8 correct?

9 A. I would assume so if we went to the next
10 round.

11 Q. Well, you testified that the final bid you
12 submitted was 142 million?

13 A. I know. I know. I am just saying you're
14 providing me this. I am assuming this is the
15 accurate document, right? Naturally, to get to the
16 next round, I have to assume we bid at the
17 end-of-round price. I don't have any specific
18 recollection of the start-of-round price and the
19 end-of-round price. I am taking you at your word
20 that these are the actual amounts.

21 Q. From the ICANN website I represent to you
22 it is a fair and accurate information of the
23 information related to the .WEB auction.

24 A. From that standpoint, I would say we must
25 have entered the end-of-round price if we got to

1 the next round.

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5 Q. Now, I would like you to assume a
6 situation where Mr. Rasco believed that .WEB was
7 not worth more than \$65 million.

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12 A. I don't know. I have no way to assume
13 what Mr. Rasco is thinking or why he would think
14 like that. So you're creating a hypothetical, but
15 go ahead.

16 Q. I am asking you to assume that that
17 factual situation took place.

18 A. However improbable, but okay.

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1 Q. And Mr. Rasco, I think you said it is
2 highly implausible, or words to that effect,
3 because, in fact, as we established earlier,
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Q. I will move on, Mr. Livesay.

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Q. Are you aware that Afiliias has claimed in this IRP that NDC was obligated to disclose the existence and terms of the DAA to ICANN upon the execution of the DAA?

A. I am aware that Afiliias has claimed that, yes.

1 Q. Now, the DAA provided that the existence
2 and terms of the agreement were confidential,
3 right?

4 A. Correct.

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1 Q. I am just wondering, is that a typo,
2 should it be October 20th, 2016?

3 A. No, I don't think it is a typo. I don't
4 recall -- there was a reason for that date. I
5 believe it was on -- I don't remember. I don't
6 remember, but there was a reason for that date. I
7 don't recall what it is now.

8 Q. Okay. If you turn to Page 78, you will
9 see that the DAA was executed on October -- excuse
10 me, on August 25th, 2015, but NDC did not disclose
11 the existence or terms of the DAA to ICANN in 2015,
12 did it?

13 A. 2015, I don't believe that they did, but I
14 believe -- pretty sure we provided a copy, but I
15 don't know about NU DOT CO.

16 Q. You provided -- sorry.

17 A. I said I don't recall whether NU DOT CO
18 provided them a copy in 2015.

19 Q. Did VeriSign provide ICANN with a copy of
20 the DAA in 2015?

21 A. I believe -- I am pretty sure that they
22 provided them a copy not too long after the
23 auction, but it's been a while. Whether it was '15
24 or '16, I thought it was '15, but that's my
25 recollection. That could be off.

1 Q. Maybe I can help you with the dates. The
2 ICANN auction for .WEB took place in July of 2016.
3 So did VeriSign disclose --

4 A. Okay. Fair enough. It would have been
5 after the auction. So that's correct.

6 Q. Okay.

7 A. My years are flipping in my head right
8 now. Sorry about that.

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Q. So your view was that -- strike that.

I am going to move on.

I'd like to direct your attention to your
witness statement where you write that,

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2 ARBITRATOR BIENVENU: Which paragraph?

3 Q. BY MR. LITWIN: Do you agree with that
4 statement?

5 ARBITRATOR BIENVENU: Which paragraph?

6 MR. LITWIN: If you just give me a second,
7 Mr. Chairman.

8 MR. VAUGHAN: It is on Page 8.

9 MR. LITWIN: Yes, Page 8 at Paragraph 21.

10 ARBITRATOR BIENVENU: Thank you.

11 THE WITNESS: I am reading that.

12 Q. BY MR. LITWIN: Now, this is a
13 representation that NDC made to VeriSign in the
14 context of a contract, correct?

15 A. Correct.

16 Q. It is fair to say that just because a
17 party represents something is true in an agreement,
18 that does not, in fact, prove that it is true,
19 right?

20 A. That's the nature of contracts, right.

21 Q. It is, indeed. That's why we have
22 misrepresentation suits, right.

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Q. In fact, that's what VeriSign requested
NDC to do in July of 2016, correct?

A. Correct.

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Q. Now, this confirmation was signed two days

1 prior to the .WEB auction; is that right?

2 A. I think the auction started on the 27th,
3 so maybe one day before.

4 Q. I'm sorry, one day before.

5 A. Two days before conclusion. So you win
6 that one. I'm with you on that one.

7 Q. There you go. Okay.

8 Now, following execution of this
9 confirmation of understanding, NDC did not disclose
10 the DAA to ICANN prior to the .WEB auction,
11 correct?

12 A. Correct.

13 Q. In fact, NDC never disclosed the DAA to
14 ICANN, right? It was only after Afilias had
15 complained to ICANN, after ICANN's external counsel
16 had called VeriSign's external counsel, did
17 VeriSign cause its external counsel to produce the
18 DAA, correct?

19 A. That's how I understand it was delivered
20 to them, yes.

21 Q. And when the DAA was finally disclosed,
22 VeriSign designated it as confidential, which
23 precluded ICANN from even informing Afilias or
24 anyone else that it received the agreement between
25 VeriSign and NDC, correct?

1 MR. JOHNSTON: Excuse me. I'd like to
2 just caution the witness not to disclose
3 communications with counsel or information he only
4 possesses because of a communication with counsel.

5 MR. LITWIN: I will accept a yes-or-no
6 answer to my question.

7 THE WITNESS: Could you restate it real
8 quick?

9 Q. BY MR. LITWIN: Sure. And when the DAA
10 was finally disclosed, VeriSign designated it as
11 confidential, which precluded ICANN from even
12 informing Afiliias or anyone else that it had
13 received the agreement between VeriSign and NDC,
14 correct?

15 A. I can only confirm having been informed
16 that a copy was sent to them from our outside
17 counsel. Anything beyond that, I wasn't involved.

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25 Q. Okay. Let me step back. Is it fair to

1 say -- is it fair to say that in agreements, there
2 are certain things that are confidential and
3 certain things that are not?

4 A. I guess it would vary on the agreement.
5 Some make all the terms confidential, some make
6 some terms confidential. I think it would vary on
7 the agreement.

8 Q. So is your testimony here that VeriSign
9 considered the entirety of the DAA to be
10 confidential?

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20 Q. I'd like to direct your attention to Page
21 15 of your witness statement, and there to
22 Paragraph 38.

23 There you write, "I was responsible for
24 this transaction. I did not have communications
25 with ICANN before or following the auction process.

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5 Do you see that, sir?

6 A. Yes, yes.

7 Q. Okay. I'd like to place this with the
8 context of some of the context that we heard
9 previously. Are you aware that Mr. Rasco called
10 Ms. Willett of ICANN on July 31st and told her that
11 someone from VeriSign would be reaching out to call
12 Mr. Atallah at ICANN?

13 A. I may have been told that at the time. I
14 don't recall specifically.

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

22 MR. De GRAMONT: I think you said,
23 "Someone did, in fact, call VeriSign."

24 MR. LITWIN: I'm sorry. Let me rephrase.

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Q. Well, I can refer you, sir, to Tab 10 of
your binder.

A. There it is.

1 Q. Does that help refresh your recollection
2 that the DAA was produced on August 23rd?

3 A. It is not refreshing my recollection
4 because I don't think I have ever actually seen
5 this document. I only know that it was sent. I
6 don't know the context. This is the first time I
7 recall seeing this particular letter.

8 Q. And the DAA was only produced after
9 Afiliias had complained to ICANN; isn't that right,
10 as you've said earlier?

11 A. I mean, sadly, Afiliias had already been
12 complaining since before the auction. So
13 everything happens after Afiliias starts
14 complaining, right.

15 Q. Mr. Livesay, what evidence do you have
16 that Afiliias made any complaints before the .WEB
17 auction?

18 A. I am not following your question about --
19 you asked about whether I knew when this -- when
20 the letter and the DAA went from our counsel to
21 ICANN's counsel, and then you said -- then you
22 asked, "Was this after or before Afiliias" something
23 or other.

24 So I am trying to make sense of your
25 question.

1 Q. My question was --

2 A. Yep.

3 Q. -- that the DAA was finally produced to
4 ICANN only after Afilias had complained following
5 the conclusion of the .WEB auction?

6 A. That I can't be sure because I don't know
7 when Afilias first complained. I am not certain if
8 you mean when they made their first complaint to
9 ICANN or -- I don't know.

10 MR. LITWIN: Mr. Chairman, I'd like to
11 take a few minutes to confer with my colleagues,
12 please.

13 ARBITRATOR BIENVENU: Very well.

14 (Whereupon a recess was taken.)

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

16 ARBITRATOR KESSEDJIAN: Just a minute.
17 Mr. Chernick is not back.

18 MR. LITWIN: Oh, I see him now. May I
19 proceed, Mr. Chairman?

20 ARBITRATOR KESSEDJIAN: Indeed, he's back.

21 ARBITRATOR BIENVENU: Yes, go ahead.

22 Q. BY MR. LITWIN: Mr. Livesay, right before
23 we went to break -- and I am going to read the
24 question and answer back to you -- I asked, "And
25 the DAA was only produced after Afilias had

1 complained to ICANN; isn't that right?"

2 You responded, "I mean, sadly Afiliias had
3 been complaining since before the auction."

4 Do you know how -- what the -- when
5 Afiliias first complained to ICANN?

6 A. I don't. In fact, even when I say "before
7 the auction," I may be confusing it with some of
8 the activities of Donuts, who I believe filed some
9 case in trying to prevent the auction. I might
10 have been misspeaking about who was complaining.

11 The question about when did Afiliias
12 complain, I don't know specifically when they made
13 any first formal complaint to ICANN. I don't know
14 what date that would be.

15 Q. Okay. But it's fair to say that you were
16 aware that complaints were made to ICANN regarding
17 the .WEB auction prior to the .WEB auction taking
18 place, correct?

19 A. There was definitely stuff circulating in
20 the swamp about that, yeah.

21 MR. LITWIN: Okay. Mr. Chairman, I have
22 no further questions. Thank you.

23 ARBITRATOR BIENVENU: Thank you very much,
24 Mr. Litwin.

25 Do my colleagues have questions for

1 Mr. Livesay?

2 ARBITRATOR KESSEDJIAN: I may have some.
3 Do you have any questions, Mr. Chairman?

4 ARBITRATOR BIENVENU: I have a few
5 questions, yes.

6 ARBITRATOR KESSEDJIAN: Perhaps you can go
7 ahead, and then I can ask if there are some
8 unanswered of my questions.

9 ARBITRATOR BIENVENU: Very well.
10 Mr. Chernick?

11 ARBITRATOR CHERNICK: I do not. Thank
12 you.

13 ARBITRATOR BIENVENU: Thank you.

14 Mr. Livesay, were you and the executives
15 you were working with on this initiative surprised
16 by the amount that NDC had to bid to win the
17 auction for .WEB?

18 THE WITNESS: I don't know if "surprised"
19 is the right word. I think we had been watching a
20 lot of TLDs go for higher prices right before then,
21 and I may get the numbers wrong, but I think .APP
22 went for 25, if I recall, something like that. We
23 were just watching this and looking and saying,
24 well, .WEB may have more potential than .APP.
25 Maybe .WEB's broader, maybe it goes for more than

1 that. 135, yeah, maybe higher than I thought, but,
2 yeah, not crazily surprised, I guess.

3 ARBITRATOR BIENVENU: When you say "higher
4 prices," you mean increasingly high prices?
5 Nothing was higher than what was bid for .WEB, as
6 we understand.

7 THE WITNESS: Yeah, I am not aware of
8 anything higher than .WEB. I am simply saying we
9 had seen some TLDs going for tens of million
10 dollars, at least in that area.

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17 ARBITRATOR BIENVENU: I think you
18 mentioned at the beginning of your evidence, but I
19 could be wrong, but I think you mentioned that
20 among the documents that you reviewed for the
21 preparation of your testimony today were the
22 filings that the parties made in the IRP; is that
23 correct?

24 THE WITNESS: Some of them. I don't
25 believe all of them. I read Afilias' document

1 from -- I think it was May, in which I then -- that
2 was kind of some of the background of creating my
3 written testimony. And then I read the filings
4 that came in after that.

5 MR. BIENVENU: Oh, you did. So I was
6 going to ask you a question about --

7 THE WITNESS: Let me clarify. When I say
8 "read," I just breezed through to kind of
9 understand what was going on. I wasn't trying to
10 take up any of the legal arguments. I just want to
11 give you a heads-up on that.

12 ARBITRATOR BIENVENU: I would just invite
13 you to comment on a paragraph from the rejoinder
14 memorial of ICANN. This is not something you would
15 have reviewed before signing your witness statement
16 because it was filed on the same day as your
17 witness statement. It was filed on June 1st. But
18 perhaps you have read it since.

19 THE WITNESS: Do you have it there to
20 show?

21 ARBITRATOR BIENVENU: Yes. Perhaps
22 somebody could display on the screen the first
23 page. It is called "ICANN's Rejoinder Memorial."

24 Mr. Litwin, is Chuck available?

25 MR. LITWIN: Do you have a copy of the

1 rejoinder? My team is sending it to him right now.
2 I would send my copy, but it has quite a bit of
3 handwritten notes on it.

4 MR. VAUGHAN: All I need is an exhibit
5 number.

6 MR. LITWIN: It is not an exhibit. It is
7 a pleading. So someone is going to have to send it
8 to you.

9 MR. JOHNSTON: Or, Mr. Chairman, if it is
10 short enough and integrated itself, you might read
11 it to the witness. He might be able to answer the
12 question without actually seeing it. If he needs
13 to see it, he can ask.

14 ARBITRATOR BIENVENU: I'd like to invite
15 him to comment on three sentences in the middle of
16 a paragraph, and I think it would be more fair if a
17 witness could see the whole paragraph. So I would
18 prefer -- I don't want to read the whole paragraph.
19 Let's see if we can display it.

20 MR. LITWIN: It will be only one more
21 minute, Mr. Chairman.

22 (Discussion off the record.)

23 ARBITRATOR BIENVENU: The cover doesn't
24 look like my cover. Is this the one dated June
25 1st?

1 MR. LITWIN: I believe it is.

2 ARBITRATOR BIENVENU: Okay. Very well.

3 So this is the document, Mr. Livesay. Do
4 you remember seeing this document?

5 THE WITNESS: Not necessarily by the
6 pleading cover. I definitely read one of
7 ICANN's -- I don't know if it was this one because
8 I read one that must have been filed later than
9 this because it had my name in it. I don't know if
10 I read this ICANN paper.

11 ARBITRATOR BIENVENU: Anyway, the
12 paragraph on which I would like to invite you to
13 comment is Paragraph 82, if Chuck would display
14 that.

15 Mr. Livesay, you are welcome to read the
16 whole paragraph. My questions will concern the
17 third, fourth and fifth sentence in that paragraph.

18 THE WITNESS: All right. Paragraph 82,
19 just give me a second to read it.

20 Okay. I have read it. What's the
21 questions?

22 ARBITRATOR BIENVENU: So I'd like you to
23 comment on the statement, the fourth line,
24 "Determining that NDC violated the Guidebook is not
25 a simple analysis that is answered on the face of

1 the Guidebook. There is no Guidebook provision
2 that squarely addresses an arrangement like the
3 DAA."

4 So I stop there for a minute. Do you
5 agree with these statements?

6 THE WITNESS: As to the first highlighted
7 one, whether it is easy or difficult to determine
8 if it's been violated, I mean, that's ICANN's
9 perspective. I think they may be using some
10 information I'm not aware of.

11 Because, again, I don't believe that what
12 we did changed the ownership or would have required
13 any type of request for reevaluation. So I don't
14 know that I necessarily agree that it is not a
15 simple analysis.

16 And then the second statement, I think
17 that's probably true. There is no guidebook that
18 squarely addresses this anymore than there's one
19 that squarely addresses the way Google constructed
20 its document or the way that -- I forget -- the Dot
21 Tech, that's not expressly addressed either, I
22 don't think.

23 ARBITRATOR BIENVENU: And what about the
24 next sentence, "A true determination of whether
25 there was a breach of the Guidebook requires an

1 in-depth analysis and interpretation of the
2 Guidebook provisions at issue, their drafting
3 history to the extent it exists, how ICANN has
4 handled similar situations, and the terms of the
5 DAA."

6 THE WITNESS: I think it is certainly fair
7 to say that some analysis needs to be had between
8 the guidebook and the DAA. How in-depth that is, I
9 think, is a matter of opinion, I suppose.

10 ARBITRATOR BIENVENU: In your experience,
11 Mr. Livesay, and those you were working with at
12 VeriSign, but, you know, exclude conversations with
13 counsel, is there a mechanism for an applicant or
14 someone interesting in conceiving deals in what you
15 describe as the secondary market, to ask on a
16 confidential basis sort of advisory opinion from
17 ICANN as to the compliant nature of a possible
18 transaction with the applicable program rules?

19 THE WITNESS: I think maybe you are
20 getting at the question of -- maybe that was so
21 long that I didn't understand your question
22 exactly.

23 MR. BIENVENU: Let me rephrase it. It was
24 a long question.

25 Is there a mechanism for someone who, like

1 VeriSign when it was looking at the DAA, to ask
2 ICANN -- suppose you had a doubt as to whether the
3 DAA was permissible or not. Was there a mechanism
4 to ask on a confidential basis for an advisory
5 opinion on --

6 THE WITNESS: Okay. I was confused by
7 your use of the term "mechanism." It made it sound
8 like there was some fixed process within the
9 company that I am not aware of.

10 There was, however, a communication made
11 after the auction. Actually, I don't know
12 specifically a date, but I believe there was a
13 generic question asked by someone from our naming
14 group to someone at ICANN about what would happen
15 if -- you know, in a request for assignment and
16 what's looked at and what types of
17 disqualifications might affect that. I believe a
18 call like that was made, because the intent from
19 our standpoint was to -- at the request for
20 assignment, after NU DOT CO had executed the
21 Registry Agreement, we wanted to feel comfortable
22 that -- I don't want to use the word "perfunctory,"
23 but given our history in running TLDs, VeriSign,
24 that is, both financially and technically, we were
25 interested in making sure, is there any other

1 reason why an assignment would not be approved to
2 us as a potential assignee. Sorry.

3 ARBITRATOR BIENVENU: I think I know what
4 you're referring to in terms of asking what is the
5 practice of ICANN when it is to approve an
6 assignment.

7 But I meant to situate my question at
8 another point in time, an earlier point in time,
9 when you and your colleagues were engaged or
10 approaching the point where you would engage with
11 potential counterparties to strike a deal like the
12 one you made in the DAA.

13 Did you consider asking ICANN whether the
14 time of the transaction, the way you proposed to
15 structure it, complied with the guidebook?

16 THE WITNESS: I don't recall having a
17 discussion specifically. I think you're asking why
18 did we -- we could have just asked ICANN ahead of
19 the auction, or maybe that's what you're asking. I
20 am not really sure.

21 ARBITRATOR BIENVENU: I am asking whether
22 when you were contemplating entering into the
23 DAA --

24 THE WITNESS: Right.

25 ARBITRATOR BIENVENU: -- whether you

1 discussed seeking an advisory opinion from ICANN as
2 to the -- as to the compliant nature of the
3 agreement you were looking at with the program
4 rules?

5 THE WITNESS:

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21 ARBITRATOR BIENVENU: Very well. Thank
22 you, Mr. Livesay.

23 Mr. Johnston, any redirect, and do you
24 want to take --

25 ARBITRATOR KESSEDJIAN: Mr. Chairman --

1 ARBITRATOR BIENVENU: Oh, sorry. Excuse
2 me.

3 ARBITRATOR KESSEDJIAN: Everybody's tired,
4 but I think I can still survive. It is 9:38 p.m.
5 for me. So it is starting to be dinnertime in the
6 Spanish way.

7 Mr. Livesay, I still have a few questions
8 for you. This is Catherine Kessedjian. I am
9 speaking from Paris, and I'd like to come back to
10 one question that was asked by the Chair.

11 THE WITNESS: Yeah.

12 ARBITRATOR KESSEDJIAN: About the
13 relationship, the business and, I would say,
14 financial and whatever you want to call it,
15 relationship between the .WEB and the .COM and the
16 other gTLDs that we have there.

17 Am I correct to think that you were a vice
18 president of VeriSign for strategy and management
19 in 2009 and 2010?

20 THE WITNESS: Correct.

21 ARBITRATOR KESSEDJIAN: Thank you. So you
22 must have a sense of the business?

23 THE WITNESS: No, not the naming business.
24 At that time, the company was predominantly two
25 businesses. The certificate business, digital

1 certificates. In fact, at that time the digital
2 certificate business was about 50 percent larger
3 than the DNS business. I believe it was about
4 60/40, I want to say, out of a billion, roughly.

5 I come from the history of the certificate
6 business. When I was hired in, I worked directly
7 for the chairman, Jim Bidzos, at the time, to help
8 look at the splitting of the two businesses, but I
9 come from that half of the world.

10 ARBITRATOR KESSEDJIAN: Okay. Very good.
11 So it was only later in 2014 that you had to become
12 aware, if you will, of the business of the gTLDs?

13 THE WITNESS: A lot of rapid learning,
14 yes.

15 ARBITRATOR KESSEDJIAN: Yes. I am
16 absolutely confident that you are capable of that.

17 Now, we read in several reports and
18 particularly a report by J.P. Morgan that it was
19 the understanding of the business that, in fact,
20 .WEB was going to be a competitor for almost every
21 single gTLD because of the nature of the word
22 "WEB."

23 Now, what is your reaction to those
24 reports? Could you tell us a bit more about that?

25 THE WITNESS: I don't know that I am

1 familiar with the report you're referring to. I
2 read a lot of things back then. I definitely
3 recall hearing both, you know, that .WEB looked
4 like a great potential true generic. That
5 certainly played into reasons why VeriSign might be
6 interested in it, which is selling domains and
7 broadening the availability of domains is what
8 VeriSign does, and this looked like a good
9 opportunity for that.

10 ARBITRATOR KESSEDJIAN: Okay. Thank you
11 very much.

12 Now, I want to understand another point
13 that was not asked within the cross or by the
14 Chair. We heard since the beginning of the
15 hearing -- so last week we have been at this
16 hearing -- that, in fact, ICANN has always favored
17 what they call a private auction. In fact, ICANN
18 favors that the contention set people, entities
19 that are in the contention set, basically do it by
20 themselves. ICANN would much prefer not to have
21 the public auction.

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4 Could you explain to us why is it that
5 VeriSign was so adamant to actually have a public
6 auction and not making it private?

7 THE WITNESS: Sure, sure. One of the
8 things that, as I got more into looking at how the
9 contention sets were resolved, in any string that
10 has more than one, how do you resolve it? I
11 definitely read and familiarized myself, and it was
12 definitely made clear that ICANN prefers a private
13 resolution.

14 But as I talked to people in different
15 contention sets, both in .WEB and some others that
16 we looked at, what became curious to me was I
17 appreciated why ICANN would want the contention set
18 to resolve itself, because at that point in theory
19 all the potential antagonists have agreed, great
20 solution.

21 The thing that looked unusual to me is
22 that whether it is a private auction or other
23 private resolution, in the private auction case,
24 the winner is paying or -- another way to look at
25 it is buying off the losers. That has a weird

1 collusive look to it for someone like VeriSign.

2 So to have a situation where we are going
3 to somehow bid and pay off all the losers seemed
4 troubling, and that's one.

5 And then in the other private resolution,
6 in fact, where it is not necessarily auction, but
7 just contention set members are, I don't know,
8 resolving through agreement and having postauction
9 transfers, it just -- the lack of transparency in
10 the conduct between the contention set members
11 seemed unusual, and the fact that it was paying off
12 people to lose was troubling.

13 I think this even came back to prove
14 itself in reality.

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18 Some of those things seem to have come
19 back in play the following year leading up to the
20 auction. For example, I was surprised to see that
21 the other contention members were still trying to
22 contact NDC during the blackout period. That kind
23 of behavior is kind of the weird behavior we didn't
24 want to be a part of in a private resolution. I
25 realize the blackout period doesn't authorize that,

1 but it was happening anyway.

2 I also recall that Afilias made not one,
3 but two offers to somehow promise NU DOT CO an
4 amount. At one point I believe it was 16.8 and
5 then they came back and raised the number to 17.02
6 or something like that. I'm like, wow, this is
7 kind of weird stuff we were wondering about. How
8 is one contention set member able to simply offer
9 money to someone else? It just seemed weird to me.

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14 ARBITRATOR KESSEDJIAN: You are not
15 mentioning one point, which may be important, which
16 is the fact that VeriSign being secretly involved,
17 there was less of a possibility to control the
18 auction and the price.

19 THE WITNESS: I don't know if that's the
20 case. In a private auction, one could see --
21 that's the thing, the way privates are resolved was
22 kind of a bit of a black box.

23 ARBITRATOR KESSEDJIAN: Okay.

24 THE WITNESS: That was kind of -- the
25 unknowns just seemed -- let's go with something

1 that's straight and open.

2 ARBITRATOR KESSEDJIAN: Okay. Thank you.
3 Now, you said that at some stage in your testimony
4 tonight -- tonight for me -- that VeriSign didn't
5 want -- or VeriSign had the confidentiality clauses
6 in the DAA because without them, it would be
7 concerned that it would -- and I use your terms, at
8 least the ones that I have noted. I don't have the
9 real live feed. I didn't sign up for that --
10 upsetting the path. That's your words, at least
11 from what I have taken as notes.

12 Now, do you refer to that as a concern
13 that VeriSign, that if it were discovered by
14 anybody that VeriSign was behind one of the
15 contention set applicants, it would really be a
16 problem? Could you explore more what you meant by
17 upsetting the path?

18 THE WITNESS: I guess the only way I can
19 say it is all the alleged claims we are hearing now
20 from Afilias, however wrong I think they are, we
21 would have heard. But that wasn't really the main
22 drive. The main drive was we figured we'd be
23 reviewed and have to take that when it came out.

24 The point was there looked like a path,
25 that there's a specific point where it would be

1 evaluated, whether we were an appropriate assignee
2 or not of the RA. So I think we just looked at a
3 particular path that looked like it would work, and
4 it still required disclosure, eventually, and
5 that's the path we are on.

6 ARBITRATOR KESSEDJIAN: Thank you,
7 Mr. Livesay.

8 No more questions, Mr. Chairman.

9 ARBITRATOR BIENVENU: Thank you. And
10 apologies for forgetting to ask you for your
11 questions.

12 Mr. Chernick, any questions?

13 ARBITRATOR CHERNICK: No thank you.

14 ARBITRATOR BIENVENU: Mr. Johnston, do you
15 want to take a few minutes before you start your
16 redirect or do you want to start right away?

17 MR. JOHNSTON: I think two minutes would
18 be helpful, but I think it will only take two
19 minutes.

20 ARBITRATOR BIENVENU: Very well. Let us
21 know when you're ready.

22 MR. JOHNSTON: Can we have a room, JD?

23 MR. ENGLISH: Sure. Give me one second.

24 (Whereupon a recess was taken.)

25 ARBITRATOR BIENVENU: Mr. Johnston, are we

1 ready to go?

2 MR. JOHNSTON: Yes, and no. We have no
3 questions, and we just thank Mr. Livesay for his
4 testimony.

5 ARBITRATOR BIENVENU: Very well.
6 Mr. Livesay, I would like to say the very same
7 thing on behalf of the members of the Panel. Thank
8 you very much for your evidence and thank you for
9 your time today.

10 THE WITNESS: Thank you all for clocking
11 in from all different parts of the world. I have
12 it easy here in California time. My apologies to
13 France. It is past my dinnertime there. Okay.
14 Great.

15 ARBITRATOR BIENVENU: Thank you, sir.
16 JD, we'll remove the witness from the
17 room.

18 MR. ENGLISH: The witness is gone from the
19 room and the meeting.

20 ARBITRATOR BIENVENU: Very good. I think
21 this concludes the evidentiary portion of this
22 hearing. Perhaps I can begin by reverting to the
23 question foreshadowed in my opening remarks this
24 morning and ask whether the parties are satisfied
25 in the manner in which this hearing is being

1 conducted and whether there is any concern in this
2 regard that either party would wish to raise.

3 I'll begin with directing the question to
4 Mr. Ali on behalf of the claimant.

5 MR. ALI: Thank you, Mr. Chairman.

6 As I indicated last week and, I must say,
7 somewhat emotionally, for which I apologize to the
8 Panel, we on our side did not believe, do not feel
9 that the prehearing phase was handled very well by
10 the Panel, putting unnecessary, undue pressure on
11 counsel in a matter that is evidently extremely
12 complicated and one which we had a very significant
13 record to deal with and a number of witnesses.

14 With that having been said, I think I
15 speak on behalf of the client and our entire team
16 to say that the hearing has been handled extremely
17 well, of course with great help from our
18 technologists and the support, but so far as the
19 hearing itself is concerned, from Afiliias' side, we
20 have no concerns. Thank you for managing such a
21 good hearing and for very incisive and very
22 well-formed questions.

23 ARBITRATOR BIENVENU: Thank you, Mr. Ali.

24 Mr. LeVee, can I ask the same question to
25 the respondent?

1 MR. LeVEE: ICANN has no objections to how
2 any of these past several weeks have been handled.
3 Certainly the parties have had -- I said certainly
4 the parties have had vigorous exchanges and the
5 last several weeks have been extraordinarily busy
6 for everyone.

7 I think the Panel handled it extremely
8 well, given that we had set specific deadlines and
9 that we had last week scheduled in Chicago and the
10 Panel made it work and then added these days. And
11 ICANN is extraordinarily appreciative of the
12 Panel's efforts, its dedication, its questions and,
13 candidly, its patience. Because I think patience
14 was required over the course of the last seven days
15 of this hearing.

16 And may I say, it may well be that virtual
17 proceedings like this are here to stay for some
18 unknown and perhaps long periods of time.

19 I think these seven days showed that it
20 can work and that we can put together people in
21 multiple locations, including time zones that are
22 nine hours from mine. And I think, candidly, I did
23 not expect it would work as well as it did. And
24 yes, we had a little bit of technology issues come
25 across, but people will get better at that as time

1 goes by. Even in a thunderstorm, Paris didn't lose
2 its Wi-Fi connection tonight.

3 So we are very pleased, and we would like
4 to thank not only the members of the Panel, but
5 opposing counsel, obviously, our client, folks from
6 the VeriSign side.

7 We thank you. This has been seven very
8 challenging but ultimately days that made sense.
9 And we thank you, and we don't want to do it again
10 any time soon, but we think it worked.

11 So thank you, Mr. Chairman, for allowing
12 me to say that.

13 ARBITRATOR BIENVENU: Thank you,
14 Mr. LeVee.

15 May I then ask of the Amici, beginning
16 with Mr. Marenberg on behalf of NDC?

17 MR. MARENBERG: Thank you, Mr. Chairman.
18 Can you all hear me clearly?

19 ARBITRATOR BIENVENU: Very clearly.

20 MR. MARENBERG: Thank you.

21 First I would like to thank the Panel for
22 your hard work and your diligence, your patience
23 and, frankly, your graciousness in handling the
24 seven days of testimony that we've had.

25 And I also express agreement with

1 Mr. LeVee that I think that the virtual nature of
2 this proceeding has been relatively seamless.

3 And I think if I were a hotel or an
4 airline, I would worry because I think we are
5 demonstrating here that these trials -- or at least
6 trials that do not involve juries, can be
7 undertaken and undertaken well with the technology
8 available now.

9 On those grounds, I have nothing but
10 praise for the Panel and praise for TRIALanywhere
11 and the proceedings and the technology.

12 I do have some concerns that I want to
13 raise on behalf of Amici, and I want to preface it
14 by saying that I have no intention of relitigating
15 Procedural Order 1 here that limited the role of
16 Amici in this instance. That's not what I am
17 saying now.

18 I do want to express concerns, concerns
19 that are particularly acute to me in light of the
20 testimony of -- I think it was Mr. Disspain, where
21 he suggested that ICANN would give, I think -- I
22 don't know whether he used "deference" or whether
23 he would take into consideration and give serious
24 consideration to whatever recommendations this
25 Panel made.

1 Here's why I have concerns about that.
2 This has not been a true adversarial proceeding
3 from NDC's -- I'll let VeriSign speak for itself,
4 but certainly from NDC's point of view.

5 We do not have the ability to put on any
6 witnesses of our own. We have not had the ability
7 to demand that Afiliias stop playing games with this
8 Panel and not withdraw the witnesses that it
9 withdrew so that we couldn't cross-examine those
10 witnesses and explain to the Panel that what they
11 are accusing NDC of doing and VeriSign of doing is
12 functionally and substantively no different from
13 what they do every day.

14 If we had their witnesses here, we could
15 have -- well, I could still not have cross-examined
16 them, but perhaps someone could have. But the fact
17 that I couldn't cross-examine them and my client's
18 rights are at issue or potentially at issue is a
19 problem with the proceeding, not a problem with the
20 Panel, but it is a problem that suggests that the
21 Panel needs to be very careful, I'll just say it
22 that way, with the, quote, "recommendation that it
23 is making," because it is doing so on the basis of
24 a somewhat one-sided presentation.

25 By the way, and I think Mr. Ali will

1 object to this, but I believe that the Panel should
2 be taking and making adverse inferences from the
3 fact that Afiliias withdrew all its witnesses. That
4 is, as I understand it, a traditional prerogative
5 of the Panel when witnesses are under control of a
6 party and they are withdrawn for no reason at all.

7 Now, I am going to guess that Mr. Ali is
8 going to object to my suggesting that because,
9 after all, I am only an Amici and not a party, and
10 I have no right to make that suggestion.

11 But if that's true, that goes to, again,
12 the limitations of this proceeding as reflected
13 from the perspective of my client, NDC, whose
14 rights are at issue here.

15 There was another instance, and, again, I
16 take no umbrage of it, and I think that the Chair
17 was quite patient with me when I interrupted the
18 proceedings at a time where I thought a witness who
19 was commenting on the actions of my client was
20 interrupted by counsel and not able to give a full
21 explanation of the answer.

22 Now, I think the Panel quite rightly said,
23 "Under the rules, you're an Amici, you have no
24 right to do that under the rules we set up. And,
25 Mr. Marenberg, please be quiet." I think I was

1 after that.

2 But it goes again to the limitations of
3 the proceedings from the perspective of NDC.
4 Again, I suspect VeriSign feels similarly to this.

5 This is, in a sense, an unbalanced
6 proceeding. I think the evidence -- and I am not
7 going to say a lot about this. The evidence has
8 come out quite favorably to the positions that were
9 taken, but it has come out despite the fact that
10 this is an uneven proceeding and unbalanced
11 proceeding.

12 Therefore, those are the comments I want
13 to make. It is no criticism of the Panel at all.
14 It is the nature of the process that we are engaged
15 in.

16 ARBITRATOR BIENVENU: Thank you,
17 Mr. Marenberg.

18 We'll hear from the parties in a minute as
19 to what was -- what is going to be proposed in
20 terms of posthearing submissions, but you will have
21 an opportunity in the course of posthearing
22 submissions of making representations of the sort
23 that you have made now, about what should or should
24 not be our recommendations.

25 As you know, the question I'm posing has a

1 narrower objective. But anyway, your concerns and
2 comments are reflected in the record.

3 Mr. Johnston.

4 MR. JOHNSTON: Yes. I would agree with
5 what Mr. Marenberg says. I am going to make my
6 comments very pointed and brief.

7 I thought the Panel has been thoughtful,
8 prepared, courteous. I don't know most of the
9 Panel members. I haven't had experience with most
10 of you before, so I can tell you that I was
11 surprised and impressed.

12 I have been an arbitrator before, and I
13 don't think I have ever been more prepared or
14 courteous than the Panel has demonstrated during
15 this hearing.

16 My concern has nothing to do with the
17 Panel. My concern is the combination of the
18 system, IRP system, and the way, in my view -- and
19 I am not going to repeat my opening statement --
20 the way it's been misused here to try and bring
21 claims asking for resolution of issues and relief
22 directly against parties who cannot be parties by
23 virtue of the rules, an ambiguity that lasted
24 throughout this hearing as to what the jurisdiction
25 would be that the Panel would rule on.

1 So we have on the one hand a system that
2 did not allow Amici to appear as parties,
3 including, for the reasons Mr. Marenberg pointed
4 out, while at the same time we had a claimant
5 asking for relief directly against unrepresented
6 parties, and then from day one objecting to
7 participation by Amici, trying to keep us out of
8 the proceeding in virtually every way. Ultimately
9 there was some relenting on that, but as
10 Mr. Marenberg summarized, it has created a
11 one-sided proceeding.

12 So my concern is basically were the Panel
13 to go beyond what we believe the Panel's
14 jurisdiction is and either in their findings
15 regarding such matters as to whether the DAA is
16 consistent with the guidebook or awards relief,
17 such as undoing an auction and setting a price for
18 Afiliias to walk off with .WEB, which is what
19 Afiliias has asked the Panel to do.

20 I don't know that there's a way that the
21 Panel can remedy the system, but one step that
22 would remedy, I guess, our concerns is if the Panel
23 adopted our notion of its jurisdiction and stayed
24 within it.

25 Because once it goes beyond that

1 definition of jurisdiction, it directly impacts our
2 interests without an equal or fair representation.

3 But in terms of what the Panel's done as
4 opposed to the way the rules are attempted to be
5 used here, I only have compliments to offer.

6 ARBITRATOR BIENVENU: Thank you very much,
7 Mr. Johnston.

8 Can I ask, then, for the parties' thoughts
9 about posthearing submissions? I assume you have
10 had time over the past 24 hours to discuss that.

11 Mr. Ali, do you want to?

12 MR. ALI: Yes, we have, Mr. Chairman. I
13 think we agreed on a date for the filing -- the
14 first round filing of the posthearing submissions,
15 which is October 8th; is that correct, Jeff?

16 MR. LeVEE: Yes. I don't know that the
17 Amici have confirmed their agreement to that date,
18 but ICANN and Afilias have agreed that we will
19 submit our posthearing brief on 8 October of 2020.

20 If I might add, just so there's no
21 ambiguity, I would propose that we do so at 8:00
22 p.m. Pacific so that everyone knows exactly what
23 time they should be submitting their briefs.

24 MR. ALI: That's fine. Of course, this is
25 subject to your comments earlier, Mr. Chairman,

1 about the Panel having -- needing time to define
2 the questions and consider the evidence that you
3 have received over the course of the past seven
4 days.

5 ARBITRATOR BIENVENU: Did you discuss with
6 your colleagues, Mr. Ali, the question of the
7 length of the posthearing submissions?

8 MR. ALI: We did, and as you can imagine,
9 we had lengthy emails about the length, and we
10 couldn't reach agreement.

11 Our basic question is that --

12 ARBITRATOR BIENVENU: I am glad everyone's
13 sense of humor remains intact.

14 MR. ALI: Hopefully the posthearing briefs
15 will be shorter than the length of the emails.

16 In any event, our position is that we
17 should have the same number of pages as ICANN and
18 Amici put together, so that if each of the ICANN
19 and Amici have 50 pages each, we get 150 pages
20 simply because we need to respond to all of the
21 various arguments.

22 As we have seen, you have got a very
23 developed and large evidentiary record now based on
24 this hearing, and as we have seen previously,
25 particularly with the Amici, they cross-refer to

1 each other. So certainly it would be extremely
2 imbalanced if we were to be given the same number
3 of pages as each of ICANN and the Amici
4 individually.

5 So that's the starting -- that's the
6 discussion that we had, and ultimately I think we
7 would have to leave it with the Panel.

8 I would just make one other point, is that
9 the evidence that's been elicited here has been
10 through our cross-examination. So we would need to
11 have the opportunity to put all of that evidence in
12 context.

13 The other point is that insofar as
14 simultaneous submissions are concerned, it doesn't
15 really matter what the page limits are because at
16 this point, we don't have any further proceedings.
17 What we are trying to do is to put the evidence in
18 context and to help you, the panelists, by bringing
19 all of the various points, to crystallize them, to
20 put them in the context for you.

21 At the end of the day, it doesn't -- it is
22 not to our client's benefit to deluge you with
23 paper, but rather to present the case as clearly as
24 we can now that we have a full evidentiary record.

25 So that's where we are coming from, sir.

1 MR. LeVEE: May I?

2 ARBITRATOR BIENVENU: Yes. I thought he
3 was paving the way for the number, and you would
4 give us the number.

5 MR. LeVEE: Well, we did have a number of
6 discussions. Mr. Ali started, as he just
7 indicated, off the discussion by indicating that he
8 did not --

9 MR. ALI: Jeff, may I just interrupt you
10 for a second? Vice President Biden has just
11 nominated Kamala Harris for vice president.
12 Historic moment. Not to interrupt this historic
13 moment that we ourselves are engaged in here.

14 MR. LeVEE: So Mr. Ali did initially
15 suggest that the page limit -- that there not be a
16 page limit. ICANN strongly opposes that. I think
17 there should be limitations.

18 And then the issue was, well, should
19 Afilias have some additional pages because they are
20 responding to more briefs, but we only are going to
21 file one brief. So Afilias -- we have simultaneous
22 briefs, so Afilias isn't going to be responding to
23 briefs. They are going to be submitting their
24 briefs just as ICANN is submitting its brief, just
25 as the Amici are submitting theirs.

1 So under the equality of treatment
2 principle, ICANN very much would like to have the
3 same number of pages as Afilias. I understand, but
4 the Amici can confirm separately, that they have
5 agreed that whatever the page limit ICANN and
6 Afilias are given, that they would have that number
7 of pages combined. So by way of example, if ICANN
8 and Afilias each had 75 pages, then the Amici
9 combined would submit 75 pages.

10 I will tell you that ICANN proposed that
11 we submit a brief of 50 pages because we think 50
12 would be sufficient, and we're not looking to have
13 the Panel have another set of briefs that are
14 literally hundreds of pages long.

15 I think it is ultimately up to the Panel
16 to determine the length, but I do think that this
17 is a situation where ICANN and Afilias should have
18 the same number of pages. If we don't use the
19 number that we are given, that's our prerogative,
20 and if the Amici are willing to -- still willing to
21 have collectively the number of pages that ICANN
22 and Afilias have, I think that that would be
23 extraordinarily fair. It would be consistent with
24 the ICDR arbitration rules.

25 So that would be our proposal. I'll be

1 candid, Mr. Ali said he wanted 150 pages. We have
2 no interest in giving the Panel 450 pages or 350
3 pages, whatever that would work out with the Amici.
4 We think it is too much. There has been a lot of
5 ink provided to the Panel already, positions that
6 have been taken, and now the parties need to
7 comment on the what the evidence was.

8 And while it is true that Afilias did most
9 of the cross-examining, some of that was because
10 they withdrew witnesses. So the parties are where
11 we are, and I think ICANN's proposal is
12 extraordinarily reasonable and consistent with the
13 rules.

14 MR. ALI: Chairman, may I make a
15 suggestion here?

16 ARBITRATOR BIENVENU: Sure.

17 MR. ALI: Insofar as the responses to the
18 Amici is concerned, the Panel, of course, will be
19 aware of the page limits. There the parties have
20 agreed that the Amici shall each be permitted to
21 file separate briefs of 50 pages in length and that
22 the parties shall each be permitted to file briefs
23 100 pages in length.

24 As Mr. LeVee says, if we choose not to use
25 100 pages, that's, of course, our respective

1 prerogatives. That would be, I think, a good way
2 of resolving this matter, given the fact that
3 that's what we agreed, and that's what the Panel
4 accepted previously. So 50 pages for VeriSign, 50
5 pages for NDC, and 100 pages each for ICANN and
6 Afiliias would be my suggestion.

7 ARBITRATOR BIENVENU: Very well. You will
8 leave it with us.

9 MR. JOHNSTON: Can Amici be heard on this,
10 please?

11 ARBITRATOR BIENVENU: Yes, of course.

12 MR. JOHNSTON: At least I -- I am not sure
13 about Mr. Marenberg, but two months to prepare
14 postclosing briefs in a seven-day trial is
15 extraordinary in our view, and -- my view, it's a
16 lot of time.

17 As one of my colleagues said, memories
18 fade, and we just had this trial and hundreds of
19 pages of briefing immediately before the trial. It
20 seems to me that this could be pushed along more
21 quickly, which might be easier on everybody because
22 they will have this fresh in mind and not have to
23 reinvent the wheel in starting to think about their
24 posthearing briefs.

25 I am very cognizant that the Panel would

1 like time to pose some questions, and I think
2 that's a superb idea because it will hopefully
3 guide the briefs in the right direction as opposed
4 to, again, going over the whole history as though
5 this trial never took place.

6 So we started off proposing two weeks and
7 then went up to a month. But in terms of our
8 position, two months is a bit long.

9 So we would ask that it be a little bit
10 shorter and that the briefs not, again, be in the
11 hundreds of pages of length. There are -- you
12 know, it sometimes gets lost there that there are
13 people with other rights and interests in moving
14 this forward than just Afilias and ICANN.

15 These are people who went in and paid
16 their money at the auction and would like to see
17 this resolved and back to the Board to follow the
18 proper processes, at least as we see those
19 processes.

20 So we have some concern about the length
21 of time that's been set, and we have concerns about
22 the size of the briefs that Afilias wants because,
23 again, we have just had this trial. We are not
24 going to retry everything, hopefully, again based
25 on briefs, although I have no doubt that the

1 Afilias briefs will be excellent. We have seen
2 quite a few of them already.

3 ARBITRATOR CHERNICK: Mr. Chairman, is it
4 contemplated that upon the submission of the
5 posthearing briefs, the matter will be submitted
6 for decision to the Panel without necessity of
7 further argument?

8 ARBITRATOR BIENVENU: Well, that was the
9 next point I was going to raise. You recall that
10 in the charts -- the chart, singular, entitled
11 "Topics for Prehearing Conference" that was
12 delivered to the Panel after the prehearing
13 conference of 29 July, there was a box for closing
14 argument. There was disagreement -- sorry.

15 I think everybody agreed that it would be
16 at the discretion of the Panel, and the way we put
17 it was that we would decide after receiving
18 posthearing briefs, but that in the event that we
19 considered that closing argument would be helpful,
20 we would agree today or in the ensuing days on a
21 date for that purpose. It would be penciled into
22 everybody's agenda, and if ever we need to use it,
23 the date will be reserved.

24 So that was the last topic I was going to
25 cover.

1 I think normally we should not need
2 closing argument in addition to a prehearing --
3 sorry, posthearing briefs, but, you know, the
4 question having been raised by the parties, I am
5 happy to leave it aside as a possibility. But we
6 should fix the date right away so that everybody is
7 available if that is to happen.

8 I don't foresee it as needed at the
9 present time, but --

10 MR. ALI: Has the Panel discussed
11 potential dates so that we can consider?

12 ARBITRATOR BIENVENU: We have not. We
13 have not. That's a good suggestion, Mr. Ali.
14 Maybe we should send you a list of dates and the
15 parties can let us know what works for everybody.

16 MR. ALI: If I may just comment on what
17 Mr. Johnston said regarding the timing of the
18 posthearing briefs. Number one, state the obvious,
19 the parties agreed on a date.

20 Number two, harkening back to the comment
21 I made regarding the prehearing stage of this
22 arbitration, there is -- there are commercial
23 interests, of course, at play, but there are also
24 human frailties and human abilities. And my team
25 members are all taking a much-deserved break.

1 And then we have commitments as well that
2 in the way -- I had initially started out with
3 Mr. LeVee asking for October 15th or 16th, and we
4 compromised. I think I said October 9th, and ICANN
5 wanted October 8 because of other commitments that
6 ICANN has. So I think that that is fairly
7 reasonable, and I think a customary length of time
8 in international arbitration.

9 Certainly we are not intending to
10 regurgitate everything, but you do have an ample
11 evidentiary record from this hearing, and we do
12 feel that the Amici submission allowances of page
13 numbers is very reasonable and fits with what has
14 already been agreed by the parties.

15 MR. LeVEE: If I can just clarify one
16 thing? ICANN had originally proposed late
17 September. Mr. Ali had come back and said that
18 they had commitments, so we did go back and forth.
19 On that basis, we landed on October 8. So that is
20 what Afilias and ICANN agreed to following
21 negotiation. It is the case that Amici did express
22 concern.

23 ARBITRATOR BIENVENU: Very well. Leave it
24 with us.

25 I will mention, insofar as the list of

1 questions from the Panel is concerned, these will
2 be targeted questions on issues about which we
3 would like further assistance from the parties.

4 For the rest, we leave it to counsel to
5 structure their posthearing brief in the way that
6 they consider most useful to bring it all together,
7 knowing that we have the evidence of witnesses.

8 ARBITRATOR KESSEDJIAN: Please remember
9 our request for a common list of exhibits and a
10 common chronology, factual chronology.

11 (Discussion off the record.)

12 ARBITRATOR KESSEDJIAN: Please remember
13 our request of -- and then the two things.

14 (Discussion off the record.)

15 ARBITRATOR KESSEDJIAN: The first one is a
16 common list of exhibits chronologically ordered,
17 and then a factual common chronology so that we can
18 actually have common paths to what happened.
19 Factual, all the essential facts in this case.

20 By the way, if you do that, and we really
21 require that you do it, it will be easier for your
22 posthearing briefs because you would not have to
23 spend too much time on the facts.

24 MR. ALI: If I may, Professor Kessedjian,
25 we will do our best. My experience, it is not easy

1 to agree on certain facts.

2 ARBITRATOR KESSEDJIAN: I am not saying it
3 is easy.

4 MR. ALI: But I would -- I think we will
5 exercise our best efforts to provide the facts that
6 we can agree on.

7 I was just going to ask if the Panel has a
8 date in mind by which you would like that, or is
9 this to be submitted simultaneously with the
10 posthearing briefing?

11 ARBITRATOR KESSEDJIAN: We didn't discuss
12 that, but from my part, I would be happy to have it
13 with the posthearing brief.

14 ARBITRATOR BIENVENU: Yes, that would be
15 good.

16 All right. Anything else from the parties
17 or the Amici?

18 MR. ALI: If I may just take a quick --
19 just peek over my computer screen to my other
20 colleagues to see if they have anything.

21 Ethan, if there's anything, just text me.
22 Just one second, Mr. Chairman.

23 A very good question has been raised by
24 one of my colleagues, which is insofar as the
25 facts, the common list of facts are concerned, is

1 that also to be agreed with the Amici?

2 ARBITRATOR BIENVENU: Well, I think it
3 would be useful to submit it to the Amici for
4 comments once a first agreed chronology has been
5 generated between the parties, yes.

6 MR. ALI: Okay. We will try and work that
7 out, and hopefully we don't have to revert to the
8 Panel, but we'll do our best to achieve the
9 objective and fully understood what you're looking
10 for.

11 That having been said, from my side,
12 again, I would like to thank my colleagues on all
13 the other screens insofar as Amici and ICANN are
14 concerned. Of course, the Panel, for all of your
15 incredible work. I've certainly been extremely
16 impressed, as has already been expressed, with the
17 precision of your questions. It is not an easy
18 matter to grapple with.

19 I have to particularly let Mr. Chernick
20 know that since I was a little boy, I have always
21 loved Charlie Chaplin but have been petrified by
22 clowns. So spending seven days looking at the
23 clown has, I think, perhaps cured me of my phobia.

24 ARBITRATOR CHERNICK: So something has
25 been gained by this proceeding.

1 MR. ALI: Yes, absolutely.

2 And, of course, to TRIALanywhere. To
3 Balinda, to all of those who have not appeared on
4 the screens who have helped to make this production
5 happen, my deep gratitude.

6 I hope people do get some time to rest and
7 recover before we get into the -- into the rigors
8 of the fall. My thanks to all.

9 ARBITRATOR BIENVENU: Mr. LeVee, nothing
10 else on your part?

11 MR. LeVEE: I am not going to repeat what
12 I said before. I thank everyone. I hope in an
13 unusual summer that everyone has the opportunity to
14 have a nice vacation or holiday someplace. I wish
15 everyone well and thank you all.

16 ARBITRATOR BIENVENU: Thanks.

17 Mr. Johnston, Mr. Marenberg, no other
18 matter to --

19 MR. MARENBERG: In the area where I do a
20 lot of work, which is entertainment, they'd be
21 cuing the music at the Oscars by now.

22 ARBITRATOR BIENVENU: We have gone through
23 our agenda, so it remains to me to bring this
24 hearing to a close.

25 But before I do so, I would like to

1 express the Panel's gratitude to each and every
2 member of the teams of lawyers and support staff
3 that contributed to the representation of the
4 parties and the Amici in this IRP.

5 I would say, if I may say so, the parties
6 and Amici are extremely well-represented in this
7 case, and it truly is a pleasure for my colleagues
8 and I to work with professionals of such high
9 caliber.

10 We also appreciate the exemplary courtesy
11 and cooperation displayed among counsel throughout
12 the hearing. It makes it very easy for the Panel
13 when that happens.

14 We also wish to thank JD and his team for
15 their excellent services throughout the hearing.
16 Everything went very smoothly.

17 And last but not least, thank you to our
18 court reporter and those who support her for their
19 services in connection with this hearing.

20 So I know that on this note, my colleagues
21 join me in wishing everyone well. Stay safe, in
22 good health, and if I may end on a positive note,
23 we will get through this pandemic, and we will meet
24 in person again once we get to the end of this
25 tunnel.

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So thank you all and have a good end of
day.

MR. MARENBERG: Thank you.

ARBITRATOR KESSEDJIAN: Good-bye,
everyone.

MR. ENGLISH: Good-bye. Thanks everyone.

(Whereupon the proceedings were
concluded at 1:38 p.m.)

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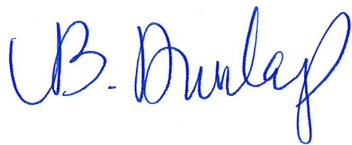
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I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full,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

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 20th day of August, 2020.



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

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